counsel moved that I should report the cause."

The defender moved the Court to authorise the Lord Ordinary to discharge the order for proof and to send the case to the Procedure Roll. The defender admitted that there was no statutory provision authorising such a course, but appealed to the *nobile officium* of the Court.

The pursuer opposed the motion and argued—Sections 27 and 28 of the Court of Session Act 1868 were absolutely binding. An interlocutor allowing proof was final, unless reclaimed against within six days, and *res noviter* made no difference. No reclaiming-note had been presented here within the statutory period.

LORD PRESIDENT—The section of the Act of Parliament which Mr Christie has referred to makes this a final interlocutor unless it is reclaimed against, and therefore it seems to me we can do nothing.

LORD ADAM—I never understood that the *nobile officium* could supersede an Act of Parliament.

LORD M'LAREN and LORD KINNEAR concurred.

The Court remitted to the Lord Ordinary to proceed, reserving all questions of expenses.

Counsel for the Pursuer—J. R. Christie. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defender—Clyde. Agent—R. Ainslie Brown, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MELROSE *v.* ADAM AND OTHERS (EDINBURGH SAVINGS BANK TRUSTEES).

Savings Bank—Dispute between Trustees and Depositor—Reference Clause—Savings Banks Acts Amendment Act 1863 (26 *and* 27 *Vict. cap.* 87), *sec.* 48.

By section 48 of the Savings Banks Acts Amendment Act 1863, any dispute between the trustees of any savings bank and any depositor therein is to be referred to arbitration.

The deposit-book of a depositor in a savings bank was stolen, and presented to the bank by the thief, who, on forging the depositor's name to a requisition, received payment of £50. The depositor called upon the trustees of the bank to credit her again with the sum so paid away, which they refused to do.

After withdrawing the balance remaining at her credit with the bank, she raised an action against the trustees for payment of the £50, averring negligence on the part of the officials of the bank in making the payment in question.

Held (*aff.* judgment of Lord Kincairney) that the dispute between the pursuer and the trustees of the bank fell within the arbitration clause of the statute, on the ground that the pursuer's claim was founded upon the contract of deposit.

In September 1887 Mrs Elizabeth Melrose became a depositor with the Edinburgh Savings Bank, established under the Savings Banks Acts Amendment Act 1863. In January 1895 her sister stole her deposit-book, presented it at the bank, forged her signature to a requisition for the withdrawal of £50, and obtained payment from the bank of that sum. The sister was apprehended, and convicted of the theft and forgery shortly afterwards. Mrs Melrose applied to the bank for repayment of the £50 thus withdrawn from her account, but this was refused. On 18th June 1896 she intimated to the trustees of the bank through her agent that she was about to raise an action against them, and on 24th June 1896 she withdrew the whole balance remaining at her credit in the bank's books, amounting to £15, 13s. 6d.

In these circumstances on 6th July 1896 Mrs Melrose raised an action against Robert Adam and others, trustees of the Edinburgh Savings Bank, under the statute, concluding for payment of £50, and averring that the officials of the bank had been guilty of negligence in making the payment in question.

The defenders founded in the first instance upon section 48 of the Savings Banks Acts Amendment Act 1863 (26 and 27 Vict. cap. 87), which is as follows—"If any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, . . . the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said hereby repealed Acts, or this Act, who shall have power to proceed *ex parte* on notice in writing to the said trustees or managers, left or sent through the post-office by the said barrister to the office of said savings bank, and whatever award, order, or determination shall be made by the said barrister shall be binding and conclusive on all parties, and be final to all intents and purposes without any appeal."

That Act has been amended by the Act 39 and 40 Vict. cap. 52, section 2—(1) . . . "The powers and duties relating to any dispute arising between the trustees and managers of any savings bank, . . . on the one hand, and any depositor or person claiming through or under a depositor on the other hand, shall be transferred to and vested in the Registrar, as defined by the Friendly Societies Act 1875."

Section 4 of the Friendly Societies Act 1875 (38 and 39 Vict. cap. 60) enacts—"The Registrar means . . . for Scotland or Ireland, the Assistant Registrar for either country respectively."

The defenders further relied upon certain Treasury regulations and rules of the bank, which need not be cited here, but which

may be briefly stated to exempt the managers of savings banks from liability for money paid away on presentation of the depositor's pass-books, though without the authority of the depositor.

The pursuer in answer averred ignorance of these rules.

