LORD ADAM—This case is before us upon the report of a detective who was employed in compliance with the interlocutor of this Court of 17th July last to try and discover the whereabouts of these children. The report is in itself far from satisfactory, as the reporter, after tracing the children up to a certain stage, has thereafter lost all clue to them. If his conclusion is to be adopted, any further search would appear to be of no practical use.

Another course has been suggested to us by the counsel for the petitioner, namely, that the respondents should be directed to obtain the opinion of Canadian counsel as to the competency in the circumstances of appealing the judgment of the Court of Nova Scotia to the Judicial Committee of the Privy Court. I do not think that such a course is practicable. We have before us the judgment of the Court in Nova Scotia, and we see from it that the Judges there by two to one found that Miss Stirling had purged the contempt, and they thereupon discharged her. In these circumstances, while this Court is most anxious to assist the petitioner to recover the custody of his children, it does not appear to us that any course has been suggested which would bring about that end. I fear that as matters stand at present this Court can do nothing further to assist the petitioner. It is clear, I think, that the directors have done all in their power, and all that they could reasonably be expected to do, to assist the petitioner, but unfortunately their efforts have not been attended with success.

I would suggest to your Lordships that this petition ought to be allowed to remain in Court, so that if any change of circumstances occurs either the petitioner or the directors may move in the matter, but that at present no further order should be pronounced in the petition.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, together with the report, No. 69 of process, Sist procedure under the petition *hoc statu:* Find the respondents liable in expenses down to this date," &c.

Counsel for the Petitioner—Ross Stewart. Agent—E. D. Young, W.S.

Counsel for the Respondent — Lorimer. Agent—R. C. Gray, S.S.C.

Friday, December 12, 1890.

OUTER HOUSE.

[Lord Stormonth Darling.

ROBERTSON (LIQUIDATOR OF INTERNATIONAL EXHIBITION ASSOCIATION OF ELECTRICAL ENGINEERING AND INVENTIONS, 1890) *v.* BRITISH LINEN COMPANY.

Company—Winding-Up—Company Limited by Guarantee—Guarantee Payable only in Event of Winding-Up—Security—Lien—Effect of Security Granted over Guarantee Fund and Letters Prior to Winding-Up.

The memorandum of association of an exhibition association, incorporated under the Companies Acts as a company limited by guarantee, provided that every member of the company should be liable, in the event of the same being wound up during the time that he was a member, to contribute to the assets of the company for the payment of its debts such an amount as might be required, not exceeding £1. It further provided for the constitution of a guarantee fund, the subscribers to which were in the same event to be liable to the extent of their guarantee. The articles of association provided that in the event of a winding-up any loss or deficiency arising should be assessed first upon the subscribers to the guarantee fund, whether members or not, and secondly, upon members in respect of their liability under the clause of the memorandum of association quoted above.

The memorandum of association also provided that one of the objects for which the company was established was "to hypothecate or assign to any corporation or person who shall lend money to the association the guarantee obligations, letters, and relative documents" from members and subscribers to the guarantee fund; and by the articles of association the executive council of the association were empowered to borrow money and to assign and hypothecate the guarantee obligations, letters, and relative documents in security thereof.

The executive council having borrowed a sum of money from a bank, resolved that "in security thereof the council, as empowered under articles of association, hereby hypothecate to the said British Linen Company the letters of guarantee granted by the subscribers to the guarantee fund of said exhibition conform to printed list thereof, and hereby undertake that all necessary proceedings shall be taken at their instance to recover the sums for which the several guarantors are respectively liable under said letters, and to apply the same in reduction of said advances." In conformity with this

minute the whole letters of guarantee were delivered by the officials of the company to the bank, and a circular was sent to each of the guarantors by the bank intimating that the executive council had hypothecated the letters of guarantee to the bank in security of advances, that the letters were in the hands of the bank, and that in the event of there being a call upon the guarantee, it would fall to be paid to the bank.

The company thereafter went into voluntary liquidation, which was placed under the supervision of the Court, and the liquidator called upon the bank to deliver to him the letters of guarantee. The bank having refused, the liquidator presented a note praying the Court to ordain the bank to deliver the letters to him, and to declare that the bank had no valid security or preference over the guarantee fund or the letters of guarantee for repayment of their advances.

