ground given in exchange since the date of the deed. I think he cannot challenge the transaction as it now stands. Moreover, if the words of the narrative were contained in the dispositive clause, and if there was a declaration that the conveyance was granted merely for the purpose of planting and improving, even then I am not satisfied that the complainer would be entitled to succeed.

There might then have been an inquiry as to the use of the ground now, as compared with the use formerly, in order to find out whether it has been improved within the meaning of the deed. But it is not necessary to give an opinion on that point, for whatever there may be in the narrative of the deed, the dispositive clause is absolute in its terms, and there is no restriction as to the use to be made of it.

On that ground alone I am clearly of opinion that we must refuse this note.

Lord Deas was absent.

The Court adhered.

Counsel for Complainer—Lang—M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Counsel for Respondent—Mackintosh—Darling. Agents—Mackenzie, Innes, & Logan, W.S.

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*Thursday, November* 6.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

## SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY AND LIQUIDATORS *v.* BOYD.

*Friendly Society—Building Society—Liquidation—Effect of Winding-up Order on Position of Members—Power of Liquidators to Call on Advanced Shareholder for Immediate Payment of Advance—Building Societies Act* 1874 (37 *and* 38 *Vict. c.* 42), *sec.* 14.

*Held* that "an advanced shareholder" of a building society who had an advance from the society, repayable by fortnightly instalments during a period of fourteen years, but who did not participate in the profits of the society, was really a debtor of the society, whose contract was to pay his debt by instalments, and could not be called upon by the liquidators, by reason of a winding-up order having been pronounced, to pay up the present value of his future instalments at once.

*Observations per* Lord Justice-Clerk, Lord Craighill, and Lord Kinnear on *Brownlie and Others* v. *Russel*, March 9, 1883, 10 R. (H.L.) 17; *ante*, vol. xx. p. 481.

The Scottish Property Investment Company Building Society was a society incorporated under the Building Societies Act 1874, in terms of rules duly certified as in conformity with the Act. These rules provided, *inter alia*:—"2. *Objects*—The objects of the company shall be by the subscriptions or payments of its members to form a fund in shares of £25 each, half-shares of £12 10s. each, and quarter-shares of £6, 5s. each, out of which fund members who are desirous of erecting or acquiring dwelling-houses or other heritable property may receive advances to enable them to do so; and further, to afford a safe and profitable investment for sums of money.

"3. *Shareholders*—All persons having entered for, or who shall enter for and subscribe to, shares in the company, in terms of these rules, shall be shareholders thereof. . . . . .

"7. *Advances of Money to Shareholders*—Advances shall be made for periods of either four, six, eight, ten, twelve, or fourteen years, as individual shareholders may prefer, and shall be repayable in advance by fortnightly instalments within the office of the company on each alternate Tuesday, according to the rates specified in the following table:—[*Here followed a scale of repayment of a loan of* £100]. . . . . .

"Applications for an advance shall be in the form No. 2 or No. 3 appended to these rules, accompanied by such specification of the security offered and other information as the directors may require, and these applications shall be recorded by the manager according to the dates at which they are received by him in a register to be kept for that purpose; and they shall be preferred and disposed of by the directors in the order in which they are recorded. No application for an advance shall be received unless the shareholder applying shall have paid the amount of one month's subscriptions on the shares on which the advance is required." . . . . . .

"13. *Power to Sell or Redeem Property*—Any shareholder may redeem the property on which he has obtained an advance at any time, on his giving two months' notice in writing to the manager, and on payment of all arrears, interest, and any fines that may have been incurred by him prior to these alterations on the rules coming into effect, and disbursements, and of the then present value of his future payments, calculated at 5 per cent, and also a fee of one shilling per share; and no member shall be entitled to redeem his securities upon any other terms than the above, any rule of law notwithstanding.

"14. *Funds of the Company*—The funds of the company shall comprise the subscriptions of the shareholders, interest, and all fines and other payments herein provided to be paid to the company. . . . . .

"The profits shall be placed to the credit of the holders of unadvanced shares to an extent not exceeding 5 per cent. per annum on the amount standing at their credit in the books of the company.

"The surplus of such profits, if any, shall be carried to a separate account, and shall form a fund to be called the 'Contingent Fund,' from which shall be defrayed all losses and expenses which the company may sustain or incur. . . . .

"18. *Investment of Funds not Advanced to Shareholders.*—It shall be lawful for the directors to lay out and dispose of any sum of money, which may not be immediately required by borrowing shareholders, on heritable security or on such other legal securities as they may think fit, in terms of the provisions of the 13th section of the Act 10 George IV. c. 56, and the trustees shall alter and vary such securities as often as they are required by the directors."

