1959 *Present :* **Basnayake, C.J., and Pulle, J.**

SARATHAMANY, Appellant, *and* KODDAIMUNAI CO-OPERATIVE STORES SOCIETY LTD. *et al.*, Respondents

S. C. 199—D. C. Batticaloa, 2,690/M.

Co-operative Societies—Hypothecary action instituted by Society against officer or employee of the Society—Jurisdiction of the Courts—Mortgage Act, No. 6 of 1949—Co-operative Societies Ordinance (Cap. 107), ss. 42(2), 43, 45(1), 45(5).

Resort to the provisions of the Mortgage Act is not excluded by Section 45(1) of the Co-operative Societies Ordinance.

Per BASNAYAKE, C.J.—"The jurisdiction of the Courts cannot be taken away by anything short of express words."

APPEAL from a judgment of the District Court, Batticaloa.

C. T. Olegasegarem, for 2nd Defendant-Appellant.

C. Renganathan, with *S. Sivarasa*, for Plaintiff-Respondent.

Cur. adv. vult.

June 23, 1959. BASNAYAKE, C.J.—

The only question for decision on this appeal is whether the plaintiff the Koddaimunai Co-operative Stores Society Limited can maintain this action.

Shortly the facts are as follows : The 1st defendant was employed as the Manager of the plaintiff's stores from 1st September 1950 till 21st May 1954. Between 29th December 1953 and 21st May 1954 there was a loss amounting to Rs. 6,181·31. At a meeting of the Executive Committee of the Society convened on 1st June 1954 to consider the loss which is described in the plaint as a "leakage", the 1st defendant agreed with the President and the Executive Committee to pay the amount of the loss to the plaintiff. As he was not able to pay the money immediately he executed deed No. 17985 of 5th June 1954 by which he admitted his liability and bound himself to pay the amount of the loss. He promised to pay Rs. 3,181·31 within three months from the date of execution of the deed and the balance he bound himself to pay within six months, interest at eighteen per centum per annum to begin to run thereafter. As security for its payment he hypothecated a land which he had received as dowry.

This action is for recovery of the principal and interest due on that bond by seizure and sale of the property mortgaged.

The 1st defendant, the ortgagor, did not file answer. The 2nd defendant who is his wife filed answer. She resisted the action on

several grounds. But the one that arises for decision on this appeal is that the plaintiff is precluded from maintaining this action by section 45 of the Co-operative Societies Ordinance and that the court has no jurisdiction to entertain it.

Section 45 (1) of the Co-operative Societies Ordinance reads—

" If any dispute touching the business of a registered Society arises—

(*a*) among members, past members and persons claiming through members, past members and deceased members ; or

(*b*) between a member, past member or person claiming through a member, past member or deceased member and the Society, its Committee or any officer or employee of the Society, whether past or present, or any heir or legal representative of any deceased officer or employee ; or

(*c*) between the Society or its Committee and any officer or employee of the Society, whether past or present, or any heir or legal representative of any deceased officer or employee ; or

(*d*) between the Society and any other registered Society,

such disputes shall be referred to the Registrar for decision.

" A claim by a registered society for any debt, demand or damages due to it from a member, officer or employee, whether past or present, or any nominee, heir or legal representative of a deceased member, officer or employee, whether such debt, demand or damages be admitted or not, shall be deemed to be a dispute touching the business of the Society within the meaning of this sub-section."

The present action is a hypothecary action for which special provision is made in the Mortgage Act, No. 6 of 1949. Although it involves a claim by a registered society for a debt due to it from a past employee neither the registrar nor an arbitrator to whom he may refer a dispute for disposal has the power to give an award which has the effect and consequences of a decree in a hypothecary action. The nature of the action and the special procedure governing it and the issues involved in such an action clearly exclude the application of section 45. There is a further difficulty in the way of the appellant. She does not fall into any of the classes of persons referred to in section 45. That is an added reason why section 45 is no bar to this action.

