

excusable. Supposing he can neither pay 5s. in the £ nor prove his failure justifiable, his only alternative is to make up the necessary amount some way or other, and if the assignation of part of his earnings contribute to this result, the debtor will thus, at the time he gets his discharge, obtain full benefit corresponding to the loss of income he has in the meantime sustained. On the other hand, if the assignation of income has not that effect, it must just continue in force till it has, when the debtor will be discharged. The moment discharge is granted the assignation will come to an end, because it is granted for the benefit of the creditors, and when the debtor is discharged he has no longer any creditors, and his debts cease to exist. He is entirely relieved of them, just as much as if he had never contracted them. Therefore the working out of the assignation ultimately affords no difficulty at all.

The remaining question is as to the amount which the Sheriff has ordered to be assigned, and I see no ground for saying it is an unreasonable amount. On the contrary, it is, I think, quite a fair proportion to be assigned.

On these grounds I am of opinion that we should adhere to the Sheriff's interlocutor.

LORD SHAND—Unquestionably prior to the recent somewhat curious Cessio Acts it was the practice to grant *cessio* under conditions, one of which was that the debtor should make over for a time a certain portion of his income to his creditors. This rule not only extended to the cases of persons having a fixed income, but also to persons possessing salaries and incomes of that class, and I see no reason to doubt that where a man's income consisted partly of commissions and partly of salary, this condition might lawfully be appended to the granting of *cessio* in his favour. I think also that no change has been operated by the recent statutes, and that it is settled by the case of *Simpson v. Jack*, that such a condition may still be appended to the granting of *cessio*.

That being so, what are the circumstances of the present case? The petition for *cessio* is presented by the debtor who is seeking to have an order of Court which will restrain his creditors from doing diligence against his property. In former times the chief purpose of the applications for *cessio* was to save the debtor from imprisonment, but as I said in a recent case, the Act of 1880 which abolished imprisonment for debt enacted that it should be competent for anyone who was notour bankrupt to apply for *cessio*, and the meaning of the enactment must be, that while a debtor who obtains decree of *cessio* must grant a disposition *omnium bonorum*, his earnings, if he is making any, are saved from the diligence of his creditors. I see no reason accordingly, why the Sheriff should not have power to append such a condition to the granting of *cessio*.

On the question whether the amount to be assigned is reasonable I concur with your Lordship.

LORD M'LAREN concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Appellant—Crole. Agent—Edward Nish, Solicitor.

Counsel for the Respondent Freer—A. S. D. Thomson—Agents—W. R. Patrick & Wallace James, S.S.C.

Counsel for the Respondent Dobbie—A. S. D. Thomson. Agents—Miller & Murray, S.S.C.

Wednesday, July 9.

FIRST DIVISION.

BLAIR (LIQUIDATOR OF THE GREENOCK PROPERTY INVESTMENT COMPANY) v. BROADFOOT'S TRUSTEES AND LYLE.

Friendly Society—Building Society—Winding-up—Liability of Members inter se—Maturing of Shares—Notices of Withdrawal.

By the rules of a building society it was provided (1) that when the profits, with the instalments paid, amounted to £25 per share, members should be paid out, provided that when members were paid out during the currency of the financial year they should only be entitled in lieu of profits to interest from the date of the immediately preceding balance on the sum standing at their credit at such rate as the directors might from time to time fix, and such interest might in the option of the directors be dealt with as profits in the maturing of shares; (2) that members who had not received an advance of money from the society might after a year from their entry withdraw by giving one month's previous notice, when the whole instalments should be repaid with the proportion of the profits effecting thereto as at the last annual balance.

The society stopped business and suspended payment on December 24th 1883, a petition for winding-up was presented to the Court on 14th January, and a winding-up order pronounced on 6th February 1884. After payment of the outside creditors of the society a surplus remained in the liquidator's hands for division among the members.

Held that a member whose shares, with the addition of interest at the rate fixed by the directors for the year, had matured before 24th December 1883, and a member who had given notice of withdrawal more than a month prior to the same date, neither of whom had received payment before the stoppage, were entitled to a preference over the other contributors for

the amount standing at the credit of their shares.

