say I was a good deal instructed by the amount of authority cited against the competency of this action, but however much I may be moved by that authority, I must look upon the opinions we have had quoted to-day as mere *obiter dicta*. I am on that account inclined to follow the opinions which have been delivered by your Lordships.

Lord Craighill was absent.

The Court pronounced this interlocutor:—

"The Court sustained the appeal and recalled the interlocutors of the Sheriffs, repelled the two pleas for the defenders above quoted and remitted to the Sheriff with instructions to proceed as accords."

Counsel for Pursuer (Appellant) — Rhind — Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders (Respondents)—R. Johnstone—R. V. Campbell. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, July 16.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

AULD *v.* GLASGOW WORKING-MEN'S PROVIDENT INVESTMENT BUILDING SOCIETY.

Building Society—Withdrawal from Membership—Rules—Casus improvisus—Ultra vires.

A registered building society, which consisted, *inter alios*, of investing members who were entitled under the rules to withdraw from the society and receive payment of the sums at their credit on giving certain notice, found itself exposed to the risk of losses owing to serious depreciation in the value of the properties held by it in security for advances made in the course of its business. The rules of the society contained no provision for such an event. The society at an annual general meeting adopted by a majority a resolution to make a deduction from the shareholders' accounts at the rate of 7s. 6d. in the pound, which was carried into effect by debiting each shareholder at that rate on his account, and carrying the amount so brought out to a suspense account. Thereafter a shareholder who objected to this course claimed to be paid out under the rules, on the footing that the resolution was *ultra vires*, and that the deduction could not therefore be made. *Held* (*diss.* Lord Justice-Clerk) that the course adopted was not *ultra vires*, and that the pursuer was entitled to payment only of the sum at his credit under the deduction.

The Glasgow Working-Men's Provident Investment Building Society was a building society incorporated under the Building Societies Act 1874, having its office in Glasgow. The object of the society, as stated in its rules, was to afford a safe and ready medium for the investment of the savings of the middle and working classes, and to make advances on heritable security and to provide means to enable members to improve, erect, or purchase dwelling-houses and acquire heritable property. The shares were of two kinds, £10 shares and £25 shares, which were paid up at 6d. per week till realised, or which might be paid up in one sum. The society also received deposits from members or others in accordance with certain provisions specified in its rules. Members were either "advanced" or "unadvanced," the liability of the former being fixed by the rules as the amount actually paid or in arrear on his shares, and that of the latter being the amount payable on his shares under any bond granted to the society or under the rules.

Rule 8 provided that each member should be furnished with a copy of the rules and a pass-book, in which all payments should be entered and initialed by such persons at the head office as may be authorised to receive the money, and that these entries so initialed should be binding on the society.

Rule 10 was as follows — "*Withdrawal of Members and Payment of Interest.* — Any member holding a share or shares upon which no advance has been made, may withdraw the whole or any portion of the sum at his credit twenty-eight days after he shall have given notice of his intention to do so, and left his pass-book at the office. On funds being realised, such members shall be paid in rotation according to the priority of their notices, and interest shall be allowed at the rate of four per cent. per annum, or such other rate as may be fixed from time to time by the directors from the last division of profits up to the date of such notice. On withdrawing in full the pass-book shall be given up."

"Rule 12. *Payment of Realised Shares.*—Members shall be entitled to receive payment of their shares when realised, as the funds of the society permit, in rotation, according to the dates of their applications therefor, provided no unpaid advance has been made thereon; and the society shall be entitled any time after the shares have been realised to pay them off."

"Rule 44. *General Meetings.*—A general meeting of the members shall be held annually in the month of March or April, for ordinary business, and a report and statement of accounts, with a balance-sheet for the year ending 18th Feburary preceding, shall be submitted; such report and balance-sheet having been previously printed and a copy sent to each member four days at least before the meeting." . . .

Rule 45 made provisions for the calling of special meetings.

"Rule 49. *Appropriation of Surplus.*—If at the annual balances a surplus profit remains after providing for expenses of management and interest on the accounts of investing members and depositors, such surplus shall be carried to the account of a general reserve or guarantee fund, which fund shall be available for the purposes of the society." . . .