Learned counsel for the appellant relied on the case of *Sanmugam v. Badulla Co-operative Stores Union* [1]. The facts of that case are different and have no application to the one before us.

In that case Gunasekara J. cites a passage from Maxwell on Interpretation of Statutes (9th Ed.) in support of the view that the jurisdiction of the courts may be taken away by implication. I have examined the cases cited in Maxwell and find that they do not lend support to such an

[1] *(1952) 54 N. L. R. 16.*

unqualified statement. Even in Maxwell the words quoted are qualified in the 10th edition by the earlier words " The saying has been attributed to Lord Mansfield that nothing but express words can take away the jurisdiction of the Superior Courts, but it seems that it may in certain circumstances be taken away by implication ". The furthest that those cases go is that the jurisdiction of the courts may be taken away by *necessary* implication. But even then the statement is hedged in by so many qualifications that the weight of opinion might be regarded as more in favour of the view that express words are necessary. I shall cite for example the words of Jessel M. R. in *Jacobs v. Brett* [1] (one of the cases cited in Maxwell)—

> " I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction of a superior court of law must be expressed in clear terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but at all events it must be done clearly. It is not to be assumed that the legislature intends to destroy the jurisdiction of a superior court. You must find the intention not merely implied, but necessarily implied. There is another principle, which is, that the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Acts of Parliament. Upon that point I may refer to the judgments delivered by the Lord Justices in *In re Lundy Granite Company* (L. R. 6 Ch. 465-468) which I think shew that that is the true view to be taken in considering Acts of Parliament, even where it is doubtful whether they do or do not take away such rights. "

My own view is that the jurisdiction of the courts cannot be taken away by anything short of express words. I am fortified in that view by the opinion of the Privy Council in *Bennett and White (Calgary) Ltd. v. Municipal District of Sugar City* [2], and the opinions of the Judges of Canada and South Africa. The Privy Council expressed itself thus :

> " The jurisdiction of the courts to determine questions of liability to taxation can only be ousted by clear words, and in their Lordships' judgment it is far from clear that s. 53 was intended to have that effect. "

This is a Canadian case and the Privy Council endorsed the view taken by the Canadian Judges. In the South African case of *Welkom Village Management Board v. Leteno* [3], the court laid down the definite rule that access to the courts cannot be taken away except by clear and unmistakable terms.

Apart from principle there is a reason why our enactments should not be construed as taking away the jurisdiction of the courts by implication, even of the nature referred to by Jessel M. R. as " necessary implication ". The reason is that according to the established practice of our Legislature

[1] *(1875) L. R. 20 Equity Cases p. 1 at p. 6.* [2] *(1951) A. C. 786 at 812.*
[3] *(1958) 1 S. A. L. R. 490.*

from the earliest times, where it intends to exclude the courts it says so expressly, as it has done in the Ordinance under consideration. Sections 42(2), 43, and 45 (5) are quoted below as illustrations :—

" 42 (2). An order made by a liquidator or by the Registrar under section 40 or section 41 shall not be called in question in any civil court, and shall be enforced by any civil court having jurisdiction over the place where the registered office of the society is situated in like manner as a decree of that court. "

" 43. Save in so far as is hereinbefore expressly provided, no civil court shall have any jurisdiction in respect of any matter concerned with the dissolution of a registered society under this Ordinance. "

" 45 (5). The award of the arbitrator or arbitrators under sub-section (2) shall, if no appeal is preferred to the Registrar under sub-section (3) or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court. "

The appeal is dismissed with costs.

PULLE, J.—

I agree that the appeal should be dismissed with costs. In my opinion the claim of the Society to obtain a hypothecary decree on the mortgage bond did not arise out of a dispute touching the business of the Society. Nor was there an earlier " dispute " because the 1st defendant admitted the claim of the Society and entered into the bond sued on. In any event I am satisfied that resort to the provisions of the Mortgage Act is not excluded by Section 45 (1) of the Co-operative Societies Ordinance.

Appeal dismissed.