one action pending at the instance of the truster (the present defender)."

At advising—

LORD PRESIDENT—We have now got in the form of a joint-minute the information with regard to the state of Mr Lee's affairs, and an account of what has been done under the trust-deed.

The deed is, generally speaking, for the distribution of the defender's estates as if they had been sequestrated, and there is also a special provision by which a mandate is granted to the trustee to apply for sequestration if that should be necessary in the execution of the trust. The import of all this is clearly to indicate that Mr Lee is in embarrassed circumstances, and that he is practically insolvent. It appears that one-half of the unsecured creditors have acceded to the trust-deed, and that the other half have taken no separate measures. The secured creditors have either intimated their accession to the trust-deed, or else are in possession of the security subjects. The pursuer has acceded to the trust-deed, and the only claim he has is that for which he sues in the present action. The trustee has completed a title to the heritable subject in dispute, and in these circumstances I do not quite understand the position the trustee has taken up. But we have nothing to do with that. The question with which we are concerned is whether the defender is to be allowed to defend this action without finding caution. In the circumstances I am of opinion that he cannot be allowed to defend without finding caution.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court adhered, and ordained the defender to find caution within seven days. There was also leave given to the trustee to sist himself within the same period.

Counsel for Pursuer (Respondent)—Strachan. Maclennan. Agent—A. Rodan Hogg, Solicitor.

Counsel for Defender (Reclaimer)—Gardner. Agent—J. B. W. Lee, S.S.C.

Friday, June 4.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MITCHELL *v.* CALEDONIAN PROPERTY INVESTMENT BUILDING SOCIETY.

Building Society—Unadvanced Member—Withdrawal—Effect of Withdrawal.

Held, on a construction of the rules of a building society, that a shareholder whose notice of withdrawal had expired, continued a member until his connection with the society was terminated by his being paid out.

Building Society—Clause of Arbitration.

The rules of a building society provided that "Any shareholder or any person claiming by or through any shareholder . . . . feeling aggrieved by any decision of the directors or shareholders, of whatever nature such may be, shall appeal to a board of arbitrators." . . . *Held* that a member who had given notice of withdrawal, but had not received payment of the value of his shares, was still a shareholder in the sense of the rule above quoted, and a plea by the society that the dispute between it and the shareholder, as to whether he could be paid out in ordinary course, was one which fell under the clause of arbitration, *sustained*.

William Mitchell, Ferry Road, Dundee, was the holder of twenty-four fully paid-up C shares of £25 each of "The Caledonian Property Investment Building Society," which carried on its business in Dundee. In February 1879 Mitchell desired to withdraw his shares, and he accordingly gave notice of his intention as required by rule 11, which provided—"Any member holding unadvanced shares may withdraw from the Society on the expiry of three months from the date when he shall have given notice to the manager in writing of his intention to withdraw, and shall be entitled to receive the amount standing at his credit in the books of the Society as at the immediately preceding annual balance; but if the money in hand shall at any time be insufficient to pay all the members wishing to withdraw, they shall be paid in rotation, according to the priority of their notices."

The Society, through its officers, made answer that they had not funds in hand sufficient to meet the sum demanded. They paid him interest on the amount down to July 1881.

In September 1885 Mitchell raised the present action against the Society concluding for payment of £600.

He averred that in May 1879, when his notice of withdrawal expired, the Society had sufficient funds to have paid him out in full.

The defenders averred that prior to February 1879 a number of shareholders had intimated their intention to withdraw, and that at the time the pursuer's intimation expired there was no money on hand to pay him out. Further, that the Society having met with losses the directors had been obliged to offer either (1) payment at 15s. per £1 after voting off the loss, or that a withdrawing shareholder should wait some time for his money, and that they had offered the pursuer £400, the amount at his credit after deducting the loss, together with interest, which offer the pursuer declined. They stated that the dispute fell under the arbitration clause in rule 29—"Any shareholder, or any person claiming by or through any shareholder, *or under the rules*, or any office-bearer feeling aggrieved by any decision of the directors or shareholders, of whatever nature such may be, shall appeal to a board of arbitrators to be appointed by the shareholders at the annual meeting of the Society. The board shall consist of twelve arbitrators not immediately interested, three of whom shall be balloted for in each case of dispute."

The words in italics, "or under the rules," were maintained by the pursuer to have been inserted without authority.

The pursuer, *inter alia*, pleaded that having given the notice required by the laws of the Society he was entitled to be paid the £600 standing at his credit, with interest; and further, that by the notice of withdrawal he became a creditor of the Society.

The defender pleaded, *inter alia*—"The action is excluded by the reference clause in the Society's rules. *Separatim*—The subject-matter of the dispute falls to be decided by arbitration."

By interlocutor of 6th March 1886 the Lord Ordinary repelled the first and second pleas-in-law for the defenders.

