that the first plea-in-law for the claimants Thomas Cunningham and others must be sustained, and that they are entitled to be ranked and preferred to the whole fund *in medio* to the extent of £125 each in terms of their claim."

Counsel for James Mackie's Trustees as Real Raisers and as Claimants—M'Lennan, K.C.—Constable. Agent—Thomas Liddle, S.S.C.

Counsel for Claimants, Thomas Cunningham and Others—Orr, K.C—W. T. Watson. Agents—Reid & Crow, Solicitors.

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*Wednesday, October* 18.

## FIRST DIVISION.

[Lord Johnston, Ordinary.

## CUTHBERTSON *v.* MAXTONE GRAHAM (LIQUIDATOR OF IRVINE AND FULLARTON PROPERTY INVESTMENT AND BUILDING SOCIETY).

*Company—Building Society—Winding-up—List of Contributories—Forfeiture of Shares in case of Failure to Pay Instalments—Automatic Forfeiture of Shares Entitling a Member who had Failed to Pay Instalments to have his Name Removed from the List of Contributories.*

The rules of a building society provided, *inter alia*, as follows—"16. Every member failing to pay his monthly instalments shall be fined 1d. per share for every month such instalments are in arrears, and such fines may be liquidated from the first monies paid in by the defaulter, or deducted from the amount already paid in by him, and, so soon as the fines shall amount to the sum at his credit, the amount thereof shall then be forfeited to the society, and be carried to the contingent fund, and the member shall thereafter cease to have an interest in the society. . . ." This rule also made provision for intimation to a member who was in arrear.

An order having been pronounced for the winding up of the society, the liquidator presented a note for settlement of the list of contributories. C objected to his name being placed on the list on the ground that he had several years before ceased to be a member of the society. It was admitted that the instalments paid by C in respect of shares were 10s. in all; that if rule 16 operated automatically, the amount of 10s. standing at the credit of C would have been extinguished by fines in 1882; and that no intimation had at any time been given to C that he was in arrear.

*Held* (*aff.* the interlocutor of Lord Johnston, Ordinary) that rule 16 automatically operated a forfeiture of shares; that C had accordingly ceased to be a member of the society in 1882; and therefore that his name fell to be removed from the list of contributories.

*Moore* v. *Rawlins*, 1859, 6 C.B. (N.S.) 289, *distinguished.*

This was a note to the Lord Ordinary for James Maxtone Graham, C.A., Edinburgh, official liquidator of the Irvine and Fullarton Property Investment and Building Society, for settlement of the list of contributories.

From the statements made in the note it appeared that on 14th November 1903 the Court, on the petition of certain creditors, ordered the society to be wound up as an unregistered company under the provisions of the Companies Acts 1862 to 1900, and appointed the petitioner to be official liquidator thereon.

The objects of the society were (1) to provide a mode of safely and profitably investing the savings of its members, and (2) to advance to its members money to erect or purchase dwelling-houses or other real or leasehold estate, or pay off burdens affecting such property.

By the 3rd article of the rules of the society it was provided that the capital of the society should be raised in shares of £25 each, payable by monthly instalments of 2s. per share, or by fortnightly instalments of 1s. per share, and by interest arising thereon.

Articles 16, 17, and 18 were as follows:—"*Article* 16. *Instalments in Arrears.*—Every member failing to pay his monthly instalments shall be fined 1d. per share for every month such instalments are in arrears, and such fines may be liquidated from the first moneys paid in by the defaulter, or deducted from the amount already paid in by him, and so soon as the fines shall amount to the sum at his credit, the amount thereof shall then be forfeited to the society, and be carried to the contingent fund, and the member shall thereafter cease to have an interest in the society. Intimation shall be given by the manager to every shareholder who may be in arrears for a period of not less than six months, stating the amount of his arrears then due, by letter addressed to such shareholder to his registered address, and having a postage label thereto attached, put into the post office at Irvine, when, if not paid, the notice shall be repeated every three months thereafter until he shall either pay his arrears or cease to be a shareholder, as before provided. The expense of these notices, which shall be assessed at 3d. each, to be paid by the shareholders to whom they are sent. *Article* 17. *Temporary Suspension of Instalments.*—The directors shall have power in special cases, where application is made for that purpose, and under such conditions as they may think fit, to allow members to suspend payment of their instalments for a limited period, not exceeding six months, without exaction of the beforementioned fine. *Article* 18. *Withdrawal of Shares.*—Any member who has not received an advance on the shares held by him may, at any time after twelve months from the date of his joining the society, on giving one month's notice to the manager in form No. 4 of appendix, withdraw his instalments on such shares,

with interest thereon at the average rate allowed by banks on open accounts since the date of last allocation of profits. Members so withdrawing shall forfeit all right to any share of the profits not yet allocated. Applications for withdrawal shall be considered and granted by the directors, and payment shall be made to such applicants as the state of the funds will permit, in the order of priority of their dates."

