

future"—to say that is I think *ultra vires* of the arbiter, the parties having so expressed themselves as to indicate that they meant to refer to the arbiter only the damage for a time, the damage sustained by any failure on the part of the landlord. It is quite sufficient in regard to the rest of the case to say that the judgment complained of applies equally to the fence. I should not say equally perhaps, because one can see room for distinction and argument; still, considering that matter to the best of my ability, I think it impossible to distinguish between them, and I do not think a judgment giving a slump sum of damages for one fence existing rather than another—I mean an average or even sum from 1880 to the end of the lease—can be sustained. I think the interlocutor of the Lord Ordinary should be adhered to.

LORD CRAIGHILL—I am entirely of the same opinion. I agree with all that has been said by your Lordship and by Lord Young, and I would only add the expression of a hope that the parties will not think it necessary to go before arbiters or any Court with respect to the matter about which they have now been in controversy. They have led a proof, and we have had what has been advanced on the one side and on the other, and I think they will act to their common advantage if the controversy can be reasonably settled.

LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Pursuer—Mackintosh—Low.
Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defender—Lang—Lyell. Agents
—Home & Lyell, W.S.

Saturday, May 16.

SECOND DIVISION.

[Sheriff of the Lothians.

SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY *v.* STEWART AND OTHERS.

Building Society—Winding up—Withdrawing Members' Liability for Losses appearing in Balance-Sheet Prepared after Date of Withdrawal, but for Year previous to that Date.

The rules of a building society provided—“Any member holding unadvanced shares shall be entitled to withdraw from the society on application to the directors in writing, and shall be entitled to receive the amount standing at his credit in the books of the society in respect of his shares as at the immediately preceding annual balance, together with the amount of subscriptions paid by him thereafter.” *Held* that under this rule a member withdrawing on 3d March 1881 was liable to a deduction of 40 per cent. on the value of his shares in respect of losses incurred by the society, as appearing from the balance-sheet for the

year ending 31st January 1881, although that balance-sheet was approved after the date of his withdrawal.

Building Society—Cancellation of Notice of Withdrawal—Conditional Cancellation.

A shareholders' committee of investigation of a building society reported that in view of the unsatisfactory financial position of the society, and of the large proportion of shareholders who had given notice of withdrawal, two courses only could be adopted—(1) liquidation, and (2) to ask the withdrawing members to cancel their notices, but “only on the express understanding that these cancellings are not to be used unless shareholders representing at least nine-tenths of the amount under notice of withdrawal should cancel their notices within a limited time.” The committee “strongly recommended” the second course, and a meeting of the society subsequently “gave a general approval to the committee's report.” The form of cancellation sent out to withdrawing members was enclosed along with a circular bearing reference to the committee's report, and was unconditional in its terms. Nine-tenths of the members who had withdrawn did not cancel their notices.

Held, in the liquidation of the society, that the cancellation was conditional on nine-tenths of the withdrawing members cancelling, and as this condition had not been purified the notice of withdrawal remained uncancelled.

The Scottish Property Investment Company Building Society was a society incorporated under the Building Societies Act 1874. By the 2d of its rules its objects were declared to be—“By the subscriptions or payments of its members, to form a fund in shares of £25 each—half-shares of £12, 10s. each, and quarter-shares of £6, 5s. each—out of which fund members who are desirous of erecting or acquiring dwelling-houses, or other heritable property, may receive advances upon heritable security by way of mortgage to enable them to do so, and generally the objects allowed by ‘The Building Societies Act 1874.’ No preferential shares shall be issued.”

In November 1881 an order was pronounced by the Sheriff of the Lothians directing the society to be wound up under supervision; and in August 1882 the liquidators petitioned the Sheriff to approve of the state of assets and liabilities, with relative schedules, which they had prepared and lodged in the Sheriff Court in terms of the Act of Sederunt 17th March 1882.

The state of assets and liabilities showed that the ordinary creditors would be paid in full, and the following schedules showed the proposed ranking of members of the society:—

Schedule G, containing the names and amount at the credit of members whose shares had matured regularly in terms of the rules. The amount due to members in this class, exclusive of interest, was £26, 12s.

Schedule H, containing the names and amount at the credit of borrowers whose properties had been sold by the society, leaving a surplus at their credit. The amount due to members of this class, exclusive of interest, was £358, 4s. 10d.

