the capital advances. Shall it be added to and form part of the sum to be collated? I think not. On this part of the case I agree with the Lord Ordinary, and have nothing to add to his reasons for judgment.

Lord Rutherfurd Clark—On the question whether in fixing the amount of legitim which is due to the pursuer the defenders are bound to collate the marriage-contract provisions settled on the daughters of the testator, I have felt considerable difficulty; but I have come to be of opinion that they are not.

An examination of the authorities has satisfied me that on the death of the father one-third, or, as the case may be, one-half, of his moveable estate vests in his children in equal shares, or, in other words, that a child has only a proportionate share of the legitim fund. Further, it is settled that the discharge by any child of its right to legitim after the death of the father does not enlarge the share of the other children, but enures to the benefit of the general disponee. From these two propositions it seems to me to follow that a child can claim no more than his share of the legitim fund, and that the general disponee can be required to do nothing further than to satisfy it.

*Collatio inter liberos* has application only when more than one child claims legitim. Its purpose is to require a child who claims legitim to collate the advances which it has received during the lifetime of the father, and thus to make a nominal enlargement of the legitim fund, in order to the more equitable distribution of the actual fund. But the general disponee cannot be bound to collate, whether he is a child or a stranger, unless he pleads his rights as a child, or as the assignee of a child, in order to limit the right of a child who is claiming legitim. In my opinion he has no occasion to plead any such rights, and does not in fact do so. For a child who claims legitim can claim no more than the proportionate share of the legitim fund which has vested in him. When he can make no higher claim it is necessarily answered by satisfying it, and this is done without pleading the right of any other child.

It is said that the general disponee is the assignee of a child who discharges his right to legitim. I do not think that that is his true legal position. He derives his right to the estate from the will of the testator. When a child accepts conventional provisions he discharges his claim to legitim. He does not assign it. He merely withdraws the restraint which as a child he possessed over the testamentary power of his father.

On the question relating to the securities in Wales I agree with your Lordship in the chair and with the Lord Ordinary.

The following interlocutor was pronounced:—

"The Lords having heard counsel for the parties on the reclaiming note for the defenders against Lord M'Laren's interlocutor of 13th December 1881, Adhere to the said interlocutor so far as it finds that in ascertaining the amount of the moveable estate of the late Duncan Monteith out of which legitim is payable, there fall to be deducted the two sums of £6000 and £4000 mentioned in the 7th article of the condescendence: *Quoad ultra* recal the said interlocutor, and find that the defenders Mrs Janet Margaret Monteith or Ferguson, Mrs Isabella Monteith or Reid, Mrs Sibla Rebecca Monteith or Hossack, and Mrs Annie Lawrie Monteith or Stanford, are not bound to collate their marriage provisions: Remit the cause to the Lord Ordinary with instructions to proceed therein as accords," &c.

Counsel for Pursuer (Respondent)—Pearson—Murray. Agents—J. & F. Anderson, W.S.

Counsel for Defenders (Reclaimers)—Mackintosh—W. C. Smith. Agents—Dove & Lockhart, S.S.C.

---

*Friday, June 30.*

## FIRST DIVISION.

### SPECIAL CASE—CARTWRIGHT AND OTHERS (MAXWELL'S CURATORS) *v.* MAXWELL AND OTHERS.

*Entail — Heir in Possession — Feu — Powers of Trustees—Payments to Reimburse Outlays of Capital.*

Testamentary trustees held certain lands with power to sell or feu the same, and under direction to convey them if unsold to a certain series of heirs of tailzie so soon as certain purposes of the trust had been fulfilled, and to convey or pay the whole free residue, if any, to a person who was first in the series of heirs of tailzie. In exercise of their feuing powers the trustees granted dispositions to a considerable extent, and for the convenience of the feuars formed sewers, drains, and streets, charging each feuar with a proportion of the cost; thereafter, the purposes of the trust having been fulfilled, the trustees conveyed the estate in tailzie as directed; the heir of tailzie obtained power to continue the feuing plan of the trustees, and sums fell due from new feuars as the proportions of the cost of the sewers, drains, and streets effeiring to them; it was debated whether these sums fell to be paid to the heir of tailzie in possession, or belonged to the executors of him who held that character at the date of the expenditure, and to whom the trustees were directed to pay the free residue of the estate. The Lords thought that the expenditure was in the due course of trust management, and that therefore the benefit of the outlay must belong to the person for whose behoof the trust was administered, *i.e.*, the heir to whom they were directed to convey, and did convey, the estate on the fulfilment of the trust purposes, and preferred the heir.

