price of the house, while it is equally clear, I think, that the purchaser in making these payments took it for granted that he would ultimately get a good title and a discharge of the burdens.

In so acting the purchaser did nothing wrong or risky, except in so far as he assumed that the trustee could give him a clear title. If the trustee was not in a position to give a clear title, that became one of the risks he ran in making this payment to account. The purchaser now discovers that there is a heritable security over this property in the form of a cash-credit bond for £800, but that at the date of the bankrupt's sequestration a certain proportion only of that £800 had been advanced, and that the amount due at that date was £525. It appears that the heritable creditors thereafter advanced various sums of money to certain contractors in order to secure the completion of the buildings, and it is now sought to turn these sums so paid into advances covered by the cash-credit bond. That however is a proposal which cannot for a moment be entertained; the only sum which is covered by the bond is the £525, which was advanced to the bankrupt prior to the date of his sequestration.

The decision of your Lordships, if you should be of the opinion I have just expressed, will involve some modification in the scheme of ranking and division submitted by the trustee but I do not anticipate that any difficulty will arise in giving effect to these alterations.

Lord Mure concurred.

Lord Shand—If the view of the various sections of this statute which has been urged upon us on behalf of the Standard Property Investment Company had been a sound one, I should have felt that there was a good deal of force in their argument. It has been urged that sections 116 and 117 are of universal application, and that no payment of the price is to be made by the purchaser until a scheme of ranking and division has been prepared, judgment upon which is to be a warrant for payment against the purchaser of the heritable estate.

I cannot, however, adopt the view taken by the company of the purport of these sections of the statute. I think that these sections were inserted for the protection of purchasers, and in order that interim warrant might on cause shown be granted for the payment of preferable claims out of the price of the estate.

In the ordinary case the trustee grants the disposition, and the purchaser is not bound to wait for a warrant of Court before making payment of the price. Here the purchaser was taken bound to pay the purchase price at Whitsunday, the time specified in the articles of roup. In return for the price he was entitled to have a clear title, in which was included a discharge of the heritable securities on the subjects.

The risk he ran in making advances to the trustee was that he might have, as in the present case, to take the title subject to such securities as might be over it. He so took it, and now he discovers that there is an existing security for £525.

There were certain collateral transactions between the heritable creditors and third parties, but it is impossible that these can in any way be made, as has been suggested, to increase the securities attaching to this heritable subject. It is impossible for the company to maintain here, as they have attempted to do, that these advances by them are to be made good by the purchaser.

Lord Adam—So far as I can see, the purchaser here was entitled, if he had chosen, to have paid the whole of purchase price of the subjects at Whitsunday 1883 under the risks which have been referred to by your Lordships, and especially of his having to be satisfied with such a title as the trustee might be able to give him. It might even happen that the heritable securities might be greater than the value of the subjects, but that is one of the risks he runs in making these advances. The clauses of the statute to which so much reference has been made were clearly intended, I think, for the protection of the purchaser, and did not compel him to keep back the purchase price until the Court ordered payment.

They were intended to meet cases in which the trustee could not, from some cause or other, give a clear title, when matters had, in consequence of a sequestration or otherwise, become complicated, and delay was likely to occur. In such cases the purchaser withholds payment until he sees to whom he ought to pay, but it was never intended that he should be kept from a settlement until such time as a scheme of ranking and division was made up.

On the question as to the amount of the incumbrance upon the subjects here, there can be no possible doubt that it is only the amount which was due on the cash-credit bond at the date of the sequestration, and that alone, that can be charged against the purchaser.

The Court appointed the trustee to amend the scheme of ranking and division in terms of the foregoing judgment.

The trustee subsequently put in an amended scheme of ranking and division, giving Goldie credit for the sums he had paid to Ferrier, and showing credit to the company only for the amount (with interest) which they had advanced prior to sequestration.

The Court approved of the scheme as amended and granted warrant for payment.

Counsel for the Trustee (Petitioner)—A. S. D. Thomson. Agent—Marcus J. Brown, L.A.

Counsel for the Respondent Goldie—W. C. Smith. Agent—J. Stewart Gellatly, S.S.C.

Counsel for Standard Property Investment Company—Lorimer. Agents—Duncan Smith & M'Laren, S.S.C.

Friday, June 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ALLAN AND OTHERS (HARVIE'S TRUSTEES) *v.* GUILD (KETTLE'S TRUSTEE).

