

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 tomorrow 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 assolvie 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 LINTHLOW.

*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

statute, certain debts due by the Bathgate and Airdrie Road Trustees, and upon 12th December he issued his decision thereupon.

The terms of the decision were as follows:—  
“Finds that the debt due to the Most Noble William Alexander Louis Stephen Duke of Hamilton, amounted, as at 1st June 1882, to the sum of £253, 3s. 4½d. of principal, with £11, 8s. 3d. of interest due thereon. Finds, estimates, and declares the value of such debt, as at the said date, to be £264, 11s. 7½d. Finds that the debts due to the other preferable creditors named in the subjoined schedule amounted, as at first June 1882, to the sum of £37,258, 5s. of principal, with £11,866, 13s. 9d. of interest due thereon. Finds, estimates, and determines the value of the debts of the said preferable creditors, as at the said date, to be the sums respectively stated in the last column of said schedule, amounting in whole to the sum of £19,342, 18s. 10d. Reserves to the parties liable for the said debts as valued, to require, before granting certificates of debt, exhibition of valid titles to the debts. Finds that the debt due to the Edinburgh and Bathgate Railway amounted, as at 1st June 1882, to the sum of £4500 of principal, with £5481, 4s. 11d. of interest due thereon; but inasmuch as the debts preferable to that of the said company cannot be met in full, there is no surplus available for the said company's debt, and he finds and determines that such debt is of no value. Finds the County Road Trustees for the counties of Lanark and Linlithgow, and the burghs of Airdrie and Bathgate, under reservation of the said parties' rights of relief *inter se*, liable to the said preferable creditors in the expenses incurred by them in this valuation: Appoints accounts thereof to be lodged within two weeks from this date, and remits the same to the Auditor of the Court of Session to tax and report, reserving to the debt commissioner to modify said expenses if he sees cause hereafter, and to allocate the same among the parties, if called upon to do so: Reserving also the question of the debt commissioner's own remuneration for future decision.”

The Duke of Hamilton and others objected to the reservation by which the commissioner reserved “to the parties liable for the said debts as valued, to require, before granting certificates of debt, exhibition of valid titles to the debts.”

The objectors required the commissioner to state the facts of the case, the question of law, and his decision, in a Special Case, as provided by section 65 of the Roads and Bridges Act of 1874.

The commissioner accordingly stated the present Special Case. He stated that the grounds upon which he proceeded in making the reservation mentioned above were contained in a note appended to the draft of his decision, and were as follows:—“The County Road Trustees called for exhibition of the claimants' titles, and the debt commissioner ordered them to be produced, as he concurred in the advisability of any questions as to title being, if possible, settled before a decision was given. But when the titles were produced, in every case the constitution and resting-owing of the debt was denied, and in no single instance was the title of the claimants admitted. On consideration, the debt commissioner did not feel called

on to pursue a detailed investigation into these matters. He is satisfied, from the revised list or state of debts which was made up and certified in terms of the Act of 1878, the original assignments produced, the minute-books of the Road Trustees, the report of Mr John Graham, C.A., which was prepared under the instructions of the joint commissioners of the County Roads of Lanarkshire and Renfrewshire appointed to deal with the matter of the road debts of these counties, as well as from the pleadings of parties, the titles produced, and the fact of interest having been paid down to the time when the Act of 1878 was adopted, that both preferable and postponed debts do affect the road trust in question, to the extents stated in the draft decision. It is possible that in some cases the claimants may not have produced a complete legal title to the debts they claimed, but on the grounds above stated he holds there is *prima facie* proof that the several debts claimed do subsist, so as to enable him to deal with and value them, leaving the parties to settle the legal question of title when certificates of debt are required from the road authorities.”

The question of law was—“Whether the reservation made by the debt commissioner in his decision, as above quoted, should have been so made? or, Whether the debt commissioner is bound to examine and decide upon the personal titles of the respective creditors of the debts claimed by them?”

Argued for the Duke of Hamilton and others—The debt commissioner was intended by the Act to deal with questions of title. The person to be appointed to the office of debt commissioner was to be a man skilled in “law and accounts,” and the questions in the present case fell under these two categories. It was impossible to determine what amount was due to each creditor until the number of creditors was fixed and the total amount of debt determined. The reservation made by the commissioner should be deleted, and the matter remitted to him to proceed with under section 65.

Argued for the Road Trustees of Lanark and Linlithgow—The constitution and subsistence of these debts was not disputed. The commissioner's duty primarily was to make out a list of debts, along with the names of parties claiming to be creditors, to ascertain and value the debt, and to deliver his determination thereupon. He was not bound to look into the titles of the respective creditors. No such duty was imposed upon him by the statute.

