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

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

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

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

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

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*Friday, June* 30.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.

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

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

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

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

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

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

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

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

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

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

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

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

grounds upon which a deed might be set aside as fraudulent, and he further found that a disposition and an assignation of the tenants' interest under leases of various durations, which constituted the more valuable part of the property upon which the oil-works had been formed, having been respectively completed by infeftment and intimation to the landlords of the leasehold subjects, were effectual securities to the debenture-holders to the extent to which they had given value for the same; and that so far as regarded the moveable subjects assigned the security had not been completed by possession, and that no valid pledge had been constituted in favour of the debenture-holders.

Against this interlocutor the debenture-holders, George Wilson Clark and others, reclaimed, and argued—The general creditors have no claim in this process, it being an unsuitable one for them to appear in. The debenture-holders' security is valid over the moveables—a disposition of moveables in security without possession is good as regards the granter, and only becomes defective in a question with third parties, or with a trustee in bankruptcy. A liquidator is not like a trustee in bankruptcy. At the time of the liquidation, and even after it, the liquidators could have been compelled to have handed over these moveables, which had been transferred to them simply for custody and administration. The Companies Acts, along with the articles of association of this company, authorise the granting of debentures over moveables in possession or not.

Authorities referred to—Stair, i. 9, 12; Bell's Com. i. 273-4; *Ronaldson* v. *Benhar Coal Co.*, 19 Scot. Law Rep. 170; Bankruptcy Act 1856 (19 and 20 Vict. c. 79), secs. 103, 108; Companies Acts 1862 and 1867 (25 and 26 Vict. c. 88, and 30 and 31 Vict. c. 131); *Marine Mansions Co.*, July 8, 1867, L.R., 4 Eq. 601; *Crumlin Viaduct Works Co.*, April 26, 1879, L.R., 11 Chan. Div. 755; *Panama, &c., Mail Co.*, Feb. 14, 1870, L.R., 5 Chan. App. 318; *Florence Land Co.*, Nov. 1878, L.R., 10 Chan. Div. 530; Bills of Sale Act (17 and 18 Vict. c. 36), sec. 1.

Argued for the trade creditors—The liquidators were in possession of these moveables up to the time of the sale, and were really joint sellers with the trustees and debenture-holders, and to them by the Companies Acts at the time of the liquidation all the property that remained in the company passed as a matter of fact; the entries in the register were made after the liquidation had commenced. Whatever would be held bad in a question of bankruptcy must also be held to be bad in a liquidation, and moveables do not create any security in Scotland. The debenture-holders had no effectual security created prior to the liquidation; these moveables fall to the liquidators therefore for distribution.

Authorities cited—Companies Act 1862 (25 and 26 Vict. c. 89), secs. 133, 163; Bell's Prin. 1299, 1300; Stair, iii. 2, 6; Erskine, ii. 6, 25; Hunter on Landlord and Tenant, 489 to 499, and 508 to 509; *Benton* v. *Craig*, July 16, 1864, 2 Macph. 1365; *Rodger* v. *Crawford*, Nov. 9, 1867, 6 Macph. 24; *Mone* v. *Gledden*, July 8, 1869, 7 Macph. 1016; *M'Bain* v. *Wallace*, July 27, 1881, 8 R. (H. of L.) 109; Lindley on Partnership, ii. 1270; Buckley on Companies Acts (3d. ed.), 132; *Wynn Hall Coal Co.*, L.R., 10 Eq. 515; *Native Iron Ore Co.*, 1876, 2 Chan. Div. 345; *General South American Co.*, 1876, 2 Chan. Div. 337; *Valfy* v. *Chaplin*, Feb. 1872, 7 Chan. 289; Addison on Contracts (7th ed.), 781, 813, 840; Fisher on Mortgages, vol. 1, p. 24; Coote on Mortgages, 360, 426, 432; *Patent File Co.*, Dec. 13, 1870, 6 Chan. 83.

