gence thereon suspended. Upon the whole matter I will suspend as prayed for, and find respondents liable in expenses."

The respondents reclaimed, and argued—They admitted that the cargo was not conform to contract. But then the suspenders had broken bulk by cutting up a part of the cargo and selling another part, and could not restore it *in forma specifica*. They were thus barred from rejecting before their earliest letter professing to do so—Addison on Contracts, 8th ed., p. 955; *Tighe* v. *Wynne*, 2 Campb. 346. Further, the suspenders' remedy was not against them, but against the shipper. They were in the position of third parties with regard to the suspenders' contract with him. There was nothing to connect them with that contract. The bill did not show it; it was merely a negotiable document which might come into the hands of any holder, against whom the suspenders could not refuse payment.

The suspenders' counsel were not called upon.

At advising—

LORD JUSTICE-CLERK—We have here a very clear and distinct note from the Lord Ordinary explaining the case on both sides. We have heard Mr Hay's argument, and it appears to me that the grounds of the Lord Ordinary's judgment have not been in the slightest degree invalidated by anything we have heard from the bar.

In the first place, the Lord Ordinary holds that the cargo furnished was not conform to contract, and not only so, but that it was entirely disconform. In the second place, he holds that there was no unnecessary delay on the part of the buyers in rejecting the cargo. I think he is right in these respects. Then it is said that to a certain and very partial extent bulk was broken, not merely by the buyers for testing, but also to supply a customer. But it seems to me that there was nothing done of a kind which barred the buyers' right to reject the cargo as disconform to contract. Indeed, in many cases disconformity can be discovered only by a customer using some of the goods.

Lastly, it is contended that the bill on which the diligence is threatened, and which was accepted by the suspenders, stands good as a document of debt, and may be enforced by the agent as drawee, against the acceptors, although the contract has not been fulfilled by the principal. I entirely differ from this view. This bill was granted in terms of a written contract which says:—"Payment by approved acceptance and to the seller's or agents' drafts at four months from date of bill of lading payable in London in exchange for shipping documents." That it relates to this contract is certain, because the respondents had no other claims against the suspenders. I know of no authority for the contention that they as agents are entitled to enforce payment of a bill when the contract to which it relates has not been performed by the principal.

On these short grounds I am quite satisfied that the Lord Ordinary's view is the right one, and that we should refuse this reclaiming-note.

LORD YOUNG—That is my opinion also. We have heard Mr Hay's argument, and I admired the great candour with which the case was stated by him. The only point with which I had any difficulty was the last—whether an agent acting for a disclosed principal could make a claim against the acceptor of a bill, which claim could not have been made by his principal? But I confess that on reflection I am of opinion with your Lordship and the Lord Ordinary that the acceptor is not cut out of any answer by the fact of his acceptance being granted to the agent with whom the contract was made on behalf of the principal, and being sued upon it by him.

On every other point I think the case is at an end, on the most candid and proper admission of the respondents' counsel that the goods sold were not conform to contract, but so disconform that the buyers were entitled to reject them. That leaves only the question of timeous rejection. I think there was timeous rejection, and that it is contained in the letters which have been read to us. Now, was anything done to bar the rejection which the buyers, on the concession of the respondents, were entitled by reason of the disconformity, to make? Two things are alleged. Thirteen logs were cut up with a view to execute an order. Was the cutting up of these a bar to rejection? I am of opinion it was not. Then again, eleven logs were sold to a third party at the ship's side. He says that bad as they were they answered his purpose. Neither do I think that was a bar to rejection. There were over six hundred logs in the cargo, and some cutting and examination was necessary to determine their quality. I think nothing was done by the buyers to bar rejection, and that it was timeously made by them, and the bill which was accepted by the buyers in payment of the price being in the hands of the seller's agent, who made the contract, I think the disconformity of the cargo to contract is a good reason for suspension of a charge on the bill.

LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent.

The Court adhered.

Counsel for Complainers—Thorburn. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Mackintosh—Hay. Agents—Henderson & Clark, W.S.

Friday, July 10.

FIRST DIVISION.

SPECIAL CASE — CARRICK AND OTHERS (NORTH BRITISH BUILDING SOCIETY IN LIQUIDATION).

Friendly Society—Building Society—Winding-up—Effect of Circular by Directors putting Stop to Business—Allocation of Losses—Rights of Borrowing and Non-Borrowing Members.

The directors of a benefit building society, which had sustained losses to an extent which absorbed the profits allocated to members of the society, borrowing and non-borrowing, issued on 13th May 1882 a circular to the members which practically brought the business of the society to a close, so that subse-

quently it only existed for the purposes of liquidation. The society had previously at a general meeting passed a rule that "all payments received from borrowing members due from and after the 11th day of April 1882 . . . be attributed, not to their shares, but to account of the sums due under their bonds to the society." A Special Case was presented to the Court in order to determine how the losses were to be allocated amongst the members, and from what point of time it was to be held that they had become chargeable, and ought to be debited to the accounts of the different members. The society subsequently went into liquidation, and was allowed, along with their liquidator, to become a party to the case. There were no outside creditors. *Held* (1) that as borrowing members were, under the rules of the society, entitled to have a share of the profits allocated to their shares, they were bound to share the losses, and that therefore borrowing members who were indebted to the society in any part of their advances on 13th May 1882 were liable to bear a share of the losses of the society in proportion to the sums standing at their credit respectively on their shares at 11th April 1882; (2) that those members whose shares were completed, or who had withdrawn their shares in terms of the rules, before 13th May 1882, became creditors, in a question with other members of the society, for the amount due to them, and were not liable to bear any share of the losses, but were entitled to payment, in the order of their intimations, out of the funds of the society as soon as the liquidator was in funds to make these payments; and (3) that the shares of certain non-borrowing members which were completed according to time, and which, according to the practice of the society, were held as completed although the final payments had not in fact been made by the members, were to be treated as completed.

Building Society—Effect of Winding-Up Order on Position of Members—Right of Liquidator to Call up Bond granted by Borrowing Member.