Schedule I, containing names of members whose shares were paid in advance, *i.e.*, who had

paid more than the subscriptions due thereon at the date of liquidation. The amount due to members of this class, exclusive of interest, was £15,603, 1s. 10d.

These three classes the liquidators proposed to rank *pari passu*, and to pay them in full out of the first funds coming into their hands, before any payment was made to the following classes of members.

Schedule K, containing the names and amount at the credit of members who had given notice to withdraw on or before 31st January 1881, and who were thus entitled to receive payment in accordance with the balance sheet of 31st January 1880, from which it appeared that the society was a solvent concern. The amount due to members of this class, exclusive of interest, was £960, 5s. 5d., and the liquidators proposed to pay each member embodied in this class in full, according to the priority of his notice of withdrawal, after those included in Schedules G, H, and I, but in priority to any other class of members.

Schedule L, containing names of members who gave notice to withdraw from the society after 31st January 1881, and who therefore fell (as the liquidators were advised) to receive payment of the amount of their subscriptions in accordance with the balance-sheet as made up and finally approved of for the year ending 31st January 1881, which balance-sheet showed a loss to the members of 40 per cent. on the amount of their subscriptions.

The liquidators proposed to pay each member in this category (who had paid in full the subscriptions due by him at the date of his withdrawal) the amount at his credit, less 40 per cent., as representing the loss shown on the balance-sheet, according to the priority of his notice.

Schedule M, containing the names of ordinary members who had not given notice of withdrawal. The amount at the credit of members in this position was £78,979, 8s. 7d., and the liquidators proposed to divide the remainder of the assets after payment of all the other members on the footing above mentioned *pari passu* among the members in this category according to the amount at their credit.

Notes of objection were lodged to several items in the state of assets and liabilities, but as two only of these objections were made the subject of decision by the Second Division in the appeal after mentioned, they alone need be detailed here.

I. The first objection was by Mr and Mrs J. C. Stewart, Mr G. W. Stewart, and Mr John Fortie, who were entered in Schedule L. They objected to the deduction of 40 per cent. on the amount of the shares in that schedule as proposed by the liquidators.

Answers were lodged by the liquidators, and also by James Coutts and certain other members who had been placed in Schedule M.

The following were the Rules of the Society bearing on the question:—

“21. The subscriptions on unadvanced shares shall be one shilling per share per fortnight; and shall be due and payable in advance, within the office of the society, on each alternate Tuesday.

“71. The books of the society shall be brought to a balance and the profits ascertained, as on the first day of February in each year, in such way

as the directors shall think proper, under the advice of a chartered accountant, or a Fellow of the Faculty of Actuaries in Scotland, if they shall deem such advice necessary.

“72. The profits shall be placed to the credit of the holders of unadvanced shares, to an extent not exceeding five per cent. per annum on the amount standing at their credit in the books of the society.

“75. Any member holding unadvanced shares shall be entitled to withdraw from the society on application to the directors in writing, and shall be entitled to receive the amount standing at his credit in the books of the society in respect of his shares as at the immediately preceding annual balance, together with the amount of subscriptions paid by him thereafter. Interest, at such rate as the directors may from time to time fix, shall be allowed on the amount standing at such member's credit at the immediately preceding annual balance, provided that the date of his notice of withdrawal is at least six months subsequent to the date of said annual balance.

“76. A fee of one shilling shall be charged against the member for each share he withdraws, unless he shall at the same time re-enter with the society for a new share instead thereof. Applications for withdrawal shall be considered and granted by the directors in the order of priority of the dates on which these applications shall have been received by the manager, and payment shall be made to such applicants so soon as the directors shall have sufficient funds at their disposal, and not otherwise, but such member shall be entitled to bank interest on the amount due to him from the date of his application being received.”

