L.R., Equity Cases, 324. (3) The Act 37 and 38 Vict. cap. 37, section 1, remedied the objection that no portion of the fund was appointed to the representatives of Alexander Mackie. It was an Act applicable to Scotland, although drawn in the first instance with reference to English procedure —*Campbell* v. *Campbell, &c.* (opinion of the Lord President and Lord Deas), *supra; Hamilton* v. *Hamilton's Trustees*, July 9, 1879, 6 R. 1221. (4) It was vain to plead that the annuity given to the pursuer was illusory. Even if it were, this objection could be cured by the Act 11 Geo. IV. and Will. IV. cap. 46, which applied to Scotland. But apart from the statute, the pursuer's mother had amply explained her reasons for gradually diminishing his annuity.

At advising—

The LORD JUSTICE-CLERK delivered the opinion of the Court in the following terms:—

The Lord Ordinary has explained his views so clearly, and with such full citation of authority, as greatly to assist us in giving our decision on the points which still remain for judgment. I agree entirely with the Lord Ordinary in all respects.

The first question which arises in the present position of the case is, whether Mrs Gloag competently exercised her power of apportionment of the marriage-contract funds by introducing the apportionment into a general settlement of her means and estate. I see no reason for doubting that this may be competently done, provided it be clear that the appointer intended thereby to exercise the power. In the present case no question can be raised on this head, for the settlement expressly refers to the power, in her trust-disposition and settlement of the 31st January 1881, and states her intention, by this present trust-disposition and settlement, to exercise said power. It is true that the directions which she gives are applicable as well to her general estate as to the fund provided in the marriage-contract which was the subject of the power; but if these directions would have been valid, which I see no reason to doubt, if applied exclusively to the marriage-contract fund, they are not rendered invalid because they are also operative in the settlement of her general estate. The authorities quoted by the Lord Ordinary, both from our own law, and that of England, are I think conclusive. The second question raised by the pursuer relates to the provision by Mrs Gloag, to her daughter in liferent, and her children in fee. But for the consent of the daughter, this would not have been a valid exercise of the power. But it seems to have been settled in England that such a provision made with the consent of the beneficiary or appointee will be supported; and I quite agree with the Lord Ordinary in his view of the authorities on this head.

The Lord Ordinary adopts a different view in regard to the third question raised—whether the provision of one-fourth of the residue to the son of the pursuer in fee was in due fulfilment of the power. He holds that it was not, as the pursuer did not consent to it; and he holds that the case of *Macdonald*, as decided by the House of Lords, necessarily leads to that conclusion. He therefore holds that this fourth share is not appointed to and falls to be divided between the pursuer and his sister. The case of *Macdonald* decided that where, without the consent of the beneficiary, his right in an appointed share is limited to a liferent, and the fee going to one not an object of the power, the limitation flies off, and the share devolves without restriction on the appointee. But here there is no room for the application of that rule, for no liferent was provided to the pursuer, and thus the share remains unappointed. The last question raised relates to the interest of a brother of the pursuer, who survived the execution of the contract of marriage, but died without issue. It is contended that his representatives were objects of the power, and that as no share was apportioned to them, the whole apportionment was invalid—The recent statute, 37 and 38 Vict. c. 37, seems to remove all difficulty on this head. It was said that the statute does not extend to Scotland, but I find no ground for that contention in the provisions or in the phraseology of the statute itself. In the case of *Hamilton*, 6 R. 122, referred to by the Lord Ordinary, we assumed that the statute applied to Scotland, and in the case of *Campbell*, 5 R. 561, the very pointed remarks of the Lord President and Lord Deas proceed on the same assumption.

I am further of opinion that the share apportioned to the pursuer was not illusory.

In these remarks I have done but little more than summarise the Lord Ordinary's very able and instructive note. I entirely agree with him, and I propose that we should adhere to his judgment.

The Court adhered.

Counsel for Reclaimer — Nevay. Agent—William Officer, S.S.C.

Counsel for Respondents—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, July 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SINCLAIR *v.* THE MERCANTILE BUILDING INVESTMENT SOCIETY.

