

cur with the Lord Ordinary in his view of the evidence. I think the ground has been used for the purpose of recreation by the inhabitants of Dundee from time immemorial, and I think that the Magistrates are entitled, in this particular contention, to represent the community. Therefore, upon all these grounds I concur in the view that the Lord Ordinary has taken. He has to a certain extent, by the judgment which he has pronounced, concurred in the judgment which the Sheriff pronounced in the process of interdict, and he has assoziated the defenders in the process of declarator.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD  
CLARK concurred.

LORD JUSTICE-CLERK.—In Scott's case the view I take depends entirely on that which makes it differ from the case of Keiller. Mrs Scott or her predecessors applied to the Woods and Forests, and obtained a Crown right to the foreshore. To that extent therefore my observations in the last case would not apply. She has a title; but then I think that title is burdened with the established rights of the inhabitants, and that the Magistrates of Dundee, as representing the inhabitants, are entitled to exercise all the rights which they have previously acquired. I do not think the right of the Magistrates under the Act of 1831 is a title to land or a title to real rights. It is a title of administration solely. I refer to the Act by which this portion of the ground along the Tay was brought within the municipality, and the Magistrates' right of administration was extended over it, subject of course to that right. I am inclined to sustain Mrs Scott's title as far as that ground is concerned. Only she must not limit or interrupt the rights acquired by the inhabitants.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD  
CLARK concurred.

The Court pronounced an interlocutor refusing the reclaiming-note in both actions, and adhering to the interlocutors of the Lord Ordinary; and in the appeal in the process of interdict, dismissed it in respect of the decision in the action of declarator.

Counsel for Reclaimers—Pearson—Guthrie—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Ghoag—Hay. Agents—Drummond & Reid, W.S.

## HOUSE OF LORDS.

Friday, July 30.

(Before Lord Chancellor (Herschell), Lord Blackburn, and Lord Fitzgerald.)

TOSH AND OTHERS v. NORTH BRITISH  
BUILDING SOCIETY AND LIQUIDATOR.

(Reported in Court of Session—under the name *Carrick and Others v. North British Building Society in Liquidation*—ante, vol. xxii. p. 833, and 12 R. 1271, July 10, 1885).

*Friendly Society—Building Society—Winding-up—Rights of Borrowing Members and Non-Borrowing Members—Allocation of Loss inter se.*

The directors of a benefit building society which had both borrowing and non-borrowing members, and had sustained losses which absorbed the profits allocated to members of both classes, issued a circular to the members which brought its operations to a close, and subsequently it was ordered to be wound up by the Court. The rules provided that borrowing members (who had to give heritable security for their advances) could redeem their bonds either (1) by giving three months' notice that they renounced their shares and paying the amount of their advances, under deduction of instalments paid and interest thereon, or (2) by payment of the whole sum borrowed, retaining their shares; and that when their payments into the society, together with the share of profits, were equal to the amount advanced, then their payments and membership of the society should cease. There were no outside creditors to be settled with in the winding-up. *Held*, in a Special Case stated to have the allocation of losses *inter se* decided on (*rev.* judgment of First Division), that the question was not one to be decided on the maxim that one who shares the profit should share the loss, but on the effect of the contract contained in the rules; that the case was ruled by the decision of the House of Lords in *Brownlie v. Russell*, March 9, 1883, L.R., 8 App. Cas. 235, and 20 S.L.R. 481, and *therefore* that the borrowing members were entitled to have their securities discharged in terms of the rules, and not bound to share the losses of the society.

As fully appears from the previous reports, the First Division of the Court of Session held that the case was not ruled by *Brownlie and Others (Liquidators of Scottish Savings and Investment Society) v. Russell*, March 9, 1883, ante, vol. xx. p. 481, and 10 R. (H.L.) 19, and that borrowing members indebted to the society at the time of the issuing of the directors' circular, by which the business was practically brought to an end on 13th May 1882, were liable to bear a share of the losses sustained by the society in proportion to the sums standing at their credit respectively on their shares as at 11th April 1882, being the date when the society in respect of a report by a valuator on their securities as at that date, passed a new rule "that all payments received from borrowing members due from and after 11th April

1882 be attributed not to their shares but to account of the sums due under their bonds to the society without prejudice to the present position of borrowing members."