The Greenock Property Investment Society carried on business in conformity with the Act for the regulation of Benefit Building Societies 6 and 7 Will. IV. cap. 32, and its objects were to raise a fund by fixed periodical contributions from the members, out of which fund advances to the amount of their shares were made to members applying for the same, for the purpose of building or purchasing dwelling-houses, lands, or other heritable subjects, to be secured to the society till repayment of the advances. Each share was of the nominal or subscribed value of £25, and was paid up by the members by monthly instalments of 2s. per share. These instalments, together with the proportion of profit credited to each share on the paid up amount thereof, as at the close of each financial year—on 30th November annually—constituted the contributions of each member towards the nominal or subscribed value of his share. During the course of 1883 the end of the financial year was changed to 31st December.

While the above were the general regulations as to all shares in the society, the members were divided into two classes according as they did or did not obtain advances. By rule 9 of the revised rules of the society it was provided—"The profits (after deducting such a sum as the directors consider should be carried to the reserve account) shall be allocated amongst the members each year, and carried to the credit of their respective accounts in the ledger. When the profits, with the instalments paid, amount to £25 per share, the members shall be paid out; provided that when such members are paid out during the currency of the financial year they shall only be entitled (in lieu of profits) to interest from the date of the immediately preceding annual balance on the sum then standing at their credit, at such rate as may from time to time be fixed by the directors; and such interest may, in the option of the directors, be dealt with as profits in the maturing of shares, but should such members not take payment of their shares when the same have come to maturity, and intimation to that effect has been made to them, then interest at bank current-account rate shall only be allowed such members from the date of such intimation till paid. Members whose shares come to maturity during the currency of the financial year shall be liable in payment of a proportion of any payment chargeable, in conformity with rule 2. Members who have not received an advance of money from the society may withdraw at the end of twelve months from the date of their entry, or at any time thereafter, by giving one month's previous notice, when the whole instalments shall be repaid, with a proportion of profits effecting thereto, as at the date of the last annual balance according to scale No. 7 of appendix, less all penalties or other payments owing by such members. All members shall be bound at settlement to deliver up to the society

their pass-books and certificates of shares."

On 24th December 1883 the directors of the society having received very unfavourable valuations of certain heritable properties on which the society had advanced money, and which had been thrown on the hands of the society by the proprietors, agreed "meantime to receive no new members, to take no further deposits, and to delay making any payments." After that date business was stopped and payments were suspended. At a special general meeting of the society held on 3rd January it was resolved that the society should only continue for the purpose of liquidation. The petition for liquidation was presented on 14th January, and a winding-up order was pronounced by the Court on 6th February 1884.

Having paid the outside creditors of the society the amount of their debts in full, the liquidator presented a note to the Court stating that a surplus remained in his hands, and that questions had arisen among members of the society who had been placed by the Court on the list of contributories as to the disposal of this surplus, and praying the Court, *inter alia*, to find that James Broadfoot's trustees and John Lyle were not creditors *inter socios*, nor entitled to any preference over the other contributories for the amount standing at their credit on their respective shares.

The facts with regard to Broadfoot's case were set forth in answers lodged for him before his death to a previous note by the liquidator and adopted by his trustees, and were as follows:—"In 1874 the respondent became the holder of twenty shares in the society for behoof of his son James Broadfoot junior, conform to certificate of transfer dated 19th July 1877. These shares were of the value of £25 each, and he thereafter proceeded to pay up the amount of said shares, namely £500, by instalments. The respondent was an investing member, and had no advance on his shares. At 30th November 1882 the sum standing at his credit, including profits up to that date, amounted to £446, 0s. 2d. During the year 1883 he paid further instalments amounting to £40, 15s. 3d., which brought up the total of his payments, as at 30th November 1883, to £486, 15s. 5d.," which was the sum entered opposite the respondent's name in the list of contributories. On 29th October the directors resolved that the rate of interest to be allowed on shares coming to maturity at or after that date should be 3 per cent. Interest at that rate on £446, 0s. 2d. to 30th November 1883 amounted to £13, 7s. 7d., which being added to the above sum of £486, 15s. 5d., made the sum standing at the credit of the respondent on 30th November £500, 3s., or three shillings more than the amount required to mature his shares.

"At a meeting of directors held on 17th September 1883 the following report was made:—"The manager reported that the following sums fell due between this date and 31st December, the close of the financial year—James Broadfoot, £500."

