days after the expiration of such fourteen days, give notice in the *Gazette* published next after expiration of such fourteen days, of the time and place of paying the dividend." . . .

In the sequestration of Lipman & Company the four months expired at midnight on 25th May. The *Gazette* was published on 9th June, the fifteenth day after the expiration of said four months. The trustee did not insert the notice required by the 127th section of the Act until 12th June.

Fearing that he had failed to comply with the statute, the trustee presented a note to the Court craving authority to insert the notice in the *Gazette* of 16th June.

The petitioner referred to the following authority—*Fortunat Edwardo Von Rothberg*, December 22, 1876, 4 R. 263.

At advising—

LORD PRESIDENT—Now that we have heard the argument, it appears that an error has been committed in this sequestration. I do not, however, say conclusively that an error has been committed, because we have only heard such argument as the statement of one counsel admits of. That being so, it appears that the sequestration cannot be worked out without our assistance. The petitioner therefore appears to be within the authority of the cases, and I think we should grant him authority to insert the notice in the coming *Gazette*.

LORD ADAM concurred.

LORD M'LAREN—I bring to this case the same principles as have been applied in other cases, and I think the meaning of the Act is that consecutive periods of time are to be treated according to the ordinary rules of arithmetic. Now, the period of four months expired on 25th May, and adding 14 to 25, and subtracting from the total the 31 days of May, we come to the 8th of June. I cannot think that the statute means that there should be between two consecutive periods of time a day belonging neither to the one or the other. It appears to me therefore that an error has been committed which we should put right.

LORD KINNEAR—I agree that it appears on Mr Salvesen's statement that an error has been committed, and that we should grant the authority craved, but I desire to reserve my opinion as to the computation of the time in the periods allowed by the statute.

The Court authorised the trustee to insert the notice in the *Gazette* of 16th June.

Counsel for the Petitioner — Salvesen. Agent—J. Smith Clark, S.S.C.

Thursday, June 15.

FIRST DIVISION.

[Sheriff Court at Selkirk.

THE GALASHIELS PROVIDENT BUILDING SOCIETY *v.* NEWLANDS.

Process — Appeal — Competency — Building Society—Sheriff—Jurisdiction—Building Societies Act 1874 (37 *and* 38 *Vict. cap.* 42), *secs.* 34, 35, *and* 36.

Section 34 of the Building Societies Act 1874, provides that where the rules of a society under the Act direct disputes to be referred to arbitration, arbitrators shall be elected in the manner such rules provide, or, in the absence of such provision, at the first general meeting of the society. Section 35 provides that the Sheriff Court may determine a dispute if it appear that one party to a dispute has applied to the other to have the dispute settled by arbitration under the rules of the society, and that such application has not been complied with within forty-eight hours. Section 36 enacts that every determination by the Sheriff Court under the Act of a dispute shall be final and not subject to appeal.

By the rules of a society incorporated under the above Act it was provided that disputes between the society and any of its members should be decided by arbitrators, but there was no provision as to the manner in which the arbitrators should be elected, and no arbitrators were elected at the first general meeting of the society.

A dispute having occurred between the society and one of its members, the society brought an action against the member in the Sheriff Court. *Held* that the provisions of section 35 of the Building Societies Act did not apply, but that the Sheriff had jurisdiction to entertain the action at common law, and accordingly that his decision was subject to appeal.

Contract—Loan—Building Society—Rules —Discharge.

The rules of a building society provided that all advances to members should be secured by such deeds as were necessary, and that interest on advances should be paid into the general fund in June and December at the rate of 4½ per cent. per annum, and failing payment that a charge of 10 per cent. per annum should be charged upon all arrears.

In 1866 a member obtained a loan from the society for which he granted a bond and disposition in security in common form. Between 1866 and 1891 he from time to time made payments to the society to meet the interest due under the bond. In 1891 he paid up the bond with interest and received from the society a discharge in ordinary form of the capital sum due under the

bond and the interest thereon. *Held* that the whole conditions of the contract of loan were not expressed in the bond, and that the society was not barred by the discharge which it had granted from charging the member under the rules with interest at 10 per cent. upon past arrears of interest.