Held that the executive council had no power to hypothecate the guarantee fund, as it was a fund not called into existence until the company went into liquidation; that no lien was constituted over the *ipsa corpora* of the letters by their delivery to the bank; and accordingly that the bank had no valid security over the fund or the letters.

By the memorandum of association of the International Exhibition Association of Electrical Engineering and Inventions 1890, incorporated under the Companies Acts 1862 to 1886, section 3, it was provided—"The objects for which the association is established are— . . . (*E*) To sell, assign, convey, or otherwise dispose of, or deal with the whole property and effects of the association. . . . (*G*) To borrow money upon bonds, bills, promissory-notes, or other obligations or securities of the association, or in such other manner as the association shall think fit, and to execute and grant cash-credit or other bonds, and make, accept, indorse, and execute promissory-notes, bills of exchange, or other negotiable instruments, and in particular, to hypothecate or assign to any corporation or person who shall lend money to the association the guarantee obligations, letters, and relative documents from corporations, firms, or persons who shall have agreed, or shall hereafter agree, to become members of the association, or shall have become or shall hereafter become subscribers to the guarantee fund of the said exhibition. . . . (*H*) To do all other lawful matters and things as are incidental or conducive to the attainment of the above objects or any of them." Section 7—"Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding one pound, or in case of his liability becoming unlimited, such other amount as may be required, in pursuance of the last preceding paragraph of this memorandum."

By the articles of association, section 5, it is provided—"Every person, corporation, and company firm shall be deemed to be a member of the association and a subscriber to the guarantee fund thereof who has placed, or given in writing express authority to the Executive Council after mentioned, or the secretary or treasurers of the association, to place his or their name on the list of subscribers to the guarantee fund of the association for a sum of money amounting to one pound or upwards, or shall hereafter give such authority to the Executive Council or the secretary or treasurers of the association." Section 28—"The management of the business and the control of the association shall be vested in the Executive Council, who shall have the whole powers and authorities conferred upon them by these articles and by statute, and in addition they may exercise all such powers of the association, and do all such acts and things as are not or shall not be by statute or these articles directed to be done only by the association in general meeting assembled, but subject to such regulations or directions (if any) as may be made or given by any meeting of the association; but no such regulations or directions shall invalidate any prior act of the Executive Council which would have been valid if such regulations and reductions had not been made or given, nor any agreements entered into in connection with the situation of the exhibition, or the site of the buildings, or the application of the surplus funds as provided in the memorandum of association; but all and every one of these agreements shall be held as confirmed and adopted by the association." Section 30—"Without prejudice to the general powers conferred by clause 28 hereof, the Executive Council shall be trusted with and may exercise and perform all or any of the following powers and duties, viz.— . . . (4) To regulate and control the custody, management, expenditure, and investment of the moneys and funds of the association. . . . (6) To borrow any sum or sums of money not exceeding *in cumulo* the amount of the guarantee fund for the purposes of the association, and that either on cash-credit or otherwise, and to assign and hypothecate on security thereof all or any part of the property and effects of the association, and in particular the guarantee obligations, letters, and relative documents from corporations, firms, or persons who shall have agreed or shall hereafter agree to become members of the association, or shall have become or shall hereafter become subscribers to the guarantee fund of the exhibition. (7) To appoint such of their own number and such of the salaried officers of the association as they shall think fit to sign cash-credit bonds

