Court: Sists process *hoc statu* that the petitioners may, if so advised, raise a declarator to establish their right to the said lane as proposed to be used by them."

The petitioners appealed. The arguments of parties were mainly directed to other points raised in the case, which the Court in the result did not find it competent in the meanwhile to determine. On the present question both parties ultimately admitted that they could not by virtue of their titles claim exclusive property in the lane in dispute.

At advising—

Lord President—When it is said that a question of heritable right cannot competently be tried in the Dean of Guild Court, that does not by any means imply that no kind of question relating to heritage can be raised and decided in that Court, but that if the question raised amounts to a distinct competition of title, then the titles must be cleared by a declarator in this Court. Now, what is the question here? Both the petitioner and the respondent aver in general terms that they are proprietors of this lane, and the question is, Whether there is a relevant averment to that effect on the one side or the other? I am of opinion that there is no relevant averment of property either by the petitioners or by the respondents. And when I say this I mean that in order to a relevant averment of right to property so as to raise a competition of title, it is essential that the averment should set forth a good title to the subjects *ex facie* of the record; and it appears to me that the titles set forth in the record by the petitioners and the respondents respectively demonstrate that neither the one nor the other of them have any right in the *solum* of the lane. I am therefore of opinion that the Court should repel the fourth plea-in-law for the respondents and remit to the Dean of Guild to proceed further with the case.

Lord Deas—If the state of the competition of titles had been as described in the interlocutor of the Dean of Guild, there cannot be the least doubt of the correctness of his judgment. But that is not the true state of matters. So far from both parties claiming an exclusive right of property in the lane, it now appears that neither of them claims the sole right. There is nothing now claimed in regard to the lane except a right of passage. That is no doubt in one sense a heritable right, but it is not a kind of heritable right from which the jurisdiction of the Dean of Guild is excluded. If his jurisdiction were excluded from that kind of heritable right, then it would be excluded in a large class of cases very fit for his useful jurisdiction. The respondents' counsel has referred to a clause in the title of one of the respondents in which it is stated that certain subjects are conveyed "together with an entry or passage from the said dwelling-house, three feet three inches in breadth, into the meuse lane behind," but that on the very face of it is not right of property at all. An entry or passage into a meuse lane or any other place may be an heritable right of passage, but it is not an heritable right of property. Both parties now confess that neither the one or the other has a title to the property of this lane, and therefore I am most clearly of opinion that neither the one nor the other can interfere with the jurisdiction of the Dean of Guild in this matter, and that the only course open to the Court was to remit the case back to the Dean of Guild to be proceeded with.

Lord Mure—I am of the same opinion. It is very clear that on their titles the petitioners have no right of property in this lane, and I think that it is equally clear that no such right is given to the respondents. There is no heritable right on either side in the sense of the word by which the Dean of Guild's jurisdiction is excluded. I am therefore for remitting the case to the Dean of Guild.

Lord Shand—I am of the same opinion. The petitioners admit that they have no right to the lane, and I do not think that this is much of a concession, for when one looks at their titles it is impossible to spell out of them anything like a right of any kind either of the lane in property or of the use of it as a passage. The respondents, on the other hand, maintained that the lane was theirs. There is some colour for this argument in the title of one of them—I mean Burnett's trustees; but I agree with Lord Deas in the construction of that title, as far as I have seen it, particularly when one looks at the contemporaneous titles of surrounding feuars, that what is thereby given is not a right of property but a right of passage only. Accordingly I agree with your Lordships that the case must be disposed of in the manner proposed. Of course the present decision will not affect any question arising from the fact that the respondents by their titles seem to have a right of entry or passage over this ground. They seem, so far as appears from their pleadings, to have the exclusive possession or right of passage. These facts will be before the Dean of Guild, and it will be for him to say whether a party having no right to the lane in question is entitled to make these alterations.

The Court recalled the Dean of Guild's interlocutor, repelled the fourth plea-in-law for the respondents, and remitted to the Dean of Guild to proceed with the case.

Counsel for Petitioners—J. P. B. Robertson—Pearson—Graham Murray. Agents—Smith & Mason, S.S.C.

Counsel for Respondents—R. Johnstone—Young. Agent—James M'Caul, S.S.C.

Thursday, July 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BROWNLIE AND OTHERS *v.* RUSSELL.

Public Company—Winding-up—Right of Members to Withdraw during Winding-up—Act 6 and 7 Will. IV. c. 32 (Building Societies Act 1836)—37 and 38 Vict. c. 42 (Building Societies Act 1874), sec. 14.

