

advise His Majesty that this appeal be allowed, and that the judgments of the 9th June 1909, the 17th September 1909, the 8th December 1909, and the 11th July 1910, in favour of the respondent, be set aside, and judgment entered for the defendant with costs.

Appeal allowed.

Counsel for the Appellant—Duke, K.C.—J. A. Compston. Agents—Gedge, Fiske, & Gedge, for Ewens & Harston, Hong-Kong, Solicitors.

Counsel for the Respondent—E. H. Sharp, K.C. (of Colonial Bar)—A. C. Nesbitt. Agents—Church, Adams, & Prior, Solicitors.

HOUSE OF LORDS.

Monday, March 4, 1912.

(Before the Lord Chancellor (Loreburn),
Lords Atkinson, Shaw, and Mersey.)

ECCLES PROVIDENT INDUSTRIAL
CO-OPERATIVE SOCIETY v.

GRIFFITHS.

(ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.)

Statute—Construction—Friendly Society—Industrial and Provident Societies Act 1893 (56 and 57 Vict. cap. 39), sec. 25 (1)—Nomination by a Member—Date at which it Takes Effect.

Section 25, sub-section 1, of the Industrial and Provident Societies Act 1893 provides that a member may nominate a person to whom his property in the society "shall be transferred at his decease, provided that the amount credited to him in the books of the society does not then exceed £100 sterling."

Held (diss. Lord Shaw) that the word "then" was referable to the date of nomination, not to that of the member's death.

The appellants, the Eccles Provident Industrial Co-operative Society, were registered under the Industrial and Provident Societies Act 1893 (56 and 57 Vict. c. 39). On 1st April 1909 James Parry, a member of the society, under the powers conferred by sub-section 1 of section 25 of the Act, nominated, as the person to whom his property in the society should be transferred at his death, his son-in-law, the respondent Griffiths. The sum at his credit in the books of the society was at that date £98, 13s. This nomination remained unrevoked at Parry's death on 3rd February 1910, at which date the sum at his credit amounted to £103, 6s. 7d. On the ground that the word "then" in the proviso above quoted applies to the date of death, the society refused to pay over Parry's property to the respondent, as being in excess of the amount so transferable. The respondent

contended that it refers to the date of nomination, which was thus valid, and brought an action to recover the money.

Their Lordships delivered considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—I will not enter upon the argument of this case, because my noble and learned friends have done so, but in my opinion the order of the Court of Appeal ought to be affirmed.

LORD MERSEY—The question in this case is whether the word "then" as used in the last line of section 25, sub-section 1, of the Statute 56 and 57 Vict. c. 39, refers to the date of the nomination mentioned in that section or to the date of the death of the nominator. Avory, J., who tried the case, and Vaughan-Williams and Kennedy, L.JJ., who heard it on appeal, were of opinion that the word referred to the date of the nomination, whereas Farwell, L.J., thought that it referred to the date of the death. I think that the opinion of the majority in the Court of Appeal was right, and that the judgment pronounced in accordance with it ought to stand.

Divested of those words, which for the purpose in hand may be regarded as surplusage, the sub-section reads as follows:—"A member may by writing under his hand, sent to the registered office during the lifetime of such member, or made in any book kept thereat, nominate any person to whom his property in the society, or so much thereof as is specified in such nomination, shall be transferred on his decease"; and then comes a proviso the words of which have given rise to the present dispute—"Provided that the amount credited to him in the books of the society does not then exceed £100." Sub-section 2 of section 25 enacts that a nomination so made may be revoked or varied by any similar document, but shall not be revocable or variable by will; and sub-section 3 directs that the society shall keep a book wherein the names of all persons so nominated, and all revocations or variations, shall be regularly entered. Before considering the effect of the enabling part of sub-section 1 and of the proviso, I think that it is desirable to draw attention to the next section of the Act of Parliament. Section 26 directs that "on receiving satisfactory proof of the death of the nominator, the committee of the society shall transfer the property comprised in the nomination in manner directed by it."

On turning now to section 25, sub-section 1, the first question is, What property does it enable the member to deal with? It appears to me that the words "his property in the society" make the answer quite plain. The only property which he has when he signs the nomination paper is the property then standing to his credit in the society's books, and it is in respect of that property, and that property only, that he can nominate. The enactment does not say that the member may nominate a person to whom any property which he may have in the society at his death

shall be transferred; it is dealing with existing property and with nothing else. The later words "or so much thereof as is specified" are hardly applicable to a future unascertained amount, which may itself turn out at the date of the death to be less than the part specified. It is difficult to understand how a part of a problematical amount can be specified at all.

