would not have referred to that case at all but to dissent as strongly as possible from the propositions upon the law of aliment laid down by the Lord Ordinary.

Lord Mure—I concur in the result at which the Lord Ordinary has arrived, and think that the defender ought to be assoilzied from the conclusions of the action. But at the same time I do not concur with the opinions expressed by the Lord Ordinary in his note on the law of aliment, but, on the contrary, agree entirely with the remarks of your Lordship and with the opinions read from the case of *Thom* v. *Mackenzie*.

The facts of the present case are very peculiar, and we are urged by the pursuer to allow a proof that he might show that he had been forced by his father to adopt a profession which he disliked, and that now his father had refused to allow him such a sum as would start him in his profession and so enable him to earn a livelihood.

I do not see how we can go into these questions, and therefore I think the demand for a proof should be refused, especially as the father denies that he is possessed of the means which are attributed to him, and has done all that he says he can do by offering his son the shelter of his own house, and by alimenting him there as he has done for the last three years.

That being the state of matters, it is impossible that the Court can institute an investigation as to the father's means, or that they can award the son an allowance from his father's estate. In such a matter the discretion of the father is absolute, and we cannot interfere, especially as the father may have excellent reasons for what he is doing which we cannot inquire into.

Lord Shand—I agree with your Lordships that the interlocutor of the Lord Ordinary ought to be adhered to, and am content for my part to put my judgment upon the same grounds as the Lord Ordinary. The pursuer of this action is in good health, both mental and physical, and it would be nonsense to say that his father is to be bound to support him in all time coming, or is to be bound to supply him with an income to live in London and do nothing. He is perfectly capable of finding employment in some other line of life, and this Court cannot oblige his father to maintain him in the profession to which he has been brought up.

If we were to interfere in such a matter as this, there would be no end to the cases that might be brought here for solution. To take, for example, the instance I suggested in the course of the discussion. A father brings up his son as a doctor, and after the son has passed several of his examinations the father changes his mind and desires that his son should adopt some other line of life. Are we to compel the father to let his son pass his final examinations, and to continue him in a profession which, for private and probably very excellent reasons, he now desires him to abandon?

Upon the question of aliment, while quite agreeing with what fell from your Lordship as to the law applicable to aliment, I do not think there is such a difference between that opinion and the Lord Ordinary's. I do not think that the Lord Ordinary intended to say anything counter to the opinions read by your Lordship. I have no doubt that in using the word *want*, Lord Kames referred to the word relatively to the position in life of the party claiming aliment, and I cannot think that the Lord Ordinary meant that the measure of relief afforded by a father to a son was to be the same as that which would be bestowed by the parish.

Upon the whole matter, I concur entirely both in the judgment and in the note of the Lord Ordinary.

Lord Adam, who was absent on circuit during the discussion, delivered no opinion.

The Court adhered.

Counsel for Pursuer — Comrie Thomson — Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defender—Low. Agent—David Turnbull, W.S.

Thursday, November 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MEIKLEJOHN *v.* THE 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 whose shares were matured or fully paid-up, objected to this course, and claimed to be paid out in full under the rules, on the footing that on his shares having matured he had ceased to be a shareholder, and had become a creditor of the society for the amount standing at his credit in the society's books at the date of the maturity of his shares. *Held* that he was not a creditor but a shareholder, and was entitled to payment only of the sum at his credit under the deduction.

See the case of *Auld* v. *Glasgow Working-Men's Provident Investment Building Society*, *ante*, vol. xxii. p. 883.

The defenders in this case were a building society incorporated under the Building Societies Act 1874. The membership consisted of advanced or borrow-

ing members, and unadvanced or investing members. The objects of the society as stated in its rules were (1) to afford a safe and ready medium for the investment of the savings of the middle and working classes; (2) 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 until realised. The society also received money on deposit from members or others in accordance with certain provisions specified in its rules.

Rule 10 provided:—"*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 4 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, at any time after the shares have been realised, to pay them off."

William Meiklejohn, portioner, Larkhall, the pursuer in the case, became an ordinary shareholder in 1871, holding fourteen shares of £25 each. These shares matured, that is to say were fully paid-up, at 16th June 1879, leaving the amount at his credit at that date, according to his pass-book, £350.

Owing to the depreciation in the value of the properties over which the society held securities which followed the failure of the City of Glasgow Bank in 1878, so many of the investing members withdrew their money that the society was reduced in numbers by nearly a half. In consequence of this state of affairs it was resolved at a meeting of the directors held on 1st December 1881, that as it was thought very unfair that the shareholders who remained in the society should bear the whole risk of possible losses, a recommendation should be made to the next general meeting to set aside a sum to meet any such risk, and thereby retain from shareholders withdrawing a contribution thereto, and with that view to empower the executive committee to employ a neutral valuator to report upon the value of the properties taken over or held in security by the society.

