as lawyers, when he spoke of the whole of the provisions in favour of Mary Whyte and her children, I think he was dealing with everything he had provided in the other parts of the deed, and that he thereby designated "issue" by the term "children." And I think that is an additional circumstance beyond those mentioned by your Lordship in favour of coming to the conclusion that the term issue means children and children only.

LORD DEAS was absent.

The Court pronounced this interlocutor:—

"Find and decern that the words 'lawful issue' of Mrs Walkinshaw in the fifth purpose of the first codicil of the late William Young's settlement include Mrs Walkinshaw's children only, and do not include grandchildren."

Counsel for First Parties (Young's Trustees)—Rankine. Agent—David Turnbull, W.S.

Counsel for Second Parties (Children of Mrs Walkinshaw)—J. P. B. Robertson—Jameson. Agent—F. J. Martin, W.S.

Counsel for Third Parties (Grandchildren of Mrs Walkinshaw)—Mackintosh--Graham Murray. Agents—Torry & Sym, W.S.

Friday, July 13.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

THE LIQUIDATORS OF THE SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY *v.* SMALL AND OTHERS (SHIELL'S TRUSTEES).

Building Society — Powers of Directors — Ultra vires.

The directors of a building society, who had power under the rules to borrow money on the society's behalf, advanced £1000 to A, taking from him a bond by which he undertook to repay the loan in fourteen instalments of £101 each, and also a disposition to the heritable subjects belonging to him which was *ex facie* absolute, but really in security of the loan. There were prior bonds over the property. A having been sequestrated, the prior bondholders gave notice of their intention to exercise the power of sale contained in their bonds, and in order to prevent the sale the directors of the society granted to them a bond of corroboration, binding the society to pay to them the sum contained in their bonds. In the subsequent liquidation of the company, *held* that the bond of corroboration was *ultra vires* of the directors, being an obligation not warranted by the rules, and which they were under no obligations to grant, and that it fell to be *reduced*.

This was an action raised by the liquidators of the Scottish Property Investment Company Building Society against the trustees of the late John Shiell, for reduction of a bond of corroboration granted in favour of the defenders by the directors of the Society previous to its going into liquidation. The circumstances under which the bond was granted were as follows—The Scottish Property Investment Company Building Society was a Society incorporated under the Building Societies Act 1874, in terms of rules which had been duly certified as being in conformity with that Act. By article 2 of the rules in force at the time of the transactions after mentioned it was provided—"The objects of the Society shall be, by the subscriptions or payments of its members, to form a fund in shares of £25 each, half shares of £12, 10s. each, and quarter shares of £6, 5s. each, out of which fund members who are desirous of erecting or acquiring dwelling-houses, or other heritable property, may receive advances upon heritable security by way of mortgage to enable them to do so; and generally the objects allowed by the Building Societies Act 1874. No preferential shares shall be issued."

By article 86 it was further provided—"The Society may receive deposits or loans at interest from the members or other persons, or from corporate bodies, joint-stock companies, or any terminating building society, to be applied to the purposes of the Society, and the directors shall, for the purposes of the Society, have power to borrow such sums from the Society's bankers, or other persons, as they may deem advisable: Provided always, that the total sum of money to be received or borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by mortgage from its members to the Society. The sums so borrowed shall form a preferable charge against the funds, claims, and effects of the Society."

Rule 96 provided—"The directors shall have power to act for the Society in accordance with these rules in all matters that may arise. Their proceedings shall be regularly entered in a minute-book which shall be kept by the secretary. Each minute shall be authenticated by the signature of the chairman of the meeting."