A building society, registered under the

Building Societies Act of 1874, was formed for the purpose of affording its members an investment for their savings, and for advancing to another class of members loans on heritable security to enable them to erect or purchase houses. It was provided by the rules that members desiring a loan should take shares to the full amount of the loan applied for, giving heritable security to the satisfaction of the directors. It was also provided that these advances should be repaid by monthly instalments, and that it should be at any time in the power of members who had obtained an advance to retire from the society upon a month's notice, and after paying up the full amount of the debt, interest, and penalties still due by them. The society having resolved to wind up its business by voluntary liquidation—*held* that a member who had obtained a loan under the rules of the society was entitled to withdraw from the society after due notice and after paying the balance of his advance still remaining due.

Observed that the liquidation of a society so constituted was an unnecessary procedure, the only possible creditors of the society being themselves members thereof.

The Scottish Savings Investment and Building Society was formed under the provisions of the Act 6 and 7 Will. IV. c. 32 (Act for the Regulation of Building Societies 1836), and its rules were certified by the Registrar of Friendly Societies in Scotland to be in conformity with law and with the provisions of that Act on 12th December 1866. On the passing of the Act 37 and 38 Vict. c. 42 (Building Societies Act 1874), the society was registered under that Act. Sec. 14 of that Act provides that "the liability of any member of any society under this Act in respect of . . . any share upon which an advance has been made shall be limited to the amount payable thereon under any mortgage or other security, or under the rules of the society." By rule 1 of the society its objects were declared to be—1st, to provide a mode of investing the savings of its members securely and profitably; 2d, to advance funds on heritable security, and to enable its members to erect or purchase houses or other heritable property in terms of the statute under which the society was formed and of the rules. Rule 2 provided that each share in the society should be of the value of £25, and that members might hold any number of shares that might be agreed upon. New members were declared admissible at any time, and entitled to share the profits from the date of entry. Shares were by rule 5 to be payable in monthly instalments of two, four, or six shillings a month, according to the scale which might be agreed on, these instalments to be paid until they should amount with profits to the full amount of £25 per share, when members holding such shares should be paid out of the society as the funds of the society permitted. Payments were to be entered by the officials of the society in a cash-book to be held by the member. By the same rule profits were to be ascertained annually, and the amount of profit belonging to each member, as declared at the annual meeting, was to be carried to his credit in the ledger and entered in his pass book as "contingent profit." Rule 9 provided as follows with regard to transfer or withdrawal of shares—"Members who have not received an advance may at any time, provided all arrears and penalties be paid, transfer their shares, with all the privileges effeiring thereto, in the form No. III. in the appendix, on payment of a transfer fee of one shilling per share to the society; or they 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 as follows: . . . 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 pass-books and certificates of shares." Rule 10, so far as material to the question in this case, was as follows—"A main object of the society being to make advances to its members for the purpose of building, purchasing, or improving houses, lands, or other heritable subjects, the directors shall make such advances to the extent of the funds at their command, at meetings called for that purpose, of which due notice shall be given to the whole members. At these meetings the sum to be advanced shall be disposed of as follows:—One-half shall be given to the member or members applying for advances, according to the priority of application; the other half shall be given to the member or members who shall offer the largest bonus for the same on being submitted to competition; but in the event of any member failing or declining to take his priority advance, the same shall also be submitted to competition. Absent members may bid by proxy on production of a proper mandate. No member shall have a right to have an advance allocated to him, nor shall any member be entitled to bid for the money when offered for sale, unless six months' instalments, and all other payments due on his shares, shall have been paid; nor shall he receive a larger advance than the amount of shares for which he has subscribed. Advances shall only be granted upon heritable security to such an extent as the directors, on the report of the society's surveyor, may consider fair and safe, but they may dispense with the surveyor's valuation if they are otherwise satisfied that the property offered is sufficient security. When the money is to be applied to the erection of buildings, the advances shall be made by instalments, and at such times as the directors may approve of; no advance, however, nor any portion of an advance, shall be paid before the society's solicitor shall have examined and reported to the directors in writing that the titles are complete. Every member who receives an advance shall grant a bond or other deed or deeds for the same over the heritable property offered by him in security, under which deeds the directors may exercise all the ordinary rights and powers of mortgagees." Rule 12 provided for repayment of advances as follows — "All advances shall be repaid by monthly instalments, with interest at the rate of five per cent per annum; and which interest shall be paid monthly in advance, and at the same time as the instalments. Any member failing to pay his instalments or interest when due shall be charged a fine of one penny per month on every sum of two shillings he shall fail in paying." Then followed a provision with