James Auld, engineer in Glasgow, was an investing or unadvanced member of the society. After the failure of the City of Glasgow Bank in 1878 the society began to get into financial difficulties from many of the investing members withdrawing their money, and the society having to assume the management of the properties of borrowing members who had become bankrupt.

At a meeting of the directors held on 1st December 1881, in view of the position of the society's affairs, a resolution was arrived at which is stated as follows in the minute of meeting:— . . . "As the society has been reduced in extent to nearly one-half, it was thought very unfair that those shareholders who had remained in the society should have the whole risk of possible losses laid upon their shoulders—it was resolved to recommend to the next general meeting of shareholders to set aside a sum to meet any such risk, and thereby retain from shareholders withdrawing a contribution thereto, and with that view it was agreed that the executive committee be empowered to put before a neutral valuator, for his valuation, such properties as they consider there is the slightest possibility of a loss, and to give all the necessary instructions connected therewith."

The executive committee employed Mr Thomas Binnie to value the properties of the society on which there was a probability of depreciation. The result of his investigation was stated in a report prepared by the directors, and submitted to the fifteenth annual meeting of the society on 29th March 1882. That report stated as follows:—"The society is composed of 265 members—127 holding 1398 £10 shares; 138 holding 1537 £25 shares. The depositors number 29. The profits for the year amount to £389, 12s., which would seem to warrant a dividend of two per cent., but in respect that shareholders representing about a third of the total capital of the society have intimated their withdrawal, the directors do not feel warranted in recommending a dividend. The large number withdrawing, and the consequent weakening of the society, prompted the directors to look carefully into the securities held by the society, as in the event of any of them turning out bad the loss would fall heavily on those shareholders who remained in the society, while the retiring shareholders would receive 20s. per £ and be free of all future risk. . . . The result of Mr Binnie's valuation was that he considered the society's advances in a number of cases safe, and in a number of others he thought that the present value was not sufficient to cover the society's loan. In summing up the amounts which Mr Binnie thought were not covered by the present value, the directors find that the depreciation amounts to the sum of £8487, 16s. Against this deficiency there falls to be deducted the sums at credit of reserve fund (£1592, 5s. 3d.) and profit and loss account (£389, 12s.), thus leaving a balance not provided for of £6505, 18s. 9d., to meet which, for the safety of the shareholders remaining in the society, and as a prudent step of management, the directors recommend that a sum of 7s. 6d. per £ be deducted from all the shareholders' accounts (exclusive of sums paid in since 1881) and placed to a suspense account."

This report was adopted by a large majority of the members present.

On 8th May following Auld wrote to the managers of the society intimating his withdrawal in terms of rule 10, and desiring payment of the sum at his credit in twenty-eight days from that date. At the same time he delivered up his pass-book,

In June 1884 he raised the present action against the society for payment of £97, 2s. 8d., which he alleged was the amount at his credit with the society on 18th February 1881 (being the date of the annual balance), and which he was entitled to receive within twenty-eight days from the date of his withdrawal. He stated further that the attempted deduction of 7s. 6d. per £ from the shareholders' account resolved on at the meeting of 29th March was *ultra vires* of the society.

The society stated in defence that in consequence of the resolution of 29th March there fell to be deducted from the sum of £97, 2s. 8d. the sum at the pursuer's credit as at 18th February 1881, the sum of £36, 8s. 6d., making the sum at his credit at the date of his withdrawal £60, 14s. 2d., which sum they had tendered to the pursuer, and on his refusing to accept it lodged it in bank on deposit-receipt in trust for him.

They stated further that the said resolution was within the powers of the society; the possibility of the said society becoming embarrassed and losing its funds by depreciation of property or otherwise was not provided for in the rules. The state of the society in March 1882 was accordingly a *casus improvisus* which the society in general meeting assembled were entitled to provide for. If they had not done so the result would have been a rush of withdrawals, causing the ruin of the society, and with this result, that those who might happen to have their withdrawals in sooner than others by possibly a few hours might carry off the whole funds of the society. The said resolution was passed for the purpose and with the effect of equitably distributing the losses the society had suffered among all its members.