Bankruptcy — Sequestration — Cautioner — Constructive Letter of Guarantee—Indefinite Payment—Ranking.

A bank, in security of cash advances to A, a customer, received a letter of guarantee

in these terms—"I . . . guarantee you due payment of all sums for which A is or may be liable to you, the amount which I am to be bound to pay under this guarantee not to exceed £15,000. . . . And I further declare that I shall not be entitled to demand from you an assignation of this guarantee so long as the said A is indebted to you in any sums such as aforesaid."

A was sequestrated, being indebted in more than £15,000 to the bank. The cautioner having paid up the £15,000, claimed for that amount in the sequestration. *Held*, on the terms of the guarantee, that the bank were entitled to rank for the full amount of their debt, and that the cautioner was not entitled to rank in competition with the bank.

Robert Kettle & Company, cotton yarn merchants and agents in Glasgow, and Andrew Hislop Maclean, sole partner of the firm, had an account-current with the Bank of Scotland. In the beginning of 1883 Maclean, who was at that time a debtor to the bank, desired further advances, and in security therefor a letter of guarantee in the following terms was granted to the bank by Alexander Harvie, grain merchant in Glasgow, Maclean's father-in-law—"I, Alexander Harvie, residing at No. 16 Elmbank Crescent, Glasgow, hereby guarantee you due payment of all sums for which Mr Andrew Hislop Maclean, cotton yarn merchant, Glasgow, is or may become liable to you, the amount which I am to be bound to pay under this guarantee not to exceed £15,000 sterling, with interest from the date or dates of advance, you being always entitled to make calls on me from time to time in respect of my said guarantee for such sums as you may fix. And I further declare that you may at any time or times, at your discretion, grant to the said Andrew Hislop Maclean, or to any drawers, acceptors, or indorsers of bills of exchange or promissory-notes received by you from him, or on which he may be liable to you, any time or other indulgence, and compound with him or such drawers, acceptors, or indorsers, without consulting me or discharging or satisfying my liability. And I further declare that I shall not be entitled to demand from you an assignation of this guarantee so long as the said Andrew Hislop Maclean is indebted to you in any sums such as aforesaid. This guarantee is to remain in force, notwithstanding my death, until recalled in writing, and shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations or any particular obligation of the said Andrew Hislop Maclean."

Sequestration of the estates of Kettle & Company and of Maclean was awarded by the Sheriff of Lanarkshire on 25th January 1884, and James Wyllie Guild, C.A., Glasgow, was appointed trustee. Alexander Harvie died on the 18th March 1884, and shortly before his death he had paid up in two sums of £10,000 and £5000 respectively the amount which he became liable for to the Bank of Scotland under the letter of guarantee. The £5000 was put to a separate account to be applied as far as required.

At the date of sequestration Maclean and his firm owed the bank £44,106 according to their claim lodged in the sequestration.

Harvie's trustees made a claim to be ranked, and to draw a dividend on the sequestrated estates for the £15,000 paid to the Bank of Scotland by Harvie under the letter of guarantee. They maintained that the bank could not claim in the sequestration for any part of the sum in the letter of guarantee in competition with them, and further that there was an express assignation of the bank's debt to the amount of the guarantee, or in any view an implied assignation thereof had resulted from the payment made by Mr Harvie to the bank.

The Bank of Scotland lodged an affidavit and claim in the sequestration for the sum of £44,106, 0s. 11d., the full amount of their debt. The bank maintained that Harvie's guarantee did not fall to be deducted from their claim.

On 10th October 1884 the trustee issued the following deliverance rejecting the claim of Harvie's trustees—

"The amount of your claim as lodged is £15,000.

"*Trustee's Deliverance.*

"The trustee now rejects this claim on the ground that the amount has not been deducted by the Bank of Scotland in their claim against the estate. (Signed) J. WYLLIE GUILD, *Trustee.*" He admitted the claim of the bank, but to the extent of £15,000 he made their right to rank and draw dividend contingent on the rejection of the claim of Harvie's trustees.

Harvie's trustees lodged two appeals in the Sheriff Court of Lanarkshire at Glasgow. The first prayed that the trustee's deliverance should be altered in so far as it granted a contingent ranking for £15,000 to the Bank of Scotland. The second prayed that the trustee should be ordained to rank Harvie's trustees in terms of their claim as creditors on the sequestrated estate.