The defenders pleaded, *inter alia*—"The action is incompetent, *et separatim*, is barred by the arbitration clauses in the Act of Parliament condescended on."

On 3rd December 1896 the Lord Ordinary (KINCAIRNEY) found that the dispute between the parties fell to be decided by reference under the statutes libelled, and dismissed the action.

Opinion.—"This is an interesting and important case. It is an action against the trustees for the Edinburgh Savings Bank for payment of £50. The pursuer avers that on 28th January 1895 the bank paid that sum, which was standing at her credit in their books, to her sister. She avers that her sister obtained payment by stealing her passbook, and by forging an order or requisition for withdrawal of the money, and by presenting the passbook and forged order to the bank. The defenders admit that the £50 was paid to the pursuer's sister. They do not admit that the order on which it was paid was forged, but they contend that they are not responsible even if it was. The question between the parties, therefore, is, whether payment by the defenders to to the pursuer's sister relieves them in the circumstances of the obligation to pay to the pursuer the money which she had deposited, or supposing the case clear of specialties in fact, the question expressed with its greatest generality is, whether a depositor in a savings bank or the bank loses by a forgery.

"The pursuer appeals to the common law, the defenders to regulations of the Treasury and rules of the bank, which are, they say, authoritative, and to which they say the pursuer has assented, and by which they are, as they maintain, protected. That is the very important and general question raised in this case.

"But there is a preliminary question stated in the defenders' first plea, viz., that the action is barred by the arbitration clauses in the Acts of Parliament.

"The primary provision on which the defenders found is section 48 of the Act 26 and 27 Vict. c. 87, which provides—[*His Lordship here cited the sections of the statute quoted above*].

"The language of this enactment appears to be very distinct, and I have not been able to see how its application can be avoided, or how it can be denied that the question raised by this action is a dispute between the trustees and an individual depositor in the bank, who claims to be entitled to money 'deposited in the bank.' The words seem to apply exactly.

"I do not understand that the application of the statute and of the above section of it to the defenders' bank is disputed, but the pursuer has pleaded that the question is not a dispute within the meaning of the statutes. This plea was supported mainly by reference to the case of *Symington's Executor* v. *Galashiels Co-operative Store Company, Limited*, January 13, 1894, 21 R. 371, but I think the case inapplicable.

"The question in that case arose under the Industrial and Provident Societies Act 1876 (39 and 40 Vict. cap. 45). The action was by the executor-dative of a deceased member for recovery of a sum claimed as due to the deceased, and the defence was that the sum claimed had been paid to certain of the next-of-kin of the deceased. It was considered that the defence imported a denial that the pursuer had the rights of a member, and it was held that a clause providing that disputes between members—or those suing in right of members—and the society should be referred to a committee of the society was inapplicable, because, while the statute provided a domestic tribunal for ascertaining what the rights of members were, it did not empower the committee to determine whether a party was or was not a member. That was held to be a proper question for the Court. It might perhaps be said that the Court, after deciding that the pursuer was entitled to the rights of a member, went on to determine what these rights were, but upon that point there was truly no dispute.

"The pursuer sought to assimilate that case to this by representing that, as in that case, the defence imported a denial that the pursuer had the rights of a member, so here the defence imported a denial that the pursuer was a depositor. But I think the cases are altogether different. The relations of a member of an industrial and provident society to the society are wholly different from those of a depositor to a savings bank. The latter is not a member of the bank, but only an ordinary creditor, subject to certain conditions. There is nothing of the nature of a domestic tribunal provided, but only a comprehensive clause of reference; and I think it is a mere play upon words to say that when a savings bank, in an action brought by a party as a depositor, pleads that the money in question has been paid, that is to be held as a denial that the party is a depositor. In this case the pursuer does not aver that the withdrawal of the £50 took from her the position of a depositor, and in point of fact it did not, for her passbook shows that £14, 19s. 4d. was left deposited to her credit in the bank.

"It was maintained that the question here raised was not the sort of question referred to in the arbitration clauses; and here again reference was made to the case of *Symington*, in which an opinion to that effect was expressed on the bench in relation to the question there raised. There the tribunal was so constituted as not to be, in the opinion of the Court, adapted to the trial of a question which was thought to involve the construction of the statute, and also so constituted as apparently to make the society judge in its own cause. But in this case the arbiter—the Assistant Registrar—is presumably, in the strictest sense, impartial; and it would be absurd to represent that an official whose statutory qualifications involve legal training and

practice was to be presumed unqualified to construe the statute which he was appointed to administer.