The admitted facts were these—Mr J. C. Stewart and Mr G. W. Stewart gave notice of withdrawal on 3d March 1881, and Mrs Stewart and Mr John Stewart on 4th March. At these dates no balance-sheet had been made up for the year ending 31st January 1881, but a balance-sheet for that year was made up and embodied in the directors' annual report of date 30th March 1881, and was submitted to a meeting of the society on 2d May, when it was disapproved, and a committee appointed to investigate. An amended balance-sheet was prepared and was appended to a report by the directors of date 20th July. In this report there was a note to the effect that “Shares of which notice of withdrawal has been given since 31st January 1881 will be subject to a rateable proportion of the estimated deficiency as appearing in this balance-sheet.” In the balance-sheet the alleged deficiency was estimated to be equal to 40 per cent., or 8s. per £ of the value of the unadvanced shares. No sum was written off the sums standing at the credit of the objectors. The original balance-sheet showed a profit for the year of £7628, and the amended balance-sheet a loss of £45,021. There was no evidence that any part of this loss had occurred between the dates of the two balance sheets. The amended balance-sheet was approved of by the Society on 28th July. The objectors also stated that they had been excluded from taking part in the business of the Society, and in particular in the meetings of 2d May and 28th July.

The objectors pleaded—“(2) The objectors, as at the dates of their withdrawals, ceased to be members of the Society, and became creditors

thereof for the sums standing at their credit as condescended on, as in a question with those remaining members of the Society. (3) It was incompetent and *ultra vires* of the Society, or the remanent members thereof, to prejudice the rights of the objectors to payment of the full sums at their credit by resolutions or actings subsequent to the dates of said withdrawals; and the objectors are accordingly not bound by said resolutions and actings, but entitled to a ranking, according to priority of notice, as claimed. (5) The objectors' notices of withdrawal having been duly given and accepted, they fall to be ranked in the liquidation for the sums claimed, and that either on the principle of reference to the balance-sheet of January 1880 or March 1881, as condescended on. (6) There being no ground or reason for making a distinction in ranking, as before and after 31st January 1881, the true and sole principle of ranking being that effect should be given to notices of withdrawal in order of priority, and that for sums at the credit of the respective withdrawers at dates of notice, the statements and schedules of the liquidators fall to be amended, and therefore Schedule K should be deleted, and the entries therein massed with Schedule L."

The liquidators pleaded—"(5) In respect that notice of withdrawal was given by the members embodied in Schedule K prior to 31st January 1881, they are entitled to receive payment of the amount at their credit at 31st January 1880, being the date of the immediately preceding annual balance. (7) The sums standing at the credit of the objectors in the balance-sheet of 31st January 1881, by the annual balance immediately preceding their notices, being the sums paid by them on their respective shares, subject to deduction of 40 per cent. as the proportion of the estimated loss which had been incurred at the date of the balance-sheet, they are only entitled to be ranked in the liquidation for the sums payable to them respectively, in terms of the balance-sheet."

II. The second of the present objections was stated by John Mitchell, whose name appeared in Schedule M as an ordinary non-withdrawing member, and the question raised by him was whether a notice of withdrawal admittedly sent by him to the directors of the Society on 11th March 1881 had been (as the liquidators maintained) subsequently cancelled unconditionally.

The following were the material facts bearing on this question:—The committee of shareholders appointed (as already mentioned) to investigate the Society's affairs in consequence of the unsatisfactory report by the directors of date 30th March, reported (on 20th June), *inter alia*, as follows:—"In view of the result brought out in the accountant's report, which shows an estimated deficiency of close upon £50,000, and looking to the fact that at 15th May last unadvanced members holding upwards of £53,000 of share capital had given notice to withdraw their shares (which sum has since been increased to about £60,000), and counsel being of opinion that those members who have so given notice to withdraw are entitled to be paid in full in the order of priority of their applications to withdraw, the committee consider that only one or other of the following courses can be adopted. These are—(1) To apply for liquidation imme-

diately. (2) To ask unadvanced members who have given notice of withdrawal to cancel their notices; and thereafter, by the necessary alteration of and addition to the rules, to alter the constitution of the Society, and especially to restrict the area of its loan operations to Midlothian, where the Society have made little or no losses. But inasmuch as it would obviously be inequitable that some unadvanced members should cancel their notices of withdrawal, while others did not, the committee suggest that, should the second course be adopted, members should be asked to cancel their notices only on the express understanding that these cancellings are not to be used unless shareholders representing at least nine-tenths of the amount under notice of withdrawal should cancel their notices within a limited time. It is for the shareholders to say which of these two courses should be followed, but a majority of the committee strongly recommend the adoption of the second course."

On 22d June an adjourned meeting of the Society "gave (as its minutes bore) a general approval to the committee's report, and the committee were instructed to send out circulars to those unadvanced shareholders who had given notice of withdrawal, inviting them to cancel their notices."