Tosh (the sixth party), Guthrie (seventh party), Finlay (ninth party), and other borrowing members who were indebted at that date (13th May 1882) to the society, appealed to the House of Lords. The special positions of these parties fully appears from the previous report.

It was pointed out in the argument, and conceded, that the Court of Session had erroneously assumed that in *Brownlie's* case, differing from the present case, borrowing members were simply debtors to the society and had no right as in this case to share profits.

The argument, as will be seen from the opinions *infra*, mainly turned upon the question whether the case of *Brownlie* could be distinguished from the present on other grounds.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL).—The question in the present case is, whether the appellants, who are borrowing or advanced members of the respondents' society, are entitled to redeem their securities and have their bonds discharged in terms of the rules of the society, or are bound to remain members and bear a share of the losses sustained by the society. The Court of Session held that they were liable to bear a share of the losses of the society in proportion to the sums standing at their credit on their shares.

The society was established in 1868 under the Building Societies Act (6 and 7 Will. IV. c. 32). It was a building society constituted in the manner and for the purposes contemplated by that Act, and it had, according to its constitution, what are known as advanced and unadvanced members. All advances were to be made on the security of heritable property to the satisfaction of the directors, and to be made to members only. Provision is made by rule 12 for non-borrowing members withdrawing from the society, and under rule 13 for their receiving payment on the completion of their shares. Provision is also made for borrowing members redeeming their property given in security to the society under rule 27.

The society carried on business, and for some years realised profits, which profits were dealt with in the manner provided for by rule 28 of the society, to which I shall hereafter call attention, a certain portion of the profits, after setting aside a sum as a guarantee fund, being carried to the credit of each member of the society. The society after proceeding prosperously for some years sustained considerable losses, which absorbed the guarantee or reserve fund, and left a loss still unprovided for. In the year 1882 or prior to that year, that condition of things having been discovered by the directors, the society ceased on the 13th of May 1882 to carry on business, and existed only for the purpose of settling the rights of its members. The society had no liabilities to meet except its liabilities to its own members. But although the society was found to be in that condition in 1882, and ceased carrying on business on the 13th of May of that year, no petition for winding-up the society was filed until the 9th of July 1884, on which petition a few days later a winding-up order was made.

Under these circumstances a Special Case was stated for the purpose of determining whether the rights claimed by the advanced or borrowing members were well founded. That Special Case was stated between the society and its liquidator of the first part (although I should imagine that the liquidator, who is now among the respondents, was added at a later stage, for the Special Case was agreed upon before the order for winding-up was made), and certain of its members, representing, as it was supposed, different interests and different states of fact, of the other parts. The Court of Session upon that Special Case pronounced an interlocutor, some parts of which are appealed against; of other parts of the interlocutor no complaint is made, and your Lordships' House have not to deal with them at all. The main complaint is this, that the Court of Session held, as I have stated, that the borrowing or advanced members were not entitled merely to complete the payments necessary for repaying their advances and then to cease to be members of the society, but that they were bound not only to complete the payments for the purpose of redeeming their properties, but also to remain members for the purpose of bearing a portion of the losses. The ground of this decision of the Court of Session is thus stated in the judgment of Lord Shand (12 Court Sess. Cas. 4th Series, p. 1285)—"Under the rules of the present society the borrowing members (rule 28) are entitled to have a share of the profits divided equitably among their shares—that is, allocated to their shares in the same way as such profits are allocated and credited to the shares of non-borrowing members, and that being so, it clearly follows that the borrowing members must bear their share of the losses. As already noticed, the society's rules or contract do not contemplate losses. It is a settled rule or principle of law, however, that an agreement to share profits, nothing being said about losses, *prima facie* means an agreement to share losses, and that in the same *ratio* or proportion as the parties respectively have fixed with reference to the division of profits, unless there be some stipulation to a contrary effect. We are therefore of opinion that borrowing members, who were still indebted to the society in any part of their advances on the 13th of May 1882, when the society stopped, are liable to bear a share of the losses sustained by the society in proportion to the sums standing at their credit respectively on their shares at the 11th of April 1882."