Revenue—Income-Tax Act 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 40—*Payment of Yearly Interest—Deduction of Income-Tax.*

Section 40 of the Income-Tax Act of 1853 provides that every person who shall be liable to the payment of any yearly interest of money, shall be entitled "on making such payment" to deduct income-tax therefrom.

Held (*dub.* Lord Kinnear) that if a debtor makes a payment of yearly interest without deducting income-tax therefrom, he loses the right to deduct in respect of such payment.

Kenneth Newlands became a member of the Galashiels Provident Building Society in 1865. The purpose of the society was to make advances out of its funds to members upon heritable security. The society was subsequently incorporated under the Building Societies Act of 1874.

Rule 5 of the (amended) rules of the society provided—"All advances to members shall be secured to the society by such deed or deeds as are necessary at the expense of the receiving member. . . . Interest on advances shall be paid into the general fund at the monthly meetings in June and December at the rate of £4, 10s. per cent. per annum, and failing payment a charge of 10 per cent. per annum shall be charged upon all arrears." . . . Rule 11 provided—"Any dispute between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be decided by arbitrators not interested directly or indirectly in the funds, and their decision shall be final."

In 1866 Newlands obtained a loan of £190 from the society under a bond and disposition in security containing the usual stipulations for repayment of principal, interest, and penalty, dated 13th and recorded 16th August 1866. In accordance with the rules and practice of the society, an account was thereafter opened in the society's books in Newlands' name. To the defender's debit in this account was placed the amount of interest falling due under the bond, and all other payments exigible from him in terms of the society's rules, and to his credit were placed all payments made by him to the society from time to time, and his share of the profits made by the society. In 1891 he sold the security subjects and out of the proceeds he paid the society a sum of £200, and the society granted him a discharge in common form of the capital sum in the bond, and of all interest thereon.

The society subsequently raised an action against Newlands in the Sheriff Court at Selkirk for payment of £35, 14s. 3d., the main item in that sum being interest on past arrears of interest due under rule 5.

The defender pleaded, *inter alia*, (1) that the jurisdiction of the Sheriff was excluded in terms of sections 34 and 35 of the Building Societies Act 1874, and that the dispute should be referred to arbitrators in terms of No. 11 of the society's rules; (2) that the pursuers' whole claim for interest on the defender's loan had been wiped out in the discharge of the bond which they had granted, and (3) that, in any view, the pursuers were bound to account to him for the income-tax effeiring to the interest which he had paid under the bond.

It appeared that no arbitrators had been appointed for the decision of disputes between the society and its members.

The pursuers admitted that income-tax had not been deducted from the half-yearly payments of interest due by the defender on his advance prior to June 1890.

Section 34 of the Building Societies Act 1874 provides—"Where the rules of a society under this Act direct disputes to be referred to arbitration, arbitrators shall be named and selected in the manner such rules provide, or if there be no such provision, at the first general meeting of the society, none of the said arbitrators being beneficially interested, directly or indirectly, in its funds, of whom a certain number, not less than three, shall be chosen by ballot in each such case of dispute." . . . Section 35 provides—"The Court (*i.e.* the Sheriff Court) may hear and determine a dispute in the following cases—1. If it shall appear to the Court, upon the petition of any party 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 the rules of the society, and that such application has not within forty days been complied with." . . . Section 36 enacts that "Every determination by the Court . . . under the Act of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal." . . . The Act 16 and 17 Vict. cap. 34, section 40, provides—"Every person who shall be liable to the payment of any rent or any yearly interest of money, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act." . . .

On 2nd March 1892 the Sheriff-Substitute (HARPER) having previously remitted to an accountant to examine the accounts between the parties, found in fact (1) that the income-tax effeiring to the interest payable by the defender to the pursuers upon their loan to him amounted to £4, 10s. 1d.; (2) that the fine or charge of 10 per cent on arrears amounted to £9, 19s. 6d: Found in law that the defender was entitled to the allowance of income-tax aforesaid, and decerned against the defender for £16, 3s. 10d.