On 5th June 1875 Mr Boyd, the defender, applied to the directors of the society by letter, in the form prescribed by rule 7 above recited,

for an advance of £12,000, offering in security certain property of his in Glasgow. He obtained an advance of £11,000 in return for which he conveyed to the society, by absolute disposition, the properties offered as security. In the disposition he was designed as "a member or shareholder in the society or company called the Scottish Property Investment Company Building Society." He also at the same time granted to the society a personal bond, whereby, on the narrative that the disposition though *ex facie* absolute was truly granted in security of his advance, he bound and obliged "myself and my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to pay to the said" society "the sum of One thousand one hundred and eleven pounds sterling per annum, and that in equal fortnightly instalments or payments in terms of the seventh of the said rules, beginning the first of said fortnightly payments on Tuesday the 7th day of September 1875 for the fortnight succeeding, and so on fortnightly on each alternate Tuesday thereafter in advance, until redemption of the foresaid subjects in terms of rule thirteen, or, in case of not-redemption, for the period of fourteen years from and after the said 7th day of September 1875, the last of said fortnightly payments being due and exigible on the 20th day of August 1889." In this bond he was designed as "a shareholder in the society or company called the Scottish Property Investment Building Society." He had not paid one month's subscription on any shares as required by rule 7 of advanced shareholders, nor was the £11,000 advanced to him taken from the funds of the society, but borrowed from a bank.

At a special general meeting of the society held on 14th November 1881 it was resolved that the society should be wound up voluntarily under the supervision of the Court, and an order was pronounced by the Sheriff of the Lothians to that effect, and appointing certain liquidators. From the 7th of September 1875, when the payments of the first instalments under his bond was due, until April 1883, Boyd regularly paid to the directors or their successors, the liquidators, the fortnightly instalments under his bond.

On 28th April thereafter the liquidators sent to all the advanced shareholders of the society whose instalments were still outstanding, and among these to Boyd, the following circular:—"Dear Sir—With reference to the case of *Brownlie and Others* (Liquidators of the Scottish Savings Investment and Building Society) v. *Russel*, recently decided in the House of Lords, it appears from the opinion expressed by the Lord Chancellor and other Judges when delivering judgment, that the liquidators of a building society can call upon the borrowers to pay up their loans at once. We have therefore to ask you to arrange for paying off your advances not later than three months from this date.—We remain, yours truly." (*Signed by the Liquidators*).

Section 14 of the Building Societies Act provides:—"The liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share; and in respect of any share upon which an advance has been made, shall be limited to the amount payable thereon under any mortgage or other security, or under the rules of the society."

In consequence of the defender's refusal to comply with the request made in the letter of 28th April the liquidators in November following raised the present action against him for declarator that under the winding-up order he became liable for the present value of the future instalments payable by him on the advance of £11,000 obtained by him as a member of the society, on the shares held by him as a member thereof, and that on reconveyance to him of the subjects disponed by him to the society in security, and on his receiving a discharge of his personal bond, he was bound to make payment of any arrears of the instalments due at the date of winding-up order, and the then present value of the instalments, under deduction of all sums paid to account. There was a petitory conclusion for payment of £5390, 11s. 3d., being the balance of the arrears and instalments, with interest due at the date of raising the action.

The pursuers averred, *inter alia*, that the defender was a member or shareholder of the society in respect of 440 shares held by him, and that in respect of his holding these shares he obtained his advance of £11,000, that being the amount or ultimate value of said shares in the society; that by winding-up order the society was brought to a close, and the account on each share terminated as at that date; that each member or shareholder to whom an advance has been made, thereupon became bound to pay the liquidators all subscriptions, arrears, fines, disbursements, and the then present value of his future payments, calculated at 5 per cent. in terms of said rules.

The defender averred, *inter alia*, as follows:—"The defender never made any application for shares, nor did he ever make any payment in respect of shares, and no shares were ever allotted to him. He was not a shareholder of the said society, and he never had any right to or interest in any profit made by the society. He did not apply for said loan, or receive the same, as a shareholder." He maintained that the only relation ever subsisting between himself and the society was that of lender and borrower.

A joint-minute of admissions was adjusted by the parties, subject to which, and to the right of each to refer to the society's books, both parties renounced probation, and agreed to admit, *inter alia*, the following facts—The society kept no "register of members" or of "shareholders," but in a book titled on the back Ledger B, 1875-77, which contained the accounts of all the advanced shareholders for the time being, the account relating to the defender's advance was headed as follows—"1009. years, James D. Boyd, 440 shares. Ann. payt. £1111. To run years, forts." [*i.e.*, fortnights]. The same heading (but with a different folio number of the ledger, and with the number of years and fortnights to run filled up) was continued throughout the whole ledgers in existence from the time the advance was made till the date of raising this action. The names and accounts of all advanced members were entered in a ledger in the same manner as the above-mentioned entry with reference to the defender's advance. The defender was held as deponing that he had no knowledge of the manner in which said books were kept, or of the entries therein, till after the present action was raised. The name and address of the defender was also entered in a book titled "Addresses, B

Ledger, 1875" (containing the names of all advanced shareholders for the time being). The defender was also held as deponing that he had no knowledge of this book either till after the present action was raised. The defender had no share in the profits of the society. It was not the practice of the society that any advanced member should have such share. The defender was not in arrear with his instalments at the date of closing the record in the action. The rules of the society were never communicated to the defender or his agents, or seen by him or them, until after the transaction was completed and the bond and disposition were granted.