On 20th July the directors sent out the following circular:—"The directors beg to refer to their report dated 30th March last, and to the reports by the committee appointed by the shareholders which have been read at the recent meetings of the Society. . . . The shareholders' committee have requested the directors to give an opportunity to those members who have given notice of withdrawal to cancel their notices, in order to facilitate the proposed arrangements. The directors accordingly enclose a form to be filled up and returned by such members as desire to do so, and they will allow notices to be thus cancelled up till the end of August."

The cancellation form was in these terms:—"I hereby cancel the notice of withdrawal of my shares in The Scottish Property Investment Company Building Society." Then followed blanks for signature, occupation, and address.

The objector had not returned his cancellation form on 19th September, having in the meanwhile received two other circulars from the Society, dated respectively 8th August and 9th September, urging him to cancel, but making no reference to the report of the committee, or to the condition therein contained.

It was admitted that shareholders representing nine-tenths of the amount under notice of withdrawal had not cancelled their notices at the date of the liquidation.

The objector pleaded—"(2) In any event the objector is entitled to be treated as a withdrawn shareholder, in respect that, *first*, his notice of withdrawal could not be, or at least never was, validly cancelled; and *second*, any cancellation of his notice was under a condition which has never been fulfilled."

The liquidator pleaded—"(1) The objector having unconditionally cancelled his notice of withdrawal, he thereupon ceased to have any of the rights or privileges of a member of the Society who had given notice of withdrawal."

J. C. Stewart and others, who also lodged answers to the present note of objections, stated

a similar plea to that of the liquidators.

On 11th August 1884 the Sheriff-Substitute (HAMILTON) approved of the scheme of ranking set forth in the state of assets and liabilities, subject to certain alterations on matters which were not at the present stage discussed on appeal.

“*Note.*—In this liquidation the ordinary debts due by the Society have now been fully paid or provided for, and the time has arrived for determining the rights of the members *inter se*, with a view to the distribution of the remaining funds.

“In connection with the scheme of ranking submitted by the liquidators, questions affecting large classes of members have arisen, with reference to which a record has been made up, and a full discussion has taken place before the Sheriff-Substitute. These are dealt with in the above interlocutor, leaving for after consideration any special questions that may be raised with regard to the rights or claims of individual members.

“The following are the points now decided—(1) That the members whose names appear in Schedules K and L are entitled to a preferable ranking, having become creditors of the Society as from the dates of their respective notices of withdrawal, rules 75 and 76 of the Society’s old rules, as read in the light of two recent English decisions, *Norwich and Norfolk Provident Building Society*, July 5, 1876, 45 L. J., Chanc. 785; *Blackburn and District Benefit Building Society*, July 6, 1883, 24 Law Reports, Chanc. 421. (2) That while the members in Schedule K are entitled to be paid the full amount of their subscriptions, those in Schedule L must suffer a deduction therefrom of 40 per cent. Both classes are withdrawing shareholders, and as such fall to be dealt with in terms of the 75th rule—*i.e.*, they are to be paid the amount standing at their credit as at the immediately preceding annual balance. Now, the balance-sheet of 31st January 1880, which is that applicable to the members included in Schedule K, shewed that the Society was then a solvent concern, whereas the balance-sheet of 31st January 1881, in accordance with which the members included in Schedule L are to be paid, as amended and ultimately adopted by the Society, shewed a deficiency equal to 40 per cent of the share capital. To pay the members in Schedule L in full would therefore be contrary to the express terms of the rule above referred to. It would also be unjust to the other shareholders of the Society. In support of his contention that the L shareholders are entitled to be paid without deduction, counsel for the objectors John Stewart and others founded strongly upon a recent decision of the Second Division of the Court of Session in the case of *Galbraith v. The Glasgow Working Men’s Provident Investment Building Society* [28th May 1884, 21 Scot. Law Rep. 782.] The Sheriff-Substitute cannot, however, regard that decision as in point, seeing that the rule regulating the rights of withdrawing shareholders which was there under consideration differs materially from that upon which the question here turns. In the Glasgow society’s rule there is no reference to a balance-sheet. (3) That members in the position of the objector John Mitchell, who, having given notice of

withdrawal afterwards cancelled it, are rightly classed in Schedule M, along with the general body of non-withdrawing members. So far as appears such cancellation was absolute and unconditional; at least there is not sufficient evidence of a conditional contract having been made with the society. Upon this point the Sheriff-Substitute may refer to the circulars issued by the directors on 8th August and 9th September 1881.