regard to a member exchanging from one security to another, and provided that should he sell the security granted by him the directors might accept the purchaser in his stead on his paying a fee for entry into the society, and granting, if required, a bond of corroboration. The concluding part of the rule was—"It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the manager one month's notice in writing and paying up the whole of his debt, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon, calculated at the rates referred to in rule 9." Rule 14 provided thus as to the insurance of property held by the society in security—"All the property vested in the society in security shall be insured by the manager in name of the trustees, at the expense of the borrower, with such insurance company as the directors may appoint, and that to the extent of the money advanced by the society, less the amount of instalments that may be paid on the shares upon which the loan has been granted, if any so desire it, but such adjustments of the amount in policies not to be made oftener than once in three years, and only if the member so desiring is not in arrears of payments." In April 1878 Mr James Russell, Glasgow, who had no previous connection with the society, with a view to obtaining a loan for building purposes from the society, applied for and had allotted to him 28 shares of £25 each, that number of shares being equal to the amount of advance he desired, viz., £700. He was admitted a member, and was granted the advance desired, on payment of a bonus of £14 and fees, for entry-money, &c. On 16th May he granted, in favour of the trustees of the society, as required by rule 10 quoted above, a bond and disposition in security for the sum of £700 over heritable property belonging to him. By a relative minute executed by him and the trustees it was agreed that the terms of this bond "shall not be enforced by the directors and manager of the said society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to become due upon his said shares in terms of the rules of the said society, but declaring that in the event of his failure to pay his said instalments, interest, and other sums stipulated in the said rules, it shall be in the power of the directors or manager of the said society for the time either to enforce the terms of said bond and disposition in security or the rules of the said society as they may think proper." After the date of this loan Mr Russell made a number of monthly payments, amounting in all, when the society went into liquidation as after mentioned, to £414, 8s. He also paid certain sums in name of interest. The question in dispute in the present case was whether this sum of £414, 8s. was to be regarded as having been made in repayment of the loan or to account of the shares allotted to him. In February 1880, in consequence of the state of affairs of the society, it was resolved that it be wound up voluntarily, and on the 20th of that month it was appointed by the Court to be so wound up. It was admitted by all the parties to this case that there were no debts due by the society to non-members, and that the present question related to losses sustained by the members *inter se*. On 22d July 1880 Mr Russell, being desirous of withdrawing from the society, gave notice of his intention so to withdraw in one month from the date of the notice. At the same time he intimated his willingness to pay up the balance of the £700, after deducting the £414, 8s. already paid, on receiving a discharge of the bond and disposition in security. The liquidators declined to grant such a discharge, and maintained that the society being in liquidation, such withdrawal could not be permitted, and that a discharge could only be granted on payment of the loan in full. They called upon Mr Russell to pay up the amount of his loan by monthly instalments, with interest on the full sum borrowed. At the same time they intimated that all payments paid subsequent to the winding-up order would go to diminish the debt and reduce the interest. This intimation was made by a circular letter addressed to all borrowing members.

Mr Russell thereupon presented to the Sheriff of Lanarkshire this petition, in which he craved the Court to find *inter alia*—"*First*, That an advance or loan of £700, obtained by the petitioner from the said society on or about 15th May 1868, has been extinguished *pro tanto* by the sum of £414, 8s., being the *cumulo* amount of instalments paid by him from time to time to account or in respect thereof from said date to 20th February 1880, the date when the said society was appointed by the Court to be wound up voluntarily, and that the said liquidators are bound to impute towards extinction of the said advance or loan all instalments that the petitioner has paid or that he may pay to them subsequent to the said 20th February 1880 to account or in respect thereof: *Second*, That the petitioner as a borrowing member of the society, upon giving notice in terms of rule 12 thereof, and upon payment to the liquidators of the difference between the said sum of £700 and the *cumulo* amount of the monthly instalments paid by him from time to time to the date of such notice to account or in respect of the said advance or loan, with the interest due to him thereon calculated and added thereto, in terms of rule 9 of the said society, is entitled, in accordance with the rules of the society, and with the universal custom and practice thereof, to withdraw therefrom, the liquidators being thereupon bound to execute a formal discharge of a bond and disposition in security for £700 granted by him over heritable subjects situated in Frances Street and Crawford Street, Glasgow, respectively, on or about 15th May 1868, in security of said advance or loan."

The Sheriff-Substitute (GUTHRIE) pronounced an interlocutor, in which, after certain findings as to the facts above explained, he found "that the petitioner is entitled, on paying up the balance of the said sum of £700, after deducting the amount of said instalments or subscriptions, being £287, 12s., with interest on the said £700 until payment of said balance, and less discount at 4 per cent. on the said sum of £287, 12s. from the date of payment to the date at which each instalment on said shares would have been payable under the rules, to receive from the respondents a discharge of his bond and disposition in security, reserving *hinc inde* all rights and liabilities of the petitioner as a member of the said

society." Thereafter he pronounced an interlocutor in which he made certain findings as to the remaining conclusions of the petition, and found the petitioner entitled to expenses.