Then, again, by sub-section 2 the name of the person nominated is to be entered in a book of the society, and inasmuch as the nomination may be as to the whole or any part of the member's property, presumably the amount is to be recorded with the name. It is difficult to understand how the secretary or other officer of the society is to record a nomination of a part of an amount which does not stand, and for that matter may never stand, to the credit of the member at all. Apply these observations to the present case. The member had to his credit at the date of the nomination £98, 13s. Acting under the enabling part of the section, he nominated the plaintiff as the person to whom the whole of his property should be transferred at his death. Can it be supposed that he had in his mind at the time of the nomination any other property than that which he then had, or can it be supposed that the Legislature intended to enable him to nominate in respect of non-existing property? I think clearly not, and if this be the right view of the effect of the enabling part of the sub-section, the difficulty which is said to stand in the way of the interpretation put upon the proviso by Avory, J., and the majority of the members of the Court of Appeal disappears. That difficulty is that if the word "then" in the proviso is to be read as meaning at the date of the nomination, a member who has at that time, say, £1, or any other sum not exceeding £100, to his credit, can avail himself of the enabling part of the section to pass to a nominee any amount, however large, which may happen to stand to his credit at his death. According to the view which I take this difficulty cannot arise, for the statute only enables the member to deal with what he has; it gives him no power to deal with what he has not.

There remains to be considered the proviso. It is a restriction upon some act, and there are only two acts to which it can possibly apply, either the act of the member in nominating or the act of the committee in transferring. But section 23, which creates the obligation to transfer, directs that the committee shall transfer in manner directed by the nomination. Under this section the committee have no choice; they cannot escape the obligation to transfer by consulting the books to see whether more or less than £100 stands to the credit of the deceased member. I think, therefore, that the proviso does not affect the obligation of the committee to transfer. Consequently it must restrict the power of the member to nominate by limiting that power to cases

in which the member has to his credit not more than £100. In other words, the proviso is intended to limit the right of the member to nominate, and not to affect the obligation of the committee to transfer. It follows that the word "then" relates to the date of the nomination.

The object of section 25 is, in my view, to give to the poorer members of a society—that is to say, to those who have not more than £100 to their credit—the power of making provision for the disposal of their death of this small sum without the expense being incurred of making a will, or of administering this part of their estate. The nomination can only be made by the members who are within this poorer class, and it is the duty of the secretary of the society, before he enters the name of the nominee in the society's book, to see that there is not more than £100 to the member's credit. If the exercise of the right to nominate is delayed until the amount of the credit is more than £100, the right itself is lost. Once made, the nomination takes effect not by creating any charge or trust in favour of the nominee as against the nominator, as was suggested during the argument, for the nominator can at any moment revoke the nomination, but by giving to the nominee a right as against the society, in the event of the death of the member without having revoked the nomination, to require the society to transfer the property in accordance with the nomination. Until death the property is the property of the member, and all benefits accruing in respect of it during his lifetime are his also. The view contended for by the appellants would make the nomination defeasible not merely by the statutory revocation provided for the purpose, but by possible future and uncertain events, such as payments by the member, or credits by the society of sums to the member's account having the effect of increasing the total to his credit at his death to a sum over £100.

The construction which I put on the Act of Parliament will, if it prevails, give effect to the object which in my opinion the Legislature had in view, and will render the nomination in this case an effective document, instead of making it, as the appellants would have it, a piece of waste paper. As to the £4, 13s. 7d., being the difference between the £98, 13s. to the member's credit at the date of the nomination, and the £103, 6s. 7d. to his credit at his death, it may be that this small sum falls into the estate of the deceased, and does not pass to the respondent, or it may be that, to the extent to which it is an accretion in respect of the capital sum, it follows the destination of the nomination. But inasmuch as counsel informed your Lordships that the matter was of no importance, I have not dealt with it. Nor have I dealt with the earlier statute, or with the rules or forms in force in relation to the present statute. None of them can in my opinion be allowed to affect the construction to be put upon the words of the Legislature.