John Crawford Stewart and others appealed to the Second Division, and argued—The present objectors were entitled to a preferential ranking according to priority of notice, and to the full value of their shares in so far as paid up, and not 60 per cent. thereof as proposed by the liquidators. From the time they gave notice of withdrawal the objectors ceased to be members of the Society (*quoad* non-withdrawing members) and became its creditors—*The Norwich and Norfolk Provident Building Society*, July 5, 1876. 45 L.J. Chanc. 785. The right of an unadvanced shareholder who withdrew consisted of a right to so much of £25 as he had already put in, with interest, and also to so much of the profits as should have *de facto* been put into the books under his name. No deduction such as was here proposed was permissible—*Glasgow Working Men’s Provident Investment Building Society*, May 28, 1884, 21 S. L.R. 782. No doubt it followed that he was also not entitled to profits accrued but not inserted in the books; but then he had voluntarily chosen a date for withdrawing before the new balance-sheet had been drawn up. Rule 75 spoke of the amount in the “books” of the Society, not in the “balance-sheet.” The rule merely fixed a date, and had nothing further to do with the balance-sheet. It was not suggested that a withdrawal meant a winding-up. Yet a deduction of 40 per cent. was really a break-up valuation. A withdrawing shareholder as a creditor *inter socios* had a right to a sum of money from a living concern. If the Society had no realisable assets, then liquidation must follow. But to go on and yet to deduct was unjust to the withdrawing shareholders. The date of withdrawal was the date of the notice to withdraw; after that the shareholder had no vote. So this question of value, which was so eminently a matter of opinion, was decided behind the shareholder’s back. Further, the deficiency was not the result of the year’s trading merely; it was the accumulation of several years during which members had been withdrawing without objection. At all events, the objector’s rights were to be settled by the original and not the amended balance-sheet.

Argued for John Mitchell—A member once withdrawn ceased to be a member, and became a creditor of the company, and it was an incompetent way of re-entering merely to cancel the notice of withdrawal. It did not bind the directors, and if it did not do so it could not bind the other party to it. Then (2) the cancellation was conditional. The form of cancellation was enclosed along with a circular which made reference to the report of the committee of shareholders setting forth the condition that the cancellation was contingent on nine-tenths of the withdrawing members also cancelling their notices of withdrawal, and nine-tenths did not do so. It followed that the withdrawing members, even though they did return notices

of cancellation, remained free—*Mason v. Benhar Coal Company*, June 2, 1882, 9 R. 883; *in re Richmond Hill Hotel Company—Pellatt's Case*, April 13, 1867, L.R. 2 Chanc. App. 527; *in re Anglo-Danish and Baltic Steam Navigation Company—Sahlgreen and Carrall's Case*, Jan. 14, 1868, L.R. 3 Chanc. App. 323; *Scottish Petroleum Company*, Feb 3, 1881, L.R. 17 Chanc. Div. 373. The Society were bound to give notice of their change of intention, if their intention as to the condition of nine-tenths had changed—*Trail v. Baring*, March 15, 1864, 4 De Gex, Jon., and Sm. 319.

The argument against both the foregoing parties was maintained by James Coutts, an unadvanced member, not by the liquidators. He argued (1) as against Stewart and others. —The meaning of rule 75 was that you were to take the position of withdrawing not according to what actually appeared from the books of the Society, but according to the balance-sheet which was, or was to be in ordinary course, made up, as for the year ending immediately previous to the date of withdrawal. Rule 71 showed that, if necessary, there was in a balance-sheet to be a re-valuation of assets, and a writing of losses from the shares. The re-valuation was to be taken to be of the property as at 1st February 1881, in the absence of contrary evidence, and there was no proof of a change of circumstances between that date and the date of the amended balance-sheet. Then (2) as against Mitchell, the cancellation was unconditional. In form it was so, and the condition was not imported by reference. It was not clear that the Society had ever made it a condition, and there was no proof that the objector had ever read the committee's report. Even if it was to be held as imported by reason of the circular accompanying the form sent, the objector did not reply to that circular but to others of a later date, in which no mention was made of any condition. There was no special form for re-entering as a shareholder, and the form of cancelling a notice of withdrawal was a perfectly competent form of becoming a shareholder again.