A member of a building society obtained an advance from the society, and granted a bond and disposition in security in ordinary form with an obligation of repayment at the first term of Whitsunday or Martinmas after the loan was granted. The rules of the society provided that the advance should be repaid by instalments only. The society having gone into liquidation—*held*, following the case of *The Liquidator of the Greenock Property Investment Company*, 11 R. 976, 21 Scot. Law Rep. 705, that the liquidator was entitled to enforce payment of the amount advanced in terms of the bond.

The North British Building Society was established in 1868 in accordance with the provisions of the Act 6 and 7 Will. IV. cap. 32, entituled "An Act for the Regulation of Benefit Building Societies."

The purpose of the society was stated in the rules to be to raise a fund to enable its members "to acquire heritable property, and to make improvements thereon," and to secure a safe and profitable investment for their savings." The provisions of rules 3, 12, 13, 27, and 28 are quoted, and those of rules 14 and 15 are narrated in the opinion of Lord Shand *infra*.

The society carried on business under the rules, and for some years made profits derived from interest, premiums on advances, redemption fees, fines, &c., which were duly declared in terms of the twenty-eighth rule, and out of these profits a guarantee fund was set aside, and the remainder was allocated to the members, borrowing and non-borrowing, in proportion to the amounts respectively standing at their credit on their shares. In the course of the society's existence many new members were added, while many others withdrew, or, their shares having been completed, were paid out.

The greater portion of the society's funds being advanced to members, as authorised by the rules, on postponed securities, the fall in the value of heritable property (which commenced in 1876 or 1877, and was accelerated by the failure of the City of Glasgow Bank), and the bankruptcy of several of the society's borrowing members, involved the society from time to time in losses which ultimately absorbed its guarantee or reserve fund, which, as it stood in 1880, was written off under the instructions of the directors, and a sum of £1046, 6s. 3d. placed to the credit of that fund in 1881 was also absorbed by losses, while in that year no profits were declared or allocated. This state of matters continued till the beginning of 1882, when a large number of the non-borrowing members gave notices of withdrawal, and some of the securities upon which the society had given advances to members had fallen further in value, while in most instances the borrowers had ceased to pay the instalments on their shares and the interest on their advances.

The directors accordingly obtained from a valuator of experience a report upon the securities which they considered doubtful, and found their apprehensions regarding these securities confirmed by the valuator's report.

To ensure that borrowing members would be in safety to continue their payments to the society without increasing the liability which might possibly rest upon them as shareholders to bear a share of the loss believed to have been sustained in proportion to the amounts standing at their credit on their shares, the society at a general meeting, *inter alia*, passed the following new rule:—"That all payments received from borrowing members due from and after the 11th day of April 1882" (the date when the directors resolved to obtain a valuation of the securities of the society) "be attributed not to their shares but to account of the sums due under their bonds to the society, without prejudice to the present position of borrowing members."

On 13th May 1882 the directors issued a circular to members of the society in which they intimated that notices of withdrawal had continued to be given for some time to such an extent that the directors felt it necessary "to take into grave consideration the position in which the remaining members would be placed if the withdrawing members were paid out in the usual course;" they then stated that their apprehensions with regard to the fall in value of the securities held by the society had been confirmed, and that it was apparent that if those

members who had given notice of withdrawal, and others who might take a similar step, were paid out in ordinary course, the risk arising from the depreciation of the society's securities would fall on the remaining members. The circular then intimated that the directors considered that they would be wanting in their duty were they to delay taking such measures as might be necessary to put all the members on an equal footing, and that they were advised that the best and speediest course to adopt in order to effect that object was to ask all the members to give notice withdrawing their shares. The issue of this circular practically brought the business of the society to a close. No new members were admitted to the society, and no new shares were taken out, and the society existed virtually for the purpose of liquidation.

Prior to the year 1881 a sum of £5509, 19s. 3d. of estimated profits had been allocated, and stood at the credit of the shareholders, borrowing and non-borrowing, but the directors in their report for the financial year ending 30th November 1882 stated that losses had been incurred to the amount of £16,044, 9s. 11d., in respect of advances made to borrowing members, which were to that extent irrecoverable owing to depreciation in the value of securities and other circumstances.

This was a Special Case presented to the Court in order to determine how these losses were to be allocated among the different classes of members. The questions raised were entirely *inter socios*, as there were no outside creditors. It was stated in the Case with regard to the above-mentioned sum of £16,044, 9s. 11d. that although a portion of that sum had since been recovered, and a further portion of it might eventually be recovered, there required to be set against that, losses which were not reckoned upon at that date, and which either had already emerged or were likely to emerge, and that it was therefore certain that the ultimate loss would entirely absorb the £5509, 19s. 3d. of profits allocated to shareholders (assuming these profits to be chargeable with the loss first of all), and would besides absorb a large amount of the capital of the society.

At the first hearing of the Case on July 3, 1884, the Court continued the cause with a view to the society being put in liquidation. The society subsequently went into liquidation, and by interlocutor of 13th November 1884 the Court allowed the society and their liquidator to become parties to the case of the first part along with the original parties, the trustees and directors of the society.

The *second* party was a completed member holding two shares in the society, which were completed in September 1880, the instalments paid by him and the profits allocated thereon (not including or anticipating any profits for the year then current) having then accumulated to £25 per share. No advance was ever made in respect of these shares. It was admitted that there were sufficient funds to pay his claims in respect of the shares, under rule 13. He maintained that he was entitled to be paid the amount at his credit in the society without deduction and with interest in terms of rule 13, in the order of the date of his shares being completed, and in preference to all members whose shares were completed or who gave notice to withdraw subsequent to the date of completion of his shares.

The *third* party was a withdrawing member holding twenty shares, in respect of which no advance had been made. On 23d August 1879 he gave intimation of withdrawal, and since that date there had been and still were sufficient funds to pay him out in terms of rule 12, after paying out all members still unpaid whose shares were completed or were withdrawn prior to the date of his notice of withdrawal. He maintained that he was entitled to be paid the instalments at his credit (excluding profits) with interest, in terms of rule 12, without deduction and in preference to all members whose shares were completed or who gave notice of withdrawal subsequent to the date of the third party's notice of withdrawal.