The result of the valuation obtained by the executive committee, and embodied in a report prepared by the directors, which is narrated at more length in the report of the case of *Auld* (*ante*, vol. xxii. p. 884), was that the depreciation in the society's properties amounted to £8487, 16s., leaving, after deducting sums at the credit of reserve fund, and profit and loss account, a balance unprovided for of £6505, 18s. 9d. To meet this deficiency the directors recommended —as they stated in their report—"that a sum of 7s. 6d. per pound should be deducted from all the shareholders' accounts (exclusive of sums paid in since 1881) and placed to a suspense account."

This report was submitted to the annual general meeting of the society held on 29th March 1882, and adopted by a large majority of the members present, the pursuer, however, protesting against it.

On 9th November 1880 the pursuer had applied in writing to the secretary for payment of £150 out of the £350 at his credit by 1st March of the next year. The secretary had replied on 18th November that owing to the number of withdrawals then on the list the executive committee could not definitely promise the pursuer £150.

On 4th December 1882 the secretary sent to the pursuer a lithographed circular in the following terms,—"7s. 6d. per pound having been deducted from the sums at credit of all the shareholders' accounts as agreed to at the annual meeting held 29th March 1882; and as the directors are anxious to get the withdrawal list exhausted as soon as possible, kindly let me hear from you by Thursday first *at latest* whether you are going to remain a member, and share in whatever sum may arise from the improvement on the suspense account, and which will be paid to the shareholders annually in the shape of dividend, or otherwise as the directors may decide upon; or whether you wish to withdraw the sum applied for.* If the latter, please call here on Thursday evening first, 7th inst., between 7·30 and 8 o'clock, when a cheque will be ready for you. Please return this letter in enclosed stamped envelope with your answer written under the word "Reply." . . . *You applied for £150 of the amount at your credit."

Under the word "reply" the pursuer wrote on 6th December "Will allow amount to remain," and returned the circular to the secretary.

On 6th February 1883 the pursuer's law-agents wrote to the law-agents of the society as follows —"We have been instructed by Mr W. Meiklejohn, Larkhall, to recover payment of the sum of £350 and interest due to him by the Glasgow Working Men's Building Society. We shall be glad to know if liability for the amount is to be admitted, and in the meantime please make the usual interim payment under reservation of all questions." To this the society's agents replied on 12th February that the pursuer having given notice of withdrawal of £150 on 9th November 1884, had withdrawn that notice by his reply on 6th December, and required to give a fresh notice of withdrawal in order to take up his rotation on the withdrawal list.

The pursuer then raised the present action against the society for payment of £350 with interest from 6th June 1879.

The defenders denied that on his shares being realised or fully paid up the pursuer became *ipso facto* entitled to payment of the sum at his credit, but only, according to rule 12, to payment thereof in rotation with other withdrawing members, according to the date of his application therefor.

They averred that on his application of 9th November 1880 for withdrawal of the £150 he had been placed on the withdrawal list for that

sum, to which he then became entitled as the funds of the society might permit, in accordance with rules 10 and 12, that he had been paid a dividend for the financial year ending 18th February 1881 on the £200 then remaining at his credit, and that on 6th December 1882 he had recalled his notice of withdrawal and his name was thereupon deleted from the withdrawal list, and that the deduction of 7s. 6d. in the pound from the shareholders' accounts made by the resolution of 29th March 1882 left the sum actually at his credit at that date £218, 15s.

The pursuer pleaded—"(2) The pursuer's shares having matured in terms of the rules, and he having applied for payment thereof, and the defenders being in a position to pay the sum due to him, decree should be granted as craved."

The defenders pleaded, *inter alia*—"(4) The pursuer being still a member of the defenders' society, and his notice of withdrawal not having yet been granted, he is not entitled to payment by them of any sum. (6) *Esto* that on the pursuer's shares being realised he is entitled to payment of the amount at his credit, such payment being only due as the funds of the society permit, and the funds not yet permitting payment, the action is premature, and ought to be dismissed, with expenses. (7) *Esto* that the amount of the sum at pursuer's credit is payable, the same being only £218, 15s., decree ought to be restricted to that sum."