At advising—

LORD CRAIGHILL—This Society is now in liquidation. A scheme of division of the funds has been prepared, but those concerned are not agreed upon the proposals exhibited in the scheme. Several points of controversy have been raised, and these were laid before the Sheriff of Midlothian, who has pronounced the decision against which the present appeal has been presented.

The questions upon which the Sheriff has given judgment relate to the rights of members, or of those who were members, but who say that they are no longer members of the Society, having withdrawn before the order for liquidation was pronounced. So far as presented to us, the questions in dispute touch only unadvanced members who have given notice of withdrawal. These are of three classes—*first*, those who gave notice before 31st January 1881; *second*, those who gave notice after that date, but before any balance-sheet, as at 1st February 1881, was approved of by the Society; and *third*, those who had given notice after the 31st January 1881, and before any balance-sheet as at 1st February 1881 was approved of, but whose withdrawal had, as mem-

bers in competition with them allege, been subsequently cancelled. With regard to the rights of the first of these classes all parties are agreed. Those who withdrew before 31st January 1881 are admittedly entitled to payment preferably to either of the other classes of unadvanced members.

As regards those who gave notice on or after 1st February 1881, there is a contention waged between them and the members who never sought to withdraw. The latter do not say that they and the members who gave notice of withdrawal subsequently to 31st January 1881 must be ranked *pari passu*, but only that the sum payable to those withdrawing shall be affected by the balance of the books struck as at 1st February 1881. Stewart and other appellants maintain a contrary opinion, upon two grounds—*first*, that the state of those accounts appearing on the books of the Society as at 1st February 1881 is the measure of the debt due to them at the time notice of withdrawal was given, and consequently is the sum for which they are now entitled to be ranked; and *second*, that independently of this consideration they cannot be affected by apparent losses resulting from depreciation of property so long as the Society is a going concern.

On the first of these contentions I have no difficulty in deciding against the appellants. Rule 75 does not mean that unadvanced members who have given notice of withdrawal after 31st January in any year shall be entitled to receive the amount standing at their credit in the books of the Society at 1st February, but means that they shall be entitled to receive the amount standing at their credit when the balance-sheet as at 1st February has been struck and the result has been carried to their several accounts. Had the appellants contended that “as at the immediately preceding balance” means in this case the balance struck after 1880, which was the latest balance existing when the notices of withdrawal were given, the words of the rule would have given some plausibility to their contention, but when they discard that and say that it is not a balance but a date which is to regulate the decision, I am clear that their reading of rule 75 is unsound.

As to the second contention of the appellants, it seems to me to be overruled by the conclusion as to the reading of rule 75 which I have adopted. If the balance when it is struck is to affect the sum at the credit of the appellant in the books of the Society, this implies necessarily that loss as well as profit must enter the account. The appellants argued that if they were not to be paid the sum which they claimed, the case was not one for reduction of the sum at their credit on 1st February, but for liquidation of the affairs of the Society. Here, however, there is an obvious misapprehension. The Society was not necessarily ripe for liquidation. When there was struck a balance by which a portion of the loss which the Society had sustained in the preceding year was thrown upon the appellant, the Society were ready to pay that which was the true amount of its debt according to the reading of the rules of the Society, and when they get what is their due, if all others also got what is due to them, the case is one simply for payment of the diminished claim and not for general liquidation. On the questions raised

under the appeal of Stewart and others, therefore, I think the deliverance of the Sheriff ought to be affirmed.

The objector John Mitchell comes forward as another appellant. He was one of many unadvanced members who gave notice of withdrawal after 1st February 1881, but before the balance for the preceding year had been struck. He is, however, said subsequently to have cancelled this notice of withdrawal, and consequently to be in the same predicament as he would have been if no notice of withdrawal had been given to the Society. This issue is one of fact, and parties are at issue upon the fact. That notice of withdrawal was conditionally cancelled is admitted by Mitchell and those who are in the same situation, and the point to be determined truly is whether the cancellation was or was not to be used unless shareholders representing at least nine-tenths of the amount under notice of withdrawal should cancel their notices within a limited time. If it was conditional the withdrawal must remain good, because nine-tenths of those who had given notice did not cancel the notices they had given. If, on the other hand, the cancellation was absolute, Mitchell and those who did as he did are in the same position as the ordinary body of non-withdrawing members. The views of the Sheriff-Substitute on this point are explained in the note to his interlocutor—"That members in the position of the objector John Mitchell, who having given notice of withdrawal afterwards cancelled it, are rightly classed in Schedule M, along with the general body of non-withdrawing members. So far as appears, such cancellation was absolute and unconditional, at least there is not sufficient evidence of a conditional contract having been made with the Society."