The late Sir John Maxwell of Pollok, Bart., died on 6th June 1865, leaving a disposition and deed of entail dated 23d July 1863, by which he entailed the estate of Pollok upon his nephew, the now deceased Sir William Stirling Maxwell (therein designed as William Stirling, Esq. of Keir), and the heirs of his body, whom failing upon the other heirs and substitutes therein specified. Of the same date he executed a trust-disposition

and settlement, whereby—on the narrative, *inter alia*, that he was "desirous that the remainder of the debt affecting the said estate of Pollok should be paid up and discharged by selling or disposing of a portion of the estate to be set aside for that purpose, consisting of the lands of Pollokshields, Kinninghouse, and Mains of Cathcart, and others hereinafter disponed," so that the estate of Pollok should "descend unburdened" to his said nephew and the other heirs of entail, —he disponed to the trustees therein named his whole estate and effects of every description, except the lands and estate of Pollok conveyed by the said deed of entail, and particularly the lands of Pollokshields, Kinninghouse, and Mains of Cathcart above mentioned, and also certain other lands belonging to him, adjacent to, but not forming part of, the said old estate of Pollok, and also various houses and others in and about Pollokshaws.

The said trust-disposition and settlement provided—"My said trustees shall, out of the proceeds of the said lands of Pollokshields, Kinninghouse, and Mains of Cathcart, and others *primo* above conveyed, pay off the remainder of the said heritable debt affecting the estate of Pollok, and interest thereon, and shall have full power to sell or feu the whole of these lands, or such parts thereof as they shall in their discretion think fit for paying off the said debt, and that by public roup or private bargain; and they shall procure valid discharges of the whole debt and all interest due thereon, and see the same properly recorded, so that the entailed estate may be entirely freed and disburdened of any claim therefor; and if any part of the said lands shall remain unsold after the whole debt is thus paid off and discharged, then my said trustees shall entail the same upon the same series of heirs, and under the same burdens, conditions, prohibitions, reservations, provisions, and declarations as are contained in the foresaid disposition and deed of entail. But if my said trustees shall, in the exercise of their discretion as aforesaid, have sold more land than turns out to be necessary for paying off the said debt, then the balance of the price or prices which may be in their hands shall form part of my general trust-estate, conveyed by and to be managed under this deed."

The trustees were further directed to "convey or pay over the whole free residue of the trust estate, if any, to the said William Stirling and his heirs and assignees."

Before his death the said Sir John Maxwell had begun to feu out the lands of Pollokshields and Kinninghouse on an extensive scale, according to a plan prepared for that purpose, and had feued out the whole, or nearly the whole, of the lands of Kinninghouse and a considerable part of the lands of Pollokshields. On his death, his trustees, of whom the said Sir William Stirling-Maxwell was one, entered on the administration and management of the estate, and in virtue of the powers conferred on them by the trust-deed, and in execution of the trust, they continued the system of feuing already begun. They sold the feu-duties of the lands of Kinninghouse and continued the feuing of Pollokshields, and out of the proceeds of these estates they had succeeded, before Sir William Stirling-Maxwell's death on 15th January 1878, in paying off the whole debts affecting the said entailed estate of Pollok, which had amounted at the time of Sir John's death to upwards of £67,000. They thereafter executed a deed of entail, dated 22d June and recorded 2d July 1880, of the remainder of the above lands and of the Mains of Cathcart and others, in terms of the directions of the said trust-deed, in favour of Sir John Maxwell Stirling-Maxwell, eldest son of the late Sir William Stirling-Maxwell, and the heirs whomsoever of his body, whom failing, the heirs whomsoever of the body of the late Sir William Stirling-Maxwell, whom failing the other heirs therein specified. In carrying out the feuing plan of Pollokshields, the trustees formed sewers, drains, and streets, and expended large sums of money thereon. During the lifetime of Sir William Stirling-Maxwell, nearly the entire income from the lands mentioned in the second purpose of the said trust-deed was expended in this way. The feu-contracts proceeded on a method whereby when feus were given off, each feuar was charged with a proportion of the expense of forming the streets, drains, and sewers, in proportion to the extent of his feu.

Sir William Stirling-Maxwell died on 15th January 1878, and his executry estate fell to be administered in the Court of Chancery, in England. The present case was adjusted in terms of an order of the Vice-Chancellor in the said Court, and remitted by him for the opinion of the Court of Session, in terms of the Act 22 and 23 Vict. c. 63. The parties to the case were (1) the executors of the said Sir William Stirling-Maxwell; (2) his eldest son, Sir John Stirling-Maxwell, a minor, and his guardian-nominate; and (3) his second son Archibald Stirling-Maxwell, and his guardian-nominate.

The questions for the opinion of the Court were:—"(1) Whether the sums received and to be received from time to time from feuars, as aforesaid, in respect of the foresaid streets, drains, and sewers, form part of the executry estate of the said Sir William Stirling-Maxwell? (2) Or whether the said sums belong to the heir of entail in possession of the estate of Pollok at the time when the said sums became payable?"

The first parties argued—The sums received and to be received from feuars in respect of the formation of said streets and drains should be paid to Sir William's executors. If Sir William had lived for a few years longer they would have fallen in to him as heir of entail in possession, and should now be paid to his personal representatives, and not to his successor in the entailed estates. The trustees were directed to sell or dispose of the lands in question until the entailed estate was by said sale or disposal cleared of debt, and then to entail the remainder of said lands. There was no machinery in the deed for a continuing trust. The trustees therefore ought to have acted with all convenient speed, and they had no power to spend the income of the said lands on the formation of streets and drains, to the prejudice of Sir William—*Stair* v. *Stair's Trustees*, June 19, 1827, 2 W. & S. 614; *Gilmour* v. *Gilmour's Trustees*, Nov. 22, 1855, 18 D. 78. The measure of Sir William's loss was the £15,000 in question.