A proof was led, at which the pursuer deponed that when he had made the final payment which brought his shares to maturity, on 16th June 1879, he had then verbally requested payment of the amount at his credit, and was told that he would have to wait his turn. He gave the following explanation of his reply to the circular of 4th December—"(Q) Did you get frightened that if you did not return the circular at once you would lose money by it?—(A) That was my impression, that it would just be made up in the books against me if I did not return it, and that I would have no resource at all. That being so I at once returned the circular. I wrote the words—'Will allow amount to remain.' When I wrote these I did not in any way mean to remain a member of the society. The object I had in view was to give me time till I would see about it. I could not get in from Larkhall at the time. I called and consulted my law-agent a day or so after I had sent in the circular. I was then advised that as there were cases in Court I should wait until these were disposed of. About 6th February I again saw my law-agent, and instructed him to write a letter to the agents of the society requesting payment of the sum due to me."

The secretary of the society gave evidence bearing out the averments of the defenders on record.

The Sheriff Substitute (LEES) pronounced an interlocutor containing findings in fact in conformity with the rules and with the above stated facts, and found as matter of law "(2) that the resolution of 29th March 1882 was not habile to deprive the pursuer of his rights as a shareholder of the society under the rules then in force; (3) that the pursuer has not bound himself by acquiescence to abide by said resolution; and (4) that he has not barred himself *rei interventu* from claiming the full sum due to him by the society as at 29th March 1882: Therefore repels the defences and decerns against the defenders for payment to the pursuer of the sum of £350, with the legal interest thereon from the date of citation hereto till payment: Finds the defenders liable to the pursuer in his expenses, &c.

"*Note.*—I may for brevity refer parties to the views I have stated in other cases against the present defenders as to some of the points raised by the present action; and I may do so with the more advantage that on appeal neither the Sheriff nor the Judges of the Supreme Court seem to have expressed any doubt of the soundness of these views. As regards the meaning and effect of the resolution passed on 29th March 1882, I may refer parties to the note attached to my interlocutor in *Galbraith's* case [May 28, 1884, *ante*, vol. xxi. p. 782], and it will be noticed that the pursuer of this action stands in the stronger position that he protested against that resolution, but it is said he remained a member of the society and is bound by the rules now in force. On the other hand, his contention is, that as soon as his shares matured he ceased to be a member of the society, except for the purpose of receiving payment of what was due to him. It appears to me that this view is not borne out by the rules, and it is not easy to see why, on this footing, it was necessary to provide that the directors should be entitled to pay matured shareholders out if they were bound to do so. Such a provision implies that the member might continue in the society unless the directors exercised their option to pay him out. But of course, whenever a member gave notice that he wanted his money, then that amounted to notice of withdrawal from the society, and it would not do to say that the defenders could, by refusing payment of the money, continue him as a member till it suited their purpose to let him retire. Now, the pursuer says that he gave notice of withdrawal when his shares matured. It was not necessary that such notice should be in writing, but I do not think it sufficiently proved, and the terms of the application for £150 can hardly be said to reveal that he had previously given any such notice. On 9th November 1880 he applied for payment of £150. This sum has never been paid to him, but the defenders say they were ready to have given it to him if he had applied after returning the circular of December 1882. The pursuer gives his account of the motives that actuated him in regard to the return of this circular. That account is not quite satisfactory; but whatever be the construction to be put on it, I am unable to read the letter from his agents of 6th February 1883 as other than a notice of withdrawal of a very forcible kind of the sum due to him by the society. . . . The case of the *Scottish Property Investment Building Company* v. *Stewart*, 16th May 1885, to which I have been referred, does not appear to me to rule the present one. It is only a fragment of the judgment that has yet been issued; but from the narrative of the case I see that the circumstances are materially different. That society was in liquidation, and its members' pecuniary rights were to be measured by the balance-sheet of the by-gone year. Now neither of these circumstances occurs in the present case. I am therefore of opinion, on the whole case, that the pursuer must obtain his decree; and as there seems sufficient reason

to believe that if the society had been of the same opinion they could have paid him out at the date when this action was raised, I have given him interest from that date."

The defenders appealed to the Sheriff (CLARK), who, for the reasons assigned by the Sheriff-Substitute, adhered.

The defenders appealed to the Court of Session.

The arguments appear from the opinion of Lord Young.

Authorities cited by pursuer—*Galbraith* v. *Glasgow Working-Men's Investment Society*, *ante*, vol. xxii. p. 780; *Carrick and Ors.*, July 10, 1885, *ante*, vol. xxii. p. 883; *Norwich* v. *Norfolk Provident Building Society*, 45 L.J., Chan. Div. 785.