"If a dispute as to whether money deposited was paid or not be not a dispute with a depositor comprehended in the clause about arbitration, it is difficult to understand what sort of dispute with a depositor would be comprehended.

"It may seem a little startling that so general a question as this, whether a savings bank or its depositor should suffer from a forgery, should be withdrawn from the cognisance of the ordinary Courts, so that apparently it is a question which can never be authoritatively determined; still, that appears to be the effect of the statute, the terms of which are too plain to admit of question, and, in my opinion, they necessitate the conclusion that the question here raised must be submitted to the Assistant Registrar.

"I think that the policy of the Act was to protect savings banks and their depositors from the cost of ordinary litigation, and to provide that disputes between them should not come into Court at all; and it seems to me that that policy would be best carried out by dismissing this action. Still, if the parties think it better that it should remain in Court to abide the issue of a reference to the Registrar, I do not object to sist it.

"Seeing that I am thus debarred from deciding the question raised, and that question falls to be decided by the Assistant Registrar, it would be obviously improper to indicate any opinion on the merits."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong. At the time of raising the action the pursuer had ceased to be a depositor in the savings bank, and therefore her claim, the character of which must be judged as at the date of raising the action, did not fall within the reference clause in the statutes. The merits of the case depended upon the construction of statutes like 50 and 51 Vict. cap. 40, which dealt with the approval of regulations made by trustees of savings banks, and the construction of Acts of Parliament was for the Court, not for an arbiter. The case was on all fours with *Symington's Executors* v. *Galashiels Co-operative Store Company, Limited*, January 13, 1894, 21 R. 371; *Prentice* v. *London*, 1875, L.R. 10 C.P. 679; and *Willis* v. *Wells* [1892], 2 Q.B.D. 225, also referred to.

Counsel for the defenders was not called upon.

At advising—

LORD PRESIDENT—I think this a very clear case. The Act of Parliament says that if any dispute shall arise between the trustees and managers of any savings bank and any depositor, that dispute (I summarise the provision) shall be settled by arbitration. This is a dispute between the trustees on the one hand and, on the other, a person who had a deposit of between £60 and £70 in this savings bank; and the matter in dispute is, whether £50 of that deposit was rightly or wrongly paid to someone else.

If the matter had stood on that footing, there would have been no room for the very slender answer to the plea of the arbitration clause now given. That answer is this—the pursuer says, "*De facto*, I am not now a depositor, because I have now no money in the bank." First of all, let us see how the facts stand. I take the pursuer's own record, and I find that an action had been intimated prior to the withdrawal by the pursuer of the £14 odds which remained on the deposit-account after the £50 now in dispute had been paid away. And therefore this dispute, which had arisen on the 24th of June, was a dispute, not as to whether the pursuer was or was not a depositor, but simply whether an item of £50 was a good debit entry in her account as a depositor or not. Therefore it is not the fact that this dispute when it arose was a dispute between the trustees and a person who was not a depositor.

But I go further, and I say that even supposing that this payment of £50 would have exhausted her account, still this would be a question between the trustees and a depositor. Consider the arguments on each side. The pursuer's case would then be—"I deposited my £50. You have paid it away wrongly, and I hold that in your books I am a depositor for that amount." The answer for the trustees is, not that they dispute that this lady is entitled to the rights of a depositor, but that these rights have been satisfied; for they say that their payment to another person is as good as their payment to her. That is a totally different kind of question from that which arose in the cases of *Symington*, *Prentice*, and *Willis*. To take specimen passages from *Prentice*—"If the matter in controversy is whether the party is a member or not, that clearly is not a matter of internal arrangement" (*per* Lindley, J.). Lord Coleridge said substantially the same, and Lord Esher, then Mr Justice Brett, said—"A dispute as to whether a party is a member or not is clearly not a dispute between the society and the plaintiff as a member." The present case is on a totally different footing. It seems to me that it is a mere accident in the case that from supervening events this pursuer has no money in the bank on her account. The question must be determined as at the time at which the dispute arose, but further, if the payment in question had exhausted her account, the question is still one between a depositor and trustees or managers.

LORD ADAM—I am of the same opinion. It is impossible to read the summons without seeing that it is a claim by a depositor for repayment of a sum wrongly paid away by the bank. The only question is, whether the sum was properly paid away or not. I agree with the Lord Ordinary that if a dispute as to whether money deposited has been paid or not be not a dispute with a depositor comprehended in the clause about arbitration, it is difficult to understand

what sort of a dispute with a depositor would be comprehended.