The pursuers pleaded—"(1) The defender having become liable under and in virtue of said winding-up order for the value, as at the date thereof, of the then future instalments of the foresaid advance obtained by him from the said society on the shares thereof held by him, and being now bound to make payment to the pursuers of the balance of the past and future instalments of the said advance, after deducting the sums paid by him to account thereof, the pursuers are entitled to decree in terms of the conclusions of the summons."

The defender pleaded—"(1) The pursuers' averments are irrelevant. (2) The defender being only liable to repay the said loan in fortnightly instalments, and having paid the whole instalments due and payable at and prior to the raising of the action, and being ready to pay the same falling due thereafter as they become due, he should be assoilzied. (4) *Separatim*, the defender not being a member or shareholder of the said society, he ought to be assoilzied."

The Lord Ordinary assoilzied the defender.

"*Opinion.*—The defender on 10th September 1875 obtained an advance of £11,000 from the Scottish Property Investment Company, in return for which he undertook to pay to the company the sum of £1111 per annum, by equal fortnightly instalments for fourteen years, or until he should redeem certain subjects which he had conveyed in security, in terms of a rule of the society to that effect. On the 14th of November 1881 it was resolved that the society should be wound up voluntarily under the supervision of the Court; and on the 28th of November a winding-up order was pronounced by the Sheriff of the Lothians, in terms of the Building Societies Act 1874. The liquidators maintain that the defender being a member of the society, the effect of the winding-up order was to determine his right to repay the advance by instalments, and to subject him to an immediate liability for repayment of the whole balance remaining due, the amount of such balance being fixed by the rules of the society at the present value of the future instalments payable under the contract.

"The defender denies that he is a member or shareholder of the society, maintaining that he has not satisfied, nor been required to satisfy, the conditions prescribed by the rules for constituting membership. But he has accepted an advance from the society on the footing, as his bond sets forth, of his being a shareholder, and on the conditions applicable to advances to persons in that position. The rules of the society are imported by express reference into the bond as regulating the rights and liabilities thereby created; and he binds himself in terms to fulfil and implement the whole obligations incumbent upon him under the rules. It appears to me, therefore, that whether the rules for the admission and registration of shareholders have been duly observed or no, he is barred from denying that he is a member of the society.

"But assuming that he is a member, I find nothing in the rules or in the terms of his bond to support the claim made against him by the liquidators.

"The position of advanced members under the rules of this society does not appear to me to differ from that of any other borrower who, not being a member, should agree to repay a loan by similar instalments. The objects of the society are declared by rule 2 to be 'by the subscriptions or payments of its members to form a fund in shares of £25 each, half shares of £12, 10s. each, and quarter shares of £6, 5s. each, out of which fund members who are desirous of erecting or acquiring dwelling-houses or other heritable property may receive advances to enable them to do so; and further, to afford a safe and profitable investment for sums of money.' As is usual with building societies, it is contemplated that there shall be two classes of members—the advanced and the unadvanced. It is provided (rule 5) that the subscriptions on unadvanced shares shall be one shilling per share per fortnight, and certain fines and penalties are imposed for non-payment of these subscriptions as they fall due. The profits of the society, in case of its prosperity, are to be placed (rule 14) to the credit of the unadvanced shareholders 'to an extent not exceeding 5 per cent. per annum on the amount standing at their credit in the books of the company.' The surplus, if any, is to be carried to a separate account, and so form a contingent fund, from which are to be defrayed all losses and expenses which the company may sustain: And 'in the event of any accumulation of such contingent fund taking place,' it is to be divided every five years among the holders of unadvanced shares. By rule 15 any shareholder holding unadvanced shares is entitled to withdraw, and to receive the amount standing at his credit in the books of the company at the immediately preceding balance, together with any subscription he may have paid thereafter: And 'so soon as the sum standing in the books of the company at the credit of any shareholder in respect of one or more unadvanced shares shall amount to £25 for each share, the amount shall be paid over to such shareholder, and he shall then cease to be a shareholder in the company and to have any claim on its funds.'