In pursuance of the ordinary business of the Society, as set forth in these rules, William M'Donald, solicitor in Dundee, obtained from the directors an advance of £1000 upon the security of certain subjects in Reform Street, Dundee. With the view of securing the advance the said William M'Donald granted the following deeds in favour of the Society—First, a bond by him for £1000, dated 5th August 1876, undertaking to repay the same in fourteen yearly instalments of £101 sterling each; and second, disposition *ex facie* absolute by him in favour of the Society of the subjects above referred to, dated 3d August, and recorded in the register of sasines kept for the burgh of Dundee on 11th September 1876. At the time this disposition in favour of the Society was granted there existed as prior burdens upon the said subjects (1) a bond and disposition in security by M'Donald in favour of the defenders for £2500, dated 2d August 1876, and duly recorded on the following day; and (2) a bond and disposition in security by M'Donald in favour of David Marnie Mills, surgeon, Newtyle, dated and recorded 30th August 1876. This latter bond and disposition in security was, by assignation dated 13th, and with warrant of registration thereon recorded 22d November 1878, assigned to David Small, solicitor in Dundee, who still held it at the date of this action.

In February 1879, in consequence of the bankruptcy of M'Donald, who was sequestrated in December 1878, the defenders and Mr Small, as the holder of the two prior bonds and dispositions in security, served notarial requisitions for payment upon the Society. Mr Small, acting for the bondholders, wrote to the law-agent for the Society to the effect that the bonds might remain on the property on bonds of corroboration being granted by the Society. A bond of corroboration in favour of the defenders was prepared by Messrs Shiell & Small, acting on their behalf. By this bond the Society, on the narrative of the bond and disposition in security by M'Donald, and that the sums contained in it were still due and unpaid, and that the Society now stood vested in the subjects, and it had been agreed between Shiells' trustees (the defenders) and the Society, at the request of the Society, that the sums of money contained in the bond should constitute a debt and burden upon the Society, and that the personal obligation contained in it should subsist and be effectual not only against M'Donald and his representative, but also against the Society, and that the said security should also subsist over the subjects, bound themselves, without prejudice to the bond and disposition in security or the obligations therein contained, but in corroboration thereof, *et accumulando jura juribus*, to pay to Shiells' trustees (the defenders) the foresaid sum of £2500. This bond was executed *ex facie* in accordance with the Society's rules, being signed by two directors and the secretary and sealed with the Society's seal.

After the date of the bond of corroboration, May 1879, property in Dundee became still further depreciated, and the Society went into liquidation in 1881. The pursuers having been appointed liquidators, raised against Shiells' trustees the present action for reduction of the bond of corroboration, the grounds of which were (1) that the bond of corroboration sought to be reduced had been obtained without the knowledge or consent of the directors, and (2) that it was in any view *ultra vires* of the directors to grant such a bond, as being without consideration and outwith the scope of the business of the Society.

In support of the former ground of action they averred that the matter had never been brought before a meeting of the directors, and that the Society's Dundee agent was not authorised to negotiate a postponement of sale on the footing of the bond of corroboration being granted.

The pursuers pleaded, *inter alia*—"(2) In any event, it being *ultra vires* of the directors, and in violation of the rules and constitution of the said Society to grant the said bond, the pursuers are entitled to decree as concluded for."

The defenders pleaded that the bond sought to be reduced "being within the scope of the Society's business, is valid, and not liable to reduction, or, at all events, the pursuers are not in a question with the defenders entitled to repudiate it, but must seek their relief, if any, against the parties executing and delivering it."

On the 10th February 1883 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"Sustains the reasons of reduction, and reduces, decerns, and declares conform to the conclusions of the libel: Finds the pursuers entitled to expenses," &c.