Now, my Lords, the view there expressed appears to me to be in direct conflict with the judgment of your Lordships' House in the case of *Brownlie v. Russell*, March 9, 1883, 8 App. Cas. 248, which was also the case of a building society very similar to the present. The very same argument was there addressed to your Lordships' House in favour of the advanced members being under an obligation to remain members for the purpose of bearing a portion of the losses, but in delivering his opinion in that case Lord Selborne thus expressed himself—"This is not a joint-stock company, still less is it a common law partnership, but it is a society of a special kind, formed and regulated under particular Acts of Parliament for special purposes. A fallacy which has pervaded much of the argument that has been offered to your Lordships in support of the appeal is, that

because the members of this society are associated together for a common purpose, therefore there must in equity and in reason, and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual state of things they may suffer. It appears to me that such a result cannot be arrived at by presumptions or inferences from the law relating to companies of a different kind, but that we must look at this particular contract." And again, Lord Bramwell in his judgment thus expresses himself—"It is sought to qualify the rule in this way. 'True, you have paid instalments which would satisfy the claim of the society upon you to the extent of their amount, with interest upon them under that rule, were it not that the society has sustained losses, and the instalments which you have so paid must be taken to be attributable in part to those losses, and consequently you have not in reality and in substance paid so many instalments as you have nominally.' Now, that I understand to be the contention of the appellants. What is there in the rules to justify it? There is not one word in the rules about losses being borne either by the advanced or unadvanced members, and the only reason that can be given why the advanced members or anybody else should bear the losses is, that they are to have profits if there were any. So they will undoubtedly, but it does not follow from that that they are to bear losses. It might have been a reasonable stipulation to put in if they had thought of it, but either they did not think of it, or if they did think of it they did not consider that it was reasonable to put it in, and we cannot put it in upon some speculation that if they had thought of it they would have put it in."

My Lords, that appears to me to show that the ground upon which the Court of Session proceeded cannot be supported, inasmuch as your Lordships' House have decided that such a ground is not well founded. The Court of Session sought to distinguish the case now under consideration from *Brownlie's* case in this way. They said—"These cases," speaking of *Brownlie's* case and another case—*Scottish Property Investment Company v. Boyd*, November 7, 1884, 12 R. 127—"are to be distinguished from the present in this material respect, that the borrowing members in both cases were simply debtors to the society in the sums borrowed, and had no right and were not entitled to receive any share of the profits—*Ibid.*, p. 1285." Now, the answer to that suggested distinction is, that it is not well founded in point of fact. There was precisely the same right to share in profits in *Brownlie's* case as there is in the present case, and it was frankly admitted by the learned counsel who argued this case on behalf of the respondents that they could not support the distinction which the Court of Session had made between *Brownlie's* case and the case now before your Lordships. But it was open to them no doubt to support the judgment of the Court below if they could upon some other grounds than that upon which the case was rested by the judgment of the learned Judges who decided it. And this they have attempted to do. They have argued, as I understand, that there are three distinctions between the present case and *Brownlie's*

case which are sufficient to differentiate it and to show that the judgment ought to be different.

First, they say that the building society in *Brownlie's* case had been registered under the Statute of 1874 and was subject to its provisions, and that Lord Selborne placed reliance in that case upon the provision of sect. 14 in the Act of 1874, that "the liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrears on such share." No doubt it is true that distinction does exist, but I think that although the fact of that provision existing in the Act of 1874 was alluded to by Lord Selborne it is impossible to read his judgment without seeing that it would have been precisely the same if the society had been registered only under the statute of William IV.