Argued for the liquidators of City of Glasgow Bank—The trade creditors have no *locus standi*, as they were not creditors at the time of the liquidation. The resolution to issue debentures, and all that followed on it, was quite regular, and in accordance with the Companies Act of 1862, and no relevant averment of fraud has been made with regard to these debentures.

Authorities referred to—*International Pulp Co.*, June 30, 1877, 6 Chan. 556; *South Durham Iron Co.*, April 1879, 11 Chan. Div. 579.

It was argued for official liquidators that while they were unwilling to take up a hostile position, they were of opinion that the whole funds should have been put at their disposal, and with this explanation they adopted the argument of the trade creditors.

At advising—

Lord President—The West Calder Oil Company is a company limited by shares, and was incorporated under the Companies Acts on the 22d of April 1872. At an extraordinary general meeting of the company held on the 5th of March 1878, it was proposed that the directors should be authorised to issue debentures or other preferable securities bearing interest at a rate not exceeding 7½ per cent., and to be redeemable at par within six years on the security of the works, lands, and property, and other assets of the company, to an extent not exceeding £25,000, and this resolution having been confirmed by a subsequent meeting held on 21st July 1875, became binding on the company as a special resolution. On the 5th of March 1878 the company went into voluntary liquidation, and thereafter, on 7th June 1878, upon an application to this Division of the Court, a supervision order was pronounced under which the liquidation has since been carried on.

The present question arises in a process of multiplepoinding in which the competing claimants are stated to be the holders of the debentures issued in terms of the special resolution to which I have referred, and the ordinary trade creditors of the company, the debenture holders or their trustees contending that they have a preferable right and a preferable security over the property of the company for their debentures, and the trade creditors on the other hand maintaining that no such security has been effectually created. It is very clear that a mere assignation to trustees for the debenture holders under the Companies Acts of 1862 and 1869 does not create any right of preference in favour of the debenture holders. They are only creditors of the company. The form of the debenture appended to the statute of 1862 shows very clearly what is intended, and indeed this is plain from the clauses of the statute as well, viz., that debentures issued under the authority of the statute should be merely personal obligations by the company for repayment of money advanced in loan, and of course, therefore, we must look elsewhere than in the debentures for

the security on which the debenture holders rely. There is a little appearance of confusion in the argument, in the way of speaking of the debenture holders as if they had some kind of preferable right over the assets of a company in liquidation, but they are merely ordinary creditors with obligations for repayment, and the obligations held by them are different altogether from those debentures or obligations granted by companies under special statutes, such as mortgages granted under the authority of the Companies Clauses Act, which undoubtedly secure a preference. But that preference is established by the special provisions of the Act of Parliament, which not only declares that there are to be such preferable securities, but provides for the mode of giving effect to them, and of making the property of the company available for the purpose. I refer more particularly to the Companies Clauses Act of 1845, and the subsequent statutes of 1863 and 1867, all of which were matters which we minutely considered in the case of the *Girvan and Portpatrick Railway*. Now, by those statutes, which, however, are specially applicable only to companies incorporated by Special Act of Parliament which incorporated the Companies Clauses Act in their statutes, mortgages created under the authority of these are unquestionably preferable securities, but debentures granted under the provisions of the Acts of 1862 and 1867, are, as I have already said, nothing but ordinary personal obligations for repayment of loans. Now, that being cleared away, we come to consider the deeds which are before us, and are said to constitute a special security in favour of these debenture holders, and we have, in the first place, a disposition dated 8th December 1875 and 21st January 1876, which conveys to trustees for the debenture holders a certain piece of ground therein described, in property, but I am not aware, and I do not find in the deed, that there are any moveables upon this piece of ground so held in property, or that any question arises on that deed at all which is the subject of contention. There is no doubt that that disposition having been duly recorded in the Register of Sasines, the piece of ground has formed an effectual security to the debenture holders for repayment of their loans. However that is, we are given to understand it is a very small part of the case, the ground conveyed by the deed being of very limited amount. In addition to this disposition, there was also granted an assignation by the company dated 8th December 1875, by which several leases of minerals, in which the company were the tenants, were assigned to the trustees for the debenture-holders. The words of assignation are "assign, transfer, convey, and make over to George Wilson Clark" and others "for the ends, uses, and purposes specified or referred to in a minute of agreement entered into or about to be entered into" between the parties there named, the whole right, title, and interest of the West Calder Oil Company "in and to the said four leases hereinbefore narrated, and to the said sub-tack, also hereinbefore narrated, and the various minutes and agreements, acknowledgments, or declarations," and so forth, "together with the whole works, buildings, machinery, pipes, retorts, plant, and utensils of every description on the subjects respectively let by the said leases, or any of them, with power to the said trustees and truster, and their and his foresaids, to occupy and possess the said subjects thereby respectively let, or (so far as we are entitled to grant the power) to set the same to tenants, in so far as the same have not been already let, as they shall think most expedient, and to intromit with and uplift the rents, profits, and duties thereof accruing to them as our assignees during the whole remaining spaces of the foresaid leases, sub-tacks, and agreements respectively yet to run, as also to surrender and give up to the proprietors of the subjects thereby let respectively the said leases hereby assigned, or any of them, if they shall think this expedient."