and other documents of debt and receipts, and also cheques on the bank account of the association. (8) To appoint such officers, agents, assistants, and others as may be considered necessary or desirable for the management of the association, including manager, acting secretary, and acting treasurer, and all other officers and servants, and to pay them such salaries or remuneration as they shall deem reasonable. . . . (11) Generally subject to the provisions of the memorandum of association, to do all things which from time to time may be, or appear to them to be, necessary or expedient for the purposes of the association." Section 37—"In the event of a loss or deficiency arising, the same shall be assessed upon the members who have subscribed to the guarantee fund, and upon the subscribers to the guarantee fund (if any) who shall not have become members of the association, in proportion to the amount of the respective subscriptions to the guarantee fund of such members and other subscribers to the guarantee fund; and when the guarantee fund has been exhausted, then upon the members in respect of their liability under clause 7 of the memorandum of association. The members shall be liable also to the amount of their respective subscriptions to the guarantee fund, or so much thereof as may not have been previously paid up, for any resulting loss arising from subscribers to the guarantee fund, whether members of the association or not, failing to pay their proportional shares of the first mentioned loss or deficiency in whole or in part, but so as that in no case shall the liability of any subscriber to the guarantee fund, whether a member of the association or not, exceed the amount of his subscription to the said fund, together with, in the case of any member, his liability under clause 7 of the memorandum of association. The said subscribers not members (if any) shall also be liable for such resulting loss, but only if and so far as they are liable therefor under the obligation of guarantee or letters of guarantee signed by them. In addition to the guarantee provided by the seventh paragraph of the memorandum of association, and so far as allowed by law without affecting the liability of other members, every member of the association who has directly subscribed or shall directly subscribe to the guarantee fund of the association, or authorised his name to be placed on the list of subscribers thereof, undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the same, and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required, not exceeding in any case the amount of his direct or authorised subscription to the guarantee fund, or so much thereof as may not have been previously paid up by him. The amount of any deficiency, in whatsoever manner such may arise, shall be ascertained and fixed by a statement under the hand of the chairman of the Executive Council for the time being."

In the end of 1889 the Executive of the exhibition applied to the British Linen Company for an overdraft, and it was ultimately agreed that the bank should give advances on condition that the Executive Council should assign and hypothecate to them the said guarantee obligations.

A meeting of the Executive Council was accordingly held on 10th January 1890, at which it was resolved as follows—"The chairman reported that arrangements had been made with the British Linen Company to allow advances to the extent of £25,000 sterling on the account or accounts kept or to be kept with said company for the purposes of said exhibition, and operated on by cheques or orders signed by two members of the finance committee and the treasurer, which arrangement is hereby approved of, and the Council hereby undertake to repay said advances with interest thereon, and in security thereof the Council, as empowered under articles of association, hereby hypothecate to the said British Linen Company the letters of guarantee granted by the subscribers to the guarantee fund of said exhibition conform to printed list thereof, and undertake that all necessary proceedings shall be taken at their instance to recover the sums for which the several guarantors are respectively liable under said letters, and to apply the same in reduction of said advances. The Council further undertake, in security of said advance, to assign to the said British Linen Company, when called upon to do so, the whole pecuniary rights and benefits to which they are entitled under the contracts about to be entered into with Alexander Mackenzie Ross, restaurateur, and Messrs T. & A. Constable, printers, and to pay all sums to be received thereunder in reduction of the said advance. It is understood that nothing in this minute shall be held as inferring a personal obligation or liability on any member of the Council for the said advance. The Council further authorises the secretary to hand a certified excerpt from this minute to the said British Linen Company, and to deliver to said company said letters of guarantee."

In conformity with the said minute the whole letters of guarantee were delivered by the officials of the Executive Council to the British Linen Company, and the circular, of which the following is a copy, was sent to each of the guarantors:—

"9 *Hill Street*,

"*Edinburgh*, 24*th October* 1890.

"Sir,—On behalf of the British Linen Company Bank, we beg to intimate to you that the Executive Council of the International Exhibition Association of Electrical Engineering and Inventions, as empowered by the articles of association, have hypothecated to the said bank in security of advances the letters of guarantee granted by the subscribers to the guarantee fund of said exhibition. From

these letters we find that you became a guarantor to the extent of £ , and you will please take notice that your letter of guarantee is now in the hands of the bank, and that in the event of there being any call upon you under your guarantee, the amount of such call will fall to be paid to the bank.—We are, sir, your obedient servants, MACKENZIE & KERMACK, W.S."

On 5th November 1890 a general meeting of the association was held, at which it was resolved that the association should be wound up voluntarily; that the said James Alexander Robertson should be appointed liquidator for the purposes of the said winding-up, and that the liquidator should apply to the Court to have the liquidation placed under the supervision of the Court. And on 13th November 1890 the Court pronounced an order directing the voluntary winding-up of the association to be continued, subject to the supervision of the Court.

On 10th November 1890 the liquidator applied to the bank for delivery of the letters of guarantee, that the sums due under them might be collected under reservation of all questions as to the bank's right to the guarantee fund, but the bank refused to part with them except on payment of the amount of their advance.