The note further stated that so far as the liquidator had been able to ascertain the claims of outside creditors amounted to upwards of £4100, and that he believed that these claims with the costs of the winding-up would exceed the sum likely to be realised from the sale of the security subjects and that a call upon the members would therefore be necessary. That in virtue of the provisions of sec. 200 of the Companies Act 1862 he had framed a list of contributories, consisting, *inter alios*, of *investing members who did not appear to have withdrawn from the Society;* that owing to the defective way in which the register of members had been kept, he had had great difficulty in ascertaining who were now contributories, and that he had accordingly lodged the present note in order that the list might be settled by the Court.

Objections and answers to the note were lodged by James Cuthbertson, contractor, Wellpark Road, Saltcoats, who objected to his name being placed on the list of contributories in respect that he was not a member of the society. He averred that he had never been a member of the society, but that, assuming he had been, he must in terms of article 16 of the rules have ceased to be a member many years before.

The liquidator lodged answers in which he averred that in November 1878 Cuthbertson had applied for shares, that he had paid entry-money and instalments, that he was duly entered on the register of members, that thereafter he was treated as a member of the society, that profit in respect of his shares was allocated to him up to and including the year 1886, and that no notice of withdrawal was ever given by him to the society. He further averred that the society did not enforce the 16th article of the rules in regard to the shares in question.

On 29th June 1905 the Lord Ordinary (JOHNSTON) pronounced the following interlocutor:—"Finds that the name of the objector, the said James Cuthbertson junior, should not have been put in the list of contributories appended to the said note, No. 89 of process, and orders the liquidator to remove his name from said list, and decerns: Finds the said objector entitled to expenses in connection with his said objections and answers out of the funds of the liquidation: Allows an account thereof to be given in," &c.

*Opinion.*—"Under this note for settlement of the list of contributories in the liquidation of the Irvine and Fullarton Property Investment and Building Society, the objector, James Cuthbertson junior, seeks to have his name removed from the list in these circumstances.

"The shares in the society are of £25 each, payable by monthly instalments of 2s. each, or fortnightly instalments of 1s. each per share, and the rules make provision for application, registration, and issue of certificates. The voucher for payment of instalments is (article 14) to be the member's pass-book. But with regard to instalments in arrear it is provided (article 16)—(1) Every member failing to pay his monthly instalment shall be fined one penny per month for every month such instalment is in arrear; (2) such fines may be liquidated from the first moneys paid in or deducted from the moneys already paid in; (3) when the moneys paid in, or at the credit of the member, are exhausted by fines, the said amount 'shall then be forfeited to the society and carried to the contingent fund, and the member shall thereupon cease to have an interest in the society'; and (4) certain notices are provided to be given to the member in arrear, and to be repeated every three months 'until he shall either pay his arrears or cease to be a shareholder as before provided.'

"Now, James Cuthbertson is alleged to have become a member in respect of three shares in 1878, and to have paid up in all only 10s. on these shares, which, if the rule of article 16 operated automatically, would have been extinguished by fines by 1882, or, at any rate, long before the liquidation of the society commenced in 1903. But the society continued him on its register, regularly credited him with a share of profits so long as profits were divided, *i.e.*, down to 1886, sent him no notices in terms of article 16 of the rules, did not debit his account with fines, and did nothing to declare the forfeiture.

"Cuthbertson, the objector, denies his identity with the Cuthbertson registered as a member, and states other objections requiring proof. But he asks judgment on the question, which would avoid proof, whether article 16 of the rules does not work automatically, so that he ceased, *ipso facto*, on exhaustion of his payments in, to be a member of the society, and therefore cannot be settled on the list of contributories.

"The liquidator maintains that the forfeiture is not automatic, and that the society, it being solely for its benefit, may elect to exercise the power of forfeiture or not as it pleases; that the forfeiture is in fact in the discretion of the society, acting through its directors.

"The Scottish case of *Bidoulac*, 17 R. 144, decided that an analogous forfeiture in a lease was in the discretion of the landlord, and the decision in one branch of *Dalrymple* v. *Herdman*, 5 R. 847, is based on the same principle.