"The rules which it seems material to consider with regard to advanced shareholders are the 7th and 13th. The advances are to be made on the security of heritable property; and the 7th rule provides that they are to be 'made for periods of four, six, eight, ten, twelve, or fourteen years, as individual shareholders may prefer,' and to be 'repayable by fortnightly instalments . . . according to the rates specified' in a certain table. The advanced shareholder is not in terms empowered, like the unadvanced, to withdraw from the society; but the 13th rule provides that he may, with consent of the directors, 'sell and transfer his right and interest in any property' which he may have conveyed

to the company, the purchaser becoming thenceforth answerable for the payment of all dues thereon: and that 'any shareholder may redeem the property on which he has obtained an advance . . . on payment of all arrears, fines, and disbursements, and of the then present value of his future payments, calculated at 5 per cent.' The scheme of the society, therefore, is to create a fund by the accumulation of small fortnightly subscriptions; to employ the money to advantage by lending it on good security at a profitable rate; and to divide the accumulated fund from time to time among the members who have not received advances, as the contributions of each with the accretion of profits may amount from time to time to the sum of £25. The unadvanced shareholders, so long as they continue members, contribute to the fund one shilling per fortnight for every £25 they ultimately hope to receive; and as soon as their contributions, with the profits which have accrued upon them, amount to £25, that sum is paid over to them as their share of the fund, and they cease to have any claim upon the society in respect of such paid-up share. The advanced shareholder, on the other hand, after he has received his loan, has no further interest in the fund. He is not entitled to participate in any profit which may be earned, and he incurs no liability for any losses. The true relation between him and the society is that of debtor and creditor, and not that of partner or joint-adventurer. He has no interest in the affairs of the society, except that which arises from his obligations as a borrower upon security; and what is called his share represents nothing but his liability to pay his debt, with the corresponding right to redeem his security upon making payment in terms of the contract.

"The special contract between the society and the defender is entirely in conformity with this view of the position of the advanced shareholder. There are, indeed, noticeable points in the transaction which are not in exact accordance with the rules. The defender appears to have obtained an advance without any previous subscription, contrary to the rule, which prescribes that 'no application for an advance shall be received unless the shareholder applying shall have paid the amount of one month's subscriptions on the shares on which the advance is required.' And the sum lent, instead of being an advance, such as was contemplated, out of funds already accumulated and in the hands of the society, was borrowed at interest from a bank in order to be lent to the defender. But these variations from the rules laid down for the management of the society's affairs do not appear to me to affect the rights and liabilities created by the contract of loan. These are expressed in the bond granted by the defender, in language too clear to admit of doubt. He had granted a disposition of certain properties to the society in absolute terms; and by the bond of the same date, on the narrative that the disposition, although *ex facie* absolute, was truly a security for an advance of £11,000, he binds and obliges himself in respect of that advance to pay to the society, or their manager or treasurer for their behoof, 'the sum of £1111 per annum, and that in equal fortnightly instalments or payments, in terms of rule 7, beginning the first of said fortnightly payments as on Tuesday the 7th day of September 1875 for the fortnight succeeding, and so on fortnightly, on each alternate Tuesday thereafter in advance until redemption of' the subjects conveyed by the disposition 'in terms of rule 13th, or in case of not-redemption, for the period of fourteen years' from the said 7th of September 1875, 'the last of said fortnightly payments being due and exigible on the 20th of August 1889.' There follow certain stipulations as to interest, and certain accessory obligations for the insurance of the subjects against fire, and for the payment of feuduties, taxes, and burdens. But there is no obligation to repay the advance otherwise than in the terms already quoted. The defender may at any time redeem his security if he chooses to take advantage of rule thirteenth. But that is an option given to him, and not to the society; and if he does not choose to redeem, there is no provision which in any event entitles the society to compel him to do so. It appears to me impossible to find, either in the bond or in the rules, any implication whatever of a right to the society, on a resolution to wind up, to exact immediate payment of the balance of the debt, or to determine the borrower's right to pay by the stipulated instalments. The winding-up order, no doubt, operates as a dissolution of the society, but it continues to exist so far as necessary for the purpose of winding up; and in the course of winding up it must adhere to its contracts in the same manner as any other trading company which has resolved to discontinue its business, and must collect its debts, whether from strangers or from its own members, in accordance with the obligations of its debtors, and not otherwise.

"It is said that the dissolution put an end to the business of payment by instalments. But that is begging the question. To the payment of instalments for the purpose of creating shares it does necessarily put an end. But whether it puts an end at the same time to the repayment by instalments of the advances which the society may have made must depend upon the contract between the society and the persons who have received such advances.

"The 14th section of the Building Societies Act 1874, upon which the pursuers rely, does not appear to me to give any higher or other right to the society or its liquidators than they have acquired under the bond. On the contrary, it is an express limitation by statute of the liability of an advanced shareholder, either to the society or its creditors, 'to the amount which may be payable under any mortgage or other security, or under the rules of the society.' The effect is to enable the liquidators, in case of a winding-up, to enforce the liabilities of shareholders to the society. But the measure of their liability is still to be found in their contract; and the liquidators can exact no payment after a winding-up order which could not have been demanded by the society if it had continued to carry on business.