There is no doubt the Sheriff is right in saying, so far as appears on the face of the cancellation of notice of withdrawal, that it was unconditional. And if this is the only thing which is to be regarded, the case of these appellants is plainly ill founded. But they say that the condition is made manifest by the proceedings of the Society, and that they having sent in the cancellation of notices of withdrawal upon the invitation of the Society, and on the condition on which this invitation was given, it must be held that they are in the same situation as they would have been if the condition had been expressed in the document itself. There was at the debate no dispute as to the competency of proving otherwise than by the notice of cancellation that the cancellation was conditional. The proof upon it may be sufficient or insufficient, but should it be considered sufficient the Court are not precluded from giving, but are entitled to give, effect to the condition which has been established. In this situation it is necessary to refer to the proceedings of the Society for the purpose of ascertaining what the facts are as to which the parties are in controversy.

For some time prior to 1st February 1881 the Society cannot be said to have been in a very prosperous condition. Apprehensions apparently were entertained on the part of many members, and prior to the 31st January 1881 many notices of withdrawal by unadvanced members had been sent in. Things did not improve after 1st February. On the contrary, the distrust of

many members seems to have increased, and the consequence was that the notices of withdrawal were so numerous that in a report by the directors to the shareholders of the Society, bearing date 30th March 1881, it was intimated that "an excessive number of applications for the withdrawal of shares have been received since the close of the year's accounts. These withdrawals to a large extent, together with the payment of mature shares, the directors have met in terms of the rules; but this they have deemed it right to discontinue for the present." Not unnaturally, this announcement created alarm in the minds of the advanced shareholders by whom notice of withdrawal had been given, and the consequence was the appointment of a committee of advanced shareholders on the 18th of April 1881 to make investigation into the affairs of the company and report to their constituents their views upon the situation. The first of the committee's recommendations is set forth in their report as follows:—"The committee believe that with the general support of the depositors and unadvanced shareholders, the company will eventually to a large extent retrieve its position; and to attain this end they have considered a scheme which might command the confidence of the shareholders, but they have not had time to mature it for the present meeting. They trust, however, to be able to submit it to an adjourned meeting."

At the annual meeting of the society on the 2d May 1881, this report was brought under the consideration of the meeting, and it was approved of, the committee also being re-appointed. What they subsequently did is not shown by the papers which have been printed, but this is immaterial, because the question in which the unadvanced shareholders were concerned was taken up by a committee of shareholders, which also was re-appointed at the annual meeting held on 2d May 1881. The minute bears that the chairman then suggested that as the unadvanced shareholders had at a recent meeting appointed a committee of their number for certain purposes; it would be courteous that before proceeding with the further business of the annual meeting of the Society the committee should be invited to give in their report, and this suggestion having been approved of, the chairman of the committee, Mr Tait, introduced the subject, and the secretary of the committee, Mr Shaw, read the report of the committee. The minute further bears that Mr Shaw moved the approval of the report, and this was seconded by Mr Wilkie, and after some questions had been put to the meeting, and answered from the chair or by the officials, the report was approved, the committee was re-appointed, and the meeting was adjourned.

A committee of shareholders had also been appointed prior to the annual meeting of 2d May 1881, and that committee was reappointed at this meeting. They submitted a report at the adjourned annual meeting, held on the 22d June 1881, in which they said that only one or other of the following courses could be adopted—*first*, to apply for liquidation immediately; *secondly*, to ask unadvanced members who have given notice of withdrawal to cancel their notices, adding, however, this qualification to what they recommended—"Inasmuch as it would obviously be inequitable that some unadvanced members should cancel their notices of withdrawal while others did

not, the committee suggest that should the second course be adopted, members should be asked to cancel their notices only on the express understanding that these cancellings are not to be used unless shareholders representing at least nine-tenths of the amount under notice of withdrawal should cancel their notices within a limited time." The committee added that it was for the shareholders to say which of these two courses should be followed, but the majority of the committee strongly recommended the adoption of the second course. The meeting, the minutes bear, gave a general approval to the committee's report, and the committee were instructed to send out circulars to those unadvanced shareholders who had given notice of withdrawal, inviting them to cancel their notices. Notices were sent out accordingly, many were returned in compliance with the invitation, and among the others were cancellations by Mitchell, and those who along with him are the present appellants.

