any vacancies in the board have now been filled up. There is therefore at present in existence a fully equipped board of arbitrators ready and willing to act, and in that state of matters I think that the defenders' two first pleas-in-law should be sustained, and that this action should be dismissed.

Lord Mure—I am of the same opinion. I think that in cases of this kind when it is pleaded that the disputes fall to be determined by arbitration, and when it is also averred that there is in existence a competent board of arbitrators, we are bound to give effect to these pleas, as was done in the unreported case of *Blyth* against the same defenders, to which we were referred.

The only new point in this case was the contention which was urged, that the pursuer's true position here was that not of a member, but of a creditor of this society. That was a point which did not arise in the case of *Carrick*, but I am of the opinion expressed by your Lordship that the true position of the pursuer here is that of a shareholder until he has terminated his connection with the Society by being paid out.

Lord Shand—The question here really is, Whether the pursuer is still a shareholder within the meaning of rule 29? I think that the pursuer is such a shareholder. He holds a certain number of shares of this Society, and in respect of these shares he is no doubt a creditor of the Society. But the same might be said of each member of the Society in respect of his holding and of the sum he has paid for it. I cannot see in what way the pursuer has ceased to be a shareholder of this Society in respect of his desire to withdraw his shares, and of the notice which he has given to that effect.

That being so, the pursuer is directly under the provisions of rule 29, which provides that all disputes of this kind are to be settled by arbitration, and it is impossible for the pursuer to avoid the provision of this rule until by receiving payment of his claim he has ceased to be a member of this Society.

Upon the question of waiver I do not think, looking to the terms of the correspondence as printed, that the pursuer has made out any sufficient case upon that point.

Lord Adam—The pursuer is still the holder of twenty-four fully paid-up C shares of £25 each in this Society; he is therefore in the same position as the member who is described in rule 11, *i.e.*, as a member who wishes to withdraw. But it is clear that until his shares are redeemed he still remains a member, and if a member then a shareholder, and so he comes directly under the provisions of rule 29, whether the words which are objected to be read in or omitted.

The Court recalled the Lord Ordinary's interlocutor, sustained the first and second pleas-in-law for the defenders, and dismissed the action.

Counsel for Pursuer—Rhind—Martin. Agents—Henderson & Clark, W.S.

Counsel for Defenders — Pearson — Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, June 4.

FIRST DIVISION.

HUTCHESON'S TRUSTEES *v.* HUTCHESON.

Marriage-Contract—Provisions to Widow and Children—Trust—Jus crediti.

By antenuptial contract of marriage the husband bound himself and his heirs and executors to make payment to his wife in the event of her survivance of a free yearly annuity of £100, and also to pay £30 as an allowance for mournings. In security *pro tanto* of these obligations the husband assigned to trustees a policy of insurance upon his life for £500. The trustees were empowered to uplift and re-invest the contents of the policy on security in trust for behoof of the widow in liferent, and the children in fee. There were children of the marriage, which was dissolved by the husband's death, leaving as his only estate (with the exception of household furniture) the policy of insurance. The trustees uplifted the contents of the policy and invested the amount in a bond and disposition in security. *Held* that the trustees were not bound to pay out of the trust funds the allowance of £30 for mournings, or the annuity of £100, except as regarded the interest accruing upon the proceeds of the policy of insurance.

By contract of marriage, dated 7th September 1867, entered into between James Hutcheson junior and Minnie Walker, the former bound and obliged "himself and his heirs, executors, and successors whomsoever, all jointly and severally, renouncing the benefit of discussing them in their order, to make payment to the said Minnie Walker, his promised spouse, if she shall survive him, during all the days and years of her life, of a free yearly annuity of £100 sterling, exempted from all burdens and deductions whatever, and that at two terms in the year, Whitsunday and Martinmas, by equal portions and in advance, beginning the first term's payment of the said annuity at the first of these terms that shall happen after the decease of the said James Hutcheson junior, for the half-year succeeding the said term, and the next term's payment thereof at the first term of Whitsunday or Martinmas thereafter; and so continuing half-yearly, termly, and proportionally in the due and regular payment of the said annuity during the lifetime of the said Minnie Walker," with interest and penalty as therein specified. Mr Hutcheson also bound himself and his foresaids to pay to the said Minnie Walker £30 as an allowance for mournings; and declared the above annuity to be purely alimentary, and not assignable or arrestable, nor subject to the *jus mariti* or right of administration of any future husband the said Minnie Walker might marry, nor liable for his debts or deeds: Further, he assigned, conveyed, and made over to and in favour of the said Minnie Walker, in case she should survive him, the whole household furniture and plenishing which might pertain to him at the time of his death.

These provisions were accepted by the wife in full satisfaction of all her legal claims.