The pursuer pleaded—"The alleged resolution of 29th March 1882 was *ultra vires* and illegal; further, it does not (even if legal) exclude or interfere with pursuer's claim."

The defenders pleaded—"(2) The rules of the said society contain no provision to meet the case of a depreciation of its assets; the resolution to reduce the amounts at the credit of the members by 7s. 6d. per pound was in the circumstances a necessary and proper resolution to be passed, with a view to distributing the loss the society had sustained equitably amongst the members, in conformity with the general principles of the law of partnership. (3) The said resolution having been duly passed at a properly constituted meeting of the society, is binding on all the members thereof."

A proof was led.

The pursuer deponed that he was present at the meeting of 29th March and opposed the passing of the resolution to impose the deductions of 7s. 6d. in the pound from members' accounts, and voted against it.

Previous to the raising of the present case another case had been raised by a member of the society named Gray, in almost precisely similar circumstances to that of the present pursuer. It was decided by the same Sheriff-Substitute in favour of the pursuer (Gray). The proof in that case, in which William Rennie, the secretary of the society, was examined at considerable length with regard to the society's affairs, was held by the parties to this case as evidence *in causa* so far as applicable to the circumstances. Rennie deponed that the object of the resolution of 29th March

was that stated in the minute of meeting of directors of 1st December 1881 above quoted, and that there was nothing in the rules of the society designed to meet losses occurring, and that the directors had to apply their minds to it as they best could; that immediately after the meeting of 29th March the amounts standing at the credit of the shares in all the books were altered, each member being debited at the rate of 7s. 6d. per £, and a suspense account consisting of these sums being constituted; that in addition there was written off altogether the profit and loss account for that year, and the reserve fund, so that in the next account no reserve fund appeared, and no dividend was paid that year in consequence of the profit and loss account being absorbed. After allowing these there still remained out of the total which Mr Binnie had reported on as being the loss to the society, the sum of £6505, 18s. 9d., to meet which the deduction of 7s. 6d. per £ was agreed.

The Sheriff-Substitute (LEES), after findings in conformity with the facts above stated, found in law that the resolution of 29th March 1882 was not habile to deprive the pursuer of his rights as a shareholder of the society; therefore repelled the defences, and decerned against the defenders for payment to the pursuer of the sum of £97, 2s. 8d.

His Lordship's *note* referred to the note issued by him in *Gray's* case, from which the following passage is taken:—"The secretary of the society was examined at great length to show that the recommendation of the directors was a prudent step, and was made *bona fide*. The alternative it presented, it is said, to any shareholder of the society was that if he agreed to accept five-eighths of the amount due to him, he was likely to get it soon, and would escape the risk of further loss by the depreciation in the society's investments growing worse, while on the other hand he would, of course, lose the chance of any growth in their value. The members who remained in, it is said, while they took the chance of a greater depreciation, took also the chance of any rise in the value of the society's assets. It is not quite clear that this was the effect of the report, for the report does not bear that a member who accepted the diminished amount of its capital was not to take his chance also of the suspense list. Perhaps it was meant that he should forfeit any such advantage; but the report does not say so, but simply that the 7s. 6d. per pound should be deducted from all shareholders' accounts and placed to a suspense account. Now, in general, the meaning of a suspense account is a debt or list of debts, which, according as circumstances turn out, may or may not come to be paid, and the contingent right in which remains with the creditors whose claim is for the time deferred. It is not unfair, too, to assume that Mr Binnie, knowing the purpose for which the valuation was wanted, would very properly, for the society's sake, be careful to err on the side of safety, that is, to lean rather to underestimating than overestimating the present worth of its investments. And it will be noticed from the report of the directors for the succeeding year that, if this was his and their object, it has to some extent been realised, the investments having improved to the extent of nearly £400 in the twelve months.

"In the next place, it is to be noticed that the shareholders who remained in the society would get (according to the above specified condition of the defenders) not only all the growth on the amount of their own capital carried to the suspense account, but also all the growth on the capital of those who had left the society. Now, there is a material difference between excluding the withdrawing shareholders from all participation in any improvement of the suspense account and allowing them to participate in it. To say to such, 'We will give only five-eighths of what is due to you very soon, and the remaining three-eighths as soon afterwards as we can,' might by a liberal construction be held to be a phase of management; but it seems to me to say to them, 'If you think it prudent to avail yourself of the right to withdraw from the society, you shall forfeit three-eighths of your capital and all chance of ever getting any,' is certainly not a matter of management, but a fundamental change on the constitution and rules of the society as to the withdrawal of members. . . .

