

which we use the words in the first of these forms of issue may arise from many different causes, temporary or permanent—for instance, from old age, excitability, timidity, sickness, or as in this case from affection. The cases which have been mentioned—those of *Clunie*, *Mann*, and *Marianski* (which last I very well remember to have been a case of timidity) all illustrate how great the variation may be in that which in practice we hold may constitute weakness or facility of mind.

It seems to me, in short, that the two classes of issues under which cases of reduction similar to the present have been tried in our practice, sufficiently comprehend the various cases of undue influence, &c., which Lord Shand has spoken of as good grounds of action in England.

I have expressed my opinion that this case might have been tried under the first form of issue I have mentioned, in order to say that the judgment we are to pronounce, which comes in place of the verdict of a jury, may fairly be held to affirm only that secondary or lower species of fraud which in our law is known as circumvention. I think, however, it is an advantage that such cases can now be tried before a Lord Ordinary, subject to review, because in that way the necessity may sometimes be advantageously avoided of using a hard and fast term which may either fall short of or exceed the appropriate degree of reproach attaching to the general character of parties implicated. In no point of view, however, can I doubt that the deed of disentail executed in this case falls to be set aside.

It is not surprising that the mother should have expressed herself desirous to obtain some deed of disentail, nor that the son should have been willing to comply with such a request. There were several children alive of her first marriage, and four of the second. There was nothing in the second marriage contrary to the law of nature, and the fact that by the law of the land as it at present exists the children of that marriage were regarded as illegitimate, and could to no extent be provided for out of the entailed estate, was not such as to diminish affection for them either on the part of their mother or of the pursuer, and was rather in favour than otherwise of the execution of a disentail. The second husband, it is right to say, seems with propriety to have stood aloof, for we have no trace of his finger in the transaction from beginning to end. I confess, however, that I am surprised that a man of business of Mr Binny's intelligence and experience, however he might think that there should be a disentail, did not consider it his duty, standing as he did in the position of family agent, to advise the pursuer to employ a neutral agent of his own, which would have been the proper course in the circumstances, or at all events to furnish him with every possible information, including an actuary's report, and call his special attention to the large sacrifice he would be making by consenting to the disentail. Nothing of the kind was done, and this of itself seems to me a sufficient ground for setting aside the transaction without the necessity of imputing wilful misrepresentation or fraudulent concealment either to the pursuer's mother or to Mr Binny. I think it not improbable that although everything had been brought under the notice of the pursuer he would have done what he did. I am not prepared to say that under similar circumstances I might not have done as the pursuer did, but it would be hazardous to go upon

grounds of that kind, and judicially I cannot do so. We have no right to take for granted what the pursuer would have been advised to have done, and would actually have done, if all the facts and their probable consequences had been developed and brought before him. He had not the opportunity which he ought to have had of forming his own deliberate opinion, and taking, as I have done, the most modified view of the case which the facts admit of, I can come to no other conclusion than that the Lord Ordinary's interlocutor ought to be adhered to.

LORD MURE was absent.

The Court adhered.

Counsel for Pursuer (Respondent) — Lord Advocate (Watson) — Balfour — Mackintosh. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Reclaimer)—Asher—J. P. B. Robertson—Begg. Agents—Morton, Neilson, & Smart, W.S.

Saturday, December 6.

## FIRST DIVISION.

### MARTIN V. SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY.

*Public Company.—Benefit Building Society—Winding-up—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 199, subsecs. 3 and 4—“Just and Equitable that Company should be Wound-up.”*

One of the rules of a benefit building society was that members “may withdraw the whole or any portion of their shares at any time after 12 months from the date of entry by giving one month's notice, when the whole instalments on the shares withdrawn shall be repaid with interest . . . Members withdrawing shall be paid out in the order of their application, and as the funds permit.” One of the shareholders of the society, which was unregistered in the sense of the Companies Act 1862, having unsuccessfully demanded payment of the sums due to him in respect of his shares, thereafter presented a petition under the 199th section of the Companies Act 1862 for a winding-up order in his capacity of creditor in respect of the failure to pay. The large majority of the shareholders—about 200 of whom appeared by minute to oppose the petition—were against the winding-up, and a committee had reported favourably as to the ultimate solvency of the society. *Held* (1) that the petitioner was not a proper creditor, his debt not being presently due, but only payable in order of application; and (2) that in the circumstances the Court could not hold it “just and equitable that the company should be wound up,” and petition *refused* accordingly.