"Further, the English case of *Moore* v. *Rawlins*, 1859, 6 Scott's C.B. Reports (new series) 289, was quoted as having decided the very point under the rules of a building society in favour of the liquidator's contention. It is true that the rubric bears it to have been held that a similar clause operated a forfeiture of the member's

shares only at the option of the directors: But I cannot find that the judges, except Mr Justice Byles in an interjected remark during the argument, make any reference to the point. But assuming the Court to have dealt with it as disposed of by Mr Justice Byles' remark, I cannot hold that case conclusive of the present. The building society there in question was in its constitution much more akin to a joint-stock company. All shares taken out were to be paid up to completion, and there was no provision for paying out except on a regular winding-up when the objects of the society were attained. There was no provision for retiring or withdrawing while shares were only partly paid up, as here under article 18 of the rules, or for paying out on demand where shares were fully paid up, as here under article 20 of the rules.

"*Moore* v. *Rawlins* may, I think, be quite well referred to the same principle as applies where there is a power of forfeiture of shares in a registered company for default of payment of calls—Lindley, 6th ed., p. 728. But it seems to me that the circumstances of the present case lead to an opposite conclusion. When the general scope of the rules is considered, it is found that in the Irvine and Fullarton Society it was not the intention to retain the member permanently or for a definite time. He came in and he went out at his own discretion, subject, it might be, to sacrifice or to delay. He might allow his contributions to be forfeited under article 16. He might apply to withdraw when only partly paid up under article 18, and, on notice to withdraw, any obligation under which he lay to pay instalments would appear to me to cease. He might apply to be paid out when fully paid up under article 20. And it is to be noticed that, while completed withdrawal under article 18, or completed payment out under article 20, must depend on the state of the funds of the society for the time being, it is provided that they shall be treated as on the same footing. Fully paid shares under article 20 'shall only be payable along with the withdrawals (under article 18) in their order, and as the funds will permit.'

"There does not appear to me, therefore, to be the same bond of obligation between the members of the society here as there is in the case of a registered company, or as there was in the particular society involved in *Moore* v. *Rawlins*. There is here a voluntary element which makes the relation of the member to the society severable at will, and prevents the society, in my opinion, enforcing the payment of instalments by any other compulsitor than the exaction of fines, while the incurring of future instalments can be ended on his own motive by the member giving notice of withdrawal under article 18.

"Accordingly, I cannot hold that the provisions of article 16, for determining the members' connection with the society, is for the benefit of the society merely, and requires to be declared by the society through its directors, and may be so declared or not, according to discretion. I think that the article gives an alternative in regard to the liquidation of arrears, but that, while the 'may' infers the option, it becomes 'must' as regards the choice of one or other of the alternatives, and that the working of the rest of the provision is automatic. The amount at credit, so soon as exhausted by fines, '*shall then* be forfeited,' and the member '*shall thereafter* cease to have an interest in the society.' And this is quite explicable if it is kept in mind that the society had no right of action—no means of enforcing payment of the full nominal amount of the shares—except indirectly by means of fines.

"Of course, if liquidation finds a member in arrear, but with his share still alive so to speak, the order for liquidation will fix his obligation there and then as a contributory, the provisions of article 16 will cease to be effective, and exhaustion of the sums at his credit will not liberate him from his liability as a contributory. But what the measure of that liability will be it is not for me at this stage to consider. But where the liquidation finds a member in the position of his interest having been already automatically determined, and particularly where, as here, the society has for a long series of years made no demand on the member *qua* member, and has so departed from its own regulations in dealing with the entries in its books relating to the member's shares, as they have done here, outwith his knowledge, I cannot hold that there is any ground for deciding that, contrary to the express terms of the articles, the former member has still an interest in the society, and that therefore he must be settled on the list of contributories.

"Accordingly, I shall order the name of the objector to be removed from the list of contributories, and shall find him entitled to the expenses of his objection."

The liquidator reclaimed.

A joint minute of admissions was thereafter lodged by the parties, in which, *inter alia*, the following facts were admitted:—"(2) That no intimation or notice was given by the society to the said James Cuthbertson junior, in terms of the 16th article of said rules or otherwise; (3) that the instalments paid by the said James Cuthbertson junior in respect of shares were 10s. in all; and (4) that if rule 16 operated, the amount of 10s. standing at the credit of the said James Cuthbertson junior would have been extinguished by fines about the month of April in the year 1882."