At advising—

LORD YOUNG—This is an appeal from the judgment of the Sheriff of Lanark in an action at the instance of the pursuer William Meiklejohn against the Glasgow Working-Men's Provident Investment Building Society, for payment of the sum of £350, being the amount alleged by him to be at his credit in the books of that society, of which he was a member. And from his pass-book, which is not impugned, there appears to be £350 at his credit on the 16th of June 1879. Now, that sum consists entirely of payments made by him to the society upon his shares, and when the last payment was made on 16th June 1879, making the whole of his payments amount to £350, his shares were fully paid-up, or, using the language of the rules of the society, were fully realised. The capital of the society consisted entirely of the sums paid-up by members upon their shares. They had no other capital. They might have had—I do not know to what extent in point of fact they had—other money at their disposal, consisting of deposits made by depositors for interest, but the capital of the society, the funds with which they carried on such business as they did carry on—if that is the word applicable to their transactions—consisted entirely of the payments in by members whether they had fully paid-up their shares or not. Now, the capital of the society from time to time is entered in the society's books, and the holders of that capital—that is, the persons who in the books are credited with it—are also entered in the books of the society with the sums at their credit which they had respectively paid. I have already stated that the sum at the pursuer's credit was £350. That was his share of the capital of the company, or capital of the society. But the society's capital was not just kept in bank or in a till. It was in use. And the use that was made of it, in fulfilment of the purposes for which the society existed, was lending it to members of the society. They lent to no other. But, at all events, the money which was paid in by some members of the society, or by all the members paying, some paying more than others, was lent out to those whom it suited to borrow, and lent to them on the security generally of buildings. For it was a building society, the members borrowing from the society, to the capital of which they had themselves contributed, sums upon the security of property on which they wished to build, or which they wished to improve. Of course this condition of the society in point of prosperity at any time depended upon how their investments stood, their investments consisting, as I have pointed out, entirely of loans by them to members upon the security of property to be built on or improved. If these loans were well secured, the capital was of course intact. If upon an investigation into the state of the affairs of the society, which was appointed to be made annually, it appeared that the investments, or any of them, were unsatisfactory, so that the money advanced and lent upon such securities as I have mentioned was more or less in jeopardy, it was, according to the majority of the Court in the case of *Auld* last session, the duty of those having charge of the matter to write off as much as they thought was lost—if absolutely lost, of course to be written off altogether. It might have appeared to them that any sum you choose to instance by way of illustration had been lost. Their duty would of course have been to diminish the amount of capital standing in the books by so much as was thus ascertained to be lost. Of course if you write off so much of the capital as lost money, you must also write off a corresponding amount from the sums at the credit of the various holders of that capital, for otherwise the two things would not balance. There would appear to be more holders of capital than there was capital in existence. It is a plain matter of book-keeping that if you write off from the capital so much as loss, you must write off a corresponding amount proportional from the various holders of that capital standing as creditors therefore in the books.

Another case short of absolute loss is prospective loss—loss which is exceedingly probable—likely to overtake the capital looking to the way in which it is invested or lent out. The company have nothing to show for it but certain securities, and if upon an investigation they are of opinion that there is a prospective loss, we thought in the case of *Auld* it was their duty to write off to suspense account so much of the capital as they thought had been so lost. But that amounts also to a deduction from the capital, and to a deduction from the sums at the credit of the holders thereof—not finally made, but made by way of warning, and so that if matters turn out better than had been anticipated there may be a restoration, and that is what I meant when I said in the case of *Auld* that 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 judgment." That explains—the narrative I have briefly given—what was done, and my view of what was done in March 1882, after due investigation, as we held in the case of *Auld*, on the facts as presented to us there, was, the company resolved to write off 7s. 6d. per pound from their capital in this provisional manner, and to write off a corresponding amount from the sums at the credit of the holders of that capital, intimating to each that he might continue, or to those who had intimated their intention to withdraw that they might withdraw, subject to that deduction, immediately, or withdraw their withdrawal, that

is, cancel it, and remain members of the company with the prospect of better times coming, the sum deducted being in that event replaced.

The main question argued here was, whether these views which I have now expressed, and which we acted upon in the case of *Auld*, are applicable to a member who has paid up his shares? It was contended that they were limited in their application to the case of members who were in the course of paying up, and continued applicable to them until the last moment—until the paying up was complete; that when they had completely paid up, they in law and in equity ceased to be members of the society and became creditors; and that no deduction could be made from the sums standing at their credit.