"The pursuers' counsel relied upon the case of *Brownlie* v. *Russel*, L. R. VIII., App. Ca. 235; and maintained that in that case it had been decided by the House of Lords that after a winding-up order has been pronounced the advanced members of a building society have no longer an option to repay by instalments as if the society were still a going concern, but may be compelled,

on the call of the liquidators, to pay up at once the whole balance remaining due at the date of the winding-up order. No such general proposition, however, appears to me to be involved in the decision, or to be deducible from the opinions of the noble and learned Lords who took part in it. The question was as to the terms on which an advanced shareholder was entitled to redeem his security, and that depended upon the interpretation and effect of a different contract from the present. By the constitution of the society —the *Scottish Savings Investment and Building Society*—the shares were to be paid up by monthly instalments, and were to be limited to £25 ; and, as in the present case, a shareholder who had received no advance was to be paid out when his instalments, with profits, amounted to £25 per share, and was entitled to withdraw at any time ; and on withdrawal was to receive the whole instalments which he had already paid, with interest. So far, therefore, as regards this class of shareholders, the two contracts are alike ; but in the position of shareholders who had received advances there is a very material difference. Such a shareholder in the *Scottish Savings Society* was to participate with the other shareholders in profits ; the rule for repayment was that he should repay the advance by monthly instalments, with interest on the loan at the rate of 5 per cent., which interest was to be paid monthly, at the same time as the instalments ; and he was entitled to withdraw from the society on giving a month's notice and paying up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares. A shareholder who had obtained an advance upon these terms, had regularly paid his instalments, and had at the same time paid interest, charged not upon the balances after deducting the instalments, but upon the whole amount of the original advance. After a winding-up order he gave notice of withdrawal under the rules. The liquidators maintained that be could not withdraw after liquidation except upon condition of paying up the whole loan, leaving the instalments which he had already paid to be refunded, according to the result of the liquidation. But it was held that although the winding-up order made it impossible for a shareholder to withdraw, he was entitled to redeem his security in conformity with the rules ; that the advance had been extinguished *pro tanto* by the amount of the instalments paid, and that he had therefore a right to redeem by paying to the liquidators the difference between the advance and the amount of the instalments paid by him, with interest at the rate of 5 per cent. upon such instalments from the time when they were paid ; there was therefore no question as to his continuing to pay by instalment, but only as to the effect of the instalments already paid in extinguishing his debt. It is said, however, to be implied in the judgment that his right to repay by instalments had been determined by the liquidation ; and the pursuers relied upon the observations of the learned Lords, and in particular upon what is said by the Lord Chancellor, as to the effect of the winding-up order in putting a close to the whole concern, and terminating at that date the account of each shareholder. But these observations were made with reference to the contract which was then under discussion, and which differed materially from the contract between the parties to the present case. For not only were the rights and liabilities of the advanced shareholder under the rules entirely different, but he had undertaken a very different obligation for repayment of the loan. He had granted a bond and disposition in security in common form for repayment of the whole amount of the loan ; and the right to repay by instalments was stipulated in a back-letter or minute of agreement executed by the society, whereby it was declared that 'Notwithstanding the said bond being in usual terms as regards the date of payment of the principal sum and interest, it is nevertheless understood that the same shall not be enforced by the directors of the said society as long as the said James Russel shall continue the regular payment of the instalments, interest, and other sums to become due upon his share in terms of the rules.' Now, an advance under the rules was a payment by anticipation to the member of the amount of his shares, upon the condition already stated ; and it is observed by Lord Watson that a member obtaining an advance was probably induced to take it upon these conditions, 'by the circumstance that he had the chance of diminishing the amount of the instalments which he had undertaken to pay by having imputed towards payment of these instalments the proportion of the profits accrescing to his shares, if such profits were made.' And his Lordship adds, that when the liquidation had supervened, 'the liquidators were no longer in a position to give him that consideration which had induced him to agree to pay instalments and interest as stipulated in the rules and in the memorandum.' It was therefore held that they could not compel him to go on paying monthly instalments and monthly interest as if the society had been a going concern, and that he was entitled to redeem his security on the terms already stated. But if it were at the same time held or implied that the liquidators on their side could have insisted on present payment, that must have been so held, because, on the construction of the minute of agreement, the condition upon which they were precluded from enforcing the bond was found to be no longer operative. The stipulation for the payment of instalments upon the shares was not, in that case, a mere form of words for describing the repayment by instalments of a definite sum of money advanced on loan. The words had a substantial meaning, in consequence of the right to participate in profits which the borrowing shareholder would acquire from the regular payment of the instalments, until all that was due upon his shares had been paid. But if the winding-up order operated, in the manner explained by the Lord Chancellor, 'as a compulsory withdrawal as against all the members,' advanced and unadvanced, it follows that no member of either class could be called upon after that date, or was after that date in a position, to pay further instalments upon his shares. The accounts of the shareholders, as such, were terminated by the winding-up order, and their shares were fixed as at that date. It may very well be, therefore, that if the shareholder had not desired to redeem his security, the liquidators might have proceeded upon the bond, and compelled him to pay all that was due, because the condition upon which the bond was not enforceable had become impossible of performance by reason of the winding-up.

