the papers in this case I came to the conclusion that from the moment a copy of the feu-charter had been produced and admitted in evidence there was but one question in the case, and that that question was the construction of that feu-charter. That question I have very carefully considered, and have listened with attention to the arguments which have been addressed to us, but I have found myself wholly unable to get over the import of the words "and not otherwise," and I shall only shortly state, my Lords, that I concur in the reading of that contract as declared in the judgment of the Lord Justice-Clerk and as now practically adopted in the House.

My Lords, I concur in the construction that there is nothing in the feu-charter which warrants or authorises an erection in the bed of the river extending from the flat rock A westward to the opposite bank of that river; whatever the effect of it may be, such is the construction of that charter. I accordingly think that the present appeal should be dismissed with costs.

Interlocutors appealed from affirmed and the appeal dismissed with costs.

Counsel for Appellant—Lord Advocate (Balfour, Q.C.)—Alison. Agents—Flux & Son—John Gill, S.S.C.

Counsel for Respondent—Solicitor-General (Asher, Q.C.)—M'Kechnie. Agents—Bolton, Robins, Bush & Company—F. J. Martin, W.S.

Friday, March 9.

BROWNLIE AND OTHERS (LIQUIDATORS OF THE SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY) *v.* RUSSELL.

(*Ante*, July 7, 1881, vol. xviii. p. 661, 8 R. 917.)

Friendly Society—Building Society—Effect of Winding-up Order on Position of Members—Right of Member to Pay up Loan and Withdraw under Rules—Act 37 *and* 38 *Vict. c.* 42—*Building Societies Act* 1874, *sec.* 14.

The rules of a building society entitled a member who had received a loan from it to withdraw from the society on payment of the balance of the loan. The society, which had no debt to creditors other than its own members, went into voluntary liquidation, and obtained a winding-up order. *Held* (*alt.* judgment of Second Division) that the effect of the winding-up order was to take away the option to withdraw given by the rules to a member who had obtained a loan, but (*aff.* judgment of Second Division) that such a member was entitled to be free from his liability as a contributory of or debtor to the the society on paying the balance of the loan unpaid at the date of the winding-up order.

This case is reported *ante*, July 7, 1881, vol. xviii. p. 661, and 8 R. 917.

The liquidators of the Scottish Savings Investment and Building Society appealed to the House of Lords.

The interlocutor of the Second Division against which this appeal was taken was as follows:—"Find that the advance or loan obtained by the respondent (pursuer) from the Scottish Savings Investment and Building Society, registered under the Building Societies Act 1874, and having its registered office at 53 West Regent Street, Glasgow, has *pro tanto* been extinguished by the sum of £414, 8s., being the amount *in cumulo* of instalments from time to time paid by the respondents to account or in respect thereof from 15th May 1868 to 20th February 1880, when the said society was by the Court appointed to be wound up, and that the appellants are bound to impute towards extinction of the said advance or loan all instalments paid to them by the respondent since 20th February 1880, or which may yet be paid to account or in respect thereof: Find that the respondent as a borrowing member of the said society on giving notice in terms of rule 12 of the said society, and upon payment to the appellants of the difference between the said sum of £700 and the amount *in cumulo* of the instalments paid by him to account or in respect of the said advance or loan, with interest due to him thereon, calculated or added thereto in terms of rule 9 of the said society, is entitled to withdraw therefrom, and that the appellants are bound thereupon to execute a formal discharge of the bond and disposition in security for £700, dated and recorded in the Register of Sasines for Renfrewshire and regality of Glasgow, &c., 16th May 1868, and granted by the respondent to the trustee for the said society in security of the said advance or loan: Find the respondent entitled to expenses in the Sheriff Court and in this Court, and remit," &c.