Now, I dissent from this altogether. I am unable to see the force of the argument. Until the last sixpence is paid, the sums standing at their credit—the amount standing at their credit—is admittedly their share of the capital of the company—nothing else. The company has no other capital except what the members have paid in, and until the last sixpence is paid upon the shares of any member, he admittedly is just a creditor for so much of the capital of the company standing at his credit. How is the nature of that in the least degree changed when he has paid his last sixpence. He has just paid up the full amount of the contribution to the capital which he undertook to make—the contribution to the capital which the pursuer undertook to make—subject to changes of mind on his part of giving notice to withdraw before or after he had made full payment. But the amount which he undertook to contribute was just the amount of his shares, £350. In June 1879, when he paid the last instalment, he just paid up the full amount of the contribution to the capital of the company which he had undertaken to make. They could then have put him out, or he could then have gone out; but if they did not choose to exercise their option to put him out, or he did not choose to exercise his option and go out, but remained a member—the holder of £350 of the capital of the company, which he had contributed, and which stood at his credit in the books of the company or society—how could things be any different? It was pointed out to us upon the evidence, and conceded on the part of the pursuer, that he was dealt with as a member, and received a return for that amount of capital at his credit, the same after it was all paid up as before. Of course before it was all paid up he was only dealt with as having the smaller sum at his credit; but after it was all paid up he and others in the same position were just dealt with as members with so much capital at their credit—dealt with as investing members as distinguished from borrowing members. How in the world could the company, if the capital was lost—I put that case—to the extent of a half, or fourth, or even a tenth, write that off from the capital without writing it off from the pursuer and others at whose credit the capital stood? It was quite impossible, and I see no ground in the world for a distinction between those who had paid up the whole except 6d., or half-a-crown, or 7s. 6d., or a pound, upon the shares, and those who had paid up the whole. They might put themselves in another position, or the company might do it—that is to say, they might be turned out against their will, or withdraw against the will of the other members—but so long as they remain and are being dealt with as members drawing their interest or dividends, I think they are just members credited with so much of the capital of the company which they have contributed. I am therefore of opinion that there is no room for distinguishing between this case and the case of *Auld*, upon the ground that the pursuer had paid up the full amount of his shares, and that therefore the resolution of the company in 1882, proceeding, as we held in the case of *Auld* it did, upon a proper preliminary investigation and inquiry, is applicable to him, and that he might remain with the 7s. 6d. provisionally deducted from his shares, or go out, not taking his chance of matters getting worse or better, as he pleased.

That reduces the question really to this, Whether having given notice or made an application for £150 of the money at his credit prior to the resolution of March 1882, that was effectually withdrawn, so as to leave him without the benefit of that notice or request for payment of £150, by his answer to the circular which was sent to him in December 1882. The circular, which is dated the 4th July 1882, is in these terms—"Seven shillings and sixpence having been deducted from the sums at credit of all the shareholders' accounts, as agreed to at the annual meeting held 29th March 1882, and as the directors are anxious to get the withdrawal list exhausted as soon as possible, kindly let me hear from you by Thursday first, at latest, whether you are going to remain a member and share in any sum which may arise from the improvement on the suspense account, and which will be paid to the shareholders annually in the shape of dividend, or otherwise, as the directors may decide upon, or whether you wish to withdraw the sum applied for. The sum applied for was £150." He answered that communication in these words—"Will allow amount to remain." But as soon as he had communicated with his man of business his application is renewed and extended. I confess I am not prepared to hold that this noting on the circular, "Will allow amount to remain," ought to be allowed to operate to deprive him of the benefit of his application for £150 before that resolution was made. I think that would be dealing with him rather too sharply. Therefore I think that that sum of £150 for which he had applied before any reduction was made upon the capital he is entitled to full payment of, if the funds of the society will admit of it. With respect to the remaining £200 of the £350, I see no room for distinguishing between him and the pursuer in the case of *Auld*, to which I have already more than once referred, and therefore am of opinion that the 7s. 6d. deduction ought to be made from that. I do not know how the matter of interest may stand. I do not doubt the parties will understand that and put it into shape. The import and result of my opinion is, that the Sheriff's judgment is right, except only to this extent, that in pursuance of the resolution of March 1882, which I think was a good resolution, 7s. 6d. in the pound must be deducted from the £200.

Lord Craighill—I concur in the opinion which Lord Young has delivered.

As regards the Sheriff's judgment, it must be

borne in mind that at the time the Sheriff's judgment was pronounced the judgment of this Court in the case of *Auld*, while it may have been given, had not been reported. So that in reversing his judgment we really are not recalling anything done by him in the face of our opinion in the former case, or against the law which we declared in that case.