"The manager (now the official liquidator

tor) got at this meeting cheques signed for the various sums mentioned in the minute as falling due before the close of the financial year, except that for the respondent's money. A cheque was not then made out for that money because the respondent, who was present at the meeting as a director, stated that he would allow the money to remain to the end of the financial year in order that he might get a share of the profits for the year. James Broadfoot junior, to whom the money belonged, was at sea at the date of the meeting last referred to; and after his return he was told that his shares had matured, and he instructed the respondent to get up the money from the society as he had use for same before the end of the year. The respondent accordingly intimated to the manager of the society that he would take up his son's money; and at a meeting of the directors held on 10th December 1883 the following report was made:—'The manager reported that notice had been given that the following sums were to be uplifted from the Society—J. Broadfoot, £500. The directors signed cheques for the following to meet the payments falling due before next meeting—J. Broadfoot, shares matured, £500. The manager stated that the shares held by Mr Broadfoot (chairman) for behoof of his son had come to maturity, and payment of which was desired immediately. On payment of these shares Mr Broadfoot would cease to be qualified for the office of director. Mr Broadfoot stated that he now resigned the office of director. Mr James Broadfoot having thus ceased to be a director of the Society, the directors in consideration of his long, valuable, and faithful services to the society, unanimously appointed him to be a trustee in the room and stead of Mr Alexander Currie. Mr Broadfoot being present accepted the office.' The respondent ceased to be a director at the meeting referred to, and did not attend any further meetings of directors. The cheque for £500 was signed by the directors and a trustee at the meeting on 10th December, and the same was handed to the manager of the company, who thereafter held it for behoof of the respondent or of his son. On 24th December James Broadfoot junior called for the cheque. The manager was out when Mr Broadfoot junior called, and the manager states that if he had been in the cheque would have been delivered and the money paid."

The respondent submitted that his name should be removed from the list of contributors in respect that his shares had matured, and he had ceased to be a member of the society before the resolution for winding-up was adopted.

The facts with regard to Lyle's case were set forth in answers lodged for him, and were as follows:—"In 1877 the respondent became the holder of ten shares in the society conform to certificate dated 3rd December 1877. These shares were of the value of £25 each, and before 12th November 1883 he had paid up contributions on his said shares to the extent of £72, which with a sum of accumulated profits on the

said contributions amounting to £9, 15s. made together a total sum of £81, 15s. due to the respondent at the said date. The respondent was an investing member, and had no advances on his shares. On or about 12th November 1883 the respondent gave notice of withdrawal in terms of rule 9 above quoted. The said notice was in the form of a letter to Mr Blair, then the manager, in the following terms:—"10 Regent Street, 13th November. Dear Sir,—I have ten shares in the Building Society (£72 paid), and I wish to withdraw them. Would you let me know when I can do so?—Yours, &c., JOHN LYLE.

"On 14th November he received the following letter from Mr Blair:—"6 West Blackhall Street, Greenock, 14th November 1883. Mr Jno. Lyle—Dear Sir,—One month's notice requires to be given before payment of shares withdrawn is made. Please call for payment of your shares on 13th December next.—I am, yours truly, W. BLAIR, manager, per J. T.

"Accordingly, on or about 13th December 1883 the respondent called at the office of the society for payment of the said sum of £81, 15s. He saw the manager, or his clerk, but was informed that through an omission the matter had not been brought before the directors at their monthly meeting held on 10th December 1883, and that he could not receive payment at that time. He was informed by the manager, or his clerk, that authority would be taken at next meeting to pay the sum due. The respondent got married about this time and left the town, and when he returned the society had suspended payment."

Argued for the liquidator—In Broadfoot's case the shares had not matured. The directors had an optional power to hold interest as profits in the maturing of shares, but this power had not been exercised in his case. The cheques for payment of his shares were in name of the manager, and were never placed beyond the power of the society to recal. In Lyle's case the notice of withdrawal was not made effectual by payment. The undertaking in the rules that the shares of matured and withdrawing members should be paid was an undertaking *inter socios*, and contingent on the ability of the society to pay—*North British Building Society v. M'Lellan*, June 23, 1887, 14 R. 827.

Argued for the respondents—The case of both respondents was the same in principle. Both had ceased to be members of the society before 24th December when the society stopped payment, though it would have been enough if they had ceased to be members before the petition for winding-up was presented on 14th January. In Broadfoot's case the directors had clearly acknowledged that his shares were matured at the meeting of 10th December, and Lyle's notice of withdrawal took effect on 13th December. They were therefore both entitled to a preference over the other members of the society—*North British Building Society v. Tosh*, July 14, 1885, 12 R. 1271, and July 30, 1886, 14 R. (H. of L.) 6; *The Black-*

burn Building Society, July 6, 1883, L.R., 24 Ch. Div. 421, and (H. of L.), November 23, 1884, 10 App. Cas. 33.

