to the unvouched loans exceeding £8, 6s. 8d. They are in a different category, and I think it right to reserve my opinion with regard to them.

The Court pronounced the following interlocutor:—

"Find that the document No. 6 is not probative in law, nor such as to exclude inquiry as to the accuracy of the accounts libelled: Find that the balance arising due on the said accounts, so far as legally vouched, is £161, 13s. 8½d.: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against: Find the defender entitled to expenses in this Court; remit," &c.

Counsel for Pursuers (Appellants)—Mackintosh—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender (Respondent)—Campbell Smith—Nevay. Agent—Wm. Gunn, S.S.C.

HOUSE OF LORDS.

Tuesday, March 6.

(Before the Lord Chancellor, Lord Watson, and Lord Fitzgerald.)

ALLAN *v.* CAMPBELL.

(*Ante*, July 19, 1881, vol. xviii., p. 707.)

Feu-Contract—Construction—Erection in Alveus *of Stream—Lower Heritor.*

Terms of a feu-contract which were *held* (*aff.* judgment of Second Division) to bar the feuar in an attempt to alter a weir with a view to convey an increased supply of water therefrom to his distillery.

In Court of Session 19th July 1881, *ante*, vol. xviii., p. 707.

The defender appealed to the House of Lords.

Counsel for the respondent were not called on.

At delivering judgment—

Lord Chancellor—My Lords, your Lordships having heard the arguments of the learned counsel for the appellant in this case, are, I believe, all of opinion that the judgment appealed from is right, and that it is not necessary to call for any argument from the learned counsel for the respondent.

The note asking for the interdict is no doubt expressed in large words—"from erecting or constructing any works on the bed, run, or sides of the river of Tobermory," and "to restore the said bed, run, or sides of the said river to the state in which they were before the operations complained of were begun." Read with the rest of the record it is quite manifest what it is that is complained of, and if there be more generality in the words than there is in the interlocutor there is no objection at all to the interlocutor, which is at all events within these words, if it be in itself right.

Now, the interlocutor appears to me, so far as the matter of fact is concerned (and there is no question of fact really raised by the appeal before your Lordships) to displace entirely the averment of the defender, made in his third answer to the pursuer's condescendence, in which he denies the general allegations of fact made by the pursuer, and explains "that the defender has recently commenced the repair and reconstruction of a channel or lead for conveying a supply of water from the river here referred to to distillery works belonging to him at Tobermory." I cannot but observe, my Lords, that that being the answer to the allegation of the pursuer, in which both the work executed in the river (the enlargement of the weir), and also the iron-piping, are complained of, it is quite plain to me from that answer that the defender himself has at all events construed the contract as including in the words "channel or lead" as they occur in the contract, not only the sluice between the works and the stream but also the channel artificially made in the stream itself by which the water is conducted to that sluice. At the same time, though I think it is satisfactory to find that his own view in that respect of the contract was such, I do not think that he would be held to be bound by it if he could show that that was an erroneous construction, and that in point of fact a different construction would make the interlocutor in substance wrong.

Now, what the interlocutor orders is this—it first of all declares "that the defender in erecting a continuation of the weir in the river on and beyond the flat rock marked A on the plan, including the stones marked C, D, and E on the plan, lying on the top of the flat rock marked A, has acted in excess of his rights under the feu-charter, and has made an illegal encroachment on the *alveus* or bed of the river which belongs to the pursuer," and it ordains him within a limited time to remove the whole of that illegal construction or encroachment. That is the matter complained of, and in my judgment it depends wholly and solely upon the proper construction of the feu-charter.

No complaint is made as to the defender's taking too much water, and therefore the question whether the water which he takes is or is not more than sufficient for his works does not at all arise in the action. In favour of the appellant it may be, I think, and ought to be, assumed that if he has done nothing else which he was not entitled to do, he has not taken more water than was wanted for the purpose of his works. But the question is, whether this grant of the use of the main stream or river authorises him to interfere with the channel of the stream or river. The words are "together with liberty to use as much of the water of the main stream or river that runs on the west side of the said piece of ground as shall be sufficient for carrying on such works as have been or may be erected thereon by the said John Sinclair or his foresaids, to be conveyed in a lead or drain under the road without raising its level to and from the said piece of ground in the direction and channel in which it is presently and has been hitherto used by the said John Sinclair, and not otherwise." On the face, therefore, of the feu-charter, two things appear to me to be referred to as existing facts—one is the existence of a certain main stream or river, which I think according to the natural meaning of the words means the stream or river in the condition in which it then existed; secondly, the actual and previous use, under whatever title,

before the date of this feu-charter, which Sinclair was already making of the water of the main stream or river in a particular manner. And he, as I understand, was to be at liberty to use as much of the water and no more as should be sufficient for carrying on his works, not only as they then were, but as they might be from time to time enlarged, provided that he obtained it in the manner which was there mentioned and not otherwise.