The liquidators appealed, and argued—The payments made were not payments in discharge of the loan. Under the rules they must be held to be instalments on the petitioner's shares in the society. There was only one class of members, not, as the petitioner contended for, two classes, borrowing and non-borrowing members. True, if the society were a going concern, the petitioner would have been entitled to leave the society under rule 12 as he proposed, but the society was in liquidation, and the course he proposed ignored the fact that he was a shareholder as well as a borrower, and that being so he could not retire during the winding-up on simply repaying the advances on his shares. Before getting credit as he proposed for £414, 8s. he had paid he must share losses with his copartners. *Leagrave* v. *Pope*, Feb. 26, 1852, 1 De Gex, M'Naughton, and Gordon, 783; *Mosely* v. *Baker*, 3 De Gex, M'Naughton, & Gordon, 1032.

Replied for Russell—It was plain that the payments were in extinction of the loan. Russell might at any time during the working of the society have retired on paying up the balance of the loan under rule 12, and there was nothing in the fact of liquidation to change the nature of the payments made. The contract formed by the rules of the society plainly meant that Russell was a borrower entitled to retire at a month's notice on paying up the balance of the loan.

At advising—

Lord Young—This is a peculiar case, as the appellants' counsel remarked in the course of the discussion. The society of which we have heard, The Scottish Savings Investment and Building Society, is in the exceptional and fortunate position, so far as I can make it out, of being unable to contract any debts. The society may make money if it can, but it can incur no debts. There are shareholders in the society, and they hold shares—that is to say, the utmost amount that can be paid upon any share is £25; and the business of the society consists in lending the money of those who pay it in and do not borrow, to those who require funds, generally, I suppose, to those who require to borrow without paying in. This is chiefly done, as it is the main object of the society to do, to members who are to build; and the security afforded to the society for their advances is a conveyance of the ground on which the proposed buildings are to be erected. If the loans are providently and prudently made and regularly paid up with interest, there will be a profit to those whose money is so lent, that is—to those who have contributed money to the society, but not borrowed any. Otherwise there will be a loss to them. There cannot be a greater loss to the whole of them than the whole money which the whole of them have contributed, but there may be a loss of that or of anything short of that.

Now, it appears that, on account I suppose of the amount or number of undertakings which speculative builders have entered into, and the amount of money which they have borrowed, the borrowers, and the securities which they granted, were not satisfactory, to some extent at least; so that the contributing members—the investing members—those members who were looking to this as a mode of advancing their money securely and profitably—were to that extent disappointed. But there were other borrowers of a different description, among whom, apparently, is Mr Russell, the respondent in this petition and in this appeal. He was a good customer, and he paid back in instalments, as he had contracted to do, the loan which had been advanced to him, and the property which he had given in security was apparently good. He had paid no money into the society for the purpose of being lent to other people. On the contrary, as I have indicated, he was a borrower and not a lender, and the transaction with him might be a loss to those whose money he had undoubtedly borrowed, but no gain to himself, unless he could otherwise profitably use the borrowed money for himself. But it occurred to those who had lost money on the transactions of the society in connection with less profitable customers, that they might impound certain payments which Mr Russell, and I suppose others in the same position, had made in pursuance of their contract to repay the loan by instalments, and thus enable them to get back their share of the loss which would otherwise fall upon them through their improvident lending to other people. And in order to attain this end, which it was, at least at one time, frankly admitted could not be done under the rules of the society, or the contract between the society and Mr Russell, they put the society into liquidation, and pleaded that that which could not be done before liquidation could be done after it.

Now, I must say I think this was a very questionable proceeding. I do not think there was any legitimate occasion for the liquidation of a society of this kind at all, which could incur no debts, and which had therefore no debts to pay. It was stated to us that any losses that might be incurred must of necessity be met by the contributions which had been paid in—by the actual money which was in; and in these circumstances it seemed to be a question of the extent to which those who had paid in money in that way were to be entitled to get it back, or should be able to get it back. But it is in vain to say that such a society required a liquidator. Any shareholder of this society, moreover, is entitled to leave it any time upon a month's notice. The appellants' counsel was perfectly right. A shareholder does not require to remain in until he has paid up his £25; and if he has paid up the arrears due according to his undertaking—it may be 2s. a-week, or 4s., or 6s.—if he has paid up all those arrears, although his payments may only have been to the extent of a few pounds, he is entitled to bid them good-bye and be off.