At advising—

LORD SHAND—The liquidation of the Greenock Property Investment Society seems at last within measurable distance of being brought to a conclusion. Before, however, the final winding-up of the society, two questions have been raised, and these have formed the subject of discussion between the liquidator and the respondents Broadfoot's trustees and Lyle.

In relation to both cases it is necessary to bear in mind these facts—The petition for the winding-up of the society was presented on 14th January 1884, and it also appears that on 24th December 1883 the persons who were in the management of the society's affairs were satisfied that it was insolvent, and resolved to suspend payment and undertake no other business on behalf of the society. The position of affairs is now this—The claims of creditors have all been settled, and the liquidator has, we are told, a surplus available for distribution among the members of the society according to their legal rights. The questions therefore which are now to be determined are *inter socios*. The respondents maintain that they are entitled to be paid out of the surplus fund prior to the payment of the other members of the society, because everything had been arranged before the stoppage of the society's business to terminate their membership and make them the creditors of the society.

Mr Broadfoot held 20 shares of £25 each, and it is maintained by his trustees that he was a matured member of the society—that is to say, that his shares were fully paid up, and that he was entitled to payment of the money at his credit with the society before the stoppage, and consequently was entitled to rank as a creditor of the society, and my opinion is that his trustees have made out their case.

The question turns on the effect to be given to rule 9 of the society's revised rules. It provides—"The profits (after deducting such a sum as the directors consider should be carried to the reserve account) shall be allocated amongst the members each year, and carried to the credit of their respective accounts in the ledger. When the profits with the instalments paid amount to £25 per share, the members shall be paid out; provided that when such members are paid out during the currency of the financial year they shall only be entitled (in lieu of profits) to interest from the date of the immediately preceding annual balance on the sum standing at their credit, at such rate as may from time to time be fixed by the directors; and such interest may, in the option of the directors, be dealt with as profits in the maturing of shares."

Now, it is averred in the answers lodged for James Broadfoot, and it is not disputed, that in October 1883 the directors of the society resolved that the rate of interest should be 3 per cent. Now, the grounds upon which it is said that rule 9 applies are

these—Mr Broadfoot had been a member of the society for a considerable time on behalf of his son, and it is stated in his answers, and not disputed, that "in 1874 the respondent became the holder of 20 shares in the society for behoof of his son James Broadfoot junior, conform to certificate of transfer dated 19th July 1877. These shares were of the value of £25 each, and he hereafter proceeded to pay up the amount of said shares, namely £500, by instalments. The respondent was an investing member, and had no advance on his shares. At 30th November 1882 the sum standing at his credit, including profits up to that date, amounted to £446, 0s. 2d. During the year 1883 he paid further instalments amounting to £40, 15s. 3d., which brought up the total of his payments, as at 30th November 1883, to £486, 15s. 5d.," so that on 30th November 1883 a sum of £13, 4s. 7d. only was required to be added to the sum at his credit with the society to make him a matured shareholder. This sum, it is maintained, was practically added to his shares by the addition of interest before 30th November 1883. The matter came up at two meetings of the directors. At the first meeting held on 17th September 1883 it was mentioned in this way—"The manager reported that the following sums fell due between this date and 31st December, the close of the financial year, and among these sums occurs the entry, 'James Broadfoot, £500.'" It is stated in the answers that the manager got at this meeting cheques signed for the various sums mentioned in the minute as falling due before the close of the financial year, except that for the respondent's money, and it is explained that the cheque was not made out because Mr Broadfoot stated "that he would allow the money to remain to the end of the financial year in order that he might get a share of the profits for that year." If matters had remained in this position Broadfoot would have been in no better a position than any other member of the society, because the financial year did not close till 31st December, but what happened on 10th December entirely changed this state of affairs. It appears that Broadfoot's son had desired payment of the money, and the manager of the society at that meeting reported "that notice had been given that the following sums were to be uplifted from the society," and again "James Broadfoot, £500," appears in the list. The report of the meeting further bears that the directors signed cheques for the sums falling due before next meeting, and among others for the £500 due to James Broadfoot, and the report proceeds—"The manager stated that the shares held by Mr Broadfoot (chairman) for behoof of his son had come to maturity, and payment of which was desired immediately. On payment of these shares Mr Broadfoot would cease to be qualified for the office of director. Mr Broadfoot stated that he now resigned the office of director. Mr James Broadfoot having thus ceased to be a director of the society, the directors, in consideration of his long, valuable, and faithful services to

the society, unanimously appointed him to be a trustee in the room and stead of Mr Alexander Currie." It is stated in the answers that "the respondent ceased to be a director at the meeting referred to, and did not attend any further meetings of the directors."