At delivering judgment—

LORD CHANCELLOR—I am of opinion that the principal interlocutor appealed from is in substance right, although I am not disposed to rest the judgment of the House upon the same grounds. The question here really is a question of the interpretation and effect of the contract between these parties. There has been a winding-up order, and I am not inclined to hold the same opinion as to that winding-up order which has been held in the Court below. I see no reason to doubt the propriety of such a winding-up order in the circumstances of this society, and I think it must have all its proper and legitimate consequences according to the principles to be ascertained from the Act which provides for the winding-up of societies of this particular description, and which regulates them. Well, my Lords, we have nothing to do here with creditors; that is admitted on both sides, and when creditors are got rid of nothing remains to be done in the winding-up except to adjust the rights of contributories *inter se.* What are these rights? How are we to ascertain them? They must be ascertained from the contract by which the parties are brought together. This is not a joint-stock company—still less a common law partnership—but is a society of a special kind, formed and regulated under particular Acts of Parliament, and for special purposes. My Lords, it appears to me that a fallacy which pervaded much of the argument offered to your Lordships in support of the appeal is that because the members of this society are associated together for common purposes therefore there must, in equity and reason, and by implication from their contract, when not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual

state of things they may suffer. My Lords, it appears to me that that result cannot be arrived at by presumption or inference from the law applicable to companies and contracts of a different kind, but that we must look at the particular contract. Now, with regard to this particular contract, it was an essential part of it that there should be two classes of members in situations materially different. One class, called the unadvanced members, who by continuing in the society for a certain period of time, and paying regularly what became due from them according to the rules, by fixed instalments, would at the end of that period of time be entitled to receive what they had paid, with certain accretions in the event of the prosperity of the company. The other class were what are called advanced members, who were to receive in the beginning the amount which the others might receive in the end, and were to be, at the time when they received that by way of advance, in the situation of debtors to the company on security, paying interest, and in that manner adding to the resources of the society, and possibly to its profits. They, as has been rightly said by Mr Davey in his argument, were members who would have to pay, but never could receive more than they received in the first instance. The other members paid in the first instance from time to time, but they also were in the end to receive, and the rules of the society fairly provided for an option—a chance—of belonging to the one or the other of these two classes of members by taking the means there provided. That all the unadvanced members would be in a position beneficial to them is manifest from the fact that one of the provisions of the rules is that for a certain proportion of the fund advanced or paid to advanced members they paid a bonus or premium. It is impossible therefore to deal with a case of this sort by presumption or inference not justified by the terms of the contract itself. Then, it is said that this is a society in which the liability of members is strictly limited in point of amount. The rules say that the shares are to be £25 each, payable by certain instalments—each share shall be of the value of £25—and in the fifth rule they are spoken of as paid-up shares when the amounts to be credited to the member have arrived at the full sum of £25. My Lords, if there were nothing but the rules I should say it was a clear case of a limited liability to the amount of £25 per share. But over and above the rules, the Act of 1874, under which the society is governed, says expressly that "the liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share." In favour of the unadvanced member therefore the statute reduces the limit of liability to a lower point than the full £25. He is only to be liable either to creditors or anybody else for that which is actually in arrear at the time when the liability is sought to be enforced in addition to what is actually paid, and the Act goes on to say, "and in respect of any share upon which an advance has been made" the liability of any member "shall be limited to the amount payable thereon under any mortgage or other security, or under the rules of the society." Now, under the rules of this society no share is to be more than £25. The liability, depending upon the rules alone, would be only £25 per share whether advanced or unadvanced. The mortgage in this case being given upon the full amount which was advanced, making in all £700, there is nothing whatever in the rules to increase the liability beyond the mortgage. Upon these advanced shares £414 had been actually paid by instalments under the rules before the winding-up order, and there remained therefore to be made up in some way or other £286 at that time. I omit in this part of the case to enter into the question whether or no the respondent was entitled to credit at the time of the winding-up order for anything more than £414. But the £414 he had actually paid, and I am totally at a loss—I have been throughout—to understand the argument, that you could cancel or treat as a nullity any actual payment on account of that or any other share merely because the society might have lost money which had been paid to it. Therefore the maximum sum required to reach the full limit of liability in respect of these shares was at the date of the winding-up order £286—I say the maximum sum, meaning if it should be determined that no credit was due to the respondent except for what he had actually paid to the society. The question arises as to the credit claimed by him for interest upon instalments which he had paid, and which was refused to him by the Sheriff, but was allowed to him by the Court of Session. The point seems not to have been much discussed in the argument or noticed in the judgment, but it is distinctly dealt with by the interlocutor. Now, my Lords, I was, in the first instance, strongly disposed, owing to imperfect understanding of the facts, to concur in the view presented by the learned counsel for the appellants, and to be of opinion that the right to any interest allowance would only arise if, while the company was a going concern, there were a withdrawal under the 12th rule, and that there could be no such withdrawal in the terms of that rule after the date of the winding-up order. But, my Lords, as the argument advanced I became of opinion that the respondent had been throughout charged interest not merely upon the balance due by him from time to time after crediting the sums which according to the contract, as I construe it, he had right to have credited as repayment of the principal sum, but upon the whole loan without regard to these repayments. Therefore, my Lords, if interest at the same rate of 5 per cent. down to the date of the winding-up order is allowed to him on his repayments, it really at the most balances or wipes off the interest with which he has been charged upon the instalments which he had paid as well as those that remained due from him. That, I think, according to general principles, would be perfectly just unless there was something in the contract to the contrary. Now, I do not find in the contract—either in the rules (the 12th rule is the only one which touches the matter), or in the bond or in the back-letter—any stipulation whatever that he shall pay interest on anything more than the amount due, and therefore the charge which he has submitted to, and about which there is no controversy in point of fact between the parties, rests upon the usage and practice which has prevailed in the company; and it seems to me that if that practice is to remain undisturbed he certainly is entitled to have written off in his favour the same rate of interest upon the sums which from time to time he