In this way there is no case here, and no possibility of a case here, such as occurs in liquidations with which we are familiar—a case in which a liquidator is calling upon a party, a partner in a limited liability company, for example, to contribute the unpaid amount of his shares; or in the case of an unlimited liability company, calling upon him to pay such an amount as may be necessary to meet the debts of the company. There is no case of that kind. The contributions of the shareholders of this society are in shillings a-week; and if all the

instalments are paid up, the shareholders are entitled to shake themselves free at any time.

And this, it should be remembered, is provided by the rules of the society and by the Act of Parliament. The mode of borrowing here, it is true, is a peculiar one. A party becomes a shareholder of as many shares as, when fully paid up, will amount to the loan which he desires, or which is agreed to be granted to him, as was done here. The loan agreed upon being £700, the proposed borrower must become a shareholder of as many shares of £25 each as will amount to £700. Thereupon, the security being satisfactory, the £700 is advanced, to be repaid as clause 12 of the rules of the society, which constitute part of the bargain with the borrower, provides, by monthly instalments with interest at the rate of 5 per cent. It was agreed between them that these monthly instalments in repayment of the loan should be put to the credit of the borrower as if it had been money paid up upon his shares —not that it was so in reality—but that it should be put to his credit as if it were so.

Accordingly, after he had paid between £400 and £500, Mr Russell considered, and he was entitled to consider, that his loan had been repaid to that extent—that is to say, that his debt to the society had been discharged to that amount—for that is the meaning of the words in clause 12 which were acted upon — that the advances were to be repaid by monthly instalments. He was not then entitled to cease to be a shareholder, for, in the first place, the Act of Parliament which applies to such societies as this, provides that the liability in respect of any share upon which an advance has been made, shall be limited to the amount payable thereon under any mortgage or other security or under the rules of the society. He was therefore under a liability in respect of the shares which he held for the advances made thereon, and the mortgage granted in respect of said advances in so far as not repaid. But in so far as repaid by instalments, there was not to be a second repayment. He was liable upon the mortgage for the unpaid balance of the debt. Upon that payment being made, his shares are paid up and his debt is discharged, and his liability ceases by the Act of Parliament. As was pointed out by the appellant's counsel, however, this provision is made by the Act subject to this, that the rules of the society may provide differently. The provision of the statute, and the primary provision, is, that if a shareholder has borrowed money upon his shares, granting a mortgage, his liability is limited to the amount borrowed, that is, to his liability under the mortgage. But the rules of the society may provide otherwise.

But do the rules of the society provide otherwise? Clause 12 provides that the advances shall be repaid by monthly instalments. That is the beginning of it, and the end of it is—"It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the society one month's notice in writing, and paying up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with the interest thereon."

Now, Mr Russell proposes to withdraw precisely in accordance with the Act, and with those very words which I have read. And the other parties say—"Well, we could not, according to the fair meaning of these words and the understanding of the parties, and the honesty of the contract between us, have refused to allow you to go on making that payment of the balance due upon that footing." But then they appeal, as I said at the outset, to a liquidator—they call in a liquidator for no other purpose except to enable them to do a thing contrary to the good faith of the contract which they had made, and subject a mere borrower upon a contract which he had purchased with a premium, to an impounding of what according to that contract was to be imputed as instalments in payment of a debt. Instead of acting according to the good faith of that contract, they say to him—"But you are the borrower of £700, with no part of it paid up, and under the security we are entitled to sell your property on the ground that no part of the debt has ever been paid." For that would be the legitimate result.

I am of opinion that the law is altogether against that. I think the true view of the case, upon the statute, upon the contract, and upon the rules of the society—for they are all in harmony—is, that Mr Russell is bound so pay his debt in so far as the instalments which he has already paid do not cover it—principal, and interest at 5 per cent; and that upon that being done, then according to the rules, and the statute, and the contract itself, his shares are fully paid up, and he ceases to be a shareholder; and that upon making the payment of the balance due now he is, in terms of the very language with which rule 12 concludes, entitled to withdraw from the society without remaining under any further obligation.

Lord Craighill—I am of the opinion which has just been expressed by my brother Lord Young.

The question raised here is one of great importance, not merely to members of this society, but to members of similar societies; and it is with considerable difficulty that I have arrived at what I consider to be a satisfactory conclusion. In the end, however, I have come to be very clearly of opinion that what has now been pointed out by Lord Young is the true result, and that accordingly effect ought to be given to that result in the interlocutor about to be pronounced.

The building society in question was established prior to 1868, and early in that year the pursuer Mr Russell, who is the respondent in the appeal, became a member, and soon after he did that which many members of the society did, viz., applied for a loan from the funds of the society, and his application having been entertained and granted, he became a debtor to the society in the sum of £700. In security of the advance he subscribed for shares in the society amounting in the aggregate to that sum, and granted a bond and disposition in security over the property in respect of which he received the money.