*Friendly Society—Building Society—Alteration in Laws—*Ultra vires*—Acquiescence—Arbitration—Building Societies Act* 1874 (37 *and* 38 *Vict. cap.* 42), *sec.* 35.

Circumstances in which *held* (1) that a member of a building society was barred by acquiescence from challenging, on the ground of *ultra vires*, the legality of a new rule, passed at a special meeting of the society, which provided that a certain deduction should be made in making repayment to withdrawing members; and (2) that the society had not forfeited their right to have a dispute between a member and themselves determined by arbitration because there had been no "application" by the member in the sense of section 35 of the Building Societies Act of 1874, with which they had failed to comply.

The Mercantile Building Investment Society,

having its chief registered office at 119 St Vincent Street, Glasgow, was originally registered under the Statute 6 and 7 Will. IV. cap. 32. At the date of the present action it was registered under the Building Societies Act 1874, under which statute it received a certificate of incorporation.

William Sinclair, steamship agent in Greenock, was in May 1874 admitted a member of the society. In 1878 the rules were amended, and rule 12 thereafter stood thus—"Any member may transfer his shares, on which no advance has been granted, on payment of a fee of one shilling per share; or such member may withdraw his instalments, with interest thereon, at the rate of 4 per centum per annum, on giving one month's written notice to the manager, and the same shall be paid as soon as the funds permit, on delivery of the member's pass-book and a proper receipt, whereupon he shall cease to be a member in respect of such shares." Sinclair never obtained any advance, nor was he a debtor to the society.

On 25th January 1882 the rules were altered by a special meeting of the society. Sinclair did not attend this meeting. No. 15 of the rules of 1882 was in these terms—"Members may withdraw their shares on which no advances have been granted, with one-half of the profits allocated thereon, till the 31st day of January preceding repayment, and interest on said instalments for the period between the last-named date and said repayment, at a rate per annum equal to one-half of the profits allocated for the previous financial year, on giving one month's written notice to the manager. . . . . Such repayments to withdrawing members holding shares subscribed for prior to 31st January 1881 shall be under deduction of 15 per cent. of the instalments due on, and the profits allocated to, said shares as at last-named date."

Upon 8th March 1882 Sinclair gave notice to the manager of the society of the withdrawal of the instalments paid by him on his shares, and during the year 1882 and 1883 he frequently called at the society's office to get payment of the sums he claimed. He was offered to be paid out under the rules of 1882, but that involved a deduction to which he objected.

Sinclair eventually raised the present action against the Mercantile Building Investment Society, concluding for payment of £365, being £313, 19s. 2d. as the total amount of instalments on his shares, and £51, 2s. 7d. as interest at 4 per cent. from the respective payments of instalments up to 8th April 1882. The pursuer averred that at the date of his notice of withdrawal, rule 12 of the regulations of 1878 was the basis of his contract with the defenders, and that he was entitled to be paid out one month after the date of the notice, or as soon thereafter as the society was in funds to pay him. He also alleged that he was no party to the altered regulations, and was not present at the meeting on 25th January 1882 at which they were passed, and that he objected whenever the defender sought to apply the said altered rules to him. He maintained that these alterations were *ultra vires* of the society. He specially objected to the deduction of 15 per cent. proposed under rule 15.

The defenders averred that the regulations objected to by the pursuer were in force at the date when he lodged his notice of withdrawal on 8th March 1882, and that they were the rules under which the society was at the date of this action being carried on. The 17th rule provided that the "books shall be balanced, and the profits or losses declared, at the end of January in each year." Provision was made by the said rule for allocation of the profits of any year in which profits had been made, after setting apart a reserve fund. The same rule further provided that "at the close of the years during which there have been losses declared, these shall be allocated amongst the shares, each member's loss being debited to his account, and at the end of his pass-book, in proportion" to the instalments due on his shares. The 15th and 17th rules applied to all members of the society, whether advanced or unadvanced, and the losses sustained by the society prior to the pursuer's notice of withdrawal, if allocated among the unadvanced members alone (which would be the result if these rules were held to be *ultra vires*), would leave the pursuer with a smaller sum to receive than was now tendered to him. They also alleged that the society had suffered losses, and that a certain portion of the loss was allocated to the pursuer, and that the sum which they were due him, and were all along ready to pay him, was £210, 6s. 6d. They further averred that under rule 33 of the existing rules it was provided that all disputes between the society and any of its members should be referred to the Registrar of Friendly Societies in Scotland, and that they were ready and willing to refer the present dispute to him.