These being the facts of the case, I am of opinion that the cancellations in question were conditional. The notices were issued by the committee, who had power only to ask for conditional cancellations, and they were returned upon the understanding on which they had been solicited. This is my reading of the proceedings of the society, and I am glad that for the sake of those concerned with the management of its affairs, this is the conclusion at which I have arrived, for anything less creditable to the society than an opposite result could scarcely be imagined. Entertaining this view, I think the decision of the Sheriff-Substitute upon this point should be altered, and that the present appellants, in place of being placed with those who are in Schedule M, should be placed with those, and should have the same rights as are possessed by those, who are in Schedule L of the paper upon which judgment has been pronounced by the Sheriff-Substitute.

LORD RUTHERFURD CLARK and LORD YOUNG concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

"The Lords, having heard counsel for the appellants, and for the respondents James Coutts and John Mitchell, in respect of no opposition, find Schedules G, H, and K entitled to the preference conferred upon them in the scheme of ranking submitted by the liquidators: Find that the balance-sheet for the year ending 31st January 1881, approved on 28th July 1881, is the balance-sheet for said year, in accordance with which members withdrawing after 31st January 1881 fall to be paid, and that such members are entitled to payment at the rate of 60 per cent. upon the subscriptions standing at their credit in the books of the society at 31st January 1881, with bank interest thereon as provided by rule 76, according to priority of their respective notices to withdraw: Find in fact that the cancellation of his notice of withdrawal sent in by the respondent John Mitchell was conditional upon nine-tenths of the members who had given notice of

withdrawal, likewise cancelling their notices: Find further in fact that nine-tenths of the members under notice of withdrawal did not so cancel: Therefore find in law that the cancellations were inoperative, and that the party John Mitchell and other members in the same position are in the ranking entitled to all rights of withdrawing members, as of the dates when their respective notices of withdrawal were sent in: Appoint the expenses of the liquidators and the parties John Crawford Stewart and others, James Coutts, and John Mitchell in this Court as well as the Court below, as said expenses shall be taxed, to be paid by the liquidators out of the funds of the liquidation."

Counsel for J. C. Stewart and Others—J. P. B. Robertson—Shaw. Agents R. R. Simpson & Lawson, W.S.

Counsel for Liquidators—Gloag—Strachan. Agents—Davidson & Syme, W.S.

Counsel for James Coutts—Pearson—Orr. Agents—Irons, Roberts, & Lewis, S.S.C.

Counsel for Mitchell—Guthrie Smith—Guthrie. Agents—Snody & Asher, S.S.C.

Saturday, May 16.

SECOND DIVISION.

[Lord McLaren, Ordinary.

CLARK v. MONTEITH AND ANOTHER.

Process—Diligence—Charge—Appeal to House of Lords—Execution Pending Appeal—Effect of Order of House of Lords on Unexpired Charge on Decree for Expenses.

The unsuccessful party in an action was charged by the agent disburser of the successful party to pay the expenses for which decree had been obtained. Before the charge expired he appealed the cause to the House of Lords, and served his petition of appeal. The respondents having three months thereafter obtained an order for execution pending appeal, proceeded to execute a pouncing without giving any fresh charge. *Held* that no fresh charge was necessary, and that the proceedings were competent.

In an action raised in the Court of Session in December 1883 by Andrew Clark, S.S.C., against Mrs Margaret Jack Field or Monteith for payment of an account alleged by him to be due to him by her, decree of absolvitor was pronounced by the Lord Ordinary in March 1884, and subsequently adhered to by the Second Division in June thereafter. Decree for the defender's account of expenses was thereafter pronounced on 3d July following, in name of William Paterson, solicitor, as agent disburser for the defender. This decree was extracted by Paterson, and Clark was charged on it on 17th July. On 29th July Clark presented a petition of appeal to the House of Lords against the interlocutors of the Lord Ordinary and the Second Division, and obtained an order for service, which was served upon Paterson for himself, and for behoof of Mrs Monteith, on 1st August 1884. Cases were