The Scottish Savings Investment and Building Society was instituted in 1856, having for its objects “(1) to provide a mode of investing the savings of its members securely and profitably; (2) to advance funds on heritable security, and

to enable its members to erect or purchase houses or other heritable property." It was enrolled under the Benefit Building Societies Act (6 and 7 Will. IV. cap. 32), and its principal place of business was in Glasgow. By its rules it was provided (rule 9) that members "may withdraw the whole or any portion of their shares at any time after twelve months from the date of entry by giving one month's notice, when the whole instalments on the shares withdrawn shall be repaid with interest. . . . Members withdrawing shall be paid out in the order of their application, and as the funds permit, and shall be bound at settlement to deliver up their passbooks and certificates of shares."

The Companies Act 1862 enacted (sec. 199)—"Subject, as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term unregistered company, may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such company, with the following exceptions and additions. . . . (3) The circumstances under which an unregistered company may be wound up are as follows (that is to say)—(a) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs. (b) Whenever the company is unable to pay its debts. (c) Whenever the Court is of opinion that it is just and equitable that the company should be wound-up. (4) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—(a) Whenever a creditor to whom the company is indebted at law or in equity by assignment or otherwise in a sum exceeding £50 then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such a manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. . . . (b) Whenever it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts."

At various dates during the years 1873, 1874, and 1875 the petitioner John Martin acquired 12 shares in the society, on which he had paid instalments amounting to £164, 10s., and on which profits had accrued to the extent of £16, 17s. 8d. On 5th July 1879 he served a demand on the society for payment of the whole sums due to him in respect of his shares, which he had previously withdrawn, and on 20th November 1879 he presented this petition to the Court for an order for winding-up the society in terms of sec. 199 of the Companies Act 1862, sub-sec. 4. Answers were lodged for the society, in which they opposed the petition and stated that it was quite solvent, and that almost the entire body of shareholders were opposed to the winding-up. It was also stated that the society was now enrolled

under the Building Societies Act 1874 (37 and 38 Victoria c. 42).

A minute of conpearance was also lodged for a body of shareholders about 200 in number, and holding shares to the value of over £40,000, in which they adopted the answers for the society, expressing perfect confidence in its ultimate solvency if allowed to continue in business, and a belief that the course adopted by the petitioner would, if sanctioned by the Court, be fatal to his own interests and those of the society generally.

The competency of the application as in accordance with English practice was not objected to.

The petitioner argued—He was entitled under sec. 199 of the Companies Act 1862 to ask that the society should be wound up, as being a creditor of an unregistered company which was unable to pay its debts, and which being indebted to him in a sum exceeding £50 had neglected for the space of three weeks to comply with his written demand for payment. The Court should alternatively order the society to produce its register, and let the application stand over until its affairs had been thoroughly investigated in conformity with English practice (*Western of Canada Oil Company*).

Authorities—*Queen's Benefit Building Society*, 1871, 6 L.R. (Chan.) 815; *Planet Benefit Building and Investment Society*, 1872, 14 L.R. (Equity) 441; *Western of Canada Oil Company*, 1873, 17 L.R. (Equity) 1; *Richardson*, 1871, 6 L.R. (Queen's Bench) 276.

The respondents replied—The petitioner had no title to demand a winding-up order. His debt was not "then due," but future and contingent. He could not be paid now without getting a preference over other shareholders whose notices of withdrawal were prior to his, which would be unjust and against rule 9 of the society, and a winding-up order would not hasten the payment of his claim. The society's inability to pay its debts must be tested in regard to debts presently payable alone, and so judged, the society was perfectly solvent. The large majority of shareholders had expressed their opposition to the petitioner's course, and to wind-up the society at present would be disastrous, and was unnecessary.

Authorities—*Suburban Hotel Company*, 1867, 2 L.R. (Chan.) 737; *European Life Assurance Society*, 1869, 9 L.R. (Equity) 122; *Langham Skating Rink Company*, 1877, 5 L.R. (Chan.) 669.

At advising—

LORD PRESIDENT—This is a petition presented under the 199th section of the Companies Act of 1862, and it seems to be supported on two grounds. The first of these is that the petitioner is a creditor of the company who has demanded payment under sub-section 4 of that section of the Act, and he has demanded in vain, the company having for three weeks after the service of the petition neglected to pay his debt. So far as the petition is founded on that provision, and on the petitioner's claim as a creditor under that provision, I am of opinion that it has failed entirely. The petitioner is not a creditor in any other sense than as being, under rule 9 of the society, entitled to withdraw the advances he has made as a shareholder, but the only effect of his exercising

that right is this, that he "shall be paid out in the order of his application, and as the funds permit." He is not therefore in a position to demand payment of a debt presently due and payable, but is only creditor in a debt which will be paid at some future time but cannot now be exacted.