The pursuer pleaded, *inter alia*—"(4) Rules XV. and XVII. of the copy rules so far as these are calculated to impose upon the pursuer, as a withdrawing member, a different mode of settlement from that provided under rule XII. of 1878, or involving deductions or charges against him not embraced in the latter rule, were illegal and *ultra vires* of the meeting at which the same are alleged to have been adopted; at least, those alterations having been made without his consent, and not having been acquiesced in by him, are not binding on pursuer. (7) The defenders having for more than forty days failed to comply with the pursuer's application to have the disputes between him and the defenders determined by the registrar, under the provisions of said rule XXXIII., have forfeited any right to have the said disputes so determined, and in terms of section 35 of the Building Societies Acts of 1874 the same now fall to be determined by this Court."

The defender pleaded, *inter alia*—"(2A) The pursuer having acquiesced in the said existing rules of the society, and the society having been carried on thereunder, from the date when the same were passed till this action was raised, without any objection from the pursuer, he is not now entitled to object to their validity."

The Sheriff-Substitute (Lees) found for the pursuer, and granted decree for £350, 8s. 3d.

In his note, after narrating the facts as above detailed, the following passages occur—"Various pleas for the defenders have already been disposed of, and the question that now has to be disposed of is, Is the pursuer barred by the resolution of 25th January 1882, or the rules subsequently adopted, or in any other way, from insisting in

the present claim? I do not think he is barred by acquiescence; for though he does not appear to have dissented from the resolution, he lost no time in withdrawing from the society, and while he has not sued the society at once, it is to be noticed that he made frequent applications for payment, and that there was little use in suing them till they were in a position to pay what he claims. . . . It appears to me that the pursuer is entitled to the protection of the Court against so sweeping a forfeiture, and that he must get the decree which I have granted him."

By interlocutor of 31st December 1884 the Sheriff (CLARK) recalled this interlocutor, and found that the matters in dispute fell to be determined by arbitration, as relating to the internal management of the association, and that the pursuer was barred by acquiescence and personal exception from calling in question the validity of the change in the regulations.

"*Note.*—The plain meaning of the Legislature is, that all questions arising within a society of this kind, that is, *inter socios*, should be determined, not by the courts of law, but by the methods of arbitration provided by the statutes. To hold otherwise would, I think, be to ignore the obvious policy of the Legislature, and also the very statutory words. There are some elements, no doubt, which may be held as not properly falling within the sphere of the arbitrators—one of those would be whether, as in the present case, the validity of the rules of the society, according to which the arbitrators would have to proceed, was itself legitimately called in question. There have been some English decisions which might be read as holding that even a question of this kind falls within the sphere of the statutory arbitration, but the opinions of the Scotch Supreme Courts would seem to be adverse to this view, and it does not appear necessarily to follow from what has been decided in England. I am inclined, therefore, to hold that if a relevant case was made out for calling in question the validity of the rules, this would properly fall to be determined by an action of reduction, and that, as already held in the interlocutor of 4th April 1884, there is nothing to prevent such reductive pleas from being dealt with in the Sheriff Court under the Act of 1876. But the question here is, whether any such difficulty really presents itself, that is to say, whether the pursuer has stated any good grounds on which he could maintain reduction, or whether, in other words, he is not barred *personali exceptione* from maintaining any such plea.