actually paid. And, my Lords, I cannot but think that the true effect of the winding-up order is very much that which was put to your Lordships by Mr Davey in his able argument. I think the winding-up order prevents the exercise of those options of retirement or withdrawal given to all the members—to the unadvanced members under the 9th rule, and to the advanced members under the 12th rule—as to which the rules must be taken to contemplate a going concern. That is perfectly consistent with the opinion of Vice-Chancellor Wood in the *Doncaster* case, who spoke of the winding-up order as substantially putting a stop to the whole affair. But, my Lords, what is the effect of a winding-up order? It takes away the option of retirement or withdrawal which otherwise, while the concern was going, would have belonged to each member. If a *vis major*, as the Vice-Chancellor said, puts a close to the whole concern, it terminates at the date of the winding-up order the account on each share. It cuts off all chance of profit which both classes of members might have had under the 5th rule. It is really equivalent, not to an optional withdrawal or retirement by the members, but a compulsory withdrawal by the operation of the winding-up order against them all. But it cannot take away from a shareholder the right to redeem his mortgage by paying up all that is due upon it, of course in that way getting rid of future interest. He is not entitled to discount, but as against the interest with which he has been charged he is entitled to get back interest upon the sums actually paid by him. That completes the result of the winding-up order upon the rights of these parties. My Lords, while the result is practically the same as the order made by the Court of Session, I cannot entirely concur in the terms of the interlocutor pronounced, and I propose to make this variation of the interlocutor of 7th July 1881:—To omit the words, "Find that the respondent, as a borrowing member of the said society, on giving notice in terms of rule 12, and upon payment to the appellants of the difference between the said sum of £700 and the amount *in cumulo* of the instalments paid by him to account, or in respect of the said advance or loan, with interest due to him thereon, calculated or added thereto in terms of rule 9, is entitled to withdraw therefrom;" and to substitute, "Find that from and at the date of the winding-up order, the respondent, as a borrowing member of the said society, was liable to pay to the appellants the difference between the said £700 and the amount of the instalments paid by him to account or in respect of the said advance or loan, with interest on all such instalments from the time that they were paid respectively down to the date of the winding-up order at the rate of 5 per cent. per annum, and that on payment of the amount of such difference, with interest thereon at the rate of 5 per cent. from the date of the winding-up down to the 22d July 1880—[the date at which the respondent wrote to the liquidators intimating that he intended to pay the balance of his advance of £700 provided he received a discharge of the heritable bond granted by him in security]—the respondent will be free from all further liability as a contributory or otherwise to the said society or the appellants as liquidators thereof." I think this will more accurately regulate the rights of parties than the form of interlocutor appealed against, but as it makes no difference in the substantial result, I shall move that the costs of the appeal be paid by the appellants.