"But if this be so, the case of *Brownlie* v. *Russel* cannot be a precedent for the decision of the present. For the defender is not in the position of a shareholder whose contributions to a joint adventure are terminated by a dissolution. He is a borrower, under obligation to repay a loan by fixed instalments. He is not relieved of his obligation by the winding-up order, for the debt still subsists, and he cannot be called upon to perform it in any other manner, because his contract is to pay by instalments and not otherwise."

The pursuers reclaimed, and argued—If the defender was a shareholder of the society, the case was ruled by that of *Brownlie*, and the pursuer's claim was well-founded. It did not follow that because the defender did not participate in the profits he was not a shareholder. He had an interest in the society which was more than that merely of debtor to it. He was a borrower on certain advantageous terms which he obtained in virtue of being a member or shareholder. His position and interest were distinct from those of a mere borrower of the invested funds of the society. This distinction was clearly shown by rule 18. The distinction between the non-advanced and the advanced shareholders in regard to the liquidation was that the former were shareholders and creditors, while the latter were shareholders and debtors. It was impossible for the liquidators to pay the former till the latter had paid up to them. When the liquidation order was pronounced, the society theoretically came to an end, and the shareholders ceased to be shareholders. The only way in which the advanced shareholders, who were debtors, could cease to be such was by redeeming all their advances. The advantage of paying by instalment was granted to them only while the society was a going concern. When they agreed to become advanced shareholders they took the risk of the contingency of a liquidation.

Authorities—*Brownlie* v. *Russel* (*supra*); *Doncaster Building Society*, L. R. III., Eq. 158, and L. R. IV., Eq. 579; Building Societies Act, sec. 32.

The defender replied—*Brownlie's* case was clearly distinguishable from this one. There the advanced shareholders participated in the profits; here they did not. It was true that the liquidation put an end to the society's business, but taking payment of instalments falling due thereafter was not carrying on business, but a necessary part of the winding-up. The liquidators could only realise the society's assets according to their nature. The defender's obligation was one pure and simple to pay a certain debt in a certain stipulated way, and he could not be called on to pay it in any other way. The liquidation of the company could not operate to his prejudice and put him in a worse position than his contract by no fault of his own; it could not make the debts of the society's debtor change their character to his disadvantage. No man being solvent can be called on to pay sooner than he has contracted by his debtor becoming bankrupt.

At advising—

Lord Justice-Clerk—The Lord Ordinary has so clearly explained the circumstances under which the present demand is made, and the nature of the contract out of which it arises, that I need not resume them in any detail. The question as now presented for our decision seems to be, Whether the defender, as an advanced or borrowing shareholder of this building society, having in conformity with its rules borrowed from the society a sum of £11,000, and granted bond for the amount, is entitled to fulfil this obligation in terms of his contract, or can be compelled by the liquidator to pay under conditions different from and inconsistent with those stipulated in the bond?

The bond by which alone this debt is constituted was granted by the defender on the 10th of September 1875, and by its terms the defender bound himself to repay this sum by payments amounting to £1111 a-year, in fortnightly instalments for fourteen years, or until he should redeem certain subjects conveyed by him in security of the advance. It is admitted that the defender has fulfilled that obligation hitherto, and it is not alleged that he has violated any of the society's rules, or that there is any question of his willingness to fulfil them for the future. But it seems that the society went into liquidation in 1881, and it is contended that the effect of this proceeding is to compel the defender to pay the whole remaining balance of his advance at once, and to prohibit the liquidator from accepting payment under the conditions prescribed and stipulated for by the society.

I am of opinion that there is neither principle or authority which can sustain or justify such a demand; that the company, although in liquidation, continues to subsist for the purpose of winding-up, for the realising of its funds, and fulfilments of its obligations, and that as it was effectually bound to accept payment of the alleged debt by the stipulated instalments, the liquidator is not entitled to evade these stipulations, but is bound to fulfil them.

It does not seem to me of much moment to inquire whether this building society comes strictly under the category of a trading partnership or not. It is certainly primarily regulated by the Acts of Parliament which have been passed in regard to such associations, and by the rules of the special association. Subject, however, to these, I should have thought that they belonged to the category of society or partnership as understood in our law. But such a society must at all events continue to exist for the purpose of winding-up, and it must fulfil its obligations in the terms and on the conditions to which their contract binds them, whatever may be the legal character of their constitution. There is no provision in any Act of Parliament or in the rules of this society which justifies the violation of deliberate contract, or which empowers the company or the shareholders to terminate them by going into liquidation. This may, and no doubt does, put an end to future transactions, but it cannot affect the rights of creditors constituted by prior obligations.

Neither do I think it of moment to consider minutely the precise position of an advanced shareholder under this contract. My own opinion is that under such a contract he is more of a creditor than of a shareholder, and that there is nothing in the fact of his being on the roll of shareholders which in any way limits his right to receive fulfilment of the obligations of the company in terms of their undertaking; neither does

it seem necessarily to imply any future or contingent obligation after his contract of repayment has been fulfilled. Much of course will depend on the particular rules of any given society, but I know of no authority for holding it to be a general rule that the liquidation of a building society of this kind alters the terms of contracts made with advanced shareholders, or renders it illegal to continue to receive payments on such debts by instalments in terms of the obligation.