The marriage-contract further contained these clauses—"And in security and implement *pro tanto* of the foregoing obligations and provisions, the said James Hutcheson junior hereby assigns, conveys, and makes over to and in favour of John Cross Hutcheson, residing in Glasgow, his brother, and Robert Hunter Dunn, shipping agent, Glasgow, and the acceptor and survivor of them, and to such other person or persons as may be assumed by them or him, in virtue of the powers after inserted (the majority of said trustees, original and assumed, surviving, and resident in Great Britain or Ireland, so long as there may be more than one, being always a quorum), and that as trustees or trustee in trust, and for security *pro tanto* of the provisions above conceived in favour of the said Minnie Walker, All and Whole a certificate or policy of insurance for the sum of five hundred pounds, marked Number 16,486 A, effected on his own life by the said James Hutcheson junior with the Life Association of Scotland;" and the trustees were also empowered "to lay out, secure, and invest, and also to uplift and reinvest the same, and that on such security, heritable or moveable, as they the said trustees may think proper, taking the bonds and securities therefor payable to themselves in trust for behoof of the said Minnie Walker, in liferent, for her liferent use allenarly, and to the child or children of the said marriage, in such proportions as the said James Hutcheson junior, whom failing the said Minnie Walker, may direct, by any writing under his or her hand, and failing such direction, among them equally and their heirs and assignees whomsoever in fee."

Mr Hutcheson died on 4th August 1872. The only estate which he left was the policy of insurance and his household furniture and plenishing.

This was a Special Case presented for the opinion of the Court, to which the marriage-contract trustees were the first parties, and the widow the second party.

The second party maintained (1) that by the terms of the marriage-contract she was entitled to receive, and the first parties as trustees were bound to pay to her, so long as any trust funds remained in their hands, the annuity of £100 per annum provided to her by her said marriage-contract; and (2) that she was entitled to the sum of £30 for mournings, to be paid to her by the first parties out of the trust funds.

The first parties maintained that the trust funds under their charge were not sufficient to justify them in paying to the second party the sum of £30 and the annuity of £100 provided in the marriage-contract, except in so far as the interest of the £500 which formed the trust funds might be regarded as a partial payment; or at all events that they were not justified in paying away any portion of the capital to the second party during the minority of the children of the marriage without judicial authority.

Argued for the second party—The question was one of construction, and under the contract the wife was entitled to the whole fund, less the expenses of administration.

Argued for the first parties—It was impossible to give effect to the whole deed, but the wife was a party to the contract, and she could not be heard to say that the children were not to get the fee of the policy, when the contract said they were to get it. Besides, under the contract there was a *jus crediti* in the children—*Bushby* v. *Renny*, June 23, 1825, 4 S. 112; *Herries, &c.* v. *Brown*, March 9, 1838, 16 S. 948; *Wilson's Trustees* v. *Pagan*, July 2, 1856, 18 D. 1096.

At advising—

Lord President—The question raised by this Special Case depends upon the construction of the contract of marriage, dated 7th September 1867, and it appears to me that the construction raises no question of difficulty.

By the contract the husband provides a free annuity to the wife if she survives him, and also £30 for mournings, and he also gives her his whole household furniture and plenishing. Now, all that depends upon personal obligation. No security has been given so far, but then a clause follows, which does provide certain security, and it is in these terms—"And in security and implement *pro tanto* of the foregoing obligations and provisions, the said James Hutcheson junior hereby assigns, conveys, and makes over to and in favour of John Cross Hutcheson, residing in Glasgow, his brother, and Robert Hunter Dunn, shipping agent, Glasgow, and the acceptor and survivor of them, and to such other person or persons as may be assumed by them or him in virtue of the powers after inserted (the majority of said trustees, original and assumed, surviving, and resident in Great Britain or Ireland, so long as there may be more than one, being always a quorum), and that as trustees or trustee in trust, and for security *pro tanto* of the provisions above conceived in favour of the said Minnie Walker, All and Whole a certificate or policy of insurance for the sum of five hundred pounds, marked Number 16,486 A, effected on his own life by the said James Hutcheson junior with the Life Association of Scotland." Then there is a subsequent clause by which the trustees are empowered "to lay out, secure, and invest, and also to uplift and reinvest the same, and that on such security, heritable or moveable, as they the said trustees may think proper, taking the bonds and securities therefor payable to themselves in trust for behoof of the said Minnie Walker in liferent for her liferent use allenarly, and to the child or children of the said marriage, in such proportions as the said James Hutcheson junior, whom failing the said Minnie Walker, may direct by any writing under his or her hand, and failing such direction among them equally, and their heirs and assignees whomsoever in fee." Now, it appears that when Mr Hutcheson died, which was in 1872, it turned out that he left no estate except this policy of insurance and household effects. The widow of course gets the furniture, but the whole estate otherwise is only the sum of £500 contained in the policy of insurance, and the question is, whether she can out of that £500 receive her annuity? She claims that she can, but I think it is impossible to maintain that, because the right is expressly limited to a right of liferent to the widow and of fee to the children, and all this in a contract to which the widow was one of the parties. Therefore I think she is not entitled to payment of her annuity except to the extent of the interest accruing on the sum of £500.