"In the first place, it is worthy of consideration whether the changes made on the rules were *ultra vires* of the powers of the society, or, in other words, they did not fairly lie within its proper sphere of action. Now, after a careful examination of the new rules, I am unable to see anything in them, beyond the powers of the society, when the circumstances in which it was at the time placed are duly considered. It was in pecuniary difficulties, insomuch that unless some effectual measures were taken, it would speedily drift into liquidation, and the interests of all concerned, including those of the pursuer, would, to say the least of it, become seriously imperilled. If the society had no power to make certain changes on the rules to meet a case of this kind, all that can be said is, that its constitution was very defective, and quite unfitted to meet such contingencies as might reasonably be expected. I have no doubt that it possessed such powers, for there is nothing in its constitution inimical to that view, and I cannot see that the mode in which they were exercised was at all at variance with the best interests of all concerned. A sacrifice to some extent had to be made, but the sacrifice was no greater than that with which we are familiar in many other associations where a resolution is come to for the creation of preference stock. Yet however much the society might be empowered to make changes on the rules, it would still be a question whether those changes were made in due conformity with the provisions in its constitution to that effect. If they were not so made, a very strong reason could be urged against their validity. In the present case, however, no such question arises. It is not disputed that the change in the rules was made in conformity with provisions to that effect. A general special meeting to consider the proposed changes was convened, and due notice was given to all members, including the pursuer. At that meeting the new rules were adopted without dissent on anyone's part, and thereafter they received the sanction of the registrar also in proper form. The only thing that could be said against them is, that the pursuer was not present at the meeting, not because he did not get due notice, but because he did not choose to attend. He knew, however, before the meeting what the proposed changes were, and he knew directly afterwards that these changes had been adopted, yet he took no protest against what had been done either at the time or subsequently—not even at the general annual meeting that soon afterwards followed. He did nothing for eight months which could show his objection to the said rules. But he allowed the society to go on and continue its operations under the new rules without taking any objection. He even gave notice of withdrawal without stating any objections to the new rules, although he well knew that these very rules, if followed, would seriously affect his claims on withdrawing. It was only when he made the claim for which he now sues, and when he was met by the answer that he was not entitled to it under the new rules, that he for the first time raised any objection to their validity. It must, I think, be held, in these circumstances, that the pursuer has acquiesced in, and, as far as he could, homologated these rules as valid, and if that is so, his plea that their validity is a question that cannot be dealt with by the arbitrators falls to the ground, inasmuch as no such question now exists.

"If I am right in these views, it seems to follow that the jurisdiction of the Court is ousted by the statutory provisions for determining the questions in issue by arbitration, and that the action falls to be dismissed."

The pursuer appealed to the Court of Session.

At the discussion the argument was, by the desire of the Court, confined to the question whether there was such a refusal to refer as would let in the provisions of section 35 of the Building Societies Act 1874.

Argued by the appellant—The letter of 22d

December 1883 (quoted in the opinion of the Lord President) was "an application" in the sense of the statute; it was something outwith the rest of the negotiations, and pointed directly to a reference to the registrar. No doubt this was the only letter that could be founded on in support of this contention, but no set form of application was required by the statute, and in the absence of any such requirement the language in the letter founded on was sufficient to constitute an "application" to the respondents for arbitration.

Replied for the respondents—The parties here were not in the position contemplated by section 35 of the Building Societies Act of 1874. That section contemplated the case of one of the parties to the dispute being desirous of having the matter at issue settled by arbitration, and the other party being unwilling to have the dispute so determined, and where an application for arbitration had been made as contemplated by the Act. That was not the state of matters here, as the appellant stated that he desired arbitration, while the respondents were ready and willing to refer the matters in dispute to the registrar; all that they objected to was going before the arbiter with a one-sided statement made up to suit the appellant's case. The matters in dispute were specially suited for arbitration in the manner contemplated by the statute, being matters connected with the internal management of the society.

The Act 37 and 38 Vict. cap. 42, section 35, provides—"That the Court may hear and determine a dispute in the following cases—1. If it shall appear to the Court, upon the petition of any person concerned, that application has been made by either party to the dispute to the other party, for the purpose of having the dispute settled by arbitration under rules of the society, and that such application has not within forty days been complied with." . . .