The *fourth* party was a withdrawing member holding twenty shares in the society, in respect of which no advance had been made, who gave notice of withdrawal on 11th January 1882. Since that date there had not been sufficient funds in the hands of the society to pay him out after paying out all members whose shares were completed or were withdrawn prior to his notice of withdrawal. His contention was the same as that of the third party.

The *fifth* party was a withdrawing member holding four shares in the society, in respect of which no advance had been made, who gave notice of withdrawal on or about 16th May 1882 in compliance with the circular issued by the directors on 13th May 1882. He was the general contradictor of all the other parties to the case as stated *infra*.

The *sixth* party was a borrowing member holding forty shares in the society. On 20th November 1871 he obtained an advance of £1000 from the society, being the nominal amount of his shares, and in security of this advance he granted a bond and disposition in security in ordinary form, containing a personal obligation to repay the principal sum at the first term of Whitsunday or Martinmas after the loan was granted. From time to time thirty-two of the shares held by the sixth party were completed by the due and regular payment of instalments and the addition of profits till the amount at the credit of these shares was equal to £25 per share; and the society thereupon discharged the bond and disposition in security to the extent of £800, being the nominal amount of the thirty-two shares. At or before 30th November 1882 there stood at the credit of the remaining eight shares held by the sixth party the sum of £191, 19s. 1d., which included £35, 19s. 1d. of profits allocated on these shares. He paid interest on the £200 remaining undischarged of the said bond up till Martinmas 1882, and on 6th December 1882 he made payment to the society of £8, 0s. 11d., thereby, as he contended, repaying the remaining balance of his bond. Had he continued to pay instalments regularly on the said eight shares, in terms of rule 3, the payments would have continued till June 1883. He maintained that he was entitled to cease being a member of the society and to have his bond and disposition in security discharged, in terms of rule 27, without any further payment, and that he was not liable to bear a share of the loss sustained

by the society in proportion to the sum standing at his credit on his shares at 11th April 1882.

The *seventh* party was (1) a completed member as regards sixteen shares, at the credit of which there stood £400, or £25 per share. This sum of £400 included £98, 17s. 4d of profits allocated on these shares. He was also (2) the holder of twenty-four shares, at the credit of which there stood the sum of £351, 5s. 1d., which included £39, 17s. 1d. of profits allocated thereon, and (3) the holder of sixteen shares, at the credit of which there stood the sum of £234, 3s. 4d., which included £26, 11s. 4d. of profits allocated thereon. On 15th May 1876 the seventh party obtained an advance from the society of £600 against these twenty-four shares, and on 20th November 1877 he obtained another advance of £400 against the last-mentioned sixteen shares, and granted bonds and dispositions in security for the amount of these advances. The bonds were in similar terms to the bond granted by the sixth party. The seventh party paid interest on the advances of £600 and £400, at the rate of five per cent. per annum, half yearly up till Martinmas 1881. On 27th April 1882 the seventh party gave intimation of his intention to withdraw from the society "as regards the shares not yet fully matured," and of his desire to apply the sums at the credit of all his shares towards his bonds, and to pay up any balance that might thereafter be due by him to the society. He maintained that he was entitled to a discharge of his bonds upon payment of the difference, if any, between the amount of his bonds, namely £1000, with interest thereon down to 27th April 1882 on the one hand; and, on the other hand, the amount at the credit of (1) his sixteen earlier completed shares, with bank interest thereon from the date of their completion, and (2) his forty later unmatured shares, with periodical interest on the amount of instalments from time to time paid on the said shares to 27th April 1882. He also maintained that the interest for which he was entitled to credit on the amount of his forty later unmatured shares should be at the rate of five per cent.

The *eighth* party was a borrowing member, holding twenty-four shares in the society. In 1878 he obtained an advance of £600 from the society, being the nominal value of the shares, and granted a bond and disposition in security therefor in similar terms to the bond granted by the sixth party. On 10th January 1882 he intimated his desire to redeem the property given in security of said advance. The sum standing in the books of the society at the credit of the shares was £158, 16s. 2d., of which £155, 7s. 6d. consisted of instalments, and the balance of £3, 8s. 8d. consisted of dividends allocated thereon. He contended that upon payment of the difference between (1) the said sum of £600, and (2) the said sum of £155, 7s. 6d., with interest on the various instalments making up the same, he was entitled under rule 27 to redeem his property and renounce his shares, and thereafter to cease to be a member of the society. He further contended that he was in no view liable to bear a share of the losses of the society, but maintained that if he should be held to be so he was entitled to have his liability postponed to that of all members who had withdrawn or renounced their shares subsequently to the said 10th January 1882.

The *ninth* party was a borrowing member holding twenty-four shares. On or about 6th October 1877 he obtained from the society an advance of £600, the nominal value of the shares, for which he granted a bond and disposition in security in the same terms as that granted by the sixth party. The sum at the credit of these twenty-four shares on 11th April 1882, including £6, 6s. 9d. of profits allocated thereon, amounted to £127, 10s. 3d. Since then no further payments were made by the ninth party to the society except the interest on said advance. On or about 16th May 1882, in compliance with the suggestion in the circular of 13th May 1882, he sent a notice withdrawing his shares. But while taking that step for his protection, *quantum valeat*, he intimated to the directors of the society his desire to continue paying up his advance by instalments as formerly under rule 3. He maintained that he was entitled to complete his shares by paying up the instalments which remained due thereon as formerly, getting credit for all profits which have been allocated upon his shares, and that upon such completion he was entitled to have his bond discharged and to cease to be a member of the society without any liability for its losses. He further contended that while his instalments remained unpaid he was not bound to pay to the society the interest on the full amount of his advance, but was entitled to have the interest rebated to the extent of the reduction effected by previous instalments and allotted profits in the amount of the principal sum due. He further maintained that he was in no view liable to bear a share of the losses of the society, but contended that if he should be held liable for a share of the losses of the society, he was entitled to be postponed in the order of liability, and to be ranked preferably to the members who had not withdrawn, and to be held liable and ranked *pari passu* with the members who like himself withdrew at the suggestion of the directors.