My Lords, I think that is no guarantee that the appellant can always and shall always in that manner get as much water as he may want for the works, and that the water to be so got shall always be sufficient for all the purposes for which he can want it. He is not in that or in any other way to have a right to use more than shall be sufficient for the works; but that which he may take for his works is to be the water of the main stream or river, in my opinion, such as it then was and not anything else; and if the water of the main stream or river, without alterations to the stream, does not give him as much as he wants, I find nothing here which either undertakes that some additional supply shall be afforded to him, or authorises him to alter the course of the river, which in substance he has done, for the purpose of getting that additional supply. The words which define the manner in which he is to use it, if construed in the limited way which the Lord Advocate suggested, will not give him a right to alter the river, to divert its course, to change its channel, to dam it up, to execute any new works in the river. The river remaining as it was at that time up to the point mentioned in the interlocutor appealed from an existing river, he would have the benefit of the river remaining as it was. He may, at whatever depth he thinks necessary, so long as he does not raise the level of the road, make a communication between his works and the river in a particular manner and not otherwise, and may take as much water as in that way he can get, so long as it is not more than sufficient for carrying on his works. That is the contract. If the words "in the direction and channel in which it is presently and has been hitherto used" are extended to that artificial portion of the channel of the river which was formed by the then existing weir and conducted part of the water to the sluice, it is admitted by the learned Lord Advocate that he would have the greatest possible difficulty in escaping from the influence of the words "and not otherwise," and justifying the appellant's enlargement of that channel by the extension of the weir.

My Lords, I confess that I should come to the same conclusion if the words were limited, as the Lord Advocate insisted that they ought to be, and applied to the sluice alone. The appellant may by means of such sluice as is there described, and not otherwise, make a communication between his works and the water and maintain it, and having made such a communication, then he may take as much water in that way as he can, so long as it is not more than enough for the purposes of his works. I cannot see anything like any implication of the grant of liberty to execute any works whatever in the bed of the river. I agree entirely in what is said in the opinion of the Lord Justice-Clerk. It seems to me that the use of the word "storeage" is perfectly accurate as applied to the circumstances of this case. And, my Lords, having said that I so agree in the reasons, it follows necessarily that I agree also in the conclusions; and I must move your Lordships to dismiss this appeal with costs.

Lord Watson—My Lords, this case in its course has involved a great many questions which fortunately are not now before the House. The question before us is reduced to a very narrow one, namely—What are the rights of this appellant upon a sound construction of the feu-contract of 1823? At the same time, that being the leading question, when we come to dispose of the merits of the case and consider the interlocutor of October 1881, it is necessary also to keep in view certain matters of fact which having been decided by both the Sheriffs and not brought under review in the Court of Session are now final and binding upon the appellant. One of these findings is important as raising a question of construction; it is to the effect that the original feuar Mr Sinclair, who obtained the feu-charter of 1823, did use for the purpose of finding and conveying water to his distillery an arrangement precisely the same as that which exists now if you remove that portion of the dam or weir which is outside or to the west of point A on the plan. That finding, as I have said, is conclusive, and the judgment of the Court is that that marks the limit of the appellant's right.

Then, my Lords, when we come to the feu-contract upon which alone the argument of the appellant is now rested, his contention is that it gives him a right to make such erections *in alves* in addition to the weir which was used by the original feuar as will enable him to convey to the distillery now erected by the appellant himself as much of the water as he can use, and the whole of the water if he can use it. Now, my Lords, for that argument and for that construction I can find no ground whatever; it appears to me that although the privilege is given of taking sufficient water, it is not given in terms absolute; it is qualified by a reference to the arrangements, the lead, the channel by which water was taken by Sinclair at the date of his grant, and the permission given, as I read it and as your Lordship has read it, is simply to take as much as he possibly can by that means, subject to this condition, that he shall at no time take by that means more than sufficient for the necessity of his works at the time; there is no guarantee that at all times or at any time it shall be sufficient, but he is made subject to the limitation that he is not entitled to take more than sufficient for his purposes within the limit to which he can take.

I therefore agree entirely in the result at which your Lordships have arrived. My Lords, although we had indications of other grounds upon which these interlocutors were assailed, it appears to me that the contention of the appellant upon this part of his case having failed, the judgment at which your Lordships have arrived, which is that embodied in the interlocutor of the Second Division of 19th July 1881, when taken together with the final interlocutors of the Sheriffs upon the facts of this case, leads to one result only, and that is to sustaining the conclusions which the Second Division have reached.

Lord Fitzgerald—My Lords, upon reading

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

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

Interlocutors appealed from affirmed and the appeal dismissed with costs.

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

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

Friday, March 9.

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

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

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

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

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

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

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

At delivering judgment—

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