LORD ATKINSON—In my view the paramount purpose of the framers of the 25th and 27th sections of the Industrial and Provident Societies Act of 1893 was, first, in the case of a member of one of such societies dying intestate without leaving behind him unrevoked a nomination such as is mentioned in the statute, to permit his interest in the society, not exceeding £100 in value, to pass to his next-of-kin without the necessity of taking out letters of administration. And secondly, in the case of a member dying, whether testate or intestate, leaving behind him such a nomination unrevoked, to permit the property mentioned in the nomination, provided that it did not exceed £100 in value, to pass to the nominees without so far as it was concerned the necessity of taking out probate or letters of administration. The property of the deceased in the society up to the limit mentioned was to pass to the beneficiaries in each case without paying toll to the State, if it may be so called.

The paramount purpose can be effectuated in the latter case in either of two ways—namely, (1) by holding that the word “then” used in sec. 25, sub-sec. 1, refers to the date of the member’s death; or (2) by holding that the word “then” refers to the date of the nomination, provided only that in the latter case the nomination is to be taken as having the effect of earmarking or setting apart the property mentioned in it to serve its purposes to feed the gift made by it. On any other hypothesis the reference of the word “then” to the date of the nomination would render the limitation to the sum of £100 quite meaningless and futile. The limit would serve no rational purpose if it enabled a member who happened at the date of the nomination to have an interest in the society not exceeding £100 in value to execute a nomination which would at his death carry twice that sum to his nominee, and I could not concur in any construction of the statute which would lead to such irrational results. I inclined myself during the argument to the opinion that the point of time indicated by the word “then” was in the 25th, as in the 27th section, the date of the member’s death; but as the construction which Lord Mersey puts upon section 25 of the statute, based, as I understand it to be, on the assumption that the property mentioned in the nomination is set aside to serve the purpose of the nomination, carries out what I conceive to have been the primary purpose of the Legislature, I am not so confident in my own opinion as to induce me to differ from him, and therefore I adopt his view and concur in the judgment which he has just delivered.

I wish especially to point out that this judgment will inflict no inconvenience of any appreciable kind upon any member of the society, inasmuch as, although it ties up the funds temporarily while the nomination is in force, it would always be competent to him, by a most easy and inexpensive process, to revoke the nomi-

nation, deal with the funds as he pleases, and, if he so desire, renominate.

LORD SHAW—The late James Parry was a member of the appellant society, which is registered under the Industrial and Provident Societies Act 1893. On the 1st April 1909 he nominated the respondent, his son-in-law, as the person to whom “shall be transferred my property in the society, whether in shares, loans, or deposits, at my decease.” I have here quoted the words of the nomination. At the date of this document the amount to his credit in the books of the society was under £100; at the date of his decease it was over £100.

Mr Parry also made a will disposing of his whole property. Stated thus, the problem is reduced to its simplest elements in fact. That problem is—Is the destination of Mr Parry’s funds in the society governed by the nomination or by the will? The solution depends upon the construction to be given to section 25 of the Industrial and Provident Societies Act 1893. That section provides that “a member may,” in writing, “nominate any person . . . to . . . whom his property in the society, whether in shares, loans, or deposits, or so much thereof as is specified in such nomination if the nomination does not comprise the whole, shall be transferred at his decease, provided that the amount credited to him in the books of the society does not then exceed £100 sterling.” There are further provisions made for the revocation or variation of the nomination by a similar document, and by sub-section 3 it is provided that “the society shall keep a book wherein the names of all persons so nominated, and of all revocations or variations, if any, of such nominations, shall be regularly entered, and the property comprised in any such nomination shall be payable or transferable to the nominees.” The question of construction involves the determination of what is the point of time at which the amount with the society is to be reckoned. If at that point it is under or over £100, then the nomination or the will respectively will regulate its disposal.

I think that the argument for the appellants was sound, to the effect that it is not illegitimate to view the scheme of this statute as one which fits in with the general scheme of legislation for the disposal at death of small estates in this country. It is not disputed that if estates, by which I mean what is *in bonis* of a citizen at the time of his decease, do not exceed £100, then in such cases the expense and formalities of probate and the payment of duty are avoided. It is accordingly clear that the legislation with regard to the Industrial and Provident Societies and the Inland Revenue legislation would be worked together, without either hiatus or overlapping, if the date of the decease was taken as the point of time when the calculation of the figure governed by the nomination is to be made. Such a consideration, however, while legitimate, is

not entirely conclusive, and is all the less so because in a certain aspect the point of public convenience may prove in a matter of construction rather a temptation than a guide. On the other hand, one cannot peruse the opinions of the learned Judges in the Court below without feeling how evenly balanced are the scales which incline on this sub-section to the one construction or the other, and I think that it is in just such a case that a view of the general scheme of legislation is not out of place.