"Therefore the defenders are driven to maintain that the adoption of the resolution was sufficient to deprive the pursuer of his right to more than five-eighths of the sum at his credit with them. It is said that the resolution was equitable to prevent those members who had given a notice of withdrawal getting a preference over those who remained in the society, or who thought fit subsequently to withdraw. From the observations I have made above as to this suspense account, it may be doubted if the result of the resolution was not in reality to give the preference to those who left it. Now, there is a well-known mode by which a society such as this can put all its shareholders on a par, if it is not in a position to give each the full measure of his rights, but this would amount to an equalisation without a liquidation. And again, as regards the attempt to prevent those who were first in giving the notice of withdrawal from getting any advantage over those who subsequently did so, I think that such attempt was in the face of the rules and of legal right. The ordinary idea is first come first served, and the rule of law is that a court should aid the vigilant, while the rule of the society is that members are to be paid in rotation.

"Then it is said that the resolution was fair and reasonable, because its result was only to put matters in the books of the society into the position in which they were as matter of fact. Now here the pursuer had paid all he had to pay. Under rule 2 he was exposed to no further liability, and under rule 12 the society was entitled to pay him out, however much he might wish to remain in. In this way he had come very much to be in the position of a creditor of those of the society upon whom calls could be made. Now, is a debtor entitled to say, 'I find my estate can only pay 12s. 6d. per £. I will write off 7s. 6d. per £, and my creditors shall get that and nothing more. I shall put this 7s. 6d. a £ to a suspense account, and if eventually my estate is able to pay it, or any part of it, it shall go into my own pocket.' With his creditors' consent, but not otherwise, this may be done."

The defenders appealed to the Court of Session.

Appellants' authority—*In re Blackburn and District Benefit Building Society*, L.R., 24 Chan. Div. 421.

Respondent's authorities—*Glasgow Working-Men's Provident Investment Building Society* v. *Galbraith*, May 28, 1884, 21 Scot. Law Rep. 782; *In re Norwich* v. *Norfolk Provident Building Society*, 45 L.J., Chan. Div. 785.

At advising—

Lord Young—The pursuer was on 8th May 1882 a member, holding unadvanced shares, of the building society, the defenders and appellants in this action. On that day he gave notice of his intention to withdraw the whole of the sum at his credit, and by rule 10 of the society the withdrawal took effect twenty-eight days thereafter. By this action he sues the society for £97, 2s. 8d., which he avers was the sum at his credit at the time of his withdrawal. The defenders aver that the sum at his credit was not £97, 2s. 8d., but £60, 14s. 2d., which they accordingly tender. Which of these two averments was the sum at the pursuer's credit when he gave notice to withdraw is the question in the case, and depends on the validity of the resolution of the society on 29th March 1882 to deduct 7s. 6d. per pound from the sum at the credit of each of the members. This resolution was immediately, and sometime before the pursuer's notice, acted on as explained in Mr Rennie's evidence—the reduction from the sum at the pursuer's credit being £36, 8s. 6d., which is the difference between the sum demanded and the sum tendered. The pursuer contends that the resolution and the deductions made in pursuance of it were invalid, and if so it is conceded and clear enough that he is entitled to decree for £97, 2s. 8d., which, in that view, was the sum at his credit in May 1882, when he gave notice under rule 10. I am of opinion, differing from the Sheriff, that the resolution was valid, and well acted on.

