Friday, November 7.

SECOND DIVISION.

SPECIAL CASE — BUCHAN (PORTEOUS' FACTOR LOCO TUTORIS) *v.* BLACKWOOD (PORTEOUS' FACTOR LOCO TUTORIS) AND ANOTHER.

Provisions to Wives and Children—Destination in Railway Debenture to Spouses (a Second Marriage) in Liferent and Children in Fee—Whether Children of First Marriage Included.

The destination in a railway debenture was in these terms:—"We, the N. B. R. Co., in consideration of the sum of £500 paid to us by J. P., do hereby assign and convey unto the said J. P. and Mrs M. G. B. or P. his wife, or either of them, and the survivor of them, for behoof of themselves in liferent and their children in fee, and to their assignees. In another debenture the consideration was stated to be paid by J. P. and Mrs P., and was in favour of them "or either of them, and the survivor of them, in liferent and to their children and the children's heirs in fee, and to their assignees;" but it was admitted that in both cases the consideration was paid by J. P. Both debentures were written by a railway clerk, were signed by two of the directors and the secretary, and were tested by the writer and another railway clerk. Mrs P. was the second wife of Mr P., and there were children of the first marriage (pupils), and living in family with their father and stepmother. There were also children of the second marriage. The children of the first marriage were entitled to a small bequest from their own mother. On the death of the father intestate, *held* that the words "their children" being contained in such a document as a railway debenture, included the issue of both marriages, unless there was clear evidence of a different intention, which did not exist in the present case.

John Porteous, farmer at Whim, Peebleshire, died on 26th June 1877 without having executed any testamentary settlement of his affairs. He was twice married. By his first marriage he had two children—John Porteous and James Porteous—whose factor *loco tutoris* was the first party to this Special Case; and by his second marriage four children—David Porteous, Jessie Porteous, Grace Porteous, and Agnes Mary Porteous—whose factor *loco tutoris* was the second party. His widow, Mrs Margaret Gray Bird or Porteous, as his executrix-dative, was the third party, but she was not personally interested in the questions raised.

The amount of the deceased's estate to which confirmation was obtained by Mrs Porteous was £10,685, 9s. 2d., including the second and excluding the first and third mortgages after mentioned; but it was afterwards ascertained that this sum included £210, 16s. 6d. erroneously given up, and the sum of £45, 8s. 5d. considered to be irrecoverable. The debts due by the deceased at the time of his death, including rent, amounted to about £556, 2s. 9d.

On his entry to office Mr Buchan, the factor *loco tutoris* to John and James Porteous, found that it would be for the advantage of John Porteous to collate the heritage falling to him as the eldest son and heir of the deceased, consisting of a lease of the farm of Whim, with the moveable estate falling to his brother James Porteous and to his half-brother and sisters; and this was accordingly done by a contract of collation; but it was agreed that nothing therein contained should affect or apply to the three mortgages which formed the subject of this Special Case, nor to the principal sums therein contained, nor to any interest due thereon.

The mortgages were in these terms:—

FIRST MORTGAGE.

"*The North British Railway Company.*

"*Mortgage No. BH3.* £100 *stg.*

"By virtue and in terms of 'The North British Railway Act 1873,' and of the 'Agreement between the Magistrates and Council of the Royal Burgh of Burntisland of the first part, and the North British Railway Company of the second part,' scheduled to and confirmed by the said Act,