The *tenth*, *eleventh*, and *twelfth* parties were non-borrowing members holding shares which had become matured according to time, though the final payments had not in fact been made. It was the practice of the society to hold that such shares were matured (as stated in the opinion of Lord Shand *infra*). These parties therefore maintained that they were entitled to be dealt with on the footing that their shares had become matured in terms of rule 13.

All these statements as to the sums at the credit of any of the parties in the books of the society were made without reference to the loss of £16,044, 9s. 11d., no part of which had been charged against any of them.

The *fifth* party was the general contradictor of all the other parties to the case. He objected to the contentions of the *second*, *third*, *fourth*, *sixth*, *seventh*, *eighth*, *ninth*, *tenth*, *eleventh*, and *twelfth* parties, on the ground that if these contentions were admitted, and if members of the society in similar positions were dealt with similarly to these parties, he and the other non-borrowing members of the society who had not withdrawn or completed their shares prior to 13th May 1882 would be burdened with all the losses incurred by the society, though the amount of these losses might not have been ascertained by the realisation of the society's investments. He

contended that these losses ought to be borne by all the members of the society; and that the same should be allocated to all the shareholders, borrowing and non-borrowing in the same manner as the estimated profits had been allocated, and that the proportion allocated to each shareholder should be deducted from the sum standing at the credit of his shares. He further contended with regard to the claims of the *second*, *third*, and *fourth* parties, that in the circumstances set forth in the case these parties were only entitled to a *pari passu* ranking on the funds of the society along with himself and all other non-borrowing members, and at all events were only entitled to be paid out preferably and in the order in which they contended for, after deduction from the sums at the credit of their shares of a proportional part of the said estimated loss of £16,044, 19s. 11d. He further contended with regard to the claim of the *sixth* party that even supposing the sixth party was not liable to bear a share of the losses of the society he was not entitled to anticipate payment of his instalments except in terms of rule 2 (which provided that it should be in the power of the directors to receive payment of any number of instalments in advance and allow interest thereon at 4 per cent), and that he was bound to pay interest up till June 1883 on the full amount of the £200 remaining due on his advance, receiving credit, however, for interest at four per cent. on the £8, 0s. 11d. paid by him, from the date of payment till June 1883. He also contended with regard to the claim of the *seventh* party that even supposing the seventh party was not liable to bear a share of the loss, he was not entitled to have the amount at the credit of the shares against which no advance was made applied towards his bonds, but that, with respect to the sums at the credit of the said unadvanced shares, the seventh party was on the same footing as the second party, and fell to be paid out on the same principle. He also contended that the interest to be credited to the seventh and eighth parties on their instalments was interest at the rates specified under rule 12 to be allowed to a withdrawing member. He also contended with regard to the claim of the *ninth* party, that the ninth party was bound to continue paying his instalments as formerly, and was not entitled to have the sums at the credit of his shares, or any instalments paid and to be paid since 11th April 1882, deducted from the principal sum due under his bond, and was bound to continue payment of interest on the full principal sum contained in the said bond until the sums standing at the credit of his shares were equal in amount to the sum due under his bond, and was only entitled to credit for his share of whatever profits might thereafter be declared by the society. He contended with regard to the claims of the *tenth*, *eleventh*, and *twelfth* parties, that they were not entitled to rank as completed shareholders in the manner contended for by them, and that if it were held that non-borrowing shareholders were to be paid out in the order of completion or withdrawal of their shares, he was entitled to be paid preferably to the tenth, eleventh, and twelfth parties.

The following questions of law were submitted for the opinion of the Court:—"(1) Is the *second* party entitled to be paid out the amount at his credit in the society without deduction and with interest in terms of rule 13, in the order of the date of his shares being completed, and in preference to all members whose shares were completed, or who gave notice to withdraw subsequent to the date of completion of his shares? (2) Is the *third* party entitled to be immediately paid out the instalments at his credit (excluding profits) with interest, in terms of rule 12, without deduction and in preference to all members whose shares were completed, or who gave notice of withdrawal subsequent to the date of the third party's notice of withdrawal? (3) Is the *fourth* party entitled to be paid out the instalments at his credit, with interest, in terms of rule 12, without deduction, as soon as the funds of the society permit, and in preference to all members whose shares were completed, or who gave notice of withdrawal subsequent to the date of the fourth party's notice of withdrawal? (4) Is the *fifth* party entitled to be paid out the sum at his credit *pari passu* with the second, third, and fourth parties, or any of them? (5) Is the *sixth* party entitled to cease being a member of the society, and to have his bond and disposition in security discharged in terms of rule 27, without any further payment, or is he liable to bear a share of the loss sustained by the society in proportion to the sum standing at his credit on his shares at 11th April 1882, and in any event is he liable for interest on his bond up till June 1883? (6) Is the *seventh* party entitled to a discharge of his bonds, and to cease to be a member of the society upon payment of the difference, if any, between the amount of his bonds, with interest thereon down to 27th April 1882, on the one hand, and, on the other hand, the amounts at the credit of (1st) his sixteen earlier completed shares, with bank interest thereon from the date of their completion, and (2d) his forty later unmatured shares, with periodical interest on the amount of instalments from time to time paid on said shares at five per cent. to 27th April 1882; or does he fall to bear a share of the losses of the society in proportion to the sum standing at his credit on his shares, or any of them, or in what other way is he to be settled with? (7) Is the *eighth* party entitled to redeem his property in terms of rule 27 on payment of the difference between the amount of his bond and the amount at the credit of his shares, excluding profits, but with interest added in terms of that rule, the rate of interest being five per cent., and thereupon to cease to be a member of the society; or does he fall to bear a share of the losses of the society in proportion to the sum standing at the credit of his shares? and if so, is he entitled to be postponed in the order of liability, and to rank preferably to all members who have withdrawn or renounced their shares subsequently to himself? (8) Is the *ninth* party, upon payment of instalments amounting *in cumulo* to the difference between the sum at his credit on his shares, including profits allocated thereon, and the amount of his said advance, entitled to have his bond discharged, and is he liable, so long as any of said instalments remain unpaid, to pay to the society interest at five per cent. on the full amount of said advance, or is he entitled to have the said interest abated to the extent of the reduction effected on the principal sum due by previous instalments and allotted