Argued for reclaimer—The Lord Ordinary was in error in thinking that the society had no right to proceed against Cuthbertson. Article 16 did not work automatically. None of the other articles did, and neither did 16. All members of the society were liable to the full extent of their means to outside creditors. No withdrawal had ever been intimated to the society. In terms of article 18 notice of withdrawal or intimation of some kind was essential—*Moore* v. *Rawlins*, May 5, 1859, 6 C.B., N.S. 289; Lindley on Com-

panies (6th edition) 728; Buckley on Companies (8th edition) 534; *Bigg's* case, December 19, 1865, L.R. 1 Eq. 309; *North British Building Society* v. *M'Lellan*, June 23, 1887, 14 R. 827, 24 S.L.R. 600; *Bidoulac* v. *Sinclair's Trustee*, November 29, 1889, 17 R. 144, 27 S.L.R. 93.

Argued for respondent—Article 16 operated automatically and no active step was necessary on the part of either party. The case of *Moore* v. *Rawlins* was different. In that case the rule relied on (viz., rule 45) was qualified by the two immediately following rules (rules 46 and 47), which gave the directors a discretionary power. In the present case there was an entire absence of any such discretionary power. The effect of article 16 was that membership was forfeited *ipso facto* on default of payment—*Liquidators of The Scottish Savings and Investment Building Society* v. *Russell*, March 9, 1883, 10 R. (H.L.) 19, 20 S.L.R. 481; *Smith's Trustees* v. *Irvine and Fullarton Property Investment and Building Society*, November 14, 1903, 6 F. 99, 41 S.L.R. 66.

At advising—

LORD PRESIDENT—This is a case in which James Cuthbertson junior seeks to have his name removed from the list of contributories which has been made up by the official liquidator of the Irvine and Fullarton Property Investment and Building Society. This building society is constituted under a set of articles, which in general scope are not unlike the articles of similar societies which your Lordships in this Court have had occasion to consider from time to time.

The general scheme of this class of building society may be described as a method by which persons can make contributions of money, which when they arrive at a certain figure are denominated a "share." The value of the share is not payable at once but by instalments. When the value of the share is "matured," that being the expression used when the instalments *plus* the interest and *plus* any bonuses accruing arrive at the nominal value of the share, the member gets the value standing at his credit. He may interrupt the process at any time by withdrawing the share or instalment and going away with any money he has contributed *plus* interest and bonuses. Or, further, he may have impignorated his share to the society for an advance made to him in respect of his house, in which case the society hold the value of his share as it matured, and also have a security over the heritable property upon which the house was built. Such was the general scheme of the society.

James Cuthertson's name was found by the liquidator in the books of the society as a person who had applied for three shares. For many years nothing had been done upon these shares, and the whole sum paid by him amounted to 10s. on the three shares. The point is, whether he is now to be put upon the list of contributories.

Cuthbertson has put forward several defences, but he has obtained judgment from the Lord Ordinary on a defence of what may be called a purely legal character. He has got an admission from the liquidator that if certain fines had been imposed in respect of his non-payment of instalments, the fines would long ago have amounted to more than 10s., which is all he ever contributed. That being so, he says that under article 16 of the rules of the society he has long ago ceased to be a member of the society. The Lord Ordinary has given effect to this contention, and it is against his Lordship's judgment that the present reclaiming note is presented.

The reclaimer's counsel founded strongly on *Moore* v. *Rawlins*. 1859, 6 C.B. (N.S.) 289, and the commentaries on that case in the works of Lord Justice Lindley and Lord Justice Buckley. I have no doubt that your Lordships would be prepared to follow that case, because the case, in so far as it decided a general principle, is merely an illustration of the well-known maxim that a man cannot take advantage of his own wrong. Where it was provided in the articles of association of an ordinary limited company that in default of proper payment the shares belonging to a shareholder should be forfeited to the company, the Court held, I think quite rightly, that that was a stipulation in favour of the company, and that, although the company might take advantage of it, the defaulting shareholder could not take advantage of his own default so as to free himself from liability. The Court, in short, held that forfeiture was in the option of the company and not in the option of the shareholder. I am very far from throwing doubt on the soundness of that doctrine, but at the same time I think the Lord Ordinary has taken the right view when he holds that it does not apply to this case.

I ventured to give a general sketch of the arrangements of this society really in order to bring out the contrast between it and a joint-stock company. A share in a limited liability company is part of the capital, and is something which cannot be got rid of. It may be transferred to someone else, but it cannot be put out of existence. Comparing it with the so-called shares of this building society the difference is apparent. A share in this building society represented no proportionate quota of the company's capital. There might be as many shares in this society as people liked to apply for. The share here represented no more than an earmarked application for a contribution of £25. The share might never come to maturity; it might be withdrawn long before it was matured. It might either be paid back or it might be wiped out in an advance. Accordingly, though the word is the same, there is nothing more than a faint analogy between it and a share in a joint-stock company.