LORD WATSON—My Lords, the order of 20th February 1880, in terms of the 32d section of the Act of 1874, terminated or dissolved the society in question—in other words, from that date the society existed not for the purpose of carrying on business, but solely for the purpose of winding-up. According to my reading of these rules, the unadvanced member of the society was a member who had agreed to pay up the amount of his shares by instalments, subject to this condition, when they were fully paid by the amount which he contributed, or by the amount so contributed, aided by his proportional share of dividends earned by the society according to the amount of the shares, he ceased to be a member upon being paid out. He was entitled to be paid in the order of his shares maturing, but it is clear that he took his chance of the society being able at the date when his shares matured to make payment to him, and also of the possibility of their never being able to make payment to him. The effect of the liquidation, so far as regarded such a shareholder, was in my opinion to put an end to all liability on his part beyond the amount which he was bound to contribute up to that date. So far as he had paid he was not bound to pay again, but he was bound to pay so far as he had failed to contribute in terms of the rules; and having done so, he was entitled in my estimation to take a share of the free assets of the society—I mean assets after settling with outside creditors—in proportion to his interest in the society at the time of liquidation, that interest depending partly upon the time for which he had been a member, partly upon the amount of his shares, and the extent of his contribution in respect of these shares. On the other hand, the advanced member stood in a very different position. An advance under the statute and under these rules does not mean a loan by the society upon the security of the shares. It signifies this, that the society paid to the member by anticipation the amount of his share upon receiving in return certain considerations which are fixed by the rules. The considerations given by an advanced member obtaining an advance in terms of these rules were that he should pay the interest monthly, and in advance, along with each instalment, and further that he should cover and protect the society from loss by giving adequate security for the amount which he had got. Now, on the other hand, it may be right to infer that the member obtaining an advance, so long as he did not avail himself of the power of withdrawal conferred by the 12th rule, had a right to participate in profits, and was probably induced to borrow upon these conditions and give security, by the circumstance that he had a chance of diminishing the amount of instalments which he had undertaken to pay, or was obliged to pay, by having imputed towards payment of his shares a proportion of the profits effeiring to these shares if such profits were made. But then what was the effect of the liquidation upon his position? Before passing to that, perhaps I ought to say that, reading together the rules, the bond, and the memorandum which

qualifies that bond and disposition in security, I am perfectly clear that the undertaking given was to pay but one set of instalments, and not two. In point of fact, it might be more properly described as instalments towards the share, because when the share was paid up the bond was paid in this sense that the holders of it had no right to proceed upon it. So there is the stipulation in the memorandum that so long as he regularly pays the instalments upon his shares, along with the interest which is stipulated in the bond and the rules in respect of the advance (it not being payable upon the instalments of the shares themselves), the bond was not to be enforced; and it follows that if these instalments were regularly paid until all that was due upon the shares was paid the bond would become in that event unenforceable, and he would be entitled to have it discharged. But then, my Lords, the liquidation supervenes, and what is the effect of that upon the position of an advanced shareholder? I think, with your Lordship, that from the moment the liquidation order was pronounced he became disabled from taking advantage of the 12th rule and withdrawing himself from the society, just as much as the unadvanced member was thereby precluded from taking advantage of rule 9 and withdrawing upon the terms of that rule. It, on the other hand, had a material effect on his rights and liabilities. The liquidator was no longer in a position to give him those considerations which induced him to agree to pay instalments and interest as stipulated in the rules and in the memorandum. I do not think it could be maintained—indeed it hardly was maintained—that the liquidator could have said to this gentleman, "You shall continue to go on paying monthly instalments and monthly interest just the same as if the society had been a going concern." I think he was quite entitled to say—and it was clearly in the interest of the liquidation also—I think he was entitled as matter of right to say, "You being no longer in a position to give me that counterpart of the contract which I contemplated in entering into this engagement, I shall pay up the shares;" and that is what he proposes to do, the only question between the parties being as to how it should be done. I shall not refer to the record. I am not going to examine it, but it is easy to discover by its terms that the real contention between the parties was that the liquidators maintained their right to impute the instalments which the respondent had paid prior to the liquidation to his share-account, and to open another, or cross-account, as it has been termed in the argument, as if he had been debtor not only upon that account but under the bond. The result of that contention, if well founded, would have been that this gentleman would have had to pay the bond in full in order to get a discharge of it, leaving the payments upon the shares to be dealt with according to the course of the liquidation. My Lords, I do not think that was the right of the liquidator, because I have already indicated that the instalments paid were imputable to either, and that whenever the instalments covered the amount in the bond, interest and penalties being at the same time duly paid, the shares were paid up and the bond was paid off, or at least the society or its liquidator was bound to discharge it. Then, my Lords, the sole question remaining is, upon what terms is the respondent to pay up the balance? The Court below have found that he was entitled to pay up the balance in terms of rule 12; but in whatever manner he shall be entitled to pay up the balance upon the instalments which he has already paid, I am perfectly clear as to this, that when he does pay the balance he has fulfilled his whole legal liability under the statute of 1874, and under the rules of this society. I cannot find in the rules or elsewhere any pretence for saying that after an advanced member has paid his instalments in full, the liquidators can turn round upon him and say—"We shall disallow this payment which you have actually made," the result of which would render him liable in second payment, and so enlarge the funds for the benefit of those members whom the assets of the company may be insufficient to pay in full. Well, my Lords, I have only to say in conclusion that I agree with your Lordship in thinking that the interlocutor of the Second Division which is appealed against ought to stand, because although it errs in law in assigning the right of this gentleman to settle on these terms to the 12th rule, it gives him no more than he is in equity entitled to. I am of opinion that neither in the rules nor in the bond is there any legal obligation to pay interest upon any part of the £700, or the amount of the shares which has already been paid by him, and considering that the payments of interest which he has made, and which are largely in excess of what is required by the rules, depended entirely on the custom of the society, I think it is right and equitable in adjusting this matter as between the liquidators and the advanced member that the allowance should be given him by way of reduction, or repayment of interest, which this interlocutor allows.