The defender having appealed, the Sheriff (HOPE) on 11th November 1892 recalled the

interlocutor of the Sheriff-Substitute, and after various findings in fact, found in law "(1) That under the circumstances in which the payments in respect of the bond were made, the discharge of the bond does not operate to extinguish the pursuers' claim for unpaid interest; (2) that the defender is barred from objecting to the pursuers charging him with compound interest and with penalties upon accumulated arrears, in respect that he did not object to the periodical balances of the society's accounts which were made on the footing of such interest and penalties being chargeable under the rules; and (3) that the defender not having deducted income-tax from the payments made by him, or timeously claimed that such should be deducted from the sums debited to him after he fell into arrears with his periodical payments, is barred from claiming deduction of income-tax prior to June 1890: Finds that the sum due by the defender on his account as restricted by the prayer of the petition is £35, 14s. 3d.;" therefore repelled the defender's pleas and decerned against him in terms of the prayer of the petition.

The defender appealed.

The pursuers objected to the competency of the appeal, and argued that under section 36 of the Building Societies Act 1874 the decision of the Sheriff was final.

The defender argued—The appeal was competent in respect that the Sheriff had no jurisdiction to entertain the action. Rule 11 provided that disputes should be settled by arbitration, but no arbiters had been appointed in terms of section 35 of the Act, and the jurisdiction of the Sheriff only arose in the case of one party refusing to submit his dispute to such arbiters. The action should be dismissed, it being the duty of the pursuers to appoint arbiters in accordance with the rules of the society to try the cause.

At advising—

LORD PRESIDENT—I think this objection fails, and that the Court has jurisdiction to entertain the appeal. The view I take of the group of sections in the Building Societies Act is this—The policy of the Act is to encourage arbitration; section 34 professes to establish through the action of the societies a system of arbitration; then section 35 gives the Sheriff Court a special jurisdiction which is to come in aid of that system, when it fails owing to a party refusing to submit his dispute to arbitration, and section 36 provides that every determination of the court of arbitration or of the Sheriff Court under the Act "shall be final . . . and shall not be subject to appeal." Now we must turn to section 35 to see whether in this case the Sheriff Court has been exercising its special jurisdiction, and it plainly appears that it has not, because no application had been made by either party to have the dispute settled by arbitration, and for the very good reason that in the case of this particular society there is no court of arbitration in existence to which disputes might be referred. The scheme of the Act is not that, in the event of a dispute arising between the society and its members, a court of arbitration should be set up *ad hoc*, for the manifest reason that in that case the society having the right of appointing the arbiters would be completely master of the situation. Accordingly a standing body of arbiters alone is a competent court of arbitration under the statute, and it is to be set up by the society electing them at a specified meeting. But it happens in the case of this society that it has omitted to elect arbitrators at all; and therefore as regards this society section 34 is inoperative. But if no court of arbitration has been appointed under section 34, section 35 cannot come into operation, because it postulates the existence of a court of arbitration, to which disputes may be referred. Accordingly, neither section 34 nor 35 applying, the pursuers come to the Sheriff Court as the common law tribunal to settle their dispute with the defender.

It appears to me, therefore, that this is an action at common law, and if so, this Court is open to the appellants, and the objection to the competency of the appeal must be repelled.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Parties were then heard on the merits.

The defender argued—(1) The pursuers' whole claim for interest had been discharged in the discharge of the bond. (2) On a reasonable construction of section 40 of the Income Tax Act of 1853 the defender was entitled, in coming to a settlement with the pursuer, to be credited with the income-tax effeiring to the sums of interest he had previously paid them.

The pursuers argued—(1) The bond did not contain the whole conditions on which the defender received his loan. The penal interest with which he was charged was not due under the bond, but under rule 5. The discharge of the bond did not therefore discharge the pursuers' claim for this interest. (2) The defender had failed to claim deduction of income-tax on making payment of the interest under the bond. He was therefore outside section 40 of the Act of 1853, and was not entitled to be now credited with the amount of such income-tax —*Middlesborough Building Society*, August 10, 1885, 53 Law Times 492; *Fraser* v. *Fraser*, February 14, 1827, 5 S. 348; *Bell* v. *Thomson*, November 30, 1867, 6 Macph. 64; *Dalmellington Iron Company* v. *Glasgow and South-Western Railway Company*, February 26, 1889, 16 R. 523.