It appears, however, that the liquidators in the present case are under the impression that the House of Lords, in the recent case of *Brownlie* v. *Russell*, had decided (I quote from their letter of the 28th of April 1883) "that the liquidators of a building society could call upon the borrowers to pay up their loans at once," and on this assumption have made the present demand. But there is, in my opinion, no ground for attributing to the noble and learned Lords who decided that case any intention to lay down any such general principle. In fact, the case raised no such question for judgment, and the circumstances were entirely the converse of the present. In *Brownlie's* case the contract—the bond—granted by the advanced shareholder was one which bound him to make immediate payment, and the House of Lords, in finding him bound to do so, only gave effect to the terms of his obligation, and to the substance of his own pleading. The questions raised in that case were substantially two—First, Whether the advanced shareholder was entitled to redeem the loan by paying it up? and secondly, Whether the instalments already paid ought to be reckoned as in diminution of his debt? No question was raised by the liquidator as to the advanced shareholder's right to continue payment by instalments, because the liquidator contended that the advanced shareholder was bound so to continue. The defender contended, and we found, that he was entitled to redeem; the House of Lords held that he was liable to do so—a proposition which he had no interest to contest.

But, as I have said, in coming to that conclusion, the House of Lords only gave effect to the principle on which I found this opinion, that it is the duty of the Court to enforce the contract of parties, whatever that may be, in the special case in hand. The advanced shareholder was not only willing but desirous of redeeming his loan; we found he was entitled to do so—the House of Lords found he was bound to do so; but he had no interest to contest the variation. If the House held, as they did, that the back-letter, which alone authorised payment by instalments, could not qualify that obligation after a liquidation order, such a conclusion was very far short of the general proposition contended for. If I rightly understand the observations of the Lord Chancellor, they proceeded on the nature and terms of the specific contract, and I am the more confirmed in this opinion by his reference to Lord Hatherley's opinion in the case of the *Doncaster Building Society*. I cannot find in the remarks which fell from Lord Hatherley in that case any sanction given to the notion that a liquidation order necessarily determines the right or the obligation on the part of the advanced shareholder to continue payment by instalments. The question on which Lord Hatherley speaks is the liability of an advanced shareholder for calls in a liquidation. I read his remarks entirely in an opposite sense. It is a case very instructive on the position of an advanced shareholder, and seems to decide that when all claims have been provided for his true position is that of a debtor or mortgagor—not that of a contributor. In that case the right to redeem was treated as a privilege, and depended on the special rules. Lord Hatherley says—"Now, it occurred to me at first that the third section of rule 18, which speaks of redemption, but does not speak of a shareholder ceasing to be a member of the society upon redemption, was in favour of the view of the respondents, and that there ought to be a continuing payment throughout the fourteen years, or whatever period might be necessary. But the 28th rule renders it impossible to hold that construction. The 2d clause of that rule provides, 'that the holders of advanced shares, on which subscriptions have been paid for fourteen years, or when the amount so paid shall equal the sums advanced, with the interest and other charges thereon, shall be entitled to a full and complete release for the mortgage given for securing the same, according to the provisions of rule 18, sec. 3, and at once cease to be members.' The alternative is not that if, and when, in consequence of the general favourable result of investments, the whole of the money together shall amount to £120 a-share, then you shall be released; but the alternative is—You must pay the sums advanced, and the interest and the other charges thereon, and then you shall be released." And afterwards he expresses himself thus—"If that be the construction, I do not see why he should not do exactly the same thing upon a mortgage. The rules say,—'You must pay for fourteen years, or you may discount that if you like, but only upon the terms prescribed by rule 18, clause 3.' A call having been now made upon all the members of the society alike, the appellants seek to escape. There is no doubt that they were members for the purpose of paying debts, and therefore it was proper and right they should be made contributories; and it was upon that ground that they were settled upon the list. But when that has been done, and the question is solely between the members of the society, standing upon the same rights and liabilities *inter se* as if there had been no winding-up at all, and when the advanced shareholders have actually advanced their subscriptions to the end of fourteen years, and thus discharged their liabilities, I feel no difficulty as to the question of fairness as between all the advanced shareholders and the rest, and I must expunge the call so far as it relates to the advanced members. The unadvanced shareholders must pay the costs of this application."—3 L.R., Equity, 138. He accordingly refused to treat the advanced shareholder, after he had redeemed his loan, as liable to a call, and held him to be simply a debtor who had paid his debt, and was free of all further obligation, although he stood on the list of contributories. It is plain that Lord Hatherley, but for the special rule, saw no reason why the payments might not have gone on for fourteen years.

I am therefore of opinion that the defender is liable in terms of his obligation, and not otherwise.