Now, this assignation was intimated to the landlords in the various leases, but no other proceeding has been taken under this assignation in the way of the trustees of the debenture-holders acquiring possession of the subjects. In short, the assignees never entered into possession of any of these leases, or of any of the moveables which are upon the ground which formed the subjects of the leases, and the question comes to be whether in these circumstances any valid and effectual security has been created in favour of the debenture-holders by means of this trust assignation. There are some other deeds connected with this transaction which it is needless to refer to—a declaration of trust, and some other things of that kind, but the important facts on which the case falls to be decided are this assignation so granted and intimated to the landlords in the leases, and that nothing else was done, and that no steps were taken to put the assignees in possession either of the subjects of the leases or the moveables or plant which was upon the ground. Now, I think it must be clear from what I have said regarding debentures granted under the Companies Acts that this is a question which falls to be determined according to the principles of the common law. These trust conveyances are not made under any Act of Parliament, or with the authority of any Act of Parliament, but they were simply trust conveyances made in terms of agreements between the company and its debenture-holders, and taking this as a question of common law it does not seem to me to be attended with any difficulty whatever. The assignation of the lease having had no possession following upon it, creates no right whatever in the assignee except a mere personal claim against the granter of the assignation. It may give him a very good personal claim to be put in possession of the subjects assigned, and the granter of the assignation may have no answer to such a claim when it is made, but till possession is actually obtained there is no legal right, and no security created in favour of the assignee whatever. At one period of our law this might undoubtedly be the subject of contention, but for the last half century it has been very well settled by the well-known case of *Cabbell and Brock*, and a series of cases connected with it, that an assignation without possession is quite unavailing. That is the case here, and it is quite clear therefore that such an assignation of moveables never could have been valid according to the law of Scotland. A mere assignation of corporeal moveables *retenta possessione* is nothing whatever but a personal obligation, and creates no preference of any kind, and therefore it appears to me to be the result

that there is not at common law any valid security created in favour of the debenture-holders.