At advising—

Lord President—It appears that there was an alteration of the rules of this society in January 1882, and it is not alleged that the changes which were then made were not submitted to the members in regular form and carried after due consideration. But it is said that the rules which were then passed are *ultra vires* of the society, and are not binding upon the pursuer of this action, and the rule to which special objection is taken is the 15th, which relates to the transfer and withdrawal of shares. There is nothing peculiar in the words of this regulation except in one part where it provides that "such repayments to withdrawing members holding shares subscribed for prior to 31st January 1881 shall be under deduction of 15 per cent. of the instalments due on and the profits allocated to said shares as at last named date."

Now, there can be no doubt that if this is a valid rule, and one which it was within the powers of the society to frame, then it applies to the case of the pursuer. But his contention is that this rule is invalid in respect that it subverts the articles of association. There might be a great deal to be said in support of that contention if the pursuer was not barred by acquiescence from taking this objection, but I am of opinion that he is so barred. He gave notice of withdrawal on 8th March 1882, that is to say, about two months after these new regulations came into operation. And it is to be observed that from the time when they were passed by the society these rules have been acted on as regards all members who have withdrawn, and whose withdrawal has only been sanctioned under this deduction of 15 per cent. Thus upon turning to the profit and loss account for the year ending January 1882 there is a statement showing that there was a sum of no less than £403 realised by the society out of this reduction of 15 per cent. upon withdrawing members, and in the following year the amount was £335. From this it appears that all members who desired to withdraw from the society were in the habit of doing so upon the footing of paying this recognised deduction.

Now, the pursuer never seems to have objected to this rule, nor does it appear that he ever protested against it, but he gave in his intimation of withdrawal upon the 8th March 1882. If matters had stopped here it might perhaps reasonably enough have been said that there was nothing in what he had done to let in acquiescence.

Upon the 27th October the pursuer wrote to Mr Tosh, the manager of the company, in these terms:—"Dear Sir—I will be glad if you could inform me now when you will be able to square up with me? You might give me a statement showing the amount due to me, with particulars of all deductions.—Yours truly, Wm. Sinclair."

In answer to this Tosh replies on 2d November and sends him a statement showing the sum due to be £334, 12s. 4d., but under deduction of 15 per cent., which brought down the amount payable by the society to £289, which sum, however, it was explained could not then be paid owing to the society's financial position.

Now, here was a very fitting occasion for a protest by the pursuer if he had any objection to offer to the proposed deduction, but instead of that he writes in these terms on 15th November:—"Dear Sir—I duly received your note of 2d inst., but you do not say in it when you think you will be in funds to pay me the £289, 0s. 2d. Kindly let me have this information at your convenience. You marked your note private, but it was omitted to be noted on the envelope, and was opened in my absence.—Yours truly, Wm. Sinclair."

Now, after such a letter how can the pursuer be allowed to come forward and say that he is entitled to the larger sum which he now claims. That I think is sufficient to dispose of the objection taken to the validity of rule 15. But a question has also been raised as to rule 17, which the pursuer maintains to be also *ultra vires* of the company, and which he further says does not apply to him even supposing its validity is established.

Now, I cannot for my part see any objection to its validity. It provides—"The books are to be balanced and the profits or losses declared at the end of January in each year. At the close of the years during which there have been profits declared, 5 per cent. thereof shall be carried to the reserve account to meet contingent losses, and the balance allocated amongst the shares in proportion to the instalments due thereon, each member's profit being credited to his account

and at the end of his pass-book. At the close of the year during which there have been losses declared, these shall be allocated amongst the shares, each member's loss being debited to his account, and at the end of his pass-book in the proportion foresaid." Now, what objection can be taken to such a rule? If there have been profits earned, a portion thereof is to be constituted a reserve fund, and the balance is to be divided among the shareholders, while in the unfortunate years the losses are to be divided among the shareholders or members. It is said by the pursuer that this rule is not applicable to his case, because it is proposed to assess him for losses incurred by the society after he gave in his notice of withdrawal. That is a matter which will be dealt with by the arbiter, and it is a question which may very fairly be brought under his consideration. The pursuer, however, says that his application to have the disputes between him and the defenders determined by the registrar not having been complied with within 40 days, the right to have the disputes so determined has been forfeited, and that the disputes between the parties must be determined by this Court.