The accounts of the society were by the rules to be balanced yearly as at 18th February, and the balance-sheets submitted, with the accounts, to a general meeting in March or April (rule 44). I think it not doubtful that the officials and directors in the first instance, and the general meeting in the last, were entitled and in duty bound to write off so much of the capital or assets of the society standing in the books as was well ascertained to have been lost, and this necessarily involved a corresponding deduction from the sums at the credit of the holders of the capital—that is, the unadvanced members—for if the capital which they showed (and they would show nothing else) was reduced, their shares of it—that is, the sums at their credit—must of necessity be reduced also. But the losses immediately in question were not ascertained as certain, but only as probable to such a high degree that in ordinary prudence they ought to be provided for by a suspense account to the credit of which should be placed a sum judged to be sufficient to meet them, that sum being provided by an equivalent debit made to capital account. This is what was done in March 1882. I think, on the evidence, it was done reasonably and prudently and after due investigation, and I am therefore of opinion that it was validly done, and ought to be sustained. The deduction from the sum at the credit of the pursuer followed necessarily as a detail, for if the capital was well debited with the sum put to the credit of suspense account, the owners of the capital, namely, the unadvanced members, were properly debited with their respective proportions, and the sums at their credit reduced accordingly. It was, and perhaps is, possible that the sums thus debited to capital may hereafter be restored, with the effect of again increasing the sums at the credit of the unadvanced members who own it. The likelihood or unlikelihood of this future good fortune was and is for the consideration of the members themselves, who will accordingly withdraw or remain members according to their individual judgments. But with respect to the pursuer, and any others who have elected to withdraw in the full knowledge of the facts, I am of opinion that they can have no more than the sums at their credit upon the footing of the validity of what has been done.

When in such a society as this a certain loss of capital is ascertained, or found on reasonable inquiry to be highly probable and imminent, I cannot assent to the proposition that the society must choose between immediate winding-up and having the capital account in the books and the sums at the credit of the members undiminished. The first of these alternatives may not be at all called for, while the second would leave members at liberty to withdraw on an altogether false footing, and unjustly and unlawfully for those who remained. If the alternative of winding-up is rejected, as it may be quite prudently and properly, the fair and reasonable course is plainly to adjust the capital account and the sums at the credit of the members according to the true state and condition of the society's affairs. This is what the directors and the society itself in general meeting did in the present case, and I think what they did was well done, and is binding on all concerned accordingly.

Lord Rutherfurd Clark—The pursuer withdrew from the society on 8th May 1882, and according to the rules he was entitled to receive the sum which then stood at his credit. The question is, how much stood or ought to have stood at his credit at the date of his withdrawal?

The only money which the society possessed for the purposes of trade or profit was the money paid by what are called the investing members. In other words, this was its capital. The borrowing members were the mere debtors of the society. It was not maintained that they incurred any further liability than to repay the sums lent to them. Nor was it contended that they were entitled to receive any share of the profits which might be made by the society. These profits it is conceded belonged to the investing members.

By the rules of the society a yearly balance was to be made as at 18th February, and in accordance therewith the directors prepared a balance-sheet for the year ending February 18, 1882. But it appeared to the directors that a large sum had been lost, or was at least in danger, owing to the depreciation of the property in which their investments were made. They had obtained a report from Mr Binnie, an eminent valuator, that owing to this cause no less than £8487, 10s. was lost or was in jeopardy, and the progress of the society showed that Mr Binnie was within the mark. To meet this loss, actual or contingent, the society had a reserve fund of £1592, 5s. 3d., and £389, 12s. standing at the credit of profit and loss. There was thus a balance of £6505,

18s. 9d. to be provided for. When the balance-sheet was laid before the society for its consideration, it was ordered, at a general meeting held on 29th March 1882, that 7s. 6d. per pound be deducted from the shareholders' accounts. This reduced the sum standing at the pursuer's credit from £97, 2s. 8d. to £60, 14s. 2d. The question is, whether this reduction was lawfully made?

In making up the balance-sheet the directors had to provide for the loss which had been incurred or was feared. They had no assets except the loans which they had made on heritable security, and while these loans amounted to £19,177, 7s. 8d., it was very doubtful whether more than £10,689, 17s. 3d. could be recovered. The reserve fund and the sum at the credit of profit and loss were absorbed, and a balance of £6505, 18s. 9d. left over. From what fund was the balance to be provided for? The society had nothing except its capital, which, as I have said, consisted of the advances made by the investing members. But that had, in accordance with the rules of the society, been invested in the heritable loans, and had been lost, or was in jeopardy, to the extent to which these loans were unsecured or stood in doubtful security.