Lord Bramwell—I am entirely of the same opinion—that this judgment should be affirmed with the trifling modification mentioned by the Lord Chancellor. My Lord, it seems to me that this winding-up order, which is really a matter between the members of the society, can make no difference in their substantial rights *inter se.* It may make, and doubtless will make—and if anything, that in my judgment helps to solve the question—this difference, that that which would have been paid at a distant time will be paid presently, and that which would have been received at a distant time shall be presently received if there are assets, and that being so the question is, what is the substantial contract between the associates in this society? Now, to my mind, rule 12 is clear. It says—"It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the manager one month's notice in writing, and paying up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon at the rates referred to in rule 9." That was the substance of the bargain they entered into with each other. I think that word *withdraw* is immaterial to the matter which we have got to consider here. The object of the stipulation that notice of withdrawal should be given was that the society might have notice of the intention of the shareholder to pay up his money so that they might dispose of it if they had an opportunity of doing so, and also that they might

make a proper calculation of what was due from the withdrawing member in the shape of debt, interest, and penalties. I think that expression "withdraw" may be left out here. As I said before, the very fact that the respondent is liable to pay, as undoubtedly he is, that which was presently due, shows to me in considering the question before us that the word withdraw is immaterial; we must look at the substance of the matter, and as I said before, that I think is plain; but it is qualified in this way. It is said—True, you have paid instalments which would satisfy the claim of the society upon you to the extent of their amount, with interest upon them under that rule, were it not that the society has sustained losses, and the instalments which you have been paying must be taken to be attributable now to these losses, and consequently that you have not in reality paid so many instalments as you have nominally. Now, what is there in the rules to justify that. There is not one word in the rules about losses being borne either by the advanced or unadvanced members, and the only reason that can be given why the advanced members should bear the losses is, that they are to have profits if there are any. So they were undoubtedly, but it does not follow from that that they are to bear losses. It might have been a reasonable stipulation to put in if they had thought of it. But either they did not think of it, or if they did they did not think it reasonable to put it in. Now, this seems to me to deal with the only conceivable argument for qualifying rule 12 in the way I have suggested. It is said that the power of withdrawal is gone. As I have said, that is immaterial to my mind. But the substance of the rule cannot be lost to this man. It is manifest that if this society had lasted two, three, or four years longer, his instalments, with the interest upon them, would have discharged his obligation to the society. Well, what is the consequence? He cannot withdraw. He cannot avail himself of that mode of paying off, but inasmuch as liquidation calls upon him to pay at once, he is entitled to that benefit. It is said this is hard upon the other shareholders, the unadvanced; they cannot withdraw now. Very likely, but what is the consequence? He is only to pay, and the society can receive of him. The others have only to receive, but cannot, because the society has not wherewithal to pay.