Next, it is said that in *Brownlie's* case, at the time when the securities and a bond with a condition for repayment of the advance made to him were given by the member to the society, a back letter was given by the directors which provided that, notwithstanding that the bond and disposition in security is in the usual terms, "it is nevertheless understood that the same 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." It is perfectly true that in the present case there is no such back-letter, but I cannot see that this makes the slightest difference in the position of the parties. It was, I think, substantially admitted by Mr Cookson, in his argument on behalf of the respondents, that although the condition of the bond was in this case absolute, and there was no back-letter, yet it would not have been open to the society, so long as the member continued to pay in accordance with the rules of the society, to enforce payment of the bond any more than if there had been such a back-letter. I think that distinction therefore also fails.

But then it is said (and this no doubt is the point with most substance in it) that the matter must be determined after all by the rules of the society, and that the rules of this society differ from the rules which were the basis of the decision in *Brownlie's* case. Now, the rule in *Brownlie's* case with regard to a member withdrawing was the 12th rule, which provided that "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, 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." It is said, first, that in that case the provision was that there was to be deducted the amount of monthly instalments "paid upon his shares," and that this showed that the payments which were made from time to time by the borrowing member upon his shares were payments made in repayment of the advance made to him, and other expressions in the rules are relied upon for the purpose of establishing that fact. Then, it is said that in the present case the payments made by the member as mem-

ber in respect of his shares are not to be regarded as repayments of his advance; that the loan was under the rules of this society to be treated as an entirely independent transaction, at all events down to the moment of the full amount having been paid, and that on the one hand, he received the loan and made the payments of interest upon that loan, and, on the other hand, he made payments quite independently upon his shares as a member of the society, and that he was not entitled to claim when the society was in difficulties and the winding-up came about that the payments which he had made as a member upon his shares were to be treated in any way as payments *pro tanto* in discharge of the loan.

Now, that renders necessary some examination of the rules of the society. I am quite unable to concur in the view thus contended for. I think that, as was pointed out by the Solicitor-General, the Building Societies Act itself, without reference even to the rules, indicates the character of these advances and what is the position of an advanced member, and that in truth his position is, that he receives his share in advance, making repayments, whilst a non-advanced member is to receive his share ultimately and in the end. I may refer to the description of advanced and non-advanced members which is given by Lord Watson—and I think quite accurately—in his judgment in *Brownlie's* case. But when these rules are looked at it appears to me that this is undistinguishable from *Brownlie's* case. Rule 16 provides that “any member who has been granted an advance may, with the consent of the directors, transfer his or her right and interest therein to any other person along with the shares representing the same.” What could show more clearly than that, the connection between the shares and the advance, and that the advance was an advance on the shares, and that the shares represented the advance?

In rule 26 the same provision is found—“Any member who has received an advance may transfer his or her right and interest in the same to any other person, along with the shares representing the same,” and then the purchaser is to “pay on entry a transfer fee of two shillings and sixpence for each share represented by the property so transferred.”

Then when we come to rule 27, which is the most important rule that we have to deal with, we find it there provided that “any member who has given any property in security to the society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same by renouncing the shares representing the advance made thereon, and paying the amount of said advance under deduction of the instalments paid in respect of the same.” Now, what are “the instalments paid in respect of the same?” These words mean—and it seems to me can only mean—the payments which have been made from time to time by the member on his shares; they are treated by this rule as instalments paid by the member in respect of his advance.

There appears to me therefore to be no substantial distinction between the rules of this society and the rules of the society in *Brownlie's* case, and I think therefore that the determination in *Brownlie's* case determines the present case also. In *Brownlie's* case it was held

after a winding-up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding-up, but it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society, and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position or their rights or render them at all different from what they would have been if they had been withdrawing under the rules.