To make a just balance provision had to be made for bad or doubtful debts. So much of the debts as were bad must be written off capital, or, in other words, must reduce *pro tanto* the amount at the credit of the investing members. So much as was merely doubtful could only be carried to a suspense account, but this operation can mean nothing else than that the capital, or, in other words, the sums at the credit of the investing members, must be correspondingly reduced. In no other way could a balance be made which would make provision for bad or doubtful debts. Such debts must reduce the capital either absolutely or contingently.

The resolution of the society at the meeting of 29th March 1882 was, in my opinion, nothing more than a resolution to provide for bad or doubtful debts, or, in other words, to make a just balance. It was therefore, in my opinion, within its competence. But a just balance necessarily reduced the capital or the amount at the credit of the investing shareholders. The sum written off was in nowise in excess of what the circumstances required. I hold therefore that the sum at the credit of the pursuer was properly reduced to £60, 14s. 2d.

I do not think that it is material that the balance-sheet was not in point of fact corrected. That is a mere matter of detail. The fact remains that the 7s. 6d. per pound was written off the members' accounts as the means or effect of making a just balance. The result is the same in either case.

It is said that this reduction was made to provide for doubtful debts only, and that it deprives the member who retires of all benefit from the improvement of the securities. No doubt that will be so, but it is inevitable. An investing member cannot, I think, have more at his credit than a just balance will allow, and he necessarily loses all chance of future benefit by withdrawing from the society, for he can take with him no more than stands, or ought to stand, at his credit.

Lord Justice-Clerk—I have considered this case attentively, and I have not been able to find any ground on which the action of the society which is complained of can be defended. I concur in the result arrived at by the Sheriff-Substitute, and in his reasons also given in the case of Gray, in which generally I agree.

Throughout the argument which was addressed to us from the bar I think the true nature of the financial proceeding complained of was misapprehended. It had no resemblance or relation to the familiar operation of carrying bad and doubtful debts to a suspense account. The operation was one—apart from its mere bookkeeping aspect—of another character. It was this. Certain securities stood in the books at a certain valuation. They for the most part consisted of house property in Glasgow over which the society had lent money or made advances to borrowing members. Owing to the depreciation of house property the directors became anxious as to these investments, and employed Mr Binnie, a surveyor, and a very competent man, to value the suspected property. The result was that Mr Binnie reported a depreciation on the subjects over which these securities extended of nearly 50 per cent.

The report did not deal with the solvency or insolvency of the society, or give any further information—at least none has been communicated to us—as to its financial condition. It has not gone into liquidation, but has continued to transact business under its rules until now. But finding the actual market value of these securities so much lower than that at which they stood in the books, the directors seem to have looked about for some available fund to redress the balance and exhibit the capital account at its former figure. With that view they laid hands on the sums standing in the books at the credit of the investing members, and carried 7s. 6d. per pound, or three-eighths of the whole amount, to what they call a suspense account, but one which in truth represented the confiscation of important proprietary interests on the part of individual members of the society, with which, excepting in the event of liquidation, they had no right to interfere.

It is quite true that these rights, which were vested in the investing members, were to a certain extent contingent. They were not perfect rights of credit unless there was money to meet them. But the members were entitled to wait and to retain them until funds were available for their liquidation. They were also entitled to withdraw from the association altogether, and to be paid out according to the state of their account in the books. The present pursuer gave his notice, and withdrew after this proposal had been carried out, and the society now offer him 12s. 6d. per pound on the balance which admittedly stood at his credit.

The rules confer no power, either on the directors or on the shareholders, to make any such use of the credits of investing members. They were, as I have said, important proprietary rights, of which, in the absence of any provision to that effect in the articles of the association, they could not be deprived without their own consent or some default on their part. In the event of liquidation, some such procedure might be justified, but even then not on the inequitable footing adopted here. But there is no liquidation in this case, and as long as the society continued to carry on business these balances stood at the

credit of the investing members solely for the purposes provided for in the articles of association.