Harvie's trustees pleaded—"(2) The sums due in respect of said letter of guarantee having been paid to the Bank of Scotland, the latter were barred from lodging any claim therefor in the sequestration, as in competition with the appellant's claim. (3) The Bank of Scotland having been paid and having received the sums claimed on the understanding and condition that they were to assign their claim against Mr Maclean to that extent, are not now entitled to be ranked as creditors in the sequestration for the sum so paid them. (4) *Separatim*, In any event, the money having been paid to and received by the bank, there is an implied assignation of their claim in favour of Mr Harvie and his trustees to the extent of the sums paid."

The trustee pleaded that as there could not be a double ranking for the same debt his deliverance on the claim for the Bank of Scotland was proper.

The bank pleaded, *inter alia*—"(2) The said Alexander Harvie having, under said guarantee, guaranteed the Bank of Scotland due payment of all sums for which the said Andrew Hislop Maclean was or might become liable to the bank, although the extent of his liability was limited as aforesaid, the appellants are not entitled to a ranking in competition with the Bank of Scotland, so long as any part of the said Andrew Hislop Maclean's indebtedness to the Bank of Scotland remains unsatisfied."

By interlocutor of 16th March 1885 the Sheriff-Substitute conjoined the two appeals, and there-

after—"Finds (1) that the late Mr Harvie gave a guarantee to the Bank of Scotland for all sums for which Mr A. H. Maclean might become liable to them; the amount to be paid under the guarantee being restricted to £15,000: Finds (2) that Mr Maclean and his firm were sequestrated on 25th January 1884: Finds (3) that Harvie paid to the bank in respect of the guarantee £15,000 between the date of sequestration and 14th March 1884: Finds (4) that his trustees claimed to be ranked on the estate for £15,000, by affidavit dated 19th May 1884; while the bank claimed for the whole debt as at the date of sequestration; and the trustee has sustained the claim of the bank and rejected the claim of Harvie's trustees, against both of which deliverances Harvie's trustees have appealed: Finds in law that the rights of parties to claim in the sequestration must be regulated by their rights at the date of sequestration: Therefore sustains the deliverances of the trustee appealed against, and dismisses the conjoined appeals: Finds the appellants liable to the respondents in the expenses of the conjoined appeals, &c.

"*Note.*—There can be no doubt that under our Bankruptcy Act the amount of a debt is its amount at the date of sequestration. This is distinctly laid down in the case of *Robertson*, July 3, 1823, 2 Sh. 450, and *Hay*, February 5, 1850, under the old Acts; and there can be no doubt it is law under the present Act also, unless under sec. 56 the cautioner obtains 'an assignation to the debt on payment of the amount thereof,' which is not the case here. Now, in the present case, the amount of the debt due by the bankrupts to the Bank of Scotland at the date of sequestration was that stated in the bank's claim; and at the date of sequestration there was no debt due by the bankrupts to Harvie's trustees at all. Therefore, whatever the ultimate liabilities of parties may be, it is for the bank in the first instance to draw the dividends on the whole debt as existing at the date of sequestration. The question, whether they may not have ultimately to refund to Harvie's trustees the dividends drawn by them on the £15,000 of which they have actually got payment is a very nice and difficult question. The balance of English authorities would seem to be in favour of such a demand, while that of Scotch authorities is more doubtful. But it is out of place to decide this question beforehand."

Harvie's trustees appealed to the Court of Session under sec. 170 of Bankruptcy Act 1856, and argued—The guarantee by Harvie was a limited guarantee, and as the whole debt under it had been paid, the appellants were entitled to get an assignation of the guarantee, or rather an assignation of the claim to rank on the sequestrated estate. The letter of guarantee was clumsily framed; it could not stand the construction claimed for it by the bank; the words "shall not be entitled to demand from you an assignation of this guarantee" had no meaning; there was nothing in the words of the letter to show that the appellants had contracted themselves out of their right to claim in the sequestration; that brought the question to be one of the scope and construction of the guarantee.