LORD YOUNG—I am entirely of the same opinion, and have really nothing to add. I think the conclusion follows logically and irresistibly

from what is conceded. It is conceded—it is impossible to dispute it—that the money was lawfully lent or advanced—advanced is the better word—on the terms expressed in the bond granted by the defender and accepted by the society. It was lawfully lent upon these terms. I put the question to Mr Gloag whether the liquidator might not lawfully fulfil these terms if he was of opinion that it was for the advantage of the society; and I understood Mr Gloag to answer—quite candidly—that he might, and that it would be his duty in that case. Thus, if satisfied that he would probably or certainly get more money for the society by accepting instalments than in pressing the man for immediate payment—selling him up and taking what it was possible to get out of him—then he might lawfully take payment of instalments. But if the money was lawfully lent upon the terms of being paid by instalments, and the liquidator notwithstanding the liquidation may lawfully observe those terms—nay, if it would be incumbent on him in the discharge of his duty to observe them, why should the liquidation render them of none effect, and change the character of the bond, to the prejudice of the debtor, who is under no other obligation than it expresses. I think these considerations, which are only very brief, are also very conclusive, but I entirely agree with what your Lordship has said with reference to the case in the House of Lords, and the observations of the noble and learned Lords, chiefly, and indeed I may say exclusively, relied on by the pursuer in maintaining what I would otherwise have thought an extravagant position, that the admittedly lawful terms of the bond upon which they are suing this debtor are changed to his prejudice by the liquidation, although the liquidator might himself make a precisely similar bargain even with an unlimited debtor if he saw it was for the advantage of the society.

I entirely concur with the judgment of the Lord Ordinary, and think it ought to be affirmed.

Lord Craighill—Assuming for the moment that this case is not over-shadowed by the judgment of the House of Lords in the case of *Brownlie*, the decision to be pronounced is perfectly clear. The defender got an advance, he gave his bond for repayment, and that is not only the measure of his obligation, but is rule by which that shall be fulfilled. The fourteen years during which the stipulated instalments were to be paid are still current, and the accident that the society has gone into liquidation cannot, any more than any other accident to their affairs which might have occurred, enlarge the rights of the one party or make more onerous the liability of the other.

The case is one of contract, and the company cannot be better, and the defender cannot be worse, than they respectively are by their bond. This being so, the question is, Is this case ruled by that of *Brownlie?* I think it is not, because, first, the two cases are not the same, so far as the subject-matter of controversy is concerned; secondly, in *Brownlie's* case the period for payment of the bond had expired—here it is still current, and at the date of the liquidation order had more than ten years to run; and thirdly, the *dicta* relied on by the reclaimers, though these might not be necessary as grounds of decision, were at any rate innocuous in *Brownlie's* case, but their application to this case would change the contract by which the debtor's liabilities are determined, and as a consequence impose upon him a burden which he never undertook, and which it may safely be said was in the contemplation of neither party when the loan was given and the bond was granted. The company came into liquidation in 1881, and such a claim as that on which they are now insisting never was advanced until after an interval of two years, when the case of *Brownlie* was decided in the House of Lords. During that period the fortnightly instalments stipulated in the bond, which in all amounted to £2317, 16s. 4d., were paid, and received as in full of all which in the course of this period could be exacted. A result more unfortunate for the administration of justice between the parties than the reclaimer's success on the pleas which are now the ground of action could, in my opinion, hardly be conceived in this or any other Court.

These views are all within this case as presented by the Lord Ordinary, and I may only add that in his decision and reasons, as well as the reasons given by your Lordships, I entirely concur.

Lord Rutherfurd Clark—I am of the same opinion.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Gloag—Strachan. Agents—Davidson & Syme, W.S.

Counsel for Defender (Respondent)—Pearson—Dickson. Agents—J. Y. Guthrie, S.S.C.

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*Friday, November 7.*

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## KEITH *v.* SMYTH AND ANOTHER.

*Property — Boundary — Salmon-Fishing — Foreshore.*

*Held* that the rule laid down in the case of *M'Taggart* v. *Macdowall*, 6th March 1867, 5 Macph. 534, with regard to the division of the foreshore between the proprietors of adjoining properties bounded by the sea, viz., "that the legal boundary was a perpendicular line let fall seaward from the end of the land march upon a straight line drawn in a direction parallel to the coast, representing the average line of coast between two points fixed by the Court," was applicable to the division of salmon-fishings between two neighbouring proprietors.

This was an action of declarator and interdict at the instance of George Keith of Usan, near Montrose, against Mrs Smyth and Mrs Stansfield, proprietrices of the estate of Dunninald, lying immediately to the west of the lands of Usan. The conclusions of the summons were for declarator "that the pursuer is proprietor of the salmon-fishings in the sea adjacent to his lands and estate of Usan or Ulyssesbaven, including the lands of Scotstown, and that the western boundary thereof seawards is as delineated on two plans thereof, dated 22d June 1811, prepared by George