The liquidator accordingly on 22nd November 1890 presented this note, in which he prayed the Court "to ordain them [the bank] to deliver forthwith into the hands of the liquidator all the said letters of guarantee so far as in their possession, or held by anyone on their behalf, and thereafter to find and declare that the said company had no valid security or preference over the said guarantee fund or the said letters of guarantee for repayment of their said advances."

The amount advanced by the bank was £18,312, 6s. 4d. exclusive of interest.

The Lord Ordinary (STORMONTH DARLING), after reporting the case to the Second Division of the Court, on 5th December 1890 pronounced this interlocutor:—"Ordains the British Linen Company to deliver forthwith into the hands of the liquidator all the letters of guarantee referred to in the said note, so far as in their possession or held by anyone on their behalf, under reservation of all questions of preference and security over the said guarantee fund and letters, and under the special declaration that any such question shall be decided as if the said British Linen Company had remained in possession of the said letters, and decerns." And on 12th December 1890 pronounced the following interlocutor:—"Finds and declares that the British Linen Company have no valid security or preference over the guarantee fund or letters of guarantee mentioned in the said note for repayment of the advances made by the said British Linen Company also mentioned in the said note: Finds the liquidator entitled to possession of the said letters of guarantee, and decerns: Finds the said British Linen Company liable in expenses to the liquidator, &c.

"*Opinion.*—The preliminary question as to delivery of the letters of guarantee having been disposed of, without prejudice to the pleas of parties, I have now to decide whether the British Linen Company have any valid security or preference over the guarantee fund or the letters for repayment of their advances. In my opinion they have not.

"It is necessary, in the first place, to attend to the nature of the association or company with which we are dealing. It was 'a company limited by guarantee' in the sense of section 9 of the Companies Act 1862. Accordingly, the memorandum of association contained a declaration (art. 7) that 'Every member of the association undertakes to contribute to the assets of the association in event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and of the costs, charges, and the expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding one pound, or in case of his liability becoming unlimited such other amount as may be required, in pursuance of the last preceding paragraph of this memorandum.'

"By article 10 there was a further provision to the effect that the limitation of liability under article 7 should not affect the liability, if any, of any member of the association who might subscribe to the guarantee fund of the association, or authorise his name to be placed on the list of subscribers thereto, under clause 37 of the articles of association, to the extent of his subscription to the guarantee fund. And by clause 37 of the articles of association there was a "provision for loss or deficiency" the effect of which was (*a*) that persons might subscribe to the guarantee fund without becoming members of the association; (*b*) that any loss or deficiency should be assessed first upon the subscribers to the guarantee fund (whether members or not) and then upon the members in respect of their liability under article 7; (*c*) that the subscribers to the guarantee fund (whether members or not) should be liable to the amount of their respective subscriptions, but no further, for any resulting loss arising from other subscribers (whether members or not) failing to pay their proportioned shares of the loss or deficiency in whole or in part; and (*d*) that, in addition to the guarantee provided by the 7th paragraph of the memorandum of association every member subscribing to the guarantee fund undertook to contribute to the assets of the association, in the event of the same being wound up, such amount as may be required not exceeding the amount of his subscription.

"Under the Companies Acts a company limited by guarantee may, or may not, have its capital divided into shares. This company had no share capital. It was not formed for purposes of gain, there being a

provision in the memorandum that no part of its income or property should be paid, directly or indirectly, by way of profit to its members, and accordingly it was, by license of the Board of Trade, under sec. 23 of the Companies Act 1867, registered with limited liability, but without the addition of the word 'Limited' to its name.

"It will thus be seen that it had to start with no capital or property whatever. It had the prospect of a very considerable income from various sources, but so far as its members and subscribers were concerned, it had no claim upon them except an obligation to contribute, within the limit of their subscriptions, such sums as might be required in the event of a winding-up.