Authorities—*Robertson* (*Rae's Trustees*), July 3, 1823, 2 S. 403; *Hay* v. *Durham*, Feb. 5, 1850, 12 D. 676; *Houston* v. *Spier's Trustees*, July 3, 1834, 12 S. 879; 1 Bell's Comm. 390, and 2 Bell's Comm. 305; Ersk. iii. 3, 68; *Ellis* v. *Emmanuel*, L.R., 1 Exch. Div. 157; *Hobson* v. *Bass*, 1871, L.R., 6 Ch. App. 792.

Replied for the respondents (The Bank of Scotland)—The question really turned upon the construction of the letter of guarantee. What was it which Harvie undertook to guarantee? the leading words were a guarantee for due payment. At the date of the guarantee M'Lean was due the bank sums in excess of the guarantee. As to cases of guarantee for office, see *Balfour* v. *Borthwick*, Jan. 29, 1819, F.C., in H. of L., 1 S. App. 13; *Maxtone*, M., *voce* Cautioner App. 1; 2 Bell's Comm. 366–7. The whole terms of the letter of guarantee were against the appellants' claim; the meaning of the expression "assignation of the guarantee" clearly was that the bank was to retain as against the guarantor some right after the £15,000 was paid, that is, until the whole debt was cleared off. If the interpretation of this expression was, that it was the debt which was assigned them, that made the respondents' case stronger.

Authorities—*Mein* v. *Saunders*, Mar. 6, 1824, 2 S. 778; *Houston* v. *Speirs*, June 25, 1824, 3 S. 180; *Barwell*, 7 Bingham 489; Smith's Mercantile Law, 9th ed. 456.

Counsel appeared for the trustee but was not called upon.

Three of their Lordships of the First Division being shareholders of the Bank of Scotland, the following joint minute was put in, in which the parties "concurred in stating that notwithstanding three of their Lordships of the First Division, before whom the case is depending, are shareholders of the Bank of Scotland, the parties desired to waive, and hereby waive, all questions of declinature, and consent to their Lordships hearing and judging the cause."

At advising—

Lord President—The bankrupt here was a customer of the Bank of Scotland, and he had a current account with them. It appears that the bank had made considerable advances to Maclean, and that in the beginning of 1883 they desired a letter of guarantee as a condition of his obtaining any further advances from them.

This letter was granted by Mr Alexander Harvie, Glasgow, and it guaranteed the bank due payment of all sums which Mr Andrew Hislop Maclean, cotton yarn merchant, Glasgow, "is or may become liable to you," but a clause followed by which the guarantee was restricted to £15,000. In the following year, on the 25th January, Maclean's estates were sequestrated, and it was then discovered that a large balance was due to the bank, amounting to upwards of £44,000.

Mr Harvie before his death, which occurred shortly after Maclean's sequestration upon 18th March 1884, had made payments to the bank amounting in all to £15,000, the extent of his liability under the letter of guarantee. The bank lodged a claim in Maclean's sequestration for a ranking on the full amount of their debt, while Harvie's trustees have also lodged a claim in which they maintain that they are entitled to a ranking for the proportion of the debt which was paid by the cautioner under the letter of guarantee.

The trustee has sustained the bank's claim, and the question which we have now to determine is, whether the party who was liable under the letter of guarantee is entitled to any ranking upon the debtor's estate until the creditor's claim has been met in full, or, in other words, whether we can interfere with the rights of the creditor to rank upon the sequestrated estate of the principal debtor for the full amount of their debt. There are some things which are plain enough in the law of guarantee in its application to a case like the present. If the cautioner is liable to the creditor for the full amount of the debt, and if he pays it in full, then of course he is entitled to rank for relief on the principal debtor's estate, while if the cautioner, being liable for the whole debt, only pays a portion of it, he cannot rank for relief in competition with the creditor.

But the peculiarity of the present case is that the cautioner here has paid to the full amount of his guaranteed liability, but that does not extinguish the claim of the creditor, or give him payment of his debt in full.

The question therefore comes to be, whether the cautioner can interfere with the creditor ranking for the full amount of his debt upon the debtor's estate? and that is a question which must depend upon the terms and construction of the letter of guarantee in each particular case.

There is no rule of general or universal application in such cases, and I think it will be found that the terms of the obligation undertaken by the cautioner must be held to determine the question. Applying that rule, then, to the present case, the construction of the letter of guarantee is conclusive of the question between the parties, and makes it clear that the cautioner is not entitled to interfere in any way to prevent the creditor getting a ranking on his debtor's estate for the full amount of his debt.