The pursuer of this action, who is respondent in the appeal, became a member of the Glasgow Working-Men's Provident Investment Building Society, and in June 1879 he had paid up the whole amount of his shares, namely, £350. In December 1880 he intimated that he wished a payment of £150, and afterwards there was a demand for the full amount. The question between the pursuer and the society is, What are his rights? The pursuer says he is entitled to have the whole of that sum of £350, because the amount of his shares was matured by the last payment of £25 in June 1879. The contention in point of law which is maintained upon this point is, that the moment the shares were matured he ceased to be a member and became a creditor of the company, his rights, such as they were, remaining entirely unaffected by the circumstances of the society, whether prosperous or adverse, or by any resolution which any meeting of shareholders might at any time subsequently pass.

I agree with my brother Lord Young that that is a contention which cannot be maintained. I do not think there is any warrant for it in any one of the rules of the society, or in all the rules put together. He was a member up to the time the last instalment was paid, and I do not see how the paying of the last sixpence changed in any respect the relations between him and the society. The purpose of the society, as explained in the second article of the rules, was to afford a safe and ready investment of the savings of the middle and working classes—that is, those of them of course who had money to invest. Other rules relate to the making of allowances to members who require them. It is not said that the investment to be made is an investment for a particular period, or up to the time when a certain payment has been made. That is not the purpose at all. The purpose of the society is to afford an easy way for working men to obtain an investment for money which they may desire to lay out; and I am inclined to think it would amount almost to absolute destruction of one of the purposes of the society if we were to sanction the view maintained on the part of the pursuer. The money is deposited there, and if it is not asked for by a member on the one side, or offered back, or asked to be taken back, by the society, it is to remain there, and it is to remain there all through, so far as I can discover, as the money of a member of the society. There is no restriction as to the period during which the money remains there; nor is there any regulation as to the period in the history of the society when the character of the deposit or the character of a member may be changed except in the event of a severance of the connection. What he was when he entered the society he continues to be in the matter of payments up till the time when something is done by him or by the society to sever the connection between the society and him as a member, and then in place of continuing a member, he is, in the event of that severance, simply a creditor of the society.

That is my opinion on the rules. But it does not appear to me to be necessary that the judgment of the Court should be rested on the rules alone. I think that the custom and practice of the society in regard to that matter is a most important circumstance in determining what is the import of those rules. If a man who has ceased to be a member goes and asks a dividend, it is an inconsistent proceeding. He has paid up the full sum, and his money still remains in the hands of the society, and notwithstanding that he says he has ceased to be a member, he is traded with by the company on the footing that he gets the share of the profits which belongs to the share of capital lent by him. That is not and cannot be the position of a person remaining in the society. He is not to show a disposition to catch at gain on the one side and not bear any loss on the other. He simply takes profit and loss. The one is put against the other. If that is done, if profits are claimed and actually earned, and he is paid, there is no other inference to be deduced than this, that at the time the claim was made and recognised and satisfied he was what he had been from the beginning, a member of the society.

Now, here we find that so late as the 13th May 1881 the pursuer writes to the secretary of the society—"I understand the dividend declared at the meeting of the Building Society is to be paid to members whose shares are paid up. Would you be kind enough to remit what is due to me." That is, due to him as one who, being a member of the society, is entitled to participate in the profits of the society. And why due to him? Just for the same reason that others are entitled to share in the profits. So that I think the least doubt or difficulty in interpreting the rules vanishes when we take that meaning as interpreted by the conduct of the members on the one side, and by the society itself on the other. So far as that is concerned, therefore, I entirely concur with the views expressed by Lord Young.

With reference to the other contention which was maintained on this part of the case, namely that there was a verbal notice given in June 1879, when the last instalment of the £350 was paid, I also concur. I do not think it necessary to inquire how the verbal notice was given. The sufficiency of the notice was not impugned. The burden is on the pursuer, and he swears perfectly honestly, I have no doubt, to one thing, but the very reverse is sworn to by the secretary. It is inconceivable that, it being the duty of the secretary, if notice was given to him such as the society was in the habit of receiving, that a member was to withdraw his money, that member should not upon this occasion be put on the list appropriate to him. It was the duty of the secretary to make that entry at the time. It is not said that the secretary was in the way of omitting such entries. It is not said that there was any difference on his part with regard to this matter, or that any such omission had been previously discovered as the pursuer's view ascribes to him.