At advising—

LORD PRESIDENT—The debts commissioner has made a mistake, I think, both as to his duties and his powers under this statute, and if we refer to the grounds of his reservation I think it will be apparent that he is not quite confident himself as to the propriety of the course which he has followed—“The County Road Trustees called for exhibition of the claimants' titles, and the debt commissioner ordered them to be produced, as he concurred in the advisability of any questions as to title being, if possible, settled before a decision was given. But when the titles were produced in every case the constitution and resting-owing of the debt was denied, and in no single instance was the title of the claimants ad-

mitted. On consideration the debt commissioner did not feel called on to pursue a detailed investigation into these matters."

From this it would appear that the condition of the debt commissioner's mind was that if there had been only one or two objections to consider he would have dealt with and disposed of them, but that when a mass of matter in the shape of titles and objections to titles was laid before him he realised the true nature of the task, and became alarmed, as he expresses it, and "did not feel that he was called upon to pursue a detailed investigation of these matters."

He accordingly put his deliverance in the form in which we have it in order that he might get the opinion of the Court as to whether he was bound to deal with questions arising out of the title of the creditors claiming their debts, or leave them to be fought out by the debtors and creditors. I can see no room for doubt upon this matter under the Act of Parliament. The debt commissioner must dispose of all matters connected with the ascertainment of the value of the debt both as regards its amount and also as to the personal title of the creditor claiming the debt, and it is only to the creditor who shall satisfy him that his title is good that the commissioner shall deliver his certificate, and to no one else.

If this were not so, then the statute would be very defective in a most important part, and there would be no machinery provided for carrying through a valuation, while a door would be opened to litigation as regarded every particular debt due by the old Road Trustees to particular creditors.

Instead, however, the Act provides machinery by which the fullest information and warning is given to everyone concerned, after which a revised list of the debts affecting the roads is to be made up by the clerk, who will give full information regarding all the vouchers of debt lodged with him, and leave them open for inspection for a certain time before they are passed by the debt commissioner, who is authorised to deal with them in such a way as will put into the hands of the true creditor in the debt the deliverance which will enable him to go under section 68 to the authorities therein mentioned, and demand from them the right of certificate that he is the creditor of such-and-such a debt. It is essential that the true creditor be ascertained by the debt commissioner before he can give up the valuation to anyone, and there is no answer by the local authority to the deliverance of the debt commissioner.

This reservation accordingly should not have been inserted by the debt commissioner, and the question falls to be answered that the debt commissioner is bound to examine and decide upon the personal titles of the respective creditors to the debts claimed by them.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. The debt commissioner has two things to deal with. In the first place, there is the subject-matter of the debt, its constitution, and existence, and in the second place there is the title of the creditor.

If the duty of the debt commissioner was of

the kind indicated by Mr Guild, it would leave it as a matter of doubt whether these debts ever subsisted, and it might turn out that a party claiming to be the creditor to the debt was met by an objection to its subsistence. If this objection were sustained the effect of that would be to alter the whole valuation.

That circumstance alone makes it clear, I think, that the debt commissioner must have been intended by the statute to deal with the title of those claiming to be creditors to the debt. The question therefore in this case falls to be answered as your Lordship has decided.

The effect of this decision may be no doubt to throw upon the commissioner a greater responsibility than he anticipated, but he has always the remedy of presenting to the Court a Special Case if he feels himself in any difficulty.

LORD ADAM—I am of the same opinion. I think the position of the debts commissioner is very much like that of a trustee in a sequestration in which there is only a limited fund to divide, and in which, until the number of creditors has been determined, it is impossible to say how much each is to receive. It is upon this account that the Act says that a list of the whole debts is to be made up, and the debt commissioner is to fix the value of each.

I therefore concur in the opinion expressed by your Lordship.

The Court answered the question whether the debt commissioner was bound to examine and decide upon the personal titles of the respective creditors to the debts claimed by them, in the affirmative.

Mr Wylie Guild in his decision of 12th December 1884, already referred to, valued certain preferable debts due by the Bathgate and Airdrie Road Trustees, at the sums stated in the schedule to his decision.

The said Road Trustees expressed themselves as dissatisfied with this decision on the point of law after mentioned, and the present Special Case was accordingly stated by the commissioner.

The following passages from the notes and the revised notes of the commissioner's proposed decision sufficiently explain the point in dispute between the parties:—"After a careful examination of the accounts, revenue, and expenditure, and general circumstances of the trust, the debt commissioner has valued the remaining preferable debts at 7s. 6d. per pound. There was, in his opinion, no prospect of these debts ever being paid in full, and he is satisfied that the certificates of debt which the creditors will receive, and which will bear four per cent. interest, will be found full and fair substitutes or equivalents for the debts and security as formerly existing. Assuming that an average rate of two and a-half per cent. interest could have for some time longer been paid on the principal sum of the debt, it could not be valued at more than twenty years' purchase, probably even considerably less, looking to the uncertain and fluctuating nature of the road revenue, which was the only security for the interest, and for the final payment, while the return of four per cent. on the certificates of debt, secured as it will