In the letter of guarantee the cautioner's obligation is thus expressed—I guarantee you due payment of all sums for which Maclean "is or may become liable to you." Now, these are very general words, and are certainly applicable to all sums that may be advanced by the bank to Maclean. They are followed, no doubt, by a restricting clause in these terms:—"The amount which I am to be bound to pay under this guarantee not to exceed £15,000," the meaning of which just is, that the cautioner guarantees all sums advanced by the bank to Maclean up to £15,000, but whenever that amount is exceeded the guarantee ceases.

This is followed by a declaration in these terms:—"And I further declare that I shall not be entitled to demand from you an assignation of this guarantee so long as the said Andrew Hislop Maclean is indebted to you in any sums such as aforesaid." Now, there is clearly some blunder in the language used here; it is not the guarantee which is not to be assigned, but what is meant is, that the cautioner is not to have an assignation so as to give him relief against the principal debtor so long as the principal debtor owes anything to the creditor. There is here, therefore, I think a distinct declaration which precludes the cautioner from saying that he can interfere with the bank recovering by all means in their power the sums owing to them by Mr Maclean. Any difficulty upon this point is removed I think by what follows—that the guarantee was to be without prejudice to any other securities or remedies which the bank might have or might acquire for the general obligations, or any particular obligation of the said Andrew Hislop Maclean. Now, the proposal of the cautioner is to interfere, and to interfere with considerable effect, with one of the bank's remedies for recovering a portion of the sums advanced to the bankrupt, and looking to the terms of this guarantee as a whole, and especially to the clause to which I have referred, I am clear that until the creditor is paid in full the cautioner cannot touch the debtor's estate.

I think therefore that the trustee was right in sustaining the bank's claim and rejecting the claim for Harvie's trustees.

Lord Mure—I agree with your Lordship in thinking that this question really turns on the terms of the letter of guarantee. In the course of the discussion we were referred to a variety of cases to illustrate the general rules which prevailed in other countries in dealing with questions like the present, but I do not think that in this case it is necessary that I should either deal with these authorities or attempt to reconcile them, because the terms of this letter of guarantee afford sufficient material for the decision of the present case. I agree with the construction of this letter proposed by your Lordship, and I also agree in thinking that the granter of this letter of guarantee has no right to enter into competition with the bank with a view to obtain a ranking on the bankrupt's estate until the whole sum due to the bank has been paid by the debtor. And I think that this view is strengthened by the clause which says that the guarantee was to be without prejudice to any of the other securities or remedies which the bank might have or might acquire for the general or particular obligations of the bankrupt.

Lord Shand—The argument in this case extended over a wide field and embraced many authorities in the law both of this and other countries. It does not appear to me, however, that the case turns upon any question of general principle, but falls to be determined entirely on the terms of the letter of guarantee. That letter contains a declaration that the cautioner was not to be entitled to demand from the bank an assignation of his guarantee so long as the debtor was to any extent indebted to the bank. I agree with your Lordships in thinking that it is wrong to speak of an assignation of the guarantee, and that what was intended to be conveyed by the expression was that the cautioner was not to be entitled to an assignation of his claim so long as Maclean was owing any sum to the bank—that is to say, so long as Maclean was due anything to the bank, the cautioner was not to be entitled to compete with the bank on the debtor's estate.

The guarantee was for payment of all sums which the debtor was or might become liable to the bank for so long as the amount which the cautioner might be called upon to pay did not exceed £15,000. Now, I think that the manner in which this clause of the letter of guarantee is expressed, is opposed to the limitation contended for by the cautioner. I think therefore that the deliverance of the trustee is well founded and ought to be adhered to.

LORD ADAM—I am of the same opinion and have nothing to add.

The Court recalled the interlocutor of the Sheriff-Substitute, of new affirmed the finding of the trustee, and remitted to the trustee to admit the bank's claim.

Counsel for Harvie's Trustees—Mackintosh—Pearson. Agents—Henry & Scott, S.S.C.

Counsel for the Trustee—Napier. Agents—Maconochie & Hare, W.S.

Counsel for the Bank of Scotland—J. P. B. Robertson—Darling. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

EARL OF KINTORE *v.* COUNTESS-DOWAGER OF KINTORE AND ANOTHER.

(*Ante*, vol. xxi. p. 647, 11 R. 1013—20th June 1884).