Lord Fitzgerald—The advance made on the security of these shares was to be reimbursed to the society by instalments until they amounted to £700, and meantime they were to get interest on the advance at the rate of five per cent. per annum. The bond and disposition, with the memorandum upon it, was a security that the society should in the end be reimbursed to the full amount of the advance in the manner prescribed. When one had arrived at the conclusion that that was the character of the contract—the agreement between the parties—and further, that the monthly instalment although paid in respect of the shares was immediately to be attributed as a payment on account of the £700—when one had arrived at that conclusion, the whole appeared to be straight and clear and free from any difficulty; and all that remained to be done in order that this gentleman should be relieved from his position as a member of the society was merely a matter of computation and nothing else, to ascertain what was due upon this security. Now, this liquidation can make no difference. It may have deprived him of some advantages which he previously had, but it certainly did not increase his liability. In point of liability he remained exactly in the same position as before. And what was that liability supposing liquidation had not intervened? What were his rights, and what were his liabilities? His liability could not go beyond £700—that is, beyond the balance of it, after giving him credit for the monthly instalments which he had paid. It may have the effect of depriving him of the right to withdraw under rule 12, but that becomes very unimportant. Liquidation has taken place. The society as a trading society has ceased to exist, and can no longer make profit. It comes to an end, and I come to the liquidators and say, "I am owing you so much; I am willing to pay everything that is due upon my security, and now offer to pay it." The liquidators, however, insist that they shall get the entire sum of £700 as if nothing had been paid. He, on the contrary, says, "According to the contract, common sense, and common justice, the sums that I have paid from time to time are to go in liquidation of the principal of this advance, and I am willing to pay the entire balance due." That is really the contract between the parties. As I have said, it is merely a matter of computation. If I have actually paid £414, and although all claim for interest on these payments be disallowed, still no more can remain payable than £286, and that whether the society was in liquidation or otherwise, because in liquidation, and under the winding-up Act, no contributory, if the liability is limited, is bound to pay more than the full amount of his shares. This gentleman, paying the full amount of his shares, had done all which, as contributory or otherwise, he could possibly be required to do. That was determined in a similar case—the case of the *Doncaster Society*—by Vice-Chancellor Wood, where he held that the advanced member was entitled to redeem by paying up the full amount due from him, and that when the full amount was paid up he ought not to be called upon to pay more for the benefit of those other contributors. They must get what they can out of the assets, including therein the contribution to them which this particular advanced shareholder makes when he pays up the full amount which is due from him.

Now, my Lords, the next question is, What is the contract here? He has £700 advanced to him. He gives to secure that a bond in ordinary form for £700, and interest, with a provision that the principal is to become due at a fixed period, and he is to pay penalties, which are of course purely nominal; and then he is to pay interest on the principal sum at the rate of 5 per cent. per annum from the date of the bond to the time of payment (that is a purely nominal time, not the time contracted by the parties), and that half-yearly, termly, and proportionally thereafter during the not-payment of the same. And then, by the back-letter, which explains the real intention of the parties, it is provided that that bond is in reality to stand as security only for performance of the obligations laid on the advanced member by these rules—"It is nevertheless understood that the same shall not be enforced