"*Opinion.*—The Scottish Property Investment Building Society, here represented by its liquidators, held a second mortgage, in the form of an *ex facie* absolute disposition, over subjects in Reform Street, Dundee, and in order to avoid a sale by a creditor holding a preferable security, the directors of the Society granted a bond of corroboration in name of the Society in favour of the holders of the preferable security. The liquidators of the Society sue for reduction of this bond of corroboration on the ground that it is a deed *ultra vires* of the directors. The bond is in substance and in form a guarantee by the Society of an obligation extrinsic to the Society's business. It appears to me to be almost a self-evident proposition that a body of directors cannot enter into a gratuitous deed of guarantee binding on their constituents. But in this case it is said that the guarantee may be supported by this consideration, that it was granted to protect the interests of the shareholders against the loss which would have arisen through a sale at the instance of the first bondholder. It is therefore necessary to consider whether the granting of the deed was within the powers of the directors, or whether the deed was one which could only be granted under the authorisation of a unanimous resolution of the body of shareholders. This question obviously depends upon the authority of the directors as defined by the constitution and rules of the Society. I have not been referred to any rule of the Society empowering its directors to enter into obligations outwith the scope of the Society's business. The defenders found upon the power to borrow contained in the 86th rule. A power to borrow may no doubt imply a power to grant bonds for money borrowed by the Society, but it will not imply a power to grant bonds for money borrowed by a different debtor. It was further contended by the defenders that the Society having taken their security in the form of an *ex facie* absolute conveyance, were virtual proprietors of the heritable subjects, and were bound, or at least entitled, to keep the property clear of debt. I cannot assent to this view of their position. If the Society had purchased the property (assuming that it had the power to purchase heritable estate) it might have required the seller to clear off the first bond in consideration of its payment of the full price. If, in such a case, the purchaser agrees to let the first bond remain undisturbed, the value of the bond is allowed for in the settlement of the price, and the purchaser becomes the proper debtor in the bond. He may or may not grant a bond of corroboration; but in any case, if the seller is called to pay the bond he will have relief against the purchasers, who must then either grant a bond of corroboration or put the seller in funds to discharge the security.

"But in the present case the Society, although in form proprietors, were in substance only heritable creditors. The granter of their title-deed was in reality their debtor, bound to repay the consideration money, and entitled to a reconveyance of the property on payment of his debt and interest. The granter of such a title clearly could not compel the Society to corroborate his obligation to the first mortgagee or to put him in funds to clear it off. The Society's bond of corroboration was therefore a deed which the Society was under no obligation to grant. It was a gratuitous

deed, bearing to be in the name of the Society, but granted by the directors without its consent. In certain contingencies the arrangement might have been advantageous to the Society, so that it would not be for the Society's interest to discharge it. But as events have happened it is for the interest of the Society to challenge it, and I see no good answer to the liquidators' claim. The defenders, although they will lose the benefit of their bond of corroboration, will still hold a first security over the heritable estate; and this, in my opinion, is all the security for their loan to which the defenders are entitled."

The defenders reclaimed. Argued for them—(1) Though a company may not as a regular course of business be entitled to do a certain act, to secure property of the company it may be so entitled. It has the same power of discretion as an ordinary proprietor. (2) Third parties are not concerned with the following out of the domestic rules of a Society as such, provided the procedure is *ex facie* regular.

Authorities—(1) 37 and 38 Vict. c. 42, sec. 13; Bryce, "Ultra Vires," pp. 151, 155–6, 208; *Fraser* v. *City of Glasgow Bank*, July 15, 1879, 6 R. 1259; *Royal Bank of India's* case, L.R., 4 Ch. App. 252; *Mullock* v. *Jenkins*, 14 Beavan, 628; *The Directors, &c., of the Ashbury Railway Carriage Company* v. *Ritchie*, L.R., 7 Eng. & Ir. App. 653, 673; *in re Barned's Banking Company*, L.R., 3 Ch. App. 105. (2) 1 Lindley on Partnership, 253; *The Royal British Bank* v. *Turquand*, 5 E. & B. 248, and 6 E. & B. 327.

Argued for pursuers and respondents—The action of the directors was *ultra vires*. They should have paid up the bond and taken an assignation. It was reasonable to protect the security, but on condition that what was done was sanctioned by the rules. This question is not to be solved by the general doctrine of *ultra vires*, so much as by the rules of the Society itself. The bond was granted without consideration.