Now, the result of these transactions clearly is this—On the one hand, Mr Broadfoot claimed that he was a matured member. The interest which fell to be added to the amount at his credit with the society was somewhat more than was required to mature his shares, and these shares were matured if the interest was added. And on the other hand, the directors acknowledged at the meeting to which I have referred that the shares were matured. That transaction terminated his membership as at the date of the transaction so as to make him a creditor *inter socios*, and he must therefore be treated as a matured member, and his trustees are entitled to obtain the amount at his credit with the society from the liquidator.

It is said that the directors had an optional power to treat interest as profits in the maturing of shares, and that Broadfoot might have been paid out by profits, but I do not think that argument can have place, as the directors and Broadfoot were at one about the addition of interest to the sum at the latter's credit, and there can be no question that after the meeting of the 10th December his shares were matured.

The case of Mr Lyle is different in its circumstances, but in principle is the same. He claims a right to be paid out as a withdrawing member who had "ceased to be a member of the society before it went into liquidation," and he ought to be dealt with as a creditor of the company, or at all events a creditor *inter socios*. The facts of the case are given in the answers lodged for Lyle, and they are shortly these—The rule applicable to the case is the same rule 9, and it provides—"Members who have not received an advance of money from the society may withdraw at the end of twelve months from the date of their entry, or at any time thereafter, by giving one month's previous notice, when the whole instalments shall be repaid with a proportion of profits effecting thereto, as at the date of the last annual balance." Now, Lyle was the holder of 10 shares of £25 each, conform to certificate dated 3rd December 1877. Before 12th November 1883 he had paid up contributions amounting to £72, which with a sum of accumulated profits added thereto made a total sum of £81, 15s. He was an investing member, and no advances had been made to him. He resolved to withdraw from the society, and intimated his wish in a letter to the manager of the society dated 13th November 1883, which was in these terms—"Dear Sir,—I have 10 shares in the Building Society (£72 paid), and I wish to withdraw them. Would you let me know when I can do so?" The answer of the manager dated the next day was as follows—"Dear Sir,—One month's notice requires to be given before payment

of shares withdrawn is made. Please call for payment of your shares on 13th December next." It is clear that by that letter a contract or arrangement was made by which it was recognised that Lyle had a right to withdraw from the society, which would emerge on 13th December 1883. On 13th December accordingly I think Lyle called on the manager to obtain payment of his shares. Not only so, but a cheque would have been ready for payment of the shares unless the manager had omitted to bring the matter under the notice of the directors at the meeting of 10th December. I think therefore the contract by which Lyle withdrew from the society was concluded in time, and that he also is entitled to payment of the amount of his shares preferably to the other members of the society.

LORD M'LAREN and the LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court found that James Broadfoot's trustees and John Lyle were creditors *inter socios*, and entitled to a preference over the other contributories for the amount standing at the credit respectively of the shares of the said James Broadfoot's trustees and John Lyle, being for the said James Broadfoot's trustees the sum of £500, with interest at the rate of 4 per cent. per annum thereon from 30th November 1883 until payment, and being for the said John Lyle the sum of £81, 15s., with interest at the rate fore-said thereon from 13th December 1883 until payment.

Counsel for the Liquidator—Vary Campbell. Agent—William B. Glen, S.S.C.

Counsel for the Respondents Broadfoot's Trustees and Lyle—Guthrie—Salvesen. Agents—Smith & Mason, S.S.C.

Thursday, July 10.

FIRST DIVISION.

[Court of Exchequer.

MAGISTRATES OF PORTOBELLO v. SURVEYOR OF TAXES.

Revenue—Income-Tax—Cemetery—Income-Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 60, Schedule A, No. 3, Rule 3.

Held that where the magistrates and town council of a burgh in fulfilling their duty to provide a burial ground for the burgh have been obliged to borrow money, they are not entitled to deduct from the profits derived from the cemetery before being assessed in income-tax the amount of the interest due on the borrowed money, but are liable to be assessed on such profits after deduction only of working expenses under Schedule A, No. 3, rule 3, of the Income-Tax Act 1842.

At a meeting of the Commissioners for the