Now, my Lords, I proceed to the special points which are raised in the case of each of the appellants who have prosecuted this appeal before your Lordships, and I think it will be found when the facts are examined that this case is really a stronger case than the case of *Brownlie v. Russell*, inasmuch as in the present case it appears to me that the parties had strictly a right to withdraw under the rules of this society, and had put themselves in a position to withdraw prior to any petition for winding-up being presented to the Court.

The first appellant, Tosh, if he had continued to pay his instalments pursuant to the rules, would in June 1883 have completed his payments, and the subscriptions with the share of the profits would have been equal to the amount of the advance. In such a case the third alternative in rule 27 provides that “when the subscriptions, with the share of profits of any member who has received an advance, are equal to the amount of said advance, then the payments of said member in respect of said shares on which the advance has been made shall cease, and his connection with the society in respect of the same shall terminate. In the event of any property being redeemed or completed as aforesaid” (it would be a case of completion), “the deed granted in security thereof shall be duly discharged by a receipt.”

Now, upon the 6th of December 1882 Tosh paid to the society the amount of £8, 0s. 11d., which was accepted by them, and which covered all the payments that fell to be made by him under the rules down to the following June. If he had paid in the ordinary way by payments spread over the intervals down to the 3d of June 1883, he would have completed his payments in the very terms of the portion of rule 27 which I have just read. What was there to prevent his so completing his payments, and receiving by virtue of rule 27 all that the rule entitled him to receive in that event? There was no petition for winding-up the society at that time. There was nothing that I can see to affect his rights. He had done precisely what the rule provided for, and I cannot in the least see why he was not entitled to the benefit which the rule in that case gave him. It is said that although the subscriptions, with the share of the profits which had been credited to him from time to time, and which stood to his credit, together with this £8, were equal to the amount of the advance, nevertheless, the society having made losses subsequently, you must deduct or take away profits which had been credited to him—that they were not really profits. I cannot concur in that view at all. They were profits—they are found by the case to have been

profits really made, and properly credited to the shareholder year by year, of which, if at the close of any of those years he had chosen to retire, he would have been entitled to take the benefit. Under those circumstances it appears to me that when the payment of £8, 0s. 11d. was made, or, at all events in June 1883, the time by which it ought to have been made, Tosh ceased to be liable to make any further payments, because his connection with the society in respect of his shares had terminated.

My Lords, the next case is that of Guthrie. On the 27th of April 1882 Guthrie gave notice of his intention to withdraw from the society as regards his shares, which were not fully matured—that is to say, the forty in respect of which he had received advances. What was there to prevent his doing so under the first alternative of rule 27? I can see nothing. It is true that a few days before that the society had ceased to carry on any fresh business; but it is not suggested that there were any outside creditors of this society at all; the only question which arises is as to the rights of the members *inter se*. What was there on the 27th of April 1882 to prevent Guthrie giving his notice and getting his property redeemed in the very terms of rule 27? I can see nothing. Rule 27 provides that a member wishing to withdraw must give “three months’ notice prior to the term of Martinmas or Whitsunday in any year.” The notice therefore was too late of course for Whitsunday 1882, and I think that the right to redeem only arose at Martinmas 1882, and that the account must be taken upon that basis.

I turn now to the remaining case, the case of Finlay. Finlay gave notice to withdraw on the 16th of May 1882. I can see no distinction between his case and that of Guthrie, and I think that he too was entitled to redeem in terms of the first part of rule 27 at Martinmas 1882.

That disposes of all the questions raised in this case with the exception of a point which was indeed raised by the case but was abandoned by the Solicitor-General in the course of his opening on behalf of the appellants, namely, the question whether Finlay was entitled to continue the payments of his subscriptions under the rules notwithstanding the winding-up, and to have the benefit of a share of the profits, he having ceased to be a member under the latter part of rule 27. That point having been abandoned—and I think wisely abandoned—it is unnecessary to say anything more upon it.