When I come to the rules of the society I am confirmed in this view. The article on which the question principally turns is article 16—[*his Lordship read this article*]. Monthly instalments are the only way in

which a member is to pay his contribution, and there is no trace in the articles of any method of recovering the contribution except the provision in this article that on such failure he should be fined. The fines might be liquidated from the first moneys paid in by the member. The provision as to forfeiture seems a proceeding which is in no way akin to the case of a forfeiture of shares in a joint-stock company. It is simply one of several covenanted ways in which a person may cease to be a member of the society. The shares might be taken out before maturity, they might be exhausted by advances for building, or fines might be allowed to run up until they reached the limit of the sums paid in, and then the member's connection with the society came to an end. I think the judgment of the Lord Ordinary does not in the slightest degree trench upon what I consider the perfectly sound law laid down in *Moore* v. *Rawlins*.

LORD ADAM—I concur.

LORD M'LAREN — This society is being wound up under the Companies Acts, and there must be some rules and principles common to the liquidations of building societies and joint-stock companies, though in applying these principles we may take into consideration the peculiarities of the constitution of building societies. Your Lordship pointed out some considerations which make it difficult to apply the decisions in regard to forfeiture of shares to a case of this kind. But there are two fundamental rules which are common to both cases—(1) the question whether a man is or is not a member of the company must be fixed as at the date of the liquidation, and as if the company was a going concern; (2) when it has once been established that a person has been a member of the company in liquidation, it lies with him to show that he has ceased to be a member.

As regards article 16 of the rules of the society, it consists of two paragraphs, the second being an amplification of the first and introducing certain conditions. If we had only the first paragraph to consider, then, without difficulty, I should concur in all that the Lord Ordinary has said as to the automatic working of the article. But the second part of the article makes provision for notice being given to each shareholder who may be not less than six months in arrears, such notice to be repeated every three months until the member either pays the arrears or ceases to be a shareholder. It is argued that we must read the provision for intimation as a condition of the right given to the society to cancel the shares. It may be that if a member had not received intimation and afterwards learned that his shares had been cancelled by reason of his failure to pay his instalments, he would have a claim against the society to have his name restored. That is clear, provided the claim were made within such an interval of time as the shareholders might excusably be in arrear. But in the present case twenty years have elapsed since any communications passed between the society and the member, and no application to be restored to the register of shareholders was ever made.

In a recent case in the House of Lords one of the noble and learned Lords made the observation that *mora* was not a separate plea, but that lapse of time was of great moment in determining questions of fact, where the state of the evidence was not the same when the question came up for consideration as it was when the cause of action arose. Are we to assume that the appellant desired to continue a member, and that it was only through want of notice that he did not pay up his arrears, or are we to assume that with the assent of the society and the member the relation of membership was dissolved? It is very improbable that a member who wished to remain on the register would allow twenty years to elapse without doing anything in the nature of taking an interest in or inquiring as to his shares. No notice was sent him by the society, so that on their part also no attempt was made to claim him as a member. In such circumstances it would, in my opinion, be most inequitable to put the appellant on the list of contributories, when it is in the highest degree improbable that he could have successfully asserted his right to be a member had he been so minded. I am therefore of the same opinion as your Lordship.

LORD KINNEAR—I also concur.

The Court adhered.

Counsel for Liquidator and Reclaimer—Wilson, K.C.—Wilton. Agent—George A. Munro, S.S.C.

Counsel for Objector and Respondent—Hunter—Lippe. Agent—W. Croft Gray, S.S.C.

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*Thursday, November 2.*

## SECOND DIVISION.

## SHAW'S TRUSTEES *v.* ESSON'S TRUSTEES AND OTHERS.

*Succession — Trust — Uncertainty — "Such Charitable, Benevolent, or Religious Objects or Purposes within the City of Aberdeen" as the Trustees shall Institute or Select.*

A testator by her trust-disposition and settlement directed that the residue of her estate should be applied by her trustees "at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select." *Held* that the bequest was void from uncertainty. *Macintyre* v. *Grimond's Trustees*, March 6, 1905, 42 S.L.R. 466, and *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, 39 S.L.R. 212, *followed*.

Mrs Anne Adam or Shaw, residing at 31 Albyn Place, Aberdeen, widow of the late