be, in the most undoubted manner, by the assessments authorised by the Act, will be marketable at probably twenty-five years' purchase." The creditors claiming, and the road trustees, represented against the debt commissioner's proposed decision, and after further procedure he issued revised notes by which he informed the parties that he had added five per cent. to his former valuation of 7s. 6d. per pound, and gave the following reasons for doing so:—"In reviewing his valuation he has had his attention prominently called to the fact that in place of the debts as valued, or the interest thereon, being payable by only one party, as heretofore, they may be eventually found payable by various different local authorities, thus causing much more trouble and expense in collection of principal and interest than under the former system. As the commissioner is directed to take into consideration 'every circumstance which might, in his opinion, reduce, enhance, or in any way affect the value of the debts,' he considers the change of debtors is one which does affect the value, and he has deemed it right to add five per cent. to his former valuation of 7s. 6d. per pound, thus making the value of the principal and accumulated interest 7s. 10½d. per pound."

The County Road Trustees of Lanarkshire and Linlithgow considered the decision of the commissioner erroneous in point of law in adding five per cent. in respect of the change of debtors.

The question of law was—"Whether the change of debtors from one body to over twenty, and the consequent sub-divisions of the principal debt as valued, are circumstances which should be taken into account by the debt commissioner in making his valuation?"

Argued for Lanark and Linlithgow Road Trustees—The five per cent. added by the commissioner was not warranted by the statute. Expense of collection caused by change of debtors was not provided for by the Act, and could not be imposed by the commissioner. Expense of collection should render the debt less valuable, yet the commissioner had dealt with it as if it thereby was worth more.

Argued for the Duke of Hamilton and others.—The intention of the Legislature in this statute was to be considered. It was not intended that the creditor should be put in a worse position by the change of debtors than he was before. If the expense of collecting his interest were increased, that was to be dealt with by the commissioner under sec. 65. The provisions of this section were very wide, and he was quite within it in what he had done.

At advising—

LORD PRESIDENT—The direction which the statute gives to the debt commissioner is that he is to "ascertain whether any and what debt is due, with the interest thereon." Now, the debt which the statute is here dealing with is a road debt, that is to say, a debt in which there is no personal obligation by the debtor, but only an assignation of the tolls, and he is to ascertain the value of that debt. He is further "to estimate and determine the same without regard to any personal or other collateral obligation undertaken by trustees or others." The creditor may have other securities, but these are not to be taken into account. In making such valuation the commissioner "shall take into account the interest paid on such debt out of the trust funds,

the state of repair of the roads or bridges to which the debt is applicable, and shall take into consideration every circumstance which might in his opinion reduce, enhance, or in any way affect the value thereof," that is, affect the value of the road debt or the security created by the assignation of the tolls. What is the true construction of this part of the 65th section? The debt commissioner has estimated this security as worth 7s. 6d. per pound, and what he has said to the creditor is virtually this—The statute has given you a new debtor, and instead of an assignation of tolls, and the right to demand payment of the interest of your debt from the trustees of a particular road trust, you will now have to collect your interest from more than twenty debtors. The commissioner thinks that this will detract from the value of the debt as he has estimated it. It clearly cannot add to the value of the debt, and as he claims, under section 65, power to take into consideration "every circumstance which might in his opinion reduce, enhance, or in any way affect the value of the debts," he has added 5 per cent. to his former valuation to cover the extra expense of collection. Now, I do not see where the commissioner gets the power to add that 5 per cent. to the original debt. There is certainly no such authority given to him in the statute. His proposal might be justifiable if looked at purely from an equitable point of view, but the provisions of the 65th section will not permit of such an addition being made to the original debt, and I can see nothing in any of the other clauses to support such a proposal.

The conclusion therefore which I come to is, that this addition of 5 per cent. allowed by the commissioner is unjustifiable, and not warranted by the statute.

LORD MURE—I have had considerable difficulty with this case, but as I understand your Lordships are agreed upon the matter I do not desire to dissent. Yet I cannot help thinking that in equity there is a great deal to be said for what the commissioner has done in this case. The Legislature has altered the nature of the creditors' security, and made the collection of the interest upon his debt more troublesome and costly than it formerly was. It has thus reduced or affected the value of the debt, and the creditor is to this extent prejudiced; upon that account something should be done to meet this prejudice, and as the provisions of section 65 are very general, and give the commissioner discretionary powers, I should have felt inclined to think that he had fairly exercised his discretion in the manner in which he has dealt with this debt.

LORDS SHAND and ADAM concurred with the Lord President.

The Court answered the question in the negative.

Counsel for Duke of Hamilton and Others—Pearson. Agents—Tods, Murray, & Jamieson, W.S.—Waddell & M'Intosh, W.S.

Counsel for Road Trustees of Lanark and Linlithgow—Darling. Agents—Bruce & Kerr, W.S.