**LORD BLACKBURN**—A Special Case was stated in the Court of Session which expressly states that there were no outside creditors. I only mention that to show that no question arises here, any more than it did in *Brownlie’s* case, as to what might be the effect with regard to outside creditors, as I may call them, of the concern. That Special Case, as stated, asked eight or nine questions of the Court of Session, as to three of which the answers in the interlocutor have been appealed from. The appeal is confined to those three queries, and we have to see whether the interlocutor was right as to the answers to them.

Now, the ground upon which Lord Shand, who delivered the opinion of the Court of Session, puts the matter is this, that where according to his reasoning (I am not pretending to quote

his words) a party is entitled to get profits, there on the principle “*qui sentit commodum, sentire debet et onus*,” he ought to share the loss, and that that applies in such a case as this. Against that there was the decision in *Brownlie’s* case, which Lord Shand held was not applicable to the present case, because, as he erroneously supposed, in *Brownlie’s* case the decision in this House went upon the ground that Russell had never got any stipulation for profits at all. That was a mistake, and when the case of *Brownlie* is looked at it is seen that it was expressly said that the question was not to be decided on the general maxim that he who shares the profit ought to bear a share of the loss, but depended upon what was the effect of the contract contained in all the rules of such a society as this. Now, in *Brownlie’s* case it was held that the contract was such that the party was entitled not to withdraw from being a member, because the winding-up prevented that, but to redeem in the manner which the contract between the parties, evidenced by the rules, showed.

That being so, the main ground upon which Lord Shand and the Court of Session went is, I think, not tenable. I do not mean to say that if it were *res integra* there might not be a great deal to be said in support of the opinion which he delivered, but it was distinctly decided by the House of Lords that that principle did not apply to the case of such a society as this, and that being so, we must consider that as decided, and as a fixed matter no longer open to be examined into at all. It was, however, said in the argument that though that was so, yet the actual contract made in this case was not the same as in *Brownlie’s* case, because the rules were not identical. There was also a point made that the Acts were different, but I think that I need not mention that, because it has been quite answered by what has been said by the noble and learned Lord, the Lord Chancellor, in his judgment just delivered. Then there is the fact, no doubt, that the bond which was delivered in *Brownlie’s* case had a back-letter attached to it, but I think that that makes no real difference. The advance which was made, whether under a bond, according to the English form of doing it, without any back-letter, or under a bond with a back-letter, was equally an advance made under the terms of the contract, whatever it was, arising from the rules.

Then it is said that the rules in this particular case are not identical with those in *Brownlie’s* case, and I think that they are not identical, and if any of them did materially differ, it might make a difference in the contract which we are to apply to the particular case. All that your Lordships have now to deal with, and all that I have to deal with, are those three cases which are brought before us. I have not thought it necessary to look at the others, and when we look at those three cases we find that there is really no difference in the effect of the contract which arose from the rules.

Tosh’s is the first case. I need not go through it; the Lord Chancellor stated the effect of what had been done, and I quite agree that the answer as respects Tosh’s case, called the sixth party in the Court below, was a mistaken answer, and that the interlocutor ought to be varied in the manner which the Lord Chancellor has read. Then comes Guthrie’s case, who was the seventh party, as he

was called in the Special Case. There is a part only of the interlocutor as regards him which is appealed against, and I agree that that should be altered in the manner which the Lord Chancellor proposes. Then comes the last case, namely, that relating to Finlay, which is the subject of the eighth query. A part of what was there appealed against has been given up. The whole of what was there appealed against has not to be altered, but a part has to be altered, and accordingly I think that the interlocutor ought to be varied in the way proposed.

**LORD FITZGERALD**—I concur in the reasoning of the Lord Chancellor and in the amendments of the interlocutor which he proposes. I am the only member of the House now present who took part in the decision of *Brownlie's* case. That case was not disposed of immediately after the hearing of the argument. There was some novelty in it, and time was taken for consideration, and even more than ordinary care was applied to it. From the beginning of the argument in the present appeal I have thought that it was governed in every part by the decision of your Lordships' House in *Brownlie v. Russell*.