"We, The North British Railway Company, in consideration of the sum of £100 sterling paid to us by John Porteous, . . . do hereby . . . assign and convey unto the said John Porteous, for behoof of James Porteous, his son, and to his executors, administrators, and assignees, the harbour and dock revenues of Burntisland, &c. . . . to hold unto our said assignee and his foresaids until the said sum of £100 sterling, together with interest for the same at the rate of £4, 5s. for every £100 by the year, payable as hereinafter mentioned, be satisfied: And it is hereby stipulated that the said principal sum shall be repayable, and the Company are hereby bound to repay the same, if required, on the 15th day of May in the year 1878, or in the option of our said assignee or his foresaids the same shall thereafter remain as a loan to the Company, in terms of the said Act and agreement, for such further period and at such rate of interest as shall be mutually agreed upon by a minute endorsed hereon to that effect, and signed by us and our said assignee or his foresaids. . . . In witness whereof, these presents (in so far as not printed), written by William Forsayth Thallon, clerk to the North British Railway Company, are subscribed by George Robertson, Writer to the Signet, and George Harrison, merchant, both in Edinburgh, two of the directors, and by George Bradley Wieland, secretary of the said Company; and the common seal of the Company is hereto affixed at Edinburgh the 22d day of January 1874 years before these witnesses," &c.

It was admitted that the consideration in this mortgage was really part of a fund which belonged to the first Mrs Porteous. The total amount of that fund, it was further admitted, was not large.

SECOND MORTGAGE.

"*The North British Railway Company.*

"*Mortgage No. A*/3156. £1000 *stg.*

"By virtue and in terms of 'The North British, Edinburgh, Perth, and Dundee, and West of Fife Railways Amalgamation Act 1862,' 'The North British Railway (Branches) Act

1862,' 'The North British Railway (Wansbeck Railway and Finance) Act 1863,' 'The Edinburgh and Glasgow and Monkland Railways Amalgamation Act 1865,' 'The North British and Edinburgh and Glasgow Railway Companies Amalgamation Act 1865,' and of 'The North British Railway (New Works) Act 1866,'

"We, the North British Railway Company, in consideration of the sum of £1000 sterling paid to us by John Porteous, farmer and grain merchant, presently residing at Whim, Leadburn, and Margaret Gray Bird or Porteous his wife, do assign and convey unto the said John Porteous and Margaret Gray Bird or Porteous, or either of them, and the survivor of them in liferent, and to their children and said children's heirs in fee, and to their assignees, the undertaking of the Company, and all the tolls and sums of money arising by virtue of the said Acts, and of the other Acts of Parliament relating to the Company, and all the estate, right, title, and interest of the Company in the same, to hold unto our said assignees and their foresaids until the said sum of £1000, together with interest for the same at the rate of £4 sterling for every £100 by the year, payable as hereinafter mentioned, be satisfied." —[*The debenture then proceeded as in the first case, and was similarly signed and tested*].

THIRD MORTGAGE.

"*The North British Railway Company.*

"*Mortgage No. BH*14. £500 *stg.*

"By virtue and in terms of 'The North British Railway Act 1873,' and of the 'Agreement between the Magistrates and Council of the Royal Burgh of Burntisland of the first part, and the North British Railway Company of the second part,' scheduled to and confirmed by the said Act,

"We, the North British Railway Company, in consideration of the sum of £500 sterling paid to us by John Porteous, farmer and grain merchant residing at Whim, Lamancha, do hereby, under and according to the provisions of the said Act, assign and convey unto the said John Porteous and Mrs Margaret Gray Bird or Porteous, or either of them, and the survivor of them, for behoof of themselves in liferent and their children in fee, and to their assignees, the harbour and dock revenues of Burntisland payable to the Company under the fifth article of the agreement above recited, in the manner provided for in the said Act and agreement, and all the estate, right, title, and interest of the Company in the same, to hold unto our said assignees and their foresaids until the said sum of £500 sterling, together with interest for the same at the rate of £4, 5s. for every £100 by the year, payable as hereinafter mentioned, be satisfied."—[*The debenture then proceeded as in the first case, and was similarly signed and tested*].