Now from 1868 down to 1880, when this society went into liquidation, Mr Russell fulfilled all the obligations incumbent upon him. And what he undertook to do was this, to pay in monthly instalments towards the extinction of the debt he was due to the society, or to make up the amount of the shares of which he had subscribed himself

the holder. When the order for the winding-up of the society came into force in February of this year, he had repaid the principal in instalments amounting to £414, 8s., and he became desirous of withdrawing from the society, and gave the liquidators notice to that effect through his agents, but the liquidators, instead of acceding to his request, made the demand that he should of new begin to pay up the instalments of the principal, as if none of it had ever been paid. The £414 which had been paid in monthly instalments had remained in the hands of the society, and to that extent it reasonably seemed as if Mr Russell's debt had been extinguished, at least to that amount. This the liquidators would not allow, and accordingly the present action was raised for the purpose of determining the question. Mr Russell seeks to have it found that upon payment of the sum forming the difference between £414—the amount of the instalments—and £700, the amount of the advance, he is to be entitled to a discharge of his bond; and the whole amount of the shares which he subscribed for having been met, that he is to be looked upon as having ceased to be a member of the society.

Now, I am of opinion that, according to the Act of Parliament, according to the law, and according to the contract between the parties, as that contract is accepted, not merely in the bond and relative memorandum, but in the laws and regulations of the society, this is a contention on the part of Mr Russell that ought to be allowed. I think it would be a very strange thing, indeed, if the contract of the parties was not a contract by which both parties were to be bound.

And in regard to this matter, I must be allowed here to say that it appears to me to be quite immaterial that the society has gone into liquidation. I look upon it that the issue to be tried and determined is simply this:—As at the date of the liquidation—February 1880—no payments having been made subsequent to that time, what was the amount of the debt due upon the bond that had been granted by Mr Russell to the society? If £700 had remained due upon that bond, undoubtedly the society would be entitled to demand payment; but if the debt which is represented by that bond has been reduced by monthly instalments to something over £200, then the society, upon receiving payment of the difference, are, as I think, bound to give Mr Russell a discharge of the bond, and all the shares for which he subscribed having been thus paid for, Mr Russell necessarily, and according to the rules of the society, ceased to be a member of the society. The contention maintained for the liquidators would lead to an extraordinary result, for the contention and any decision giving effect to it would have been the same supposing that in place of £414 having been paid by Mr Russell in monthly instalments he had paid the full sum of £700. It would still have been said that although £700 had been paid in monthly instalments, yet the amount of the loan remained as much as it was when first granted.

That, no one can deny, would be a very strange result, but strange or not it is a result against which the rules of the society are, as I think, quite sufficient. That repayments have been made to the extent of £414 is not matter of controversy. That which is controverted is whether they were paid on account of shares, leaving the amount of the bond unaffected, or whether—paid on account of shares or not—the condition on which payment was made was that to the extent of each payment the debt due should be diminished. If each payment on account of shares represents also a payment on account of money for which the bond was granted, by each payment there is necessarily reduced the amount of the debt due to the society.

Now, it appears to me that according to the rules, and particularly according to rule 12, this is the result, and the only result, at which we can reasonably arrive. The first sentence of section 12 does not appear to me to be susceptible of any other interpretation, because that which is thereby provided is, that "all advances shall be repaid by monthly instalments with interest at the rate of 5 per cent. per annum, and which interest shall be paid monthly in advance, and at the same time as the instalments." Is that law for the society, and is it law for every borrower of the society who is also a member of the society? If it is, it appears to me that the result of every payment is to extinguish to the extent of every payment the debt that was due. And this does not stand alone, but must be read in connection with the clause adverted to by my brother Lord Young, at the end of article 12—"It shall be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the manager one month's notice in writing, and paying up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with the interest thereon." All monthly payments made on account of shares are called payments of debt, and this appears to me to be according to the true construction, the true result being this, that a member who pays on account of shares, if he is a borrowing member, when he pays monthly instalments, also and necessarily pays the amount of his debt. Mr Russell paid on account of shares, and with reference to the number of his shares, but he was also a debtor on the bond, and when he made a payment he made a payment on account of this bond as well as on account of shares; and to the extent of the payment thus made the debt due to the society was in my opinion reduced, the consequence being, that after the liquidation the amount of the debt, which was £700 to start with, had been reduced by the amount stated. The amount of the instalments that had been made, and the interest upon these instalments, was a payment on account of debt due, and that to which the society were entitled, as a condition of granting a discharge, was the difference between £414 and £700.