The defenders reclaimed (by leave).

At the discussion the Court in respect of there being no relevant averment on record of the existence of a valid board of arbitrators, appointed the defenders to amend their record.

In their minute of amendment the defenders set forth that there was a valid board of arbitrators appointed in terms of the rules founded on by the pursuer; that the board appointed in 1869 still held office in 1876, when the rules of the Society on which the pursuer founded were adopted; that on 28th October 1882 a board of twelve arbitrators was appointed in place of the board already referred to, and that in 1885 a vacancy which had occurred was filled up.

The pursuer in answer to this amendment, besides denying the existence of a legal and valid board of arbitrators, averred that any right which the defenders might have had to compel the pursuer to resort to arbitration was, as appeared from correspondence produced, waived by the defenders.

Argued for defenders and reclaimers — The pursuer was still a member of the Society, and so under law 29. Though a creditor *inter socios*, he was still a shareholder until paid out. The present question was settled by the unreported case of *Blyth* against the same defenders, decided 25th January 1882; Building Societies Act 1874 (37 and 38 Vict. c. 42), secs. 66, 34.

Replied for pursuer — The pursuer's true position from the date of the expiry of his notice of withdrawal was that of a creditor of the Society. He had complied with all the formalities prescribed by the rules, and it was not his fault that he had not been paid out—*Norwich Building Company*, 45 L.J., Ch. 785; *Meiklejohn* v. *Glasgow Working-Men's Provident Society*, November 5, 1885, 13 R. 144; *Carrick and Others*, July 14, 1885, 12 R. 1271.

On the question of arbitration—Rule 29 provided that "any shareholder, or any person claiming by or through a shareholder" who felt aggrieved by the directors' decision should appeal to the board of arbitrators. If the pursuer was a creditor and not a shareholder he was not struck at by this rule, and could not be compelled to go to arbitration. There was no valid board of arbitrators, as the original board had been appointed under a statute which had been repealed some years prior to its appointment. The correspondence showed that the Society had waived its right to arbitration, assuming such to exist.

At advising—

LORD PRESIDENT—[*After narrating the facts above stated.*]—It is in these circumstances that the present action is raised by Mitchell, and he is met by the preliminary pleas that this is a dispute which falls to be settled by arbitration in terms of the contract between the parties, and that the board of arbitrators is the only tribunal to which the pursuer can resort.

Before considering this defence it is necessary in the first place to attend to the terms of the rule which entitles a member to withdraw from the Society. That rule is No. 11, and it is as follows—[*His Lordship here read rule* 11 *as quoted above*]. It is not disputed that the pursuer did all that was required of him under this 11th section in the way of giving notice of his desire to withdraw from the Society, but the answer which the defenders made is that at the time when the application was made they had not the funds in hand to pay out all the members wishing to withdraw, and that the pursuer must take his turn.

But the clause upon which the question between the parties really turns is that contained in rule 29, and set forth in statement 9 for the defenders.

There are certain words in that section which it appears are objected to by the pursuer as having crept in without the authority of the Society, but from the view which I take of this question I do not think it a matter of much importance whether these words are read in or omitted. I therefore take this section without these words, and so taken it is as follows—[*His Lordship here read rule* 29 *as above quoted*]. It is contended that the pursuer from the date of the expiry of his notice of withdrawal, ceased to be a shareholder of the Society, and remained simply a creditor. Now, I am prepared to admit that he is a creditor in this sense, that he can demand payment of the money at his credit if the directors are in a position to pay; but that does not in any way prevent him from being at the same time a shareholder of this Society. He remains a shareholder until he terminates his connection with the Society by receiving the money standing at his credit, and I can see nothing in the case of *Carrick* to which we were referred, which is in any way opposed to the view which I have now taken. Lord Shand there says—"It appears to be clear therefore that persons whose shares were completed, or who had withdrawn their shares in terms of these rules before the stoppage of the Society, are not liable to bear any share of the losses. In a question with other members of the Society they became creditors for the amount due to them, having a vested right to payment of these amounts, the payment being however deferred till such time as the funds would permit." Now, I quite agree with all this, and there can be no doubt that in a question with the other members of the Society, withdrawing members are in one sense in the position of creditors. They are creditors in the question of bearing losses incurred by the Society subsequent to their notice of withdrawal, but they still remain shareholders of the Society until their connection with it is terminated by their being paid out, and that is the condition of the pursuer in the present case.

But it was further urged against the present question being submitted to arbitration that there was no existing valid board of arbitrators, because the original board had been appointed under a statute which some years prior to the appointment had been repealed. At the end of rule 29, as quoted in the minute of amendment for the defenders, there is however this provision—"The existing arbitrators shall be the arbitrators of the Society, and if no new appointment be made they shall continue." It also appears from the minutes printed by the defenders that

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.