"Very shortly after its formation the association required an advance of money from the bank, and the Executive Council (which corresponded to the board of directors in an ordinary company) on 10th January 1890 passed a resolution which is set out in the note. By this resolution the Council hypothecated to the bank the letter of guarantee granted by the subscribers to the guarantee fund, and undertook that all necessary proceedings should be taken at their instance to recover the sums for which the several guarantors were respectively liable under the letters, and to apply the same in reduction of the advances. There was also an undertaking to assign to the bank, when called upon, the whole pecuniary rights and benefits to which the council were entitled under certain contracts about to be entered into. Further, the secretary was authorised to deliver to the bank the letters of guarantee, and this was afterwards done.

"Whatever may be the legal effect of this transaction, it was undoubtedly in accordance with the memorandum and articles of association. By the memorandum (3 g) one of the objects of the association was declared to be (after a general power of borrowing money and executing cash-credit or other bonds, bills, promisory-notes, and so forth) 'in particular to hypothecate or assign to any corporation or person who shall lend money to the association the guarantee obligations, letters, and relative documents,' from members and subscribers to the guarantee fund. By the articles [30 (6)] the Executive Council were empowered 'to borrow any sum or sums of money, not exceeding *in cumulo* the amount of the guarantee fund, for the purposes of the association, and that either on cash-credit or otherwise, and to assign and hypothecate in security thereof all or any part of the property and effects of the association, and in particular the guarantee obligations, letters, and relative documents from corporations, firms, or persons who shall have agreed, or shall hereafter agree, to become members of the association, or shall have become or shall hereafter become subscribers to the guarantee fund of the exhibition.'

"The first question which arises is, whether the power so conferred and exercised is consistent with the general scope and tenor of the Companies Acts? Of course neither the memorandum nor the articles of association can confer power upon directors to do anything contrary to the statutes by which limited liability is allowed. Of this there are two very recent illustrations in Scotland (*Klenck*, 16 R. 271, and *General Property Investment Company*, 16 R. 282) where it was held *ultra vires* of a company in the one case to issue its shares at a discount, and in the other to purchase its own shares, although there was power to that effect in the memorandum and articles. These cases were decided in conformity with *Trever* v. *Whitworth* in the House of Lords (12 L.R. App. Cas. 409), which was also a case of a company purchasing its own shares, and the *ratio decidendi* in all of them was, not that there was any express prohibition in the Companies Acts against the things done, but that under the statutes the creditors of the company were entitled to rely on the preservation of the capital, both called and uncalled, for their behoof, except in so far as it was diminished by the operations of the company in pursuit of its lawful business. In the one case (of the company buying its own shares) this principle was infringed by what was practically a return of a portion of the paid-up capital to the shareholder who sold, and in the other case (of the company issuing its shares at a discount) by what was practically a discharge of a portion of the unpaid capital which *ex facie* of the share the shareholder was bound to pay. (See opinion of the Lord President at p. 277 of 16 R.)

"Now, these were all cases of companies limited by shares, where of course the directors have a power of making calls while the company is still in operation. The peculiarity here is that the guarantee fund is an asset which can only be called up when the company is in liquidation, and then only if there happens to be a deficiency. The intention of the Act of 1862, as expressed in section 133, is, that in a winding-up 'the property of the company shall be applied in satisfaction of its liabilities *pari passu*." The knowledge that such an asset exists *in spe* may be, and no doubt is a source of credit to the company while it is in operation, but that is a very different thing from holding that a contingent fund of this sort, intended for the purpose of meeting its liabilities in the event of a winding-up, and never under the control of the directors while it is a going concern, can be anticipated by them in favour of a particular creditor for the purpose of meeting its immediate necessities.

"This question was fully discussed in the recent English case *In re Pyle Works*, L.R. 44 Ch. Div. 534. The company there was one limited by shares, and the directors had exercised a power contained in the articles to 'borrow on mortgage of all or any part of the property of the company,' and to include in any such mortgage 'all or any definite proportion of the capital of the company then uncalled.' It was held