No doubt there are things in the transactions between the parties following upon membership and upon this bond which appear at first sight to be inconsistent with the result at which I have arrived; but I think there is that in the laws of the society itself which shows what in truth was the reality of these payments—that they were payments, I do not say not on account of shares, but being, it may be, on account of shares, on account of debt also.

This was a loan over house property, and it is provided by rule 14 that when the society elect a member on the security of house property they are entitled to insure to the full extent at the cost of the member, so that in the event of the destruction of the property the society could recover from the insurance company as much at least as would extinguish the debt due to them. Now, how would that matter stand if some instalments had been paid? Does not the power of the company to insure become limited as the amount of their debt is paid up? They are not entitled in such circumstances to insure for the full sum, or to take the full sum, supposing instalments have been paid in extinction of the debt. All that they are entitled at their own hands to do, at the cost of the member who is their debtor, is to insure the property for such a sum as will cover the amount lent and not repaid. And how is this result secured? Simply by the payments that have been made from time to time diminishing the amount of the original debt in respect of which the society could make any claim. I do not think it is for the society in reason to contest the soundness of this deduction. If there had been no payments to account—payments due under the bond—there could be no reason why the society should not insure for the full amount. But there was to be a limitation in the case suggested, and that limitation was regulated by the amount of the monthly instalments which as at the particular period when the insurance was effected had been paid to the society.

The necessary inference is, that according to what was the reality of the transaction and the legality of it, the sum that was paid on account of the member or debtor—whether you call it on account of shares or of instalments—was a sum by which the debt represented in the bond was extinguished. That was the purpose of the thing. I do not think there was anything of the nature of keeping up a debt on the one hand and giving credit for shares on the other. On the contrary, what was done was in fulfilment of an obligation to pay instalments upon certain shares, and, fulfilling this obligation, at the same time to extinguish a debt which had been constituted over a loan given to Mr Russell by the society.

Upon these grounds I am humbly of opinion that that which has been suggested by my brother Lord Young is the judgment which should be pronounced.

Lord Justice-Clerk—I concur entirely in the result at which your Lordships have arrived; and as this question is one of very great interest to a large body of the people, I think it right to express in a word or two the grounds on which I have arrived at that result. I think the case a very important one; and, moreover, I think the demand that is here made is a very unjust one, for it means nothing but this, that this liquidator wishes to exact payment of a debt which has been already discharged. It has no other meaning. If the liquidator succeeded in this case that would be the only result.

This association had two objects to serve, and they were quite distinct. One was the ordinary object of an investing society, in order to make profit of the interest of their money; the other was to enable members to borrow money to carry on building speculations of that kind on terms that were accessible to the class who generally belonged to the association. It appears to me that in better times this association was entirely successful. But in regard to the first, it was to get a return for the money, and the second was to get the advantage of a loan on terms which they could meet.

Now, to that second class belonged the respondent, and that was his only character in the transaction from first to last. He was a borrowing member, and the provisions of the contract with the parties, as far as he is concerned, are those relating to borrowing members and no other. The loan is a peculiar one, and very profitable to the lender, because he was to get full interest on the whole of his money, while the borrower was bound to pay into his coffers, whatever the terms and conditions of the payment of interest might be, certain instalments which in the end, if continued, would liquidate the whole of the advance. That was manifestly a great advantage, for not only was the full interest paid upon the whole debt, but the instalments themselves were rendered available for the earning of other interest.

Now, the respondent says he has paid up a certain amount of his loan; and if the monthly instalments referred to are to be imputed to repayment of the loan there can be no doubt he is right. There is little dispute upon that matter. But the liquidator says he has not paid anything towards repayment of the loan, because the instalments were paid to account of the money due on his shares as if he had been an investing member. And so the real object of this proceeding is to compel the respondent to pay over again what he has already paid. It has no other object, and that is an object which in my opinion is directly in the face of the precise terms of the Act of Parliament. It is contended—and that is one of the pleas of the appellant here—that these instalments were not attributable to the loan, and that therefore the loan remains the same as if the instalments never had been paid. That view also proceeds in direct opposition to the precise words of article 12, which provides not only that the instalments may be taken into consideration, but provides that the debt shall be paid in that manner and in no other, for it is the nature of the provision in article 12 that these advances shall be paid by instalments. I daresay the manager of the association might accept payment otherwise—and there are provisions to that effect for certain circumstances—but the normal condition is that the instalments shall be paid by the borrowing member for no other purpose whatever but to extinguish the debt. He is bound to extinguish it in that way.