profits? Or does he fall to bear a share of the losses of the society in proportion to the sum standing at the credit of his shares at 11th April 1882? and if so, is he entitled to be postponed in the order of liability, and to be ranked preferably to the members who have not withdrawn, and to be held liable and ranked *pari passu* with the members who, like himself, withdrew on the suggestion of the directors? (9) Is the *tenth* party entitled to be paid out on terms similar to those on which the second party is entitled to be paid out, but on the footing that the tenth party's shares fall to be held as completed in September 1881; or if not on what terms? (10) Is the *eleventh* party entitled to be paid out on terms similar to those on which the second party is entitled to be paid out, but on the footing that the eleventh party's share falls to be held as completed in April 1882; or if not, on what terms? (11) Is the *twelfth* party entitled to be paid out on terms similar to those on which the second party is entitled to be paid out, and on the footing that the twelfth party's shares fall to be held as completed in September 1880; or if not, on what terms?"

It will be seen from the above statement that the members of the society represented in the case were divisible generally into four classes, viz.—Non-borrowing members—Two classes.—A. Those who had withdrawn their shares (rule 12); B. Those whose shares had become completed (rule 13). Borrowing members—Two classes.—C. Those who offered to redeem by paying the difference between the amount of their instalments, with periodical interest, and the amount of their bond (rule 27, 1st alternative); D. Those whose payments along with the profits from time to time allotted to them equalled the amount in their bond (rule 27, 3d alternative).

In argument, classes A and B, non-borrowing members, founded on the cases of *The Norwich and Norfolk Provident Building Society ex parte Rackham*, 45 L. J. (N.S.), Ch. Div. 785; *The Glasgow Working-Men's Provident Investment Building Society* v. *Galbraith*, May 28, 1884, 21 Scot. Law Rep. 782; *The Blackburn and District Benefit Building Society*, L.R., 24 Ch. Div. 421, *aff.* L.R., 10 App. Cases 33; *Doncaster Building Society ex parte Clark*, 14 L.J. (N.S.) 13; and on the opinions in the House of Lords in *Brownlie's* case *infra*.

Classes C and D, borrowing members, founded on the case of *Brownlie and Others* (*Liquidators of The Scottish Savings and Investment Building Society*) v. *Russell*, July 7, 1881, 8 R. 917, *aff.* (with variations) March 9, 1833, 10 R. (H. of L.) 19, and also on the *dicta* in *Galbraith's* case *supra*.

The ninth party, in support of his contention that he was entitled to go on paying up his bond by instalments as formerly notwithstanding the liquidation, founded on the case of *The Scottish Property Investment Company Building Society* v. *Boyd*, Nov. 14, 1884, 12 R. 127.

On this point the contradictor founded on the case of *Blair* (*Liquidator of Greenock Property Investment Co.*) v. *Agnew, &c.*, June 25, 1884, 11 R. 976.

At advising—

The opinion of the Court—Lord President, Lord Mure, and Lord Shand—was delivered by

Lord Shand—In this case the official liquidator of the North British Building Society, now in liquidation, and a number of its members, have presented a Special Case to the Court containing a series of questions, eleven in number, with reference to the varying circumstances of different members of the society which are stated in detail in the Case. It will be found that the answers to the queries stated really depend on the settlement of one or two leading questions which formed the subject of the argument submitted to the Court.

The first question is, what effect is to be given to the issue of a circular by the directors of the society on the 13th of May 1882, in which the members of the society were informed of a great depreciation of the society's securities, and the risk of loss resulting, and were at the same time invited to take measures to put the whole members so far as possible on an equal footing; and the second, whether the members of the society who borrowed part of the society's funds are liable to bear a share of the loss which the society has sustained along with those members who did not obtain any such advance. It will be found that on these two matters being settled the detailed queries appended to the Case admit of easy solution.

The society was established in Glasgow in October 1868 under the provisions of the Act 6 and 7 William IV., cap. 32, and the rules in force for a number of years and until the society's business came to a stop were adopted on 27th September 1872, and altered to some extent at a meeting held on 5th July 1877.

The business consisted on the one hand of the receipt of contributions by members, paid in regular instalments; and on the other hand, of advances made to members to the extent of the shares held by them—the profits being allocated in terms of the rules both amongst those who had and those who had not obtained advances out of the funds. As is usual in such societies the rules contained certain powers of withdrawal on the part of members who had not obtained advances, and of redemption of their securities on the part of those who had borrowed part of the society's funds. The terms of these rules will be immediately referred to.

The society, which began in 1868, carried on business until the 13th of May 1882, and for some years made profits, derived from interest, premiums on advances, redemption fees, fines, and otherwise. Out of these profits a guarantee fund was set aside, and the remainder of the profits was allocated to the members, borrowing and non-borrowing, in proportion to the amounts respectively standing at their credit on their shares. In the course of the society's existence many new members were added while many others withdrew, or were paid out after their shares had become completed.

The greater part of the society's funds having been advanced on postponed securities, the fall in the value of heritable property in 1876 and 1877, increased by the failure of the City of Glasgow Bank in the following year, and the bankruptcy of several of the society's borrowing members, caused losses "which ultimately absorbed this guarantee or reserve fund," and a sum of £1046 placed to the credit of that fund in 1881 was absorbed by losses, while in that year no profits

were declared or allocated. In the beginning of 1882 a large number of the non-borrowing members gave notice of withdrawal, and some of the securities upon which the society had given advances had fallen further in value, while in most instances the borrowers had ceased to pay the instalments on their shares and the interest on their advances.