It appears to me that some assistance is obtained on this subject from rule 12 of the appellants society, which deals with the subject of nomination by members. This is one of a body of rules made in terms of the statute, and it provides that "the secretary shall keep a book in which he shall register or record all nominations made by members . . . to whom such nominator's shares (the term 'shares' including for the purposes of this rule loans and deposits) shall be transferred at his decease, provided that the amount credited to him in the books of the society does not exceed £100." I do not consider it doubtful that this proviso as to the amount credited to the member not exceeding £100 is a proviso applicable to the time of transfer, and the time of transfer is to be the decease of the member. The rule appears to me to stipulate quite plainly that the nomination shall be effective for the purposes of transfer as at the date of the member's death, if at that date the amount credited to him does not exceed £100. I now put that alongside of the nomination by Mr Parry in this case, which was in favour of his son-in-law, in the language quoted, namely, "to whom shall be transferred any property in the society, whether in shares, loans, or deposits, at my decease." It would appear, accordingly, that both the society on the one hand, and the member, Mr Parry, on the other, accepted the situation that the nomination governed the state of affairs at the date of the latter's death, if at that time his property in the society did not exceed £100.

All this, however, although it also fits in with the scheme of general legislation, would still not be conclusive on a construction of the language of section 25 itself. After repeated consideration I am of opinion that the construction put upon that section by Farwell, L.J., is correct. He says—"I cannot come to the conclusion that the word 'then' in the section means anything but 'at his decease,' and therefore I think that in this case the nomination must fail for that reason." When the section stipulates that a member may nominate the person to whom his property "shall be transferred at his decease provided that the amount credited to him in the books of the society does not then exceed £100 sterling, it does not appear to me, with the greatest respect for Vaughan Williams, L.J., to be legitimate to cite the section with the omission of those words "to whom his property shall be transferred at his de-

cease," and so to be able to read back the date to that of the nomination itself. By this process of omission a solution, of course, becomes easy, but the words omitted appear to me to be the words which are crucial. The nomination of a person to whom the shares, &c., "shall be transferred at his decease, provided that the amount credited . . . does not then exceed £100," appears to me to fix the point of time "then" as the death of the shareholder. The subject does not admit of elaboration, but I am glad to think that this construction, which indeed I regard as the only legitimate one, is one which manifestly squares with the construction put upon their rights by the society and the shareholders themselves, and also with the general legislative scheme as to small estates to which I have referred. I entertain great apprehensions as to the disturbance of this construction and this scheme, and as to the hindrance to the simple operations of payment and withdrawal if the effect of a nomination be to attach particular funds and to prevent members or depositors from dealing freely with their means unless after execution at each transaction of a revocation or a fresh nomination. In the view which I take I do not think that the provisions of the statute warrants such results.

It is with real regret and much diffidence that I find myself out of agreement with my noble and learned friends whose judgments have just been delivered, but I am of opinion that the judgment of the Court below should be reversed, and that the suit should be dismissed.

Judgment appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—Danckwerts, K.C.—Burgis. Agents—Bower, Cotton, & Bower, for Aston, Harwood, & Somers, Manchester, Solicitors.

Counsel for the Respondent—F. W. R. Rycroft—G. J. Rycroft. Agents—Braikenbridge & Edwards, for H. Gilman Jones, Salford, Solicitors.

HOUSE OF LORDS.

Thursday, March 7, 1912.

(Before the Lord Chancellor (Loreburn),
Viscount Haldane, Lords Alverstone,
and Atkinson.)

SUN INSURANCE OFFICE *v.* CLARK.
(ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.)

*Revenue—Income Tax Act 1842 (5 and 6
Vict. cap. 35), Sched. D—Insurance Com-
pany—Estimation of Profits—Deduction
for Unexpired Risks.*

In estimating the average of profits of an insurance company assessable to income tax it is a question of fact