It was stated, and very strongly contended, that although this is all perfectly clear in a question between the holders of such an assignation and their creditors doing diligence, or a trustee in a sequestration, the same rule will not hold in a liquidation, and we had an argument addressed to us to show the very clear and precise difference which there is between a trustee in a sequestration and a liquidator in a winding-up, and to all that was said on that subject I entirely assent. The trustee in a sequestration is invested in the entire estate of the bankrupt, and the bankrupt is entirely divested, just as much as if the estate had never belonged to him; and the trustee in a sequestration is also in the position of having vested in him the same rights as if he had done diligence against every part of the estate, and therefore he is in a more favourable position than creditors who are doing diligence but who have not completed their charges of payment to exclude him. Liquidators, on the other hand, are not vested with the estate of the company. The estate remains vested in the company itself, and the liquidators are merely the administrators of the estate. But then they are administrators for a special purpose. They are administrators for the purpose of dividing the estate among the creditors of the company, and, if there be any balance, for dividing it among the contributories. But if the estate be insolvent, then the sole purpose for which the liquidators administer is to distribute it amongst the various creditors of the company according to their rights as creditors, and the statute especially provides that the distribution of the estate among the creditors is to be *pari passu*—that is to say, whether the company is solvent or insolvent the distribution of the estate is to be *pari passu*—every creditor is to receive an equal share, unless, of course, he has got a preferable security over the estate of the company or some part of it.

The counsel for the debenture-holders contended that there was a security here in favour of the debenture-holders, although not completed in such a way as to compete with creditors doing diligence, or with a trustee in a sequestration, and he represented that security as consisting in the right to demand that the company shall give him possession, and the nature of his claim here, he says, is that the company shall give him possession of the leases and the moveables. Now, what is that claim? It is not a claim depending upon security. If it were a claim depending upon a security the creditor could help himself. He would not require his debtor to do anything for him, and his debtor could do nothing for him after his insolvency, and a company in liquidation can do nothing for any creditor after their hands are tied. Now, the position of the debenture-holders is nothing more than this, that they have a good personal obligation against the company; it may be an obligation *ad factum præstandum* to give possession of the subjects of the lease and the moveables, but that does not make it a bit the less a mere personal obligation, and all personal creditors unsecured must, according to the statute, be ranked *pari passu*; therefore their position is nothing better than that of an unsecured creditor of the company. Now, it appears to me that that disposes of the most difficult part of this case. The other questions which have been decided or noticed by the Lord Ordinary are of minor importance. We are here in a multiplepoinding. That arose from the circumstance that the estates here over which the supposed security extended were sold under the authority of the Court, and the price came to be consigned to await the claims of all parties interested, and hence this action takes the form of a multiplepoinding. I should be disposed to think that wherever there is a multiplepoinding there must be a competition of creditors, or at least all the parties claiming in some character or other and upon separate and distinct titles, and where the estate to be distributed in the multiplepoinding is insufficient to pay the debts of all parties in full, it is plainly a competition of creditors, so that the mere term of this proceeding shows plainly enough that we have a competition of creditors here, and in a competition of creditors no man can prevail over another unless he has some preferable right or security. But then it is said that it is an accident that put this estate into Court in an action of multiplepoinding, and that the question might have been raised equally well in the liquidation. I take it to be so. I think it might have been raised in the liquidation process, and we shall assume that we are deciding this question in the liquidation, and I understand that we are deciding the question just as we would have done in the liquidation. A liquidation of an insolvent estate is just as much a competition as a multiplepoinding. Everybody is here that could be in a liquidation proceeding, and nobody is being dealt with that might not have been dealt with in a liquidation. These are the elements of a competition, and therefore taking the proceedings as in a liquidation, it is there, as here, a competition of creditors in which all must take equal shares; all must suffer equal deduction, unless they have acquired a preference over the company's estate or some part of it.

The parties to this process, as I have said before, are the debenture-holders on the one hand and the trade creditors on the other, and it was objected in the Outer House, apparently, that the trade creditors had not a sufficient title in this competition. I confess I do not see that there is any force in that objection at all, and I agree with the Lord Ordinary that it is not worth considering or determining. It may very well be in point of form that the proper representatives of the trade creditors are the liquidators as against any parties claiming a preference, but the liquidators are here, and if the trade creditors have not themselves a good title to draw their share of this fund, the liquidators are not only entitled but bound to do so for them, and so any practical difficulty is removed.