Authorities—(1) *Brettel* v. *Williams*, 4 Exch., Wellsby, Hurlstone, & Gordon, 623; *Chaples* v. *Brunswick Permanent Building Society*, L.R., 6 Q.B. Div. 696; *The Crewer Company* v. *Williams*, July 24, 1866, 14 Weekly Reporter, 444, 1003; *in re National Permanent Benefit Building Society*, L.R., 5 Ch. App. 309; *Lang* v. *Reed*, L.R., 5 Ch. App. 4; Lindley on Partnership, 4th ed., 538; *Hawtagne* v. *Bourne*, 7 M. & W. 595. (2) *Kirk* v. *Bell*, 16 Q.B. 290; *Earnest* v. *Nicholls*, 6 Clark's H. of L. Rep. 401; *D'Arcy* v. *Tamar Railway Company*, L.R., 2 Ex. 158; *Heiton* v. *Waverley Hydropathic Company*, June 6, 1877, 4 R. 830.

At advising—

Lord Craighill—The pursuers of this action are the liquidators of the Scottish Property Investment Company Building Society, which was incorporated under the Building Societies Act of 1874. The purpose for which it was formed is set forth in article 2 of the rules which were in force at the time when the transaction with the defenders which has issued in the present litigation was concluded. That rule is as follows—"The objects of the Society shall be, by the subscriptions or payments of its members, to form a fund in shares of £25 each, half shares of £12, 10s. each, and quarter shares of £6, 5s. each, out of which fund members who are desirous of erecting or acquiring dwelling-houses, or other heritable property, may receive advances upon heritable security by way of mortgage to enable them to do so, and generally the objects allowed by the Building Societies Act 1874." As ancillary to the objects of the Society, power was given to the directors by rule 86 to receive deposits or loans at interest—"The Society may receive deposits or loans at interest from the members or other persons, or from corporate bodies, joint-stock companies, or any terminating building society, to be applied to the purposes of the Society, and the directors shall, for the purposes of the Society, have power to borrow such sums from the Society's bankers or other persons as they may deem advisable: Provided always, that the total sum of money to be received or borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by mortgage from its members to the Society. The sums so borrowed shall form a preferable charge against the funds, claims, and effects of the Society."

M'Donald, a solicitor in Dundee, received from the Society in 1876 an advance of £1000 on subjects in Reform Street, Dundee, and to secure the stipulated repayment he granted to the society—First, a bond by which he undertook to repay the advance in fourteen yearly instalments of £101 each; and second, an *ex facie* absolute disposition of the property. This transaction, whether prudent or not as an investment, which may be doubted, as there was a prior bond for £2500 over the subjects conveyed in security, was in all its parts covered by the rules of the Society. In the first place, it was an advance to a member of the Society on the security of heritable property. In the second place, the repayment was by instalments as authorised by article 30; and in the third place, the form in which the security was given was one of those specified in article 34 of the rules of the Society.

The loan of £1000 to M'Donald was given on the security obtained, as already mentioned, in 1876. But even prior to that time there had been over-speculation in the building trade. The consequences came to be severely felt in 1878, if not before; and when in October of that year the City of Glasgow Bank stopped payment the credit of many builders, and that of some building societies, completely collapsed. Among others who succumbed to the pressure of the times was M'Donald, the owner of the property in question which constituted the security both of the Scottish Property Investment Company Building Society and of the defenders, who hold the prior bond for £2500. His estate was sequestrated in December 1878, and the defenders in January 1879 gave notice that at the end of three months the property would be sold failing payment of their debt. Thereupon communings occurred between the Society and the defenders, the object of the one party being to obtain delay in the sale, and that of the other to obtain a bond of corroboration from the Society. The result was the granting of the bond which is now challenged in this action. After May 1879, the date of the bond, things in the building trade became worse, the value of house property still further declined, and so it came to pass that this Society went into liquidation in 1881. The liquidators are the pursuers of the present action. They

challenge the bond on the ground—First, that it was *ultra vires*, because the transaction was of the nature not authorised by the rules of the Society, and because no consideration was received for the bond; and second, that it was irregularly granted, its execution having been unauthorised by the board of directors. Both of these are important questions, but entertaining the views I do on the first, it is unnecessary for me to express an opinion on the second on the present occasion.