But the petition is supported on another ground. It is said the petitioner has made out a case to satisfy the Court that "it is just and equitable that the company should be wound up." Now, no doubt in the course of the last year, this company has been in considerable difficulties, and in that respect most probably its condition was not very different from that of many companies of other kinds. The securities on which its money was advanced were not so good owing to the depression in trade, and partly to the deterioration in the value of house property in Glasgow, where its principal place of business is situated. But it does not follow that "it is just and equitable" to wind-up the company. It may not now be in a position to comply with the demand of this particular shareholder or of any other shareholder, because it is not in funds to pay him out; and our attention was called to the fact that the amount of funds in the directors' hands at any time depends to some extent on the regularity of the shareholders in paying the instalments of money which they advance upon their shares. If the petitioner had alleged anything like a necessary or permanent insolvency of the company, I could understand his right to this demand, or if he represented the affairs of the company as being mismanaged and the shareholders were generally dissatisfied and anxious that it should be wound up, these would be very important considerations for the Court in deciding as to the justice and equity of the proposal. But the position of the petitioner in that respect is somewhat unfortunate; he is entirely alone and unsupported by any other member of the company. On the other hand, the manager and directors state in their answers that they cannot see any reason why the petitioner should insist in this application unless to obtain a preference, contrary to the rules of the society; and we have a body of shareholders of great number, and to the extent of more than £40,000 in value, appearing by minute and adopting and sanctioning that statement, and alleging that the petition "if sanctioned by the Court would be fatal to the interests of the compeers and of the petitioner himself, and would be most injurious to the interests of the society." All the statements made by way of argument from the bar pointed to an investigation into the position of the society's affairs, and this at first sight seemed very plausible, but on inquiry it appears that that very investigation has been made in the most competent and proper way by the society itself. At a meeting held in April last a committee of investigation was appointed to inquire into the whole condition of the society's affairs; and it is plain from their report that very serious suggestions had been made at the general meeting in regard to the conduct of some of the directors. But the result of this report was to clear the directors and to state that they had acted all along with great discretion; that the society's losses were due to the depression of trade and the stoppage of the City of Glasgow Bank; and the report concludes in the following terms:—"The committee would

strongly urge upon all the shareholders to give the directors their entire confidence and support, being satisfied that if they do so there is not the least doubt but the affairs of the society will be brought through successfully, and the society become as prosperous as hitherto. Any other course on the part of a large number of shareholders is all but fatal to their own interests and injurious to the society."

I think it is out of the question in the face of this report and of the explanations we have had to interfere with the management of the present directors and to put the society into liquidation, when the shareholders themselves have resolved that the society's prospects are promising, and are all with one exception satisfied with that resolution. I am for refusing the petition.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court refused the petition.

Counsel for Petitioner — R. V. Campbell.  
Agent—D. R. Grubb, L.A.

Counsel for the Society (Respondents)—Asher  
—C. S. Dickson. Agent—J. Smith Clark, S.S.C.

Counsel for Compearing Shareholders—James Reid. Agent—J. Smith Clark, S.S.C.

Tuesday, December 9.

## FIRST DIVISION.

BURNS v. BURNS.

*Diligence—Inhibition—Arrestment on Dependence of Consistorial Action—Competency—Recal upon Caution.*

In a petition by a husband for recal of inhibition and arrestments used against him by his wife on dependence of an action for separation and aliment at her instance against him, held that the diligence was competent, the summons of the depending action concluding for payment of aliment, and that recal could not in the circumstances be granted without substantial caution, there being evidence that the husband was *in meditatione fugæ*.

Michael Burns presented this petition to the Court for recal of inhibition and arrestments used against him by his wife on the dependence of an action at her instance against him. The summons was raised on October 30, 1879, and concluded for separation on the ground of cruelty, and for aliment to the amount of £750 per annum, to be payable quarterly in advance. On the dependence of the action, and under warrants contained in the summons, Mrs Burns on 19th November 1879 recorded a notice of inhibition against the petitioner; and on 25th November she caused arrestments to be used in the hands of Messrs Currer & Cowper, S.S.C., to the amount of £10,000, and to the amount of £3000 in the hands of the Royal Bank of Scotland, Edinburgh. The petitioner stated that Mrs Burns had left his house at Kingussie on September 24, 1879, and had not since resided with him; that since then he had paid her aliment at the rate of £150 per an-