by the directors and manager of the society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to become due upon his said shares in terms of the rules of the society." That refers to the 12th rule in particular, which states how an advanced member is to make the repayment of his advances—"All advances shall be repaid by monthly instalments, with interest at the rate of 5 per cent. per annum, and which interest shall be paid monthly in advance, and at the same time as the instalments." Now, my Lords, it is impossible to read that as meaning that there should be two instalments paid by the advanced member, one as shareholder and the other as a debtor or mortgagor, but he is to repay the advance made to him for which he has given his bond and security, by these instalments which members have to pay from time to time. It is impossible, after he has actually paid that, for the society to say that the instalments they received from time to time are not to be ascribed as payments of the advance. It is perfectly clear they must be so ascribed, and therefore this gentleman, at the time of the winding-up order, having paid instalments to the amount of £414, was entitled to have full credit for the same as a repayment, as far as it would extend, of the advance made to him, reducing, as I have said, the sum to be paid to £286. Then, my Lords, the question arises whether there is anything in the contract to vary that result to prevent him exercising his right to redeem, for he must have a right to redeem on payment of the whole amount remaining due and advanced to him. There is not one word from which it can be possibly implied that an advanced member, merely because the society has sustained losses, and because these losses may diminish the return of payments to be received by the advanced member, is to have his advance recalled, and to be turned *ex post facto* into an unadvanced member, so that any repetition, as distinct from his obligation to make repayment according to his contract, can be obtained from him.

Interlocutor affirmed with a variation (being that moved by the Lord Chancellor), and appeal dismissed with costs.

Counsel for Appellants — Solicitor-General Herschell, Q.C.—Solicitor-General Asher, Q.C. —M'Clymont. Agents—Grahames, Currey, & Spens—J. Smith Clark, S.S.C.

Counsel for Respondents — Davey, Q.C.— Hedderwick. Agents—Lewin, Gregory, & Anderson—Miller & Murray, S.S.C.

COURT OF SESSION.

Friday, March 9.

SECOND DIVISION.

MACKIE *v.* GLOAG'S TRUSTEES.

*Succession—Antenuptial Contract—Provisions to Children of First Marriage in Contract entered into at Second Marriage, whether Testamentary—Onerosity—Delivery—*Jus quæsitum tertio *—Power of Appointment*

A widow who had three children entered into a second marriage. In contemplation of this marriage she entered into an antenuptial contract with her intended husband whereby she conveyed to trustees certain specified heritable and moveable property for behoof of herself "in liferent, for her liferent alimentary use of the annual proceeds thereof allenarly, and seclusive of the *jus mariti* and right of administration" of her husband, and not affectable by the debts or deeds of either, and for behoof of the children "procreated or to be procreated" of her body in fee, according as she might appoint, or failing an appointment, then equally among them. The trustees were infeft in the heritable property, and entered into possession and management of the estate conveyed to them. There were no children of the second marriage. The wife left a settlement by which she affected to exercise her power of apportionment, and to deal with her whole property, whether falling within the contract of marriage or not. By this deed she made a very small provision for one of the children of the first marriage. *Held*, in an action at his instance to have it declared that he had a right under the marriage-contract which she could not defeat, (1) that the provisions of the marriage-contract were, so far as he was concerned, not onerous in their character; (2) that the provisions of the marriage-contract with regard to the children of the first marriage were testamentary only, and were therefore validly revoked by the mother's settlement—*diss.* Lord Rutherfurd Clark, who was of opinion that the marriage-contract being in favour of the children "procreated and to be procreated," and being delivered to the trustees under it, constituted an irrevocable donation in favour of the children of the first marriage.

Exclusion of Jus mariti.

Opinions per Lord Justice-Clerk and Lord Young, that by the terms of the marriage-contract the *jus mariti* of the husband was excluded from the fee of the moveable estate; *per* Lord Rutherfurd Clark, that it was excluded from income only.

Apportionment Act (37 and 38 Vict. c. 37)—Appointment under Powers Act 1874.

Opinion (per Lord Fraser) that this Act applies to Scotland.

Mrs Helen Campbell or Mackie was predeceased by her husband Peter Mackie. In 1855 she contracted a second marriage with John Gloag. Several children had been born of the first marriage, three of whom, two sons and a daughter, were alive at the date of the second. In contemplation of her second marriage Mrs Mackie entered into an antenuptial marriage-contract with her intended husband John Gloag. By this deed she, with his consent, conveyed to certain parties (including herself and him) as trustees—(1) Certain heritable property in Glasgow; (2) 31 shares in the Clydesdale Bank, and 37 shares in the Gorbals Gravitation Water Company; (3) A policy of assurance upon her life for £499. Gloag on his part conveyed no property to the trustees. The purposes of the trust were that the trustees should hold the property conveyed by the wife for behoof of her "in liferent for her liferent alimentary use of the annual proceeds thereof allenarly, and seclusive of the *jus mariti*