Parent and Child—Legitim—Entail—Improvement Expenditure—Heritable or Moveable—Entail Amendment Act 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 11.

An heir of entail in possession expended certain sums of money on permanent improvements, and died without having obtained decree from the Court ascertaining the amount of expenditure which he could charge against the entailed estates. The amount was subsequently fixed at £5670, 12s. 2d⅔. in a petition presented under the 11th section of the Act 38 and 39 Vict. cap. 61, by his widow, to whom he had "expressly" bequeathed these sums in terms of said section, and the succeeding heir was ordained to execute a bond of disposition in security over the entailed estates for the ascertained sum, which he did. *Held* (1) that this sum was *in bonis* of the deceased at the date of his death; and (2) (*rev.* Lord Fraser) that as the right bequeathed was in terms of the statute the right to demand an heritable security, it was *sua natura* heritable, and the sum in the bond therefore did not form part of the legitim fund.

By an interlocutor of the First Division, dated 20th June 1884, and previously reported, the Court, adhering to the interlocutor of Lord Fraser, Ordinary, found that the Earl of Kintore was not barred by the terms of his parents' marriage-contract from claiming legitim out of his father's estate, and remitted to the Lord Ordinary to proceed with the cause.

The subsequent procedure was for the purpose of ascertaining the amount of the legitim fund, and with regard to that several questions arose. The only question of importance had reference to certain sums of money expended by the deceased Earl upon improvements, and the facts in connection with this and the judgment of the Lord Ordinary thereon are stated in the following passage of his Lordship's opinion:—"In the inventory of the personal estate given up by the executrix there is an item entered thus—'Sums expended by the deceased since 31st October 1875 on permanent improvements on his entailed estates in Aberdeenshire and Kincardineshire, not charged upon the estates, and specially bequeathed to his executrix, amounting in all to upwards of £9900, of which there may be recoverable £5000 or £6000, but say in the meantime £5000.' At the time of the late Lord Kintore's death he had obtained no decree from the Court ascertaining the amount of improvement expenditure which he could charge against the succeeding heirs of entail and the entailed estates; but this was subsequently done in a petition presented by the defender, his widow—the amount being £5670, 12s. 2d⅔. Lord Kintore died on 18th July 1880. He left a will dated in 1852, and a codicil thereto dated in 1879. By the codicil he narrated that he had appointed the defender to be his executrix and universal legatory, bequeathing to her his whole moveable estate, and he further made this special bequest:—'And seeing that I have expended, and am in the course of expending, and intend to continue to expend, considerable sums of money in executing improvements on my entailed estates, I hereby explain that, in case of my death without having charged the estates with the amount which I was entitled to charge of the sums expended on such improvements, such sums shall form part of my executry estate; and I accordingly hereby expressly leave and bequeath the same to my said executrix and residuary legatee, whom failing, to my younger children.' Being thus a legatee to whom the improvement expenditure had been expressly bequeathed, the defender became entitled under the 11th section of the Act 38 and 39 Vict. cap. 61, to present a petition to the Court praying the Court to find and declare the sums expended on improvements, and that she was in right thereof, and to decern and ordain the heir in possession to execute a bond and disposition in security over the estate for the amount. She accordingly did present such a petition on the 7th of December 1880, and after the usual procedure the Court ascertained the amount to be, exclusive of expenses, the above sum of £5670, 12s. 2d⅔., and ordained the pursuer, as the heir of entail in possession, to execute a bond and disposition in security over the entailed estates for the ascertained sum, which he did on the 20th of April 1882. By this bond the pursuer bound himself, and the heirs of entail succeeding to him, 'to pay to the Right Honourable Madeline Louisa, Dowager-Countess of Kintore, as executrix and residuary legatee of the said deceased Francis Alexander Keith Falconer, Earl of Kintore, her executors or assignees whomsoever,' the various sums of improvement expenditure ascertained by decree of the Court, and the entailed estates were conveyed in security."

"Now, it is contended on behalf of the defender that this sum of £5670, 12s. 2d⅔. is not personal estate, and therefore constitutes no part of the fund out of which legitim is payable. The character of the fund must be looked at as at the date of the Earl's death. At that time it was a claim which he was entitled to make against succeeding heirs and the entailed estate, and which, although he had not obtained a constitution of it by decree of the Court, was just as much *in bonis* of him as