At advising—

LORD PRESIDENT—Two questions have been argued to us, the first relating to a demand made by the pursuers for interest on arrears of interest, levies, and insurance, but the point in dispute turns out to depend on the question, is the liability of this member of the society for advances made to him limited to the prestations in his bond, or is his liability determined by the rules and regulations which constitute the contract of copartnery between members of the society? I think the latter is the true view.

A member obtains an advance according to the rules; the rules contemplate that such advances will be made, and prescribe that in a question with the party liable certain interests and additional payments shall be claimed by the society. In order to secure the principal and interest a bond and disposition in security is taken from the debtor, but I do not think that this is intended to set forth or to limit the whole terms of the advance. I think that as a partner in the society the debtor is bound to conform to the conditions under which alone the copartnery is entitled to advance funds to an individual member, and the terms of the bond granted by the debtor are not a supersession of the rules of the society, the object of the bond being to give the society security for payment of the principal and interest of the debt. I think, therefore, the defender is wrong on this point, and the same consideration leads to the conclusion that the discharge is not a good defence, for the reason that it is, and in express terms purports to be, only a discharge of the bond. It therefore only wipes out the liability expressed in the bond, and does not touch any liability standing independently of the bond. I am therefore against the defender on this point.

With regard to the claim for deduction of income-tax, the provision of the Act of Parliament is this—"Every person who shall be liable to the payment of any rent, or any yearly interest of money . . . shall be entitled, and is hereby authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act." If the debtor does not make the deduction at the time of paying the interest, is he entitled when subsequently settling with his creditor to claim the deduction from his creditor, as if the deduction had been taken on payment being made? I think, as Lord Adam said in the course of the discussion, that it would be unsafe in dealing with so artificial a system as that set up by the Income-Tax Acts to step beyond what the statute itself enacts.

I am therefore for affirming the Sheriff's decision.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion.

In the first place I think that the liability of the partners of this society *inter se* is regulated not only by the bonds granted to the society, but also by the rules of the society, and for the reasons given by your Lordship I do not doubt that under his contract with the society the defender is liable for the 10 per cent. penal interest claimed.

On the second point I confess I have greater difficulty, because it seems to me that there is a great deal in the argument advanced by Mr Reid worthy of consideration, but at the same time I do not dissent from your Lordships' decision, as I am not sure that the defender has succeeded in bringing himself within the terms of the clause on which the claim must be founded. It is conceded that the defender, whether in a position to do so or not, did not in fact avail himself of the privilege of deducting the income-tax "on making payment" of the interest due under the bond, but I am not disposed to say that it is impossible for a debtor to obtain the benefit of the statutory provision, even although he has not made the deduction according to the strict terms of the statute, if he shows that he has paid the interest without making the deduction, and that the creditor has got the benefit of the payment. If the defender's case were, that though he was not within the strict terms of the statute, he was entitled, in respect of the course of dealing and the manner of accounting which had been usual between him and his creditor, still to maintain that the benefit of the clause was open to him, I should be unable to decide without inquiry unto these matters. It is clear enough that in a small case like the present, it would not be a mercy but a cruelty to allow a proof of that kind, and indeed none is asked. The view, therefore, on which I proceed is, that that pursuer is not within the strict terms of the statute, and that he has produced no evidence to show that he is entitled to the benefit of the clause on any other grounds.

The Court recalled the interlocutor of the Sheriff, of new repelled the defences, and decerned against the defender for the sum sued for.

Counsel for the Pursuers—A. S. D. Thomson—Cullen. Agent—Andrew Tosh, S.S.C.

Counsel for the Defender—James Reid. Agent—Andrew Newlands, S.S.C.

Thursday, June 15.

FIRST DIVISION.

[Lord Low, Ordinary.

HERON *v.* MARTIN.

Property—Disposition—Agreement between Coterminous Proprietors — Reduction — Title of Heritable Creditor to Defend.

By disposition dated and recorded in 1879, K, a proprietor, in implement of an arrangement previously made, disponed a narrow strip of ground on the boundary of his property to H, the adjoining proprietor, his heirs and assignees whomsoever, under, *inter alia*, the following real burdens and conditions, namely, that K and his successors should be bound when required and entitled, when he or they thought fit, to excavate the ground disponed, and so much of the ground belonging to H as should be necessary for the formation of an access between the properties of a certain width, that H and his foresaids should be bound to erect retaining walls on his own ground