In these circumstances the directors obtained from a valuator of experience a report on the securities which they considered doubtful, and became satisfied that considerable losses had been sustained. Accordingly, the directors on 13th May 1882 issued a circular to the members of the society—a copy of which is appended to the Case—in which they intimated that they had felt it necessary to take into grave consideration the position in which the remaining members would be placed if the withdrawing members were paid out in the usual course, and after indicating that considerable losses must be expected from the fall in the value of securities, and that it was apparent that if those members who had given notice of withdrawal, and others who might take a similar step, should be paid out in ordinary course, the risk arising from the depreciation of the society's securities would fall on the remaining members, they stated that they would be wanting in their duty were they to delay taking such measures as might be necessary "to put all the members on an equal footing." The directors in order to effect that object suggested that all the members should give notice of withdrawal of their shares, and a form of notice for that purpose was enclosed. The issue of this circular practically brought the business of the society to a close. It is stated in article 19 of the Case that no new members were being admitted, and no new shares taken out, and that the society virtually existed only for the purposes of liquidation; and in the petition to the Court praying that the society should be wound up under the Companies Acts 1862 to 1883, under which an order for liquidation was pronounced, it was stated that since the date of the circular the whole operations of the society had been suspended, no new shares taken out and no instalments paid, and that the society now existed only for the purpose of having its affairs wound up.

Prior to 1881 it appears that a sum of upwards of £5500 of the estimated profits had been allocated, and stood at the credit of the shareholders, borrowing and non-borrowing, but in the report of November 1882 it was stated that losses had been incurred to the amount of upwards of £16,000 in respect of the advances made to borrowing members, which, having regard to the depreciation of the value of securities and other circumstances, were to that extent considered to be irrecoverable. The parties in article 18 of the Case state that "although a portion of that sum has since been recovered, and a further portion of it may eventually be recovered, there has to be set against that losses which were not reckoned upon at that date, and which either have already emerged or are likely to emerge; and it is therefore certain that the ultimate loss will entirely absorb the £5509, 19s. 3d. of profits allocated to shareholders (assuming these profits to be chargeable with the loss first of all), and will besides absorb a large amount of the capital of the society." In this state of matters a question between the parties has arisen how the losses are to be allocated? The borrowing members maintain that no portion of these losses ought to be debited to them, while the non-borrowing members maintain that the losses ought to be allocated amongst members of both classes.

The 3d rule of the society titled "Mode of raising the Capital" provided "that the capital of the society shall be raised in shares of £25 each, payable by fortnightly instalments of one shilling and threepence per share, and by interest arising therefrom," and provided also for certain fines and additional payments to be made by persons in arrear.

The 28th rule titled "Books and Accounts" contains a provision in regard to the annual balance, and the allocation of profits. It provides—"The society's books shall be balanced by the manager annually at the end of November, and the profits of the year shall be ascertained, and after setting aside a sum out of the same as a guarantee fund to meet any losses that may be sustained, divided equitably among the shares and carried to the credit of each member's account in the society's books, and also entered at the end of the members' pass-books, but except to the extent stated in Rule XII. shall not form part of the funds that can be withdrawn from the society until the shares are fully completed."

The 2d rule of the society prescribed the mode of the members obtaining admission, and for the payment of entry-moneys and subscriptions, and the 12th and 13th rules provided for the withdrawal of shares, and the completion of shares, on which no advance has been made. By rule 12 it was provided, *inter alia*—"Any member holding shares on which no advance has been made, may, on giving one month's notice in writing to the manager, withdraw his or her subscriptions paid thereon, with interest at the rate of three per cent. for the first and second years, three and a half per cent. for the third and fourth years, and four per cent. thereafter, and the same shall be paid as soon after the expiry of the month's notice as the funds will permit." While by rule 13 it was provided that "Any member holding any share in respect of which no advance has been made, which by the subscriptions paid, and the profits thereon, shall have accumulated to twenty-five pounds (the amount of said share), shall be entitled to receive the amount thereof with bank interest from the date of completion, and his connection with the society in respect of the same shall cease; but the directors shall not be bound to pay said shares sooner than three months after the same have been ascertained to be due, and the same shall only be payable along with withdrawals in their order and as the funds will permit."

The 14th rule provides for the disposal of the funds, by giving the directors power, when they have sufficient funds in hand, to advance the same to members on payment of interest, and of such premium as may seem fair and reasonable, and directs that all advances by the society should be made on the security of heritable property to the satisfaction of the directors. While rule 15 provides, that if members have received advances they shall pay to the society interest

thereon at the rate of five per cent. on the full amount, and that all interest shall be payable at the terms of Martinmas and Whitsunday.

The only additional rule of the society which it is necessary to notice is rule 27, titled "Redemption of Property." By that rule it is provided that "Any member who has given any property in security to the society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same by renouncing the shares representing the advance made thereon, and paying the amount of said advance, under deduction of the instalments paid in respect of the same, and interest thereon, and his interest in said society so far as said shares are concerned shall cease; or any member who has given any property in security to the society may redeem the same as above by payment of the whole sum borrowed, and other dues thereon, and retain his shares in the same manner as if no advance had been made in respect of said shares, . . . or when the subscriptions, with the share of profits, of any member who has received an advance are equal to the amount of said advance, then the payments of said member in respect of said shares on which the advance has been made shall cease, and his connection with the society in respect of the same shall terminate."

The question to be determined, as already indicated, is, How are the losses which have been sustained to be allocated amongst the members, and from what point of time is it to be held that these losses have become chargeable, and ought to be debited to the accounts of the different members? In reference to the last of these points it appears to the Court that the issue by the directors of the circular on 13th May 1882, and the immediate stoppage of the business, followed as this was by the subsequent official order for the winding up of the society and the appointment of a liquidator, who is now a party to the case, fixes the point of time at which an important change on the rights of the members must be held to have taken place. The rules of the society from beginning to end contemplate the realisation and division of profits only, and make no reference to the possibility of losses, and no provision for the allocation or distribution of losses. When it became apparent that the large losses already referred to had been incurred, it necessarily followed that the business must come to an end, and, at all events, the directors took that view, and in effect the business was then stopped. It became at once necessary that the losses which had been incurred should be provided for by being allocated amongst the members liable to bear a share of them; and it seems therefore to follow that no change could thereafter be made in the position of the different members so as to shift the incidence of the losses, and that the rights and liabilities of members could not be thereafter affected by any notice which might be given. Members could no longer insist upon paying up, or going on to pay up, the instalments on their shares with the view of the completion of shares, for the purpose for which such instalments were provided, viz., the carrying on of the business of the society, was one which could no longer be effected. These members were practically in the position of being compelled to withdraw their shares and abandon the notion of taking out profits. The large losses incurred, the declaration of these, and the stoppage of the company's business except for the purpose of winding up, had really the effects of an order for liquidation, which were thus stated by the Lord Chancellor in the case of *Brownlie and Others*, 10 R. (H. of L.) 24. With reference to the liquidation in that case, his Lordship said, the liquidation "puts a close to the whole concern, it terminates at that date the account of each shareholder, it cuts off all chance of profit which if the thing had gone on both classes of members might have had under the 5th rule. It is equivalent, not to an optional withdrawal or retirement by individual members, but to a compulsory withdrawal by the operation of the winding-up order as against them all."