The sums contained in the latter two mortgages were lent to the railway company by the deceased out of his own funds, that contained in the first having, as above stated, formed part of a fund belonging to the first Mrs Porteous. The mortgages were found in Mr Porteous' dwelling-house at Whim after his death, in an iron box in which he kept his papers of importance. The first party maintained that the fee of the sums contained in the second and third mortgages fell to the issue both of the first and second marriages. The second party maintained that the fee of the sums contained in the second and third mortgages fell to the children of the second marriage exclusively, and that those sums were to be computed as part of the third of the deceased's estate forming dead's part, the remainder of the dead's part falling to be divided equally among the whole children of the deceased. The right of the third party was admitted to the liferent of the sums contained in the second and third mortgages, which she took along with a third of the remainder of the estate (excluding the fee of the said mortgages) as *jus relictæ*.

All the children claimed legitim. As between the first and second parties it was in dispute whether in the event of its being held that the fee of the sums in the second and third mortgages fell to the children of the second marriage exclusively, the children of that marriage were bound to collate them *inter liberos*. The first party maintained the affirmative, and the second party the negative. It was agreed that should it be held that the sums contained in the second and third mortgages fell to be collated *inter liberos*, that should also be done in the case of the first mortgage.

The questions for opinion and judgment were—"(1) Does the fee of the second and third mortgages fall to the whole children of the deceased, or to the children of the second marriage exclusively? And are the amounts of those mortgages to be computed as part of the third of the deceased's estate forming dead's part, the remainder of the dead's part being equally divisible among the whole children of the deceased? (2) Are those children who are entitled to the fee of the sums in the mortgages respectively bound to collate the amounts *inter liberos* in settling with them for their legitim?"

Argued for the first party—(1) The words "their children" meant either "the children of John Porteous and of Margaret Porteous" or "the children of John and Margaret Porteous." The presumption was in favour of the widest signification—*Norris* v. *Norris; Barrington* v. *Tristram;* and in this case the intention of the father, who gave the money, coincided with that presumption, because there was no antenuptial provision in favour of the children of the first marriage, and because on the other construction the children of the second marriage would receive a very large proportion of their father's estate without exclusion of legitim. But (2) assuming that the words were to be taken as meaning "children of John and Margaret Porteous," even then the children of the first marriage were included. The first departure from the strict interpretation included half-blood—*Scott* v. *Scott; Grieves* v. *Rawley.* Then where there were no blood to answer the description, relations by affinity would take—*Sheratt* v. *Mountford.* In one case recourse was had to extrinsic evidence even where there was a person fully corresponding to the primary signification—*Grant* v. *Grant.* (3) If, however, the children of the second marriage only were included, then the bequest was invalid, because it was neither *a donatio mortis causa* nor a legacy. It was not *a donatio mortis causa*, because it was not delivered—*Hill* v. *Hill; Cruickshanks* v.

Cruickshanks; nor a legacy—*Watt* v. *Mackenzie; Cuthill* v. *Burns.*

Authorities—*Norris* v. *Norris*, December 11, 1838, 2 D. 220; *Barrington* v. *Tristram*, July 22, 1801, 6 Vesey 345; *Scott* v. *Scott*, July 17, 1852, 14 D. 1057; *Grieves* v. *Rawley*, July 17, 1852, 10 Hare 63; *Sheratt* v. *Mountford*, March 13, 1873, L.R., 15 Eq. 305, and July 12, 1873, 8 Ch. 928; *Grant* v. *Grant*, June 22, 1870, L.R., 5 C.P. 727; *Hill* v. *Hill*, July 2, 1775, M. 11,580; *Cruickshanks* v. *Cruickshanks*, December 10, 1853, 16 D. 168; *Watt* v. *Mackenzie*, July 1, 1869, 7 Macph. 932; *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849.

Argued for the second party—There was nothing here to take away the primary meaning of the words. The deeds were unambiguous, and if recourse was had to extrinsic evidence it would be found that the children of the first marriage were provided for by their mother. In regard to the question whether these mortgages were an effectual transference of the sums contained in them, the case was ruled by *Walker* v. *Walker*, June 19, 1879, 5 R. 965.