Lord Mure—I have no difficulty in concur-

ring. I think the practical effect of the argument for the widow would be to carry away the whole of this small estate, consisting of a policy of insurance, for her benefit, and to the detriment of the children of the marriage. But I see nothing to put her in a more favourable position than the children. The only money left by Mr Hutcheson was this sum of £500, which is put in trust for the children and the widow, and I think she can only claim the liferent of it. The case to my mind very much resembles that of *Wilson's Trustees* v. *Pagan*, 18 D. 1096.

Lord Shand—When this case was opened I confess I had a somewhat different opinion, and was under the impression that the whole right to this policy was in the widow. That impression was founded upon the clause by which the policy is conveyed in security in implement *pro tanto* of the foregoing provisions, one of which is the annuity of the wife. But when one goes on to read the subsequent clause there can be no doubt that though the policy is conveyed in security *pro tanto*, it is yet, so far as the wife is concerned, conveyed only so as to give her the annual interest of the proceeds of the policy.

Lord Adam concurred.

The Court found that the second party was not entitled to receive, and the first party was not bound to pay out of the trust funds, first, the allowance of £30 for mournings, or second, the annuity of £100, except as regarded the interest accruing upon the proceeds of the policy of insurance.

Counsel for First Parties—Gloag—Black. Agents—Ronald & Ritchie, S.S.C.

Counsel for Second Party—Shaw. Agent—James Skinner, S.S.C.

Saturday, June 5.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY *v.* FINNIE AND OTHERS.

Diligence—Poinding of the Ground—Right in Security—English Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 118—*Conveyancing Act Amendment Act* 1879 (42 *and* 43 *Vict. c.* 40), *sec.* 3.

Held that the Conveyancing Act Amendment Act 1879, limiting the effect, in competition with a trustee in bankruptcy, of a poinding of the ground executed by a creditor holding a security over the bankrupt's heritable estate preferable to the trustee's right, so as to make it available only for the interest on the debt for the current half-yearly term and arrears of interest for one year prior to the commencement thereof, applies only to a Scottish sequestration, and cannot, where the debtor has become bankrupt in England, be made available by the trustee in the English bankruptcy.

Heritable Creditor—Poinding of the Ground.

A person in right of a liferent of heritage incurred debt and granted in security thereof an assignation to his liferent right. An action of poinding the ground being thereafter brought against him, his trustee in bankruptcy maintained it to be incompetent because the creditor was by the bond surrogated into the full rights of the bankrupt with power to enter into possession and sell, and had in fact entered into possession, and so was in the position of a proprietor and could not poind the ground. Objection *repelled* because the title of the creditor was not one of property but of security.

The Conveyancing (Scotland) Act Amendment Act 1879 (42 and 43 Vict. cap. 40), sec. 3, provides —. . . "No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration shall (except to the extent hereinafter provided) be available in any question with the trustee, provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee, shall be prevented from executing a poinding of the ground after the sequestration, but such poinding shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term.

By bond and assignation and disposition in security dated and recorded 17th May 1883, William Finnie, liferent proprietor of the lands of Newfield and Peatland in the county of Ayr, acknowledged himself to have borrowed, and bound and obliged himself, his heirs, executors, and representatives whomsoever, to pay to the Scottish Union and National Insurance Company the principal sum of £7000, with interest at five per cent. till payment. In security of these obligations Finnie assigned his liferent interest in the lands of Newfield and others in the county of Ayr. Finnie also assigned certain policies of assurance on his life binding himself to pay the premiums, and to do nothing to infringe the conditions of the certificates.

In consequence of the irregularity in payment of the interest upon the principal sum, and of the premiums of insurance, the Assurance Company called up the loan, and as they were unable to obtain payment they, on 17th December 1885, raised the present action of poinding of the ground against Finnie and Mrs Jessie Moffat, tenant or occupant of Newfield House.

The pursuers averred that there was due to them the principal sum of £7000 above referred to with interest since Martinmas 1885, along with penalties and premiums of insurance.

The defender averred that the disposition and assignation in favour of the pursuers was not an ordinary bond and disposition in security, but one under which they were surrogated and substituted in his full liferent rights, with all the powers incident thereto. He also averred that the pursuers had some time prior to the raising of the action entered into possession and were in possession still, that they held ample security for their debt, and that no interest was due at that date.