The evidence appealed to in support of this plea is a letter addressed to the agents of the pursuer by the agents of the society. It is in these terms:—"Dear Sirs—Referring to your letter of 15th inst., Mr Tosh will be glad to show you the books of the society in his office to-morrow at one o'clock afternoon. Under the rules of the society, any dispute between the society and its members is referred to the Registrar of Friendly Societies, and if you are to insist on more than is offered, it appears to us that you should proceed in terms of the rules. —Yours truly, JOHN STEWART & GILLIES."

Now, what was offered was the £283, less a proportion of the losses. Now, the letter was answered on the 22d December, in these terms: —Dear Sirs—"As arranged with your Mr Gillies on Wednesday last, we enclose statement of claim by our client, and shall be glad at your early convenience to have the same returned with the answers for the society, to which, if need be, we shall prepare and send you replies, preliminary to a meeting with you before Mr Balfour Paul.—Yours truly, MORRISON & WRIGHT."

Now, it is said that this letter is, within the meaning of section 35 of the Building Societies Act of 1874, an application to have the disputes settled by arbitration. I cannot so read it. It is a letter written after the parties have arranged to refer the matters in dispute, and indeed it forms part of a series of negotiations. There was no room in the present case for an application such as the statute is there contemplating, and no room for failure through a lapse of 40 days.

In these circumstances the question comes really to be, what ought each of the parties to have done? The pursuer ought to have lodged his claim and called upon the arbiter to have adjudicated upon it. It has been said that the parties were not successful in adjusting their pleadings prior to going before the arbiter, but that is not a failure in the sense of the Act of Parliament, the provisions of which therefore do not in my opinion apply, while the application of rule 17 is a matter which has still to be dealt with by the arbiter.

LORDS MURE, SHAND, and ADAM concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor complained of: Find that the pursuer is barred by his own conduct and acquiescence from challenging the legality of article 15th of the new rules of the society adopted in January 1882: Find that rule 17th is not beyond the powers of the society to enact, and that the question whether it is applicable to the pursuer's case falls to be determined by the Registrar of Friendly Societies as arbiter: Find that the defenders have not in any way forfeited their right to insist on the said question being determined by the said arbiter: Therefore assoilzie the defenders from the conclusions of the action and decern."

Counsel for Appellant—Pearson—A. Moody Stuart. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondents—Strachan—Ure. Agent—David Turnbull, W.S.

Thursday, July 9.

FIRST DIVISION.

SPECIAL CASES—DUKE OF HAMILTON AND OTHERS, AND THE ROAD TRUSTEES OF THE COUNTIES OF LANARK AND LINLITHGOW.

Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51)—*Debt Commissioner, Duties of—Special Case.*

The debt commissioner appointed under sec. 59 of The Roads and Bridges (Scotland) Act 1878 is bound to examine and decide upon the personal titles of the respective creditors to the debts claimed by them.

Observed that the commissioner has the remedy of applying to the Court in the form of a Special Case if ever he feels himself in a position of difficulty.

Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51)—*Debt Commissioner—Valuation of Debt—Circumstances affecting Valuation.*

Section 65 provides that the debt commissioner "shall take into consideration every circumstance which might in his opinion reduce, enhance, or in any way affect" his valuation. *Held* that the change of debtors from one body to over twenty, and the consequent sub-divisions of the principal debt as valued, involving greater trouble and expense in collection of principal and interest, were not circumstances which should be taken into account by the debt commissioner in making his valuation, and an addition of five per cent. to the estimated value of the debt in respect thereof *disallowed.*

James Wyllie Guild, chartered accountant, Glasgow, was appointed debt commissioner under the Roads and Bridges Act 1878 for the district which included, among others, the counties of Lanark and Renfrew. After a lengthened inquiry he valued, pursuant to the provisions of the said