In the case of *Tennant* v. *The City of Glasgow Bank and its Liquidators* (6 R. 554, *aff.* on appeal, 6 R., H. of L., 69), in which a number of authorities were cited and considered as to the effect of the stoppage of a business on the declared insolvency of the company, it was held that no change could thereafter be made in reference to the rights or *status* of the members of the company, so that at least the rights of creditors might be preserved. The principle to which effect was there given seems to be applicable in the present case. It had become apparent from the time that the directors became aware of the losses of the society that its business could no longer be carried on. The rules applicable only to a going business could no longer receive effect, and it seems clearly to follow that the liability of the parties to share the losses must be fixed as at that time, and could not be affected by notices of withdrawal, which were only suitable to a going business, and had become quite unsuitable after every member had of necessity been compelled to withdraw. Assuming, then, that the rights of parties are to be determined as on the 13th of May 1882, the next question to be settled is, upon whom the losses of the society shall fall. It is maintained by the borrowing members that they are not liable for any part of these losses, and in support of their argument they have referred to the cases of *Brownlie*, 8 R. 917, affirmed on appeal, 10 R. (H. of L.) 19; and *The Scottish Provident Investment Co.* v. *Boyd*, 12 R. 127. These cases are to be distinguished from the present in this material respect, that borrowing members in both cases were simply debtors to the society in the sums borrowed, and had no right, and were not entitled to receive any share of the profits. Under the rules of the present society the borrowing members (rule 28) are entitled to have a share of the profits divided equally among their shares—that is, allocated to their shares in the same way as such profits are allocated and credited to the shares of non-borrowing members—and that being so, it clearly follows that the borrowing members must bear their share of the losses. As already noticed, the society's rules or contract does not contemplate losses. It is a settled rule or principle of law, however, that an agreement to share profits—nothing being said about losses—*prima facie* means an agreement to share losses, and that in the same *ratio* or proportion as the parties respectively have fixed with reference to the division of profits, unless there be

some stipulation to a contrary effect. We are therefore of opinion that borrowing members who were still indebted to the society in any part of their advances on the 13th of May 1882, when the society stopped, are liable to bear a share of the losses sustained by the society in proportion to the sums standing at their credit respectively on their shares at 11th April 1882.

A further question has been raised in regard to certain shares which had been completed prior to the stoppage on 13th May 1882, in terms of the society's rule (13), by the subscriptions which had been paid, and the profits allocated to the shares having accumulated prior to that date to the full amount of £25 per share, and also as to the rights of non-borrowing members who more than a month prior to the stoppage had intimated, in terms of rule 12, the withdrawal of their shares, thereby renouncing right to profits, and claiming repayment of their subscriptions and interest in terms of that rule. In the case of completed shares and withdrawal of shares, the members by the rules became entitled to payment of the amount due to them as soon as the funds would permit. It appears to be clear, therefore, that persons whose shares were completed, or who had withdrawn their shares in terms of these rules before the stoppage of the society, are not liable to bear any share of the losses. In a question with other members of the society they became creditors for the amount due to them, having a vested right to payment of these amounts, the payments being, however, deferred till such time as the funds would permit, and these persons in the order of their intimations are entitled to payment out of the society's funds of the amounts due to them as soon as the liquidator is in funds to make these payments. It further appears that it was the practice of the society to hold the shares of non-borrowing members to be matured when they became matured according to time, although certain of the final subscriptions or payments had not in fact been made by those members, the view of the society apparently being that it was unnecessary for the member to make the small payments required towards the closing of his membership, as the money would simply be repaid to him within a short time. This practice must have been known generally to the members. The shares were marked in the books of the society as completed when they became mature according to time. They were reported as completed by the manager to the directors, and were included as completed shares in the directors' annual report to the members, and the shares were credited with interest from the date of completion, and no longer credited with profits, and to members in that position no copy of the circular of 13th May 1882 was issued. It further appears that shares in the position which has just been mentioned were paid out by the directors in their order of completion according to time, and as the funds permitted, along with withdrawals and fully paid-up shares, all as fully stated in the Case. Cases of this class are enumerated in articles 28, 29, and 30 of the Special Case. In one of these cases the shares matured according to time in August 1881, and were only 9d. short of the amount necessary to complete them, and in another only 8s. 4d. short. Having regard to the practice of the society, as stated in the Case, we are of opinion that persons holding shares which have been so treated prior to the stoppage are not liable to bear any share of the ultimate losses. The case of *The Blackburn and District Benefit Building Society*, L.R., 24 Chan. Div., p. 421, *aff.* L.R., 10 Appeal Cases, p. 33, is a decision practically in point as to the rights of members whose shares had been completed, or who had given timeous notice of withdrawal previous to the 13th of May 1882. It was there held, affirming the decision of the Court of Appeal, that those investing members who had given notice of withdrawal, and whose notice had expired before the winding-up began, were entitled to be paid out of the assets in priority to those members who had not given notice of withdrawal, notwithstanding the fact that between the giving of the notice and the winding-up there never were any funds for payment.