So much with reference to the right of the

pursuer to decree for £350. If he is not right in either of these contentions, it is not said he is entitled to decree for £350. The question is, how much is he entitled to obtain? The answer has been given by Lord Young. The pursuer gave notice in November 1880 that he wished £150. He applied for that amount. It is admitted to have been a perfectly good notice. If the efficacy of the notice be admitted, it is allowed that 7s. 6d. per pound cannot be deducted from that £150. It is said that he did consent that the notice should be withdrawn. In that matter also I concur with Lord Young. I think it is plain that there might easily have been a misapprehension on the pursuer's part, even if there was no erroneous representation on the other. It is plain that he said that which according to law he had no warrant for saying; and it is quite plain, further, that the pursuer in dealing with the notice as he did—in putting that *notandum* or intimation on the circular, that the amount was to be allowed to remain—did not in the least derogate from the efficacy of that notice, or from the efficacy of the application for £150 which he had previously made. My view of the matter is this, that according to the pursuer's reading of the circular, he took it that he would have his £150 if he liked, but subject to a deduction of 7s. 6d. in the pound which the circular said the society would deduct from all members. The pursuer would say to himself, and he meant to indicate, no more than this, that if 7s. 6d. was to be taken from each pound, he would allow his money to remain in the meantime. He might mean that as regards the £200, but as regards the £150 I do not think it can be held that he withdrew or meant to withdraw the notice.

But I do not need to prolong my remarks on this branch of the case. It being as I have endeavoured to point out, there is really no controversy, because the notice of 6th February 1883, or the application of 1883, is admitted to have been good. And so it comes to this, as Lord Young has shewn, that that which the pursuer was to receive was not £350, for which the Sheriff gave decree, because with reference to £200 the pursuer was affected in March 1882, when the meeting of the company was held, by the resolution which the company then adopted—the resolution to put aside into a suspense fund, and deduct from the balances at the credit of the several members, a proportion of their credit amount equal to 7s. 6d.

On the whole matter, I agree with the views presented by Lord Young in the judgment which he has proposed.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I concur in the judgment. I do no mean to resume the various principles discussed in the case of *Auld*. I retain my own opinion, although a sufficient majority ruled the case on the other side. I must fairly own that the book-keeping proceeding in that case was a novelty to me. The more I consider it the more novel it appears. It was not the case of a creditor carrying to a suspense account debts due to himself which were bad or doubtful. It is a debtor carrying the debts which he himself owes to a suspense account, and in that way contending that they were so far cancelled. I think that is a novel proceeding, and I still retain very considerable doubts of the principle. In regard to the debts due by the company to investing shareholders, or shareholders who had paid up their shares, if it was doubtful whether money could be found to pay them, the only way of remedying that unfortunate state of matters was by a contribution from the advanced shareholders as well as others—in other words, liquidation. But that has not been set on foot. Consequently I have the greatest doubts whether there is not an error and flaw in the whole principle that has ruled these cases. But having said so I am bound to accept that judgment as being conclusive in this, and accepting it, I agree in the result at which Lord Young and your Lordships have arrived—the result being this, that from £200 of the £350, 7s. 6d. per pound must be deducted. To that extent the judgment of the Sheriff must be altered. In other respects the judgment of the Sheriff will be affirmed.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties on the appeal, Find in fact that the pursuer holds fourteen shares in the Glasgow Working Men's Provident Investment Building Society, the defenders in this action, and that by 16th June 1879 he had paid the instalments due thereon, amounting in all to £350: Find that on 9th November 1880 he gave notice, in accordance with the rules of the society, of his intention to withdraw £150 of the said sum: Find that on 29th March 1882 the defenders resolved to deduct 7s. 6d. per pound from the sums standing at the credit of the shareholders, and to place the amount in a suspense account: Find that they intimated the resolution to the pursuer, and in doing so, desired him to state whether he would share in the suspense account and withdraw his call for payment of £150, and that he stated in answer that he would allow that sum to remain with the defenders, but afterwards, on advising with his agents, renewed his demand for payment as aforesaid: Find that not having received payment of the £150, he on 6th February 1883 required the defenders to make payment to him of the entire sum of £350 standing at his credit: Find in law that he is not barred from insisting for payment of the £150, and that the defenders are bound to pay that sum to him: Find that he is also entitled to payment of the balance of the said sum of £350, being £200, but under deduction of £75, being 7s. 6d. per pound: Therefore alter the judgment of the Sheriff-Substitute and of the Sheriff appealed against, in so far as not consistent with the foregoing findings, and recal the decerniture therein: Ordain the defenders to make payment to the pursuer of the sum of £275 sterling, with interest thereon at the rate of £5 per centum per annum, from the date of citation in this action till paid: Of new find the pursuer entitled to expenses in the Inferior

Court, and remit to the Auditor to tax the same and to report: Find no expenses due in this Court by either party to the other. and decern."