The second parties replied—The trustees had acted within their powers. The formation of the streets and drains, &c., was an ordinary and necessary act of trust administration. The trustees had right so to spend the income, as

"proceeds" of said lands. If they erred, they increased the entailed estate in value, though they might have diminished it in extent. The sums as they fell in from feuars should be paid to the heir of entail in possession for the time.

The Lords, after making avizandum, and without delivering opinions, pronounced the following judgment:—

"The Lords of the First Division having considered the petition for Thomas Robert Brook Leslie Melville Cartwright and others, with the Case presented for the opinion of this Court, in virtue of an order pronounced by the High Court of Justice, Chancery Division, in England, on the 4th February 1882, under the authority of the Statute 22 and 23 Vict. cap. 63, and heard counsel for the executors of the late Sir William Stirling Maxwell, Baronet, petitioners, and also for Sir John Stirling Maxwell, Baronet, and his curators, petitioners, make answer to the questions of law submitted for the opinion of this Court as follows: They answer the first question in the negative, and the second question in the affirmative."

Counsel for First Parties—Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Second Parties — Mackintosh — Pearson. Agents — Carment, Wedderburn, & Watson, W.S.

---

*Friday, June* 30.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

## CLARK AND OTHERS *v.* WEST CALDER OIL COMPANY (LIMITED) AND OTHERS.

*Public Company—Companies Acts* 1862 *and* 1867 (25 *and* 26 *Vict. c.* 89, *and* 30 *and* 31 *Vict. c.* 47)—*Issue of Debentures—Assignation of Moveables* retenta possessione—*Liquidation.*

An assignation of a lease intimated to the landlord but not clothed with possession does not create a preferable security in favour of the assignee.

An assignation of moveables *retenta possessione* imports nothing more than a personal obligation, and does not create a preferable security in favour of the assignee.

A company incorporated under the Companies Acts issued debentures, and in security of the sums advanced on these debentures granted to trustees on behalf of the debenture creditors an assignation to the tenants' part of certain mineral leases, together with the plant and machinery held by the company; these assignations were intimated to the various landlords, but no possession was taken. The company having fallen into liquidation, the debenture creditors contended that they were entitled to be ranked preferably to the other creditors of the company in respect of the security thus created. Their claim was *repelled*, no possession having followed on the assignation.

*Observations* on the difference in the legal position of liquidators and trustees in bankruptcy.

The West Calder Oil Company (Limited) was incorporated under the Companies Acts on 22d April 1872. At an extraordinary general meeting held on 22d July 1875 it was resolved that the directors should be authorised to issue debentures or other preferable securities, bearing interest at the rate of 7½ per cent. per annum, "on the security of the works, properties, and other assets of the company, to an extent not exceeding £25,000." This resolution was confirmed at a subsequent meeting. On the 5th March 1878 the company went into voluntary liquidation, and at a later date a supervision order was pronounced by the First Division of the Court of Session, under which the liquidation was carried on. The present question arose in a process of multiplepoinding, the principal parties to which were—first, the holders of the debentures issued in terms of the special resolution of July 2, 1875, some of whom had surrendered their estates to the liquidators of the City of Glasgow Bank, who now claimed in their right; second, the ordinary trade creditors of the company.

It was maintained by the first parties that they had a preferable right over the property of the company, while the second parties contended that the debenture-holders had no such right, and were entitled only to a *pari passu* ranking with ordinary creditors. A subordinate question was also raised as to the title of the trade creditors to appear, it being maintained that they would be more appropriately represented by the official liquidator.

At the time when money was being advanced to the company by debentures, in terms of the resolution of July 2, 1875, and in security of the sums so advanced, a disposition was granted of lands held by the company to certain persons therein named, as trustees for the debenture-holders. This disposition was duly registered in the register of sasines, and no question arose regarding it. But there was also granted an assignation by which certain leases of minerals and relative plant in which the company were tenants were made over to the same parties as trustees for the debenture-holders. The important sections of this assignation are quoted in the opinion of the Lord President. It appeared that this assignation had been duly intimated to the various landlords in the leases, but that no steps had been taken by the assignees to enter into possession under these leases, or to take possession of the moveables, machinery, plant, &c., which were upon the ground.

Under these circumstances various questions arose,—Whether in a company incorporated under the Acts of 1862 and 1867, an assignation to trustees for debenture-holders, created in favour of these debenture-holders any right of preference? and Whether by the intimation of this assignation to the landlords in the various leases any effectual security had been created in favour of the debenture-holders?

General averments of insolvency and fraud were made by the trade creditors, who further pleaded that it was *ultra vires* of the company or its directors to make the debentures preferable.

The Lord Ordinary by his judgment held that the case did not fall within any of the established