**LORD CHANCELLOR (HEBSHELL)**—The order will be that the costs of both parties be paid by the liquidator out of the society's estates.

Interlocutor appealed from varied by omitting the answer to query 5, and substituting therefor the following words—"In answer to query 5, find and declare that the sixth party is entitled to cease being a member of the society, and to have his bond and disposition in security discharged in terms of rule 27, without any further payment, and that he is not liable to bear a share of the loss sustained by the society in proportion to the sum standing at his credit on his shares at 11th April 1882;" by omitting so much of the answer to query 6 as is appealed against, and substituting therefor the following words—"So far as regards the other shares held by him in respect of which the advances mentioned in art. 24 of the case were made, he is entitled in terms of art. 27 to a discharge of his bonds, and to cease to be a member of the society, upon payment of the difference between the amount of his bonds with interest thereon down to Martinmas 1882, on the one hand, and on the other hand the amount of the instalments paid in respect of the shares, with interest on the amount of the instalments from time to time paid at 5 per cent. to Martinmas 1882, and that he does not fall to bear a share of the losses of the society in proportion to the sum standing to his credit on his shares;" and by omitting the answer to the eighth query and substituting the following—"In answer to the eighth query, find and declare that the ninth party is entitled to have his bond discharged, and to cease to be a member of the society, in terms of art. 27, upon payment of the difference between the amount of his bond with interest thereon down to Martinmas 1882, on the one hand, and on the other hand the amount of the instalments paid in respect of his shares with interest on the amount of the instalments from time to time paid at five per cent. to Martinmas 1882, and that he does not fall to bear a share of the losses of the society in proportion to the sum

standing to his credit on his shares, but that he is not entitled to complete his shares by paying up the instalments which remain due thereon, getting credit for all profits which have been allocated upon his shares, and upon such completion to have his bond discharged and cease to be a member.

"The costs of all parties to this appeal to be paid out of the estate of the respondent society."

Counsel for Appellants—Sol.-Gen. Davey, Q.C.—Farwell. Agents—Davidson, Burch, & Co., for Mackenzie & Black, W.S.

Counsel for Respondents—Cookson, Q.C.—MacClymont—C. E. Allan. Agents—Lindo & Co., for David Turnbull, W.S.

## COURT OF SESSION.

Friday, November 26.

### SECOND DIVISION.

[Lord Fraser, Ordinary.]

HUTCHISON STIRLING v. MACKENZIE,  
GARDNER, & ALEXANDER.

*Agent and Client—Duty of Agent—Responsibility of Agent.*

A law-agent who recommends a security to a client having money to lend is responsible not merely as a conveyancer, but is also bound to take all reasonable care in inquiring as to the sufficiency of the security, even though the client is a man possessing a knowledge of business, and who judges for himself as to whether the investment is prudent.

Such duty on the part of an agent does not, however, extend to the making of inquiries as to whether the property is likely to continue fully let so as to maintain a rental equal to that existing at the date of the loan, it being, in the ordinary case, sufficient that the agent shall ascertain, and truly communicate to the client, the existing condition of the security, as to rental and otherwise, at that date.

Circumstances in which it was held that an agent who had recommended a heritable security to a client who wished a security which would yield good interest, and knew that the security recommended was not first-class, was not liable to the client for loss arising from the failure of the security owing to the depreciation in the value of heritable property.

In this action James Hutchison Stirling, Esq., LL.D., Edinburgh, sought to make the firm of Mackenzie, Gardner, & Alexander, writers, Glasgow, liable for £3000, with interest at 5 per cent. from Martinmas 1882, as loss which he alleged he had suffered from an investment made on their advice as his agents, which advice he alleged they had given with want of due care and with gross negligence.

The pursuer had from time to time for a number of years consulted as to his investments the senior member of the defenders' firm, who was on friendly terms with him. He was engaged