Counsel for Pursuer (Respondent)— D.-F. Balfour, Q.C.—Guthrie. Agents—Dove & Lockhart, S.S.C.

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

Friday, November 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

ROGERSONS *v.* CROSBIE (ROGERSON'S TRUSTEE).

(*Ante*, vol. xxii. p. 673, 26th May 1885.)

Provisions to Children—Assignation of Provision by Child to Creditors—Alimentary or Non-Alimentary.

A bankrupt granted in favour of his trustee a separate assignation for behoof of his creditors, and with the approval of the creditors, of his interest in the rents of certain lands which were payable to him during his lifetime by his father's testamentary trustees under the terms of his father's settlement, reserving to himself out of the rents an annual sum equal to about a quarter the whole as an alimentary allowance. The father's settlement contained a clause to the effect that the rents should not be attachable by the son's creditors, nor should he have power to sell or assign the same to any party whatever. It contained no clause declaring these provisions alimentary or for subsistence only. In an action by the bankrupt against his trustee to reduce, as having been *ultra vires*, the trust-assignation granted by him, *held*, assuming it to be an open question whether the pursuer's interest in the provision was alimentary or not, that his transaction with his creditors, embodied in the trust-assignation, constituted a compromise between him and them of a doubtful claim, and that he could not reduce it.

Held by Lord M'Laren (Ordinary), and *opinion per* Lord Rutherfurd Clark, that the interest of the bankrupt in his father's estate was not alimentary.

Opinion per Lord M'Laren (Ordinary) that if there had been an alimentary trust it had been sufficiently recognised by the reservation of the alimentary allowance by the bankrupt.

The pursuer in this action sought to reduce a trust-assignation granted by him for behoof of creditors. The defender was the trustee.

John Rogerson, Esq. of Girthhead, in Dumfriesshire (pursuer's father), and his wife, executed a trust-disposition and settlement in 1859, conveying their whole means and estate to trustees for certain purposes. By the second purpose of the trust John Rogerson directed and appointed his trustees to hold the lands of Broomhillbank and Shawside, belonging to him, together with the whole stock and farm implements on the same, in trust for Samuel Rogerson, his eldest son, and Joseph Kirkpatrick Rogerson, his second son (the pursuer), equally betwixt them, each son being entitled to one-half of the return or annual produce thereof during his lifetime, and on their death to dispone the said lands to the eldest heir-male of the bodies of each of his said sons equally between them. The settlement also contained the following clause—"And further, we hereby expressly declare that none of our said sons shall have power to sell the lands respectively to be held for them, or to burden the same with debt, neither shall the lands or rents be attachable by their creditors, neither shall our sons have power to sell or assign the same or any interest or annual produce thereof to any party whatever, with this exception," that in the event of their marrying they should have power to make a certain provision for their widows.

John Rogerson died in 1864, predeceased by his wife.

The trustees appointed in his settlement entered into possession of and administered his estate.

In 1878 Joseph Kirkpatrick Rogerson having become embarrassed in his affairs, his estates were sequestrated under the Bankruptcy Acts, and a trustee appointed. Shortly after the sequestration the pursuer granted the trust-assignation which he now sought to reduce.

By this deed, on the narrative that he was under his father's will entitled to one-half of the rents of Broomhillbank, Shawside, and others, which rents were thereby declared unattachable by his creditors, that he was desirous that all his creditors should be paid in full, and that they had agreed to accept of his offer to make the assignation, he assigned to the trustee under the assignation in trust for his creditors the rents of Broomhillbank, &c., with power to uplift the rents and grant discharges for them for certain purposes, and, *inter alia*, for payment to him out of the rents of £60 per annum by monthly instalments, and also any sum which might be received as his proportion of rent of the game on the lands of Broomhillbank, &c., which sums were declared to be the proportion of rents due to him, and which should during the subsistence of the trust be considered a reasonable alimentary allowance, and necessary for the maintenance and support of himself and his family; and (lastly) that whatever balance of free rents should remain after fulfilling the previous purposes should be held to be part of the assets of his bankrupt estate, and applied by the trustee in terms of the statutes till his whole creditors should be paid in full.

The lands of Broomhillbank, &c., were then, and at the date of this action, let by the trustees at a rental of £515, one-half of which was paid to the widow of Samuel Rogerson, who had died, and the other half was applied under the assignation.

In April 1885, J. K. Rogerson, his wife, and his six children raised the present action against William Glendonwyn Crosbie, as trustee under the assignation, concluding for reduction thereof. They averred—"(Cond. 6) The said trust-assignation was *ultra vires* of the granter, and in contravention of the terms of the trust-disposition and