It appears clearly enough from the minutes of the directors that the main object they had in view was to arrest the current of withdrawal on the part of the investing members, and it must be owned that the readjustment of the capital account was important if they had possessed funds to meet it, but what they did was quite beyond their power. The investing members had as good a right to withdraw and be paid out according to the rules as the borrowing members had to receive advances and to repay them by instalments, and no general meeting had power to interfere with these rights.

I may add that I do not think the annual meeting had power to deal with this matter. The 44th rule limits such meetings to the discharge of ordinary business, which this certainly was not.

LORD CRAIGHILL was absent.

The Court pronounced this interlocutor:—

"Find in fact that the defenders at their annual general meeting, held on 29th March 1882, approved of a report by the directors recommending that in consequence of the depreciation of the heritable property on the security of which the funds of the society were invested, a sum of seven shillings and sixpence per pound should be deducted from the account of all the shareholders and placed to a suspense account, and that the defenders accordingly made a corresponding deduction from the sums standing in the books of the society at the credit of the pursuer from ninety-seven pounds two shillings and eightpence to sixty pounds fourteen shillings and twopence, which sum the defenders are willing to pay: Find in law that this reduction was validly made; therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; dismiss the action: Find the defenders entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer (Respondent)—Scott—Rhind. Agent—William Officer, S.S.C.

Counsel for Defenders (Appellants)—Mackintosh—Jameson. Agents—Carment, Wedderburn & Watson, W.S.

Thursday, July 16.

FIRST DIVISION.

GARDINERS *v.* VICTORIA ESTATES COMPANY.

Public Company—Transfer of Shares—Rectification of Register—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 35—Ultra vires.

A shareholder in a public company sold his shares to the managing director, and the directors approved of the transfer "in favour of the managing director for behoof of the company." The name of the company itself was thereupon entered on the register as holder of the shares. Six years thereafter the company, on the ground that it had no power to hold its own shares, challenged the transaction, and replaced the shareholder's name on the register. *Held* that the shareholder's name having been lawfully removed in consequence of a transfer which the directors approved could not again be placed on the register.

This was a petition to have the register of the Victoria Estates Company (Limited) altered.

The Victoria Estates Company was incorporated under the Companies Act 1862 and 1867, in 1877. Its registered office was at the office of the managing director James Drummond, C.A. The business done was that of a company dealing in acquiring and erecting houses, lending money on heritable property, &c. The capital was divided into shares of £5 each. The company was a small one; its shares were not quoted on the Stock Exchange. In October 1878 W. G. Gardiner and James Gardiner, who were brothers, were each owners of 100 shares, on which £100 had been paid in each case.

Being desirous to invest their funds in their business as shipbrokers, the Gardiners resolved to realise, and one of them called on Drummond on the subject. After one or two meetings it was intimated by Drummond that the shares would be taken at par. The Gardiners, as they contended and deponed in evidence in this action, understood Drummond to be the purchaser for his own account. The transfers, which were dated 26th October 1878, bore that Drummond was transferee, but there was added the words "for behoof of the Victoria Estates Company, Limited." In the case of W. G. Gardiner's transfer these words were interlined, and the interlineation was not authenticated. The Gardiners and the witness who witnessed their signature deponed that to the best of their recollection and belief these words were not there at the time of signature. James Gardiner alleged that in his case also the words "for behoof of the Victoria Estates Company, Limited," had been introduced after the signature. In this process the company and Drummond both maintained that the transaction was all along intended to be, and known by the Gardiners to be, one for behoof of the company, and not of Drummond at all.

After this transaction the Gardiners believed themselves to be no longer shareholders of the company. They were not called to meetings, they received no call-letters when calls on the shares were made—as was done on several occasions—their names were not on the list furnished to the Registrar of Joint-Stock Companies, nor did they receive dividends, balance-sheets, reports, or the like.

It subsequently appeared that the shares from the date of the transfers stood in the books as the property of the Victoria Estates Company, the directors having approved of the transfers "in favour of the managing director for behoof of the company," and the company's name having then been put on its register as owner of the shares. In the summer of 1884 the directors took the advice of counsel as to the power of the company to hold its own shares. The only provisions on the subject in the articles were—Article 15, "The board shall have power, without assigning any reason, to decline to register any transfer or transmission of shares in favour of any person whom they may consider it against the interest of the company to