I quite agree with your Lordship and the Lord Ordinary, and think it a clear case.

LORD M'LAREN—I agree. I think there is no doubt that the question in dispute is referred to arbitration.

LORD KINNEAR—I entirely agree. The pursuer avers that she deposited certain sums in the defenders' bank. She is suing on the contract of deposit, and the only defence is founded on what the defenders allege to be the terms of the contract. The dispute is as to what are the rights of the parties to the contract of deposit, *inter se*. I agree in an observation of the Lord Ordinary, that the defenders' argument that the pursuer is not a depositor in their bank, because, as they say, the money deposited has been paid, resolves itself into a mere play of words.

I have no doubt whatever that the Lord Ordinary's judgment is right.

The Court pronounced this interlocutor:—"Adhere to the interlocutor [of the Lord Ordinary], with the variation that in place of dismissing the action they sist the same."

Counsel for the Pursuer — Cook — D. Anderson. Agent—David Murray, Solicitor.

Counsel for the Defenders—Shaw, Q.C.—W. Campbell — J. G. Stewart. Agents — Curror, Cowper, & Curror, W.S.

Thursday, February 4.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CLARK *v.* SUTHERLAND.

(*Ante*, p. 153.)

Election Law — Proof — Corrupt Practices Act 1883 (46 *and* 47 *Vict. cap.* 51), *sec.* 34 *— Authorised Excuse — Competency of Evidence as to Irregularities for which Excuse not Sought.*

In a proof on a petition presented under sec. 34 of the Corrupt Practices Act 1883 for an authorised excuse for failure to transmit the statutory return of expenses at a parliamentary election in respect of certain specified errors and omissions in the return actually made, *held* competent for the respondent both to cross-examine the petitioner and to lead substantive evidence with respect to further irregularities in the said return which were not mentioned in the petition, and for which no excuse was sought, on the ground that such evidence was relevant to the main question under the section, viz., whether any error or false statement in the return arose by reason of "inadvertence" and not by reason of "any want of good faith" on the part of the applicant.

This was a petition presented by Dr Gavin Brown Clark, M.P. for the county of Caithness, craving the Court "to make an order for allowing an authorised excuse for the petitioner's failure "(1) to transmit the return of his election expenses within the time fixed by the Statute 46 and 47 Vict. cap. 51, sec. 33; (2) to enclose as part of said return the receipt for £2, 2s. paid by the petitioner to the Lybster Temperance Hall Committee; (3) to enclose as part of said return the receipt for £5, 15s, paid by the petitioner to James Nicol, Wick; (4) to insert the date of the election in the return which he made; (5) to state accurately the Christian name of the said James Nicol in the said return; (6) to insert the date of the election in the declaration as to the petitioner's expenses; and (7) to insert in the said declaration the amount paid by him for the purpose of the said election, or for his failure to do any of the above wherein your Lordships shall consider that the petitioner has not complied with the statute, and further to make an order allowing all or any of the above failures or omissions, if found to have been committed, to be an exception or exceptions from the provisions of the said Act, which would otherwise make the same an illegal practice."

The election in question took place in July 1895, and the petitioner acted as his own election agent.

Answers were lodged by Robert Sutherland, an elector in the county, whose averments will be found *ante*, p. 155.

The Corrupt Practices Act 1883 (46 and 47 Vict. cap. 51), in terms of which this application was presented, section 34, enacts "(1) Where the return and declarations respecting election expenses of a candidate at an election for a county or borough have not been transmitted as required by this Act, or being transmitted contain some error or false statement, then (*a*) if the candidate applies to the High Court or an election court and shows that the failure to transmit such return and declarations, or any of them, or any part thereof, or any error or false statement therein has arisen by reason of his illness, or of the absence, death, illness, or misconduct of his election agent or sub-agent or of any clerk or officer of such agent, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, . . . the Court may, after such notice of the application in the said county or borough, and on production of such evidence of the grounds stated in the application, and of the good faith of the application, and otherwise, as to the Court seems fit, make such order for allowing an authorised excuse for the failure to transmit such return and declaration, or for an error or false statement in such return and declaration as to the Court seems just."

Sections 23 and 33, the only others which need be referred to, will be found in the report of the previous stage of the case, *ante*, p. 154.

In terms of a remit from the Court, the Lord Ordinary (KYLLACHY) granted the