On the face of the deed no consideration is set forth. The only thing there to be found that suggests a motive or cause for granting is, that the Society had come to be vested with the subjects of the security by disposition from M'Donald. But the right which they received was only a security right, though the disposition was *ex facie* absolute. The case, it may be added, would hardly have been better for the defenders even if the disposition had not only in form but in reality been absolute, inasmuch as the directors were not entitled to speculate in the purchase of house property. Plain it is, at anyrate, that the granting of such a deed was no way obligatory on the Society. In these circumstances what is there in the shape of consideration to support the deed? All that the defenders allege is, that "in consideration of the granting of the said bonds of corroboration the defenders departed from their intimation calling up their bonds which they otherwise would have insisted in."

This appears to me by itself quite insufficient as a justification. The transaction was not one within the letter of the rules, and there is nothing to suggest even that it was within the spirit of the rules—that is to say, was in the circumstances so obviously a provident, if not an absolutely necessary measure, that the power which the directors professed to exercise must be taken to be ancillary to the power which they exercised when they gave the loan for £1000 on the security of M'Donald's property. There is no allegation of urgency, no allegation of loss prevented, none of benefit gained, and in these circumstances the true conclusion is, that the granting of the bond of corroboration, which was not obligatory, and for which nothing can be regarded as a reasonable consideration rendered by the defenders, was grossly improvident, and the granting of it beyond the power of the directors. What might have been said on the question of powers if the granting of the bond had been called for or justified by reasonable regard to the interests of the society is a question on which, as there is no occasion, I refrain from expressing an opinion. As things are, and for the reasons already explained, I concur with the Lord Ordinary in thinking that this bond should be reduced.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I should be slow to affirm as a general proposition that a building society carrying on their business under these rules, might in no circumstances have granted such an obligation as is now before the Court. On the contrary, I think that if they had power—and I do not at all doubt that they had power—to become creditors in a second or postponed heritable security they might have paid up the first bond, or have granted a corroborative security in a commercial crisis or in a period of depression in the building trade, provided that appeared to be a beneficial and reasonable act for the protection of the company. But I am not prepared to differ from the proposed judgment, because in order to support such a transaction it ought to have been shown to be likely to prove for the benefit of the Society and its members. This was plainly not the case in the present instance. I think it was of a doubtful character from the first. The original security should never have been accepted at all when the margin was so very narrow, and the additional risk undertaken by the bond of corroboration was manifestly indefensible.

Lord Young having been absent on Circuit during the hearing, gave no opinion.

The Court adhered.

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

Counsel for Defenders — Mackintosh — H. Johnston. Agents — Henderson & Clark, W.S.

Friday, July 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TENNENT *v.* TENNENT.

Evidence — Character of Witness — Credibility — Divorce.

Observed (*per* Lord President), in advising an action of divorce for adultery, that the evidence of prostitutes and persons trading in prostitution is not to be rejected *in toto* though uncorroborated, but that it must be strictly examined.

In the action of divorce at the instance of Mrs Tennent against her husband Charles Tennent, on the ground of adultery, the Lord Ordinary (Fraser) assoilzied the defender. On a reclaiming-note the First Division adhered, and the following observations were made by the Lord President on the character of the evidence.

Lord President—This is an action of divorce at the instance of a wife against her husband, on the ground of adultery, alleged to have been committed in brothels in Edinburgh, and also in London. . . . The occasions set forth in the condescendence are spoken to by the keeper of the house in which the adultery is said to have been committed; her evidence is supported by that of a prostitute in the house, and is further confirmed by that of her own husband.

This evidence is of course of such a character as to require very strict attention and scrutiny, but I am not able to concur with the views of the Lord Ordinary in regard to this class of evidence, and think it necessary to express my dissent from them somewhat emphatically.

After going over the evidence of these three persons, the Lord Ordinary says—"Now if all this was credible evidence, only one conclusion could be arrived at. But then the evidence is the evidence of prostitutes, and such evidence without corroboration is not credible. Everyone who has had experience in dealing with it knows that