At advising—

Lord Justice-Clerk—An important general question is raised in this case, which relates to the terms in which two mortgages for £1000 and £500 respectively were taken by Mr Porteous from the North British Railway Company. As far as appears from the case—and neither party has proposed to go beyond it—Mr Porteous had been married some time ago, and had had two children by his first wife, who died in 1868. He married again, and at the date of his death in 1877 there were four children of that second marriage. In 1873, however, when these mortgages were taken, only two of these children had been born.

Now, in the first place, these mortgages were clearly of the nature of investments merely. I cannot regard them as anything else. They were of a temporary character, for they were intended to endure for five years only, and a man when he makes a settlement of his affairs does not usually employ a temporary investment as the means of doing so. I do not say that this alone is conclusive as to the meaning of the destination, but it is an important element to keep in view when construing the terms of these documents. In the second place, the document was prepared by the railway company without any interference on the part of the investor, and therefore I assume that the terms of the document are truly those prescribed by the railway company, although under the general instructions no doubt of Mr Porteous. In the third place, these sums of £1000 and £500 were a material part of Mr Porteous' fortune, and there is no presumption that he intended to favour the children of his second marriage at the expense of those of his first.

Now, let us see what are the terms of the documents? They are not exactly the same in form, because in the second (Third Mortgage above) there is an intervening trust which is not found in the first (Second Mortgage above), which however does not alter matters.

The North British Railway begin by acknowledging payment of £1000 by the spouses. That however is admittedly contrary to the fact, as the payment was not by the spouses but by Mr Porteous alone, so that the document requires to be construed from the first apart from the literal meaning of the words used. The deed then goes on—"do assign and convey unto the said John Porteous and Margaret Gray Bird or Porteous, or either of them, and the survivor of them in liferent, and to their children and said children's heirs in fee." Now, the question is whether the words "their children" is to be understood to mean the children of the second marriage only to the exclusion of those of the first. I do not think it is. These children were all in pupillarity and in need of support, and belonged to the same household; and keeping in view that this document was merely a shorthand and popular way of making an investment, I confess that I should have required very strong evidence of an intention to favour the children of the second marriage before I could hold these words to have the effect of cutting out the first family. The words are natural for a man to use who knew nothing about the state of the family. Then, further, the amount which each of the children of the second marriage born at the date of the mortgage would get is £700, while the other children would not together have that sum. It is quite true that other children were to be expected, but it is difficult to believe that the man who made the deed had that in view. It is no doubt also the case that the two children of the first marriage had some small provision from their own mother, but there is no reason to suppose because there was something left to them by their mother that Mr Porteous intended to exclude them from a share in the property. In short, looking to the fact that the term used is a flexible one, I think we can hold, without doing violence to the words, that it was not his intention to exclude any of his children from a share in these mortgages.

Now, that being so, it is unnecessary to go into the larger and more difficult questions as to the effect of investments of this kind. I will only say that I think the decision in the case of *Walker* is sufficient for the present case. I do not think that there was any *jus crediti* in the children, but that if the money was left invested in these terms it would go on the death of Mr Porteous to the persons favoured accordingly.

Lord Gifford—I am of the same opinion, and on the same grounds.

The question first in order is, whether the destination is effectual at all? but passing that by I am prepared to hold in the circumstances of the case that the words "their children" include the whole members of the family, whether by the first or second marriage. In the first place, we must give a somewhat liberal interpretation to the words of these documents. They bear, for instance, that the money was paid by both the spouses, whereas it is admitted that all came from Mr Porteous alone; and that being so, does the expression "or either of them" include the wife—could she on getting the money say that she was one of "either of them?" I do not think so. Then again the expression "their children and the said children's heirs in fee" is a very loose form of destination. We therefore begin with this fact, that the mortgage is not expressed in strict technical language, but in the familiar way which one not conversant with legal formalities would use in a loose document of a temporary nature. Now, I do not believe that the

railway clerk knew of the existence of the two families, and therefore I do not think we ought to apply the literal interpretation here either. I think step-children are fairly included under the head of children, and when Mr Porteous told the clerk what he wanted to be done, he mentioned "children," and had no intention of drawing any distinction between the children of his first and those of his second marriage. They were all living in family together, receiving the same aliment, and, as I hope, all treated as equally the children of Mr and Mrs Porteous. I am therefore for answering the first question in the affirmative.