It is perfectly true that interest was paid upon the whole sum, and that is not an unimportant element in this matter. That was for the greater security of the company, and those payments or instalments doubtless remained in the hands of the company, while interest was paid on the whole debt; but that does not derogate from the clear provision, first, in the opening sentence of the 12th article, which provides that the debt shall be so paid, and secondly, from the concluding clause, which is

couched in terms so precise that it is utterly impossible to mistake it.

Therefore I think that this demand of the liquidator is a most inequitable one, because the real meaning of it, as I have said, is to compel this party who has paid instalments under the Act of Parliament to pay them over again.

It is said that the company is in liquidation, and I must plainly say, that listening to the argument as I have done, I am at a loss to know what that means. It is not in liquidation of its debts, for there are none of those. It is not in liquidation of anything arising out of the investing part of its business, because the investing members do not owe anything to each other, and they do not owe anything to the outer world. There can be no liquidation with the borrowing members, for this simple reason, that if they are not only borrowing but investing members they will simply lose that money *pro rata* along with the rest of them. The way in which the borrowing or investing members suffer, which is the only pretext for liquidation, is that they do not get so much for their money as they expected. There is no other. And if the borrower here had been an investing member, or held to be such, there would be so much the less profit, in proportion to the amount he had invested. Therefore, with Lord Young, I am utterly at a loss to comprehend on what ground liquidation is proceeding. It seems to me that liquidation is not the term to be applied to the winding-up of the affairs of the company, if the company is to be put a stop to. I do not suppose they are to stop, and I think this is a mere device to raise this question, which has for its aim the compelling a man to pay his debt twice over.

I therefore think we had better affirm the judgment of the Sheriff-Substitute. He no doubt finds that in the present condition the respondent is not entitled to withdraw, but I apprehend that only means that he is not entitled to withdraw independently of having his bond cancelled. Cancellation of the bond would, I daresay, be quite enough to obviate any objection of that sort.

The Lords found in terms of the first and second heads of the petition.

Counsel for Appellants—Guthrie Smith—R. Johnstone—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Counsel for Respondent—H. J. Moncreiff—Strachan. Agent—R. H. Miller, L.A.

Friday, July 8.

SECOND DIVISION.

ANGUS *v.* ANGUS.

Executor—Count and Reckoning with Beneficiary.

This was an action by James Angus, Aberdeen, against his brother William Angus, executor of his father the deceased James Angus. The summons concluded for £150 as the amount due to him as one of the next-of-kin of his father. The defence was that at a meeting of the family after the father's funeral, when an interim division of his estate was made by the defender as executor, in which division the sum paid to each next-of-kin was £85, the pursuer had admitted having recently received from his father an advance of £70, and agreed to sign a receipt for his £85 on receiving a payment of £15. The defender produced the executry accounts, which brought out a further balance of £21, which he stated he had all along been ready and willing to pay to the pursuer. At the proof the pursuer took up the position that the signing of the receipt was a mistake, and that he had not read it over before signature. The Lord Ordinary having assoilzied the defender except as regarded the £21, which he was willing to pay, the pursuer reclaimed. In the Inner House he abandoned the contention that the signing of the receipt was a mistake, but maintained that the taking of such a receipt was not a competent way of taking credit for a debt to the estate (assuming it to be such) which the defender could not otherwise have proved but by writ or oath of the pursuer. The defences, he argued, were an admission that the receipt stated what was not true in point of fact.

Their Lordships adhered to the Lord Ordinary's interlocutor, but expressed the opinion that the taking of the receipt in the manner which had been done was irregular and not to be commended. On that ground they refused to the defender the expenses of the proof.

Counsel for Pursuer—J. Campbell Smith—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defender — M'Kechnie — Ure. Agent—Thomas Carmichael, S.S.C.

Friday, July 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BARRON *v.* MITCHELL.

Bankruptcy—Estate Acquired after Sequestration and before Discharge—Schoolmaster's Salary—19 *and* 20 *Vict. cap.* 79, *sec.* 103.

Where the teacher of a public school was sequestrated, *held* that the salary accruing to him after the date of his sequestration could not be attached under the provisions of the 103d section of the Bankruptcy Act as estate acquired by the bankrupt after his sequestration.

Bankruptcy—Estate Falling under Sequestration—Schoolmaster's Salary—19 *and* 20 *Vict. cap.* 79, *sec.* 4.

Question, Whether a schoolmaster's salary is estate within the meaning of the 4th section of the Bankruptcy Act?

Opinion (*per* Lord Fraser, Ordinary) that it is not.

The petitioner in this case was the trustee on the sequestrated estate of John Mitchell, English master in the Elgin Academy. The petition was under the 103d section of the Bankruptcy Act of 1876 (19 and 20 Vict. c. 79), which provides —"If any estate, wherever situated, shall, after