It is only necessary to add with reference to another point raised by one of the queries as to the right of a borrowing member, notwithstanding the liquidation of the society, to pay up the balance due of the advance made to him by instalments only, in terms of the rules, that the advances were given on bonds and dispositions in security in ordinary terms, with an obligation for repayment at the first term of Whitsunday or Martinmas after the loan was granted. An obligation having been granted in these terms, we are of opinion that the liquidator is entitled to enforce payment of the amount advanced in terms of the bond. This point was in effect decided in the case of *The Greenock Investment Co.*, 11 R. 976. The case of *Boyd*, 12 R. 127, does not apply, because in that case the borrowing members had not granted any obligation for repayment of the advance except by way of special instalments, payable at regular stated intervals over a period of time.

Having made these general statements of the principles which we think must be applied in extricating the rights of parties, the following answers to the queries appended to the Case will be made:—(these answers are embodied in the interlocutor *infra*).

The Court pronounced this interlocutor:—

"Find and declare in answer to queries 1, 2, and 3, *affirmative* of each of the said queries: In answer to query 4, Find and declare *negative* of said query: In answer to query 5, Find and declare that the sixth party is liable to bear a share of the loss sustained by the society in proportion to the sum standing at the credit of his shares as at 11th April 1882: In answer to query 6, Find and declare that so far as regards the seventh party's sixteen completed shares, he is entitled to be paid the instalments at his credit, with interest in terms of rule 12th without deduction, as soon as the funds of the society permit, and in preference to all members whose shares were completed, or who gave notice of withdrawal subsequent to the date when the shares were completed; but so far as regards the other shares held by him in respect of which the advances mentioned in article 25 of the case were made, he is liable to bear a share of the losses of the society in proportion to the sum

standing at his credit on those shares as at 11th April 1882: In answer to the first alternative of the 7th query, Find and declare *affirmative* of the said first alternative, and *negative* of the remaining part of the said query: In answer to the 8th query, Find and declare that the ninth party is liable to bear a share of the losses sustained by the society in proportion to the sum standing to the credit of his shares at 11th April 1882; that the power of withdrawal is limited to shares on which no advance has been made; and that the ninth party has no preference in respect of his intimation of withdrawal, and is liable to pay the balance due on his bonds, and interest at the term of Whitsunday or Martinmas after three months' notice by the liquidator: And in answer to queries 9, 10, and 11, Find and declare *affirmative* of the said several queries, and decern."

Counsel for First Parties—R. Johnstone—Ure. Agent—David Turnbull, W.S.

Counsel for Second, Third, and Fourth Parties—Strachan. Agents—Miller & Murray, W.S.

Counsel for Fifth Party—Pearson—Graham Murray. Agents—Dove & Lockhart, S.S.C.

Counsel for Sixth Party—Rhind—Shaw. Agent—R. Pasley Stevenson, S.S.C.

Counsel for Seventh Party—Mackay. Agent—F. J. Martin, W.S.

Counsel for Eighth and Ninth Parties—Mackintosh—Moody Stuart. Agents—Auld & Macdonald, W.S.—Mackenzie & Black, W.S.

Counsel for Tenth, Eleventh, and Twelfth Parties—W. Campbell. Agents—J. & J. Galletly, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, July 10.

[Sheriff of Fife.

NICHOLSON *v.* YOOLE.

Sea Fisheries Act 1883 (46 *and* 47 *Vict. c.* 22), *sec.* 11—*Procurator-Fiscal—Title to Prosecute.* *Held* that a procurator-fiscal has a title to prosecute under the Sea Fisheries Act 1883 notwithstanding the provisions of section 11.

This was a complaint in the Sheriff Court of Fifeshire at Cupar under the Summary Jurisdiction Acts 1864 and 1881 at the instance of David Yoole, Depute-Procurator-Fiscal, against William Nicholson, master of the steam-trawler "Deerhound," for a contravention of the Sea Fisheries Act 1883.

An objection was taken on behalf of Nicholson at the trial, that as sub-section 1 of section 11 of the Sea Fisheries Act, 1883 enacts that "the provisions of this Act and of any Order in Council under this Act, or under the sections of the Sea Fisheries Act 1868, amended by this Act, shall be enforced by sea fishery officers, either British or foreign," a complaint at the instance of a procurator-fiscal was incompetent, in respect he was not a British or foreign sea fishery officer.

The Sheriff (CRICHTON) repelled the objection.

Nicholson pleaded not guilty, and, after proof, was convicted and fined £5 with the alternative of thirty days' imprisonment.

Nicholson appealed to the High Court of Justiciary.

This question of law was stated for the opinion of the Court—"Was the Procurator-Fiscal entitled to prosecute the complaint in question?"

Argued for the appellant—The limitation in the Act of the title to prosecute to fishery officers was definite and distinct, and must be strictly interpreted. Besides, there was no necessity for the interference of the Procurator-Fiscal. The matter was not of public interest in the proper sense. The Act was not for the public safety, but for the protection of a particular industry, which had its own officers specially pointed out by the Act, and one of these was as available as the Procurator-Fiscal. Any coastguard officer could have prosecuted.

Counsel for the respondent were not called upon.

At advising—

LORD JUSTICE-CLERK—I am quite satisfied that the judgment of the Sheriff is right in sustaining the instance of the procurator-fiscal in this prosecution, and I think the propriety of it is not in any way affected by the clause of the Act which has been cited by the appellant. The Act no doubt gives authority to sea officers here and in foreign countries to enforce its provisions, and if a foreign fishery officer should choose to prosecute under it before the Justices or the Sheriff he would be entitled to do so, and also to require the services of the procurator-fiscal to enforce his rights. It is important, I think, that the Act proceeds on a convention with foreign States, and that there are therefore rights which are to be looked on with attention by the Court. I do not think the Act has anything to do with the instance of the procurator-fiscal in his own Court, which is an inherent part of our judicial system. He is the prosecutor in the public interest, and whenever a prosecution in the public interest is instituted, unless his instance is expressly excluded, he is the proper party to conduct it.

On these grounds I propose that we should sustain the judgment of the Sheriff and dismiss the appeal.

LORD YOUNG and LORD M'LAREN concurred.

The Court dismissed the appeal.

Counsel for Appellant—Watt. Agent—Alexander Clark, S.S.C.

Counsel for Respondent—Sol.-Gen. Robertson—M'Kechnie. Agent—David Crole, Solicitor.