by the Court of Appeal that the calls to be made by the liquidator in the winding-up were bound by the mortgages, and that the severa lmortgagees were entitled to have the calls applied on payment of their mortgage debts in priority to the general creditors. But the judgment was expressly put on the ground that it was impossible to draw a distinction between calls made in fact by the directors and calls made in fact by the liquidator, and that the latter were as much part of the assets or capital of the company as the former. In this respect the learned Judges distinguished the case of a company limited by shares from the case of a company limited by guarantee. Lord Justice Cotton said (p. 574)—'We are considering the case of a call made in the winding-up of a limited company, not of a company limited by guarantee, nor of an unlimited company. In the case of an unlimited or of a guarantee company, what can be called for the winding-up may not be, and I think is not, considered as part of the capital of the company.' Similarly Lord Justice Lindley said—"Those moneys which are payable only on a winding-up, and which by the Act are excluded from the capital of the company, are never under the control of the directors, and cannot, I apprehend, be dealt with in any way by them. Those moneys form a statutory fund which only comes into existence when the company is in liquidation—that is to say, when the powers of the directors have ceased.' And later on he illustrated his meaning by reference to those banks and other unlimited companies which were allowed by the Companies Act 1879 to register as limited by declaring that a portion of their capital should not be called up except in the event and for the purposes of the company being wound up. He said "The Companies Act 1879, sec. 5, enables a limited company to divide capital into two parts, one of which shall only be called up in the event of a winding-up. When the capital of the company has been so divided, that part which can only be called up in the event of a winding-up, ceases to be subject to the control of the directors, and cannot, I apprehend, be charged or disposed of by them." Now the case of a guarantee fund seems to me *a fortiori* of the case of a company under the Act of 1879, for while there might be some plausibility in holding that the uncalled capital of the latter was capital of the company from the beginning, I do not see any reason for treating a guarantee fund as capital until the commencement of the winding-up.

"If this be so, there is a manifest repugnancy in article 30 (6) which first authorises the Executive Council to assign and hypothecate "all or any part of the property and effects of the association," and then goes on to specify in particular "the guarantee obligations" which *ex hypothesi* are not part of such property or effects so long as it is a going concern. At all events, it seems to me that whether they be regarded as the property of the association prior to liquidation or not, they are appropriated by the statute for the satisfaction of the company's liabilities *pari passu*, and are therefore not capable of being used for the purpose of giving a preference to any particular creditor.

"Even, however, if I am wrong on this point, the question remains, whether the minute of January 10th 1890, gave the bank a valid preference as regards the guarantee letters, over the general body of creditors.

"The respondents maintain that the effect of the minute was to give them an assignation to the debts contained in the letters, and that they duly intimated the assignation by the circular of their law-agents issued to the guarantors on 24th October 1890. I cannot so construe the minute. It seems to me, that having the choice under the memorandum and articles of assignation or hypothecation, the Executive Council deliberately selected the latter, and that the undertaking to use all necessary proceedings at their own instance for recovery of the sums guaranteed was consistent with hypothecation and inconsistent with assignation.

"To meet this alternative the respondents say, that although they may have no claim to the debts contained in the letters, and consequently no right to recover directly from the debtors, they still have a good hypothecation, and consequently a right to retain possession of the letters till their claim is paid in full. Whatever might have been their rights in a question with the Executive Council, who possibly might have been barred from pleading that the hypothecation was ineffectual, it by no means follows that the liquidator is under any such disability. Not only is it his duty to ingather and distribute the estate for behoof of the general body of creditors, but his position since the Companies Act of 1886 is very much assimilated to that of a trustee in bankruptcy. A winding-up by or under the supervision of the Court is now, by section 3 of that Act, equivalent, *inter alia*, to an arrestment in execution and decree of furthcoming, and the question therefore is, whether the pledgee of documents like these having no title to the debts which they instruct, can successfully maintain a preference over a creditor who has used the appropriate diligence in the hands of the debtors and followed it up by a decree of furthcoming. In considering this question it is of no moment to say that the constitution of the company permitted such hypothecation, for the memorandum and articles in the present case can no more validate a security which is bad at common law, than the special resolution of the company in the *West Calder* case (9 R. 1017) could make good an assignation of leases and moveables on which no possession had followed.