Lord Young—The only question of interest is whether the destination in the second and third mortgages is exclusively to the children of the second marriage, for if it is not, it is unnecessary to consider any of the other questions raised.

I am of opinion that a gift may be made by means of a railway bond or debenture. And it does not signify in the least that in the case of one of these debenture bonds here the father constituted himself a trustee. That is a very well-known practice in the law of this country, Nor do I doubt that in a mortgage a man may effectually give expression to his intention as to the disposal of the sum in the bond in case he should die before uplifting the mortgage. That is precisely the case of *Walker*.

But assuming all that, I am not disposed to construe critically any words to the effect of preferring the children of one marriage to those of another—words, I mean, which although a habile mode of making a general destination, do not form a final and deliberate expression of intention. They are not a habile mode of creating a preference of one family over the other. I do not think it would be proper to put such a construction upon such documents as we have here.

The Court answered the first question in the affirmative.

Counsel for First Party—Dean of Faculty (Fraser)—Guthrie. Agent—H. Buchan, S.S,C.

Counsel for Second and Third Parties—Balfour—G. R. Gillespie. Agents—Gillespie & Paterson, W.S.

Wednesday, November 12.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

THE NEWPORT RAILWAY COMPANY *v.* FLEMINGS.

Railway—Railway Clauses Consolidation Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 6—*Superior and Vassal—Feu-Contract—Reserved Power—Access.*

In 1870 a railway company obtained an Act enabling them to pass through certain lands, and served statutory notice upon the proprietor on 26th July 1872. In January 1872 a feu had been given off, the feu-contract conveying the lands as laid down on a plan therein referred to, "together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power declared that the superior should "have full power and liberty to vary and alter the said plan or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The railway commenced operations in 1877, and the vassal having claimed compensation under section 6 of the Railways Clauses Consolidation Act 1845, in respect that the operations, though they did not touch his feu, were injurious, as they cut off the existing accesses—*held* that at the date of the notice in 1872 there was in fact no such existing access, and (*dub.* Lord Deas) that there no claim lay against the company.

Observations upon the rights of parties in such cases.

Mr Just was proprietor of lands in the county of Fife known as Wellgate Park. He had been in process of feuing these since the year 1860, but the feuing had not made much progress. In January 1872 he feued a portion of his land to William Reid, who in 1874 disponed it to Mrs Fleming, the disposition being recorded in January 1875. In the feu-charter the feu was described as "All and Whole that lot or piece of ground marked lot No. on a feuing plan of that park of land called the Wellgate Park, belonging to the said Thomas Just, and lying on the south side of the turnpike road leading from Newport to Woodhaven, and which lot or piece of ground hereby disponed measures 41 poles and 13 yards imperial measure or thereby, and is bounded on the south by a road called the Kirk Road; on the north by a road or street 20 feet in breadth on the said plan; on the east by lot marked No. on the said plan, still unfeued; and on the west by a road or street of 24 feet in breadth, ... together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power aftermentioned. . . . . Declaring always that the said William Reid and his foresaids shall be bound at their own expense to form, level, and make the half of the breadth of the said streets opposite to the said lot of ground on the north and west, when the same are opened (but which shall not be opened, except in the option of the said Thomas Just or his successors, until the ground to the east and north thereof is feued on both sides), and which shall be made in strict conformity to said plan. . . . . Declaring that the said streets and footpaths when made shall remain common thoroughfares. . . . . And it is hereby expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit."

The Newport Railway Company obtained an Act of Parliament in 1870, under the powers in which they were enabled to enter upon and lay down a line through Mr Just's land. In pursuance of the provisions of their Act and of the Acts incorporated therewith, notice was served by them on Mr Just on 26th July 1872, and the amount of compensation due to him was ascer-