"It is contended by the liquidator that the proper subjects of pledge are corporeal moveables, and that documents of debt cannot be effectually pledged (at all events in competition with anyone having a title to the debt itself) except where the debt is inseparable from the document, as in bills, or bonds payable to bearer. His main authority for this contention is the case of

Christie v. *Ruxton*, 24 D. 1182, which related to the title-deeds of an estate pledged for an advance of money, but the case was decided on the broad ground stated by Lord Benholme (and concurred in by Lord President Inglis) that, 'by our law it is incompetent to impignorate title-deeds or mere documents of debt, so as to give a title of possession of these moveable subjects capable of competing with right to vindicate their possession competent to the proprietor of the estate or the creditor in the bond who has acquired right to the estate or to the debt by singular and onerous title from the impignorator.' His Lordship quotes a passage from Baron Hume's Lectures which fully sustains the general principle, and supplies an illustration exactly meeting the present case, for, after asserting the preference of an assignee to a bond who has intimated his assignation but has never possessed the bond, over one who has got delivery of the bond but has not intimated, Baron Hume adds, 'In the same way he who duly arrests has right to the document of debt arrested, wherever that document may be.' If that be the law of Scotland, as I believe it is, the liquidator is in the position of having 'duly arrested,' and is therefore preferable to the mere pledgee of the document.

"It was urged for the respondents that Mr Bell in his Commentaries had adopted a different view. But whatever may be said of some observations about the deposit of title-deeds, it is plain that he agrees with Baron Hume as to documents of debt, for at p. 24 of vol. ii. (Lord M'Laren's edition) he says—'It seems in the same way inconsistent with the true principles of law to sanction a burden on the real right even to moveables or debts, without an act of permanent or temporary transference of the right itself, unless in the case already mentioned of the debts and vouchers being inseparable." And—"It is not necessary, in order to transfer a debt, that the instrument or bond should be delivered to the assignee, but the debt itself may be attached by arrestment in whose hands soever the bond may happen to be, so that the possession of the document gives no apparent property.' And the paragraph concludes with the general statement—'The pledge of the document cannot therefore be the regular way of constituting a security over such a subject.'

"Two recent cases were cited by the respondents—*Meikle* v. *Pollard*, 8 R. 69, and *Robertson* v. *Ross*, 15 R. 67, which were said to recognise a pledge of books and papers as effectual to the full extent here contended for. But I do not read these cases as inconsistent with the general principle laid down by Baron Hume and Mr Bell. In both cases the question arose with trustees under voluntary deeds—a not unimportant distinction—and in both the right to retain the documents was claimed, in the one case by an accountant, and in the other by a factor, merely until they were paid for the work in connection with which the documents had been delivered to them. In neither case therefore was there any question of the validity of a pledge in security for money lent of documents of debt where a right to the debt itself had been acquired by arrestment. Indeed, the cases were treated as falling under the same principle as the right of an artificer to retain possession of an article entrusted to him for repair until payment of his account.

"I need hardly add that the respondents rest their case on the express contract contained in the minute of January 10th, and not on the right of retention known as banker's lien. The latter would not avail them, for it extends merely to 'unappropriated negotiable instruments belonging to the customer in the hands of the banker' —*Horsbrugh* v. *Royal Bank*, October 24, 1890, 28 S.L.R. 35, *per* Lord President, 39.

"I therefore come to the conclusion (1) that it was *ultra vires* of the Executive Council to create a security over the guarantee fund in favour of a particular creditor, and (2) that in any view the hypothecation or pledge of the letters was ineffectual to constitute a preference over the fund in competition with the liquidator, who is entitled to possession of the letters as accessories of the fund. All that I require to do is to find and declare that the respondents have no valid security or preference over the guarantee fund or the letters of guarantee for repayment of the advances mentioned in the petition."

Counsel for the Liquidator—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Counsel for the British Linen Company—Comrie Thomson — Guthrie. Agents — Mackenzie & Kermack, W.S.

Saturday, December 20.

OUTER HOUSE.

[Lord Kincairney.

FINDLAY *v.* STUART.

Landlord and Tenant—Commonty—Right of Pasture Incident to Lease—Lease—Interpretation of—"As Presently Possessed."

The tenants in succession of a farm adjoining a commonty, in which their landlord had a *pro indiviso* share, had for many years used the commonty for pasture. In 1876, S, who had previously been tenant but without a formal lease, obtained a lease of the farm for nineteen years, the farm being described as of a certain acreage "as presently possessed by the said S." Besides the landlord of S, the other proprietors *pro indiviso* of the commonty were two neighbouring proprietors. By dispositions from the whole of the proprietors having right to the commonty, F acquired the whole proprietary rights in the commonty. The disposition by S's landlord contained a clause saving the