Further, with reference to the challenge of this transaction by which these securities were attempted to be created as being invalid on the ground of fraud, I think it necessary to say only that I entirely agree with the Lord Ordinary. I think there is no relevant ground for reducing it at common law or on any other ground, and therefore, while agreeing generally with the view of the Lord Ordinary, I think it necessary to dissent from one part of the interlocutor, in which he holds that the leasehold subjects in question have been effectually transferred to the trustees and confer a good security on the debenture-holders.

I cannot help thinking that there must have been some misunderstanding in the Outer House, because nobody knows better than the Lord Ordinary in this case the rule of law upon which that subject is perfectly settled, and how that came to find its way into the interlocutor I am at a loss to understand; but it will be necessary, in consequence of that, to recal the interlocutor and recast it in order, if your Lordships agree with me, to give effect to the view I have expressed.

Lord Deas—This case arises as to the effect of certain debentures granted by a joint stock company under the Acts of 1862 and 1867, and what has followed on these debentures. It is perfectly plain that these of themselves could confer no preference in favour of the holders, and it was not pretended that they did so. The questions raised are, how far what follows upon these is effectual to constitute a security or securities in so far as the holders of the debentures are infeft through their trustees in certain heritable subjects—and there is no doubt about their preferable securities over these subjects, but unfortunately, as your Lordship has observed, they are a very small part of the value of what would be required for a substantial security. The assignation of the moveable estate to the trustees for behoof of the debenture-holders is important if it has the effect of making a valid security, and the assignation of the leases is also of importance if it make a preferable security over these. But in so far as regards the assignation of the moveables, I agree with your Lordship that it is perfectly settled beyond all question in our law and practice that such an assignation if not followed by possession confers no security whatever. And, in the next place, it is not alleged that there has been a transference of the moveables so assigned. The Lord Ordinary seems to have thought that the case is different so far as regards the assignation to the leases, but it is just as clear that the assignation to the leases does not make a security unless the assignation is followed by possession. Mere intimation to the landlord is not sufficient. These things are very clear by the law of Scotland, provided that the law of Scotland is to rule this case, and as to that I am of opinion with your Lordship, and very clearly so, that if there is nothing special in the Act or Acts of Parliament founded on, the law of Scotland must rule in this matter. The law of England might rule, and very likely would rule, in regard to cases in England to the contrary, but with regard to cases in Scotland where there is nothing to exclude the application of the law of Scotland, that law must take effect. It is not pretended that there is any clause in any Act of Parliament which enacts anything special regarding this matter, and that being so, it is to my mind perfectly clear that this assignation of moveables and this assignation of leases are equally invalid as preferable securities.

A great deal of argument was submitted to us to show that these assignations confer preferable securities when simply followed by intimation, as one has here, or at any rate that there was in these deeds an obligation, express or implied, to give possession. In both cases it was stated that the debenture-holders were entitled to enforce the obligation and to get possession of these subjects still. But it is quite clear that if that were so the result would be that in all cases of assignations of moveables, and in all cases of assignations of leases, assignations would be just as good without possession as with it. That would practically be the result of that, and I think such a doctrine was never mooted in any case of this sort before that I am aware of. But, as your Lordship has stated, an obligation to that effect is nothing more than a personal obligation, and like all obligations applicable to such subjects, cannot give a preferable security. If the contrary were the law of Scotland, and if the law of Scotland be the law which is applicable here, as I cannot doubt it to be, it follows necessarily that these assignees are still entitled to get that which they might have insisted upon originally. But I cannot hold that to be the law of Scotland, for that would just be holding that securities not followed by possession are equally good as those that are.

I agree with your Lordship that the liquidators are not here in the position of a trustee in a sequestration under the Bankruptcy statute, which takes the whole of the property of the bankrupt just as it stood in him, and with the various rights and privileges which are mentioned in the statute. But liquidators have no clauses of that kind in any Act, and they do not pretend that they have, and therefore it is in vain to say that they are in any more favourable a position than the trustee in a sequestration.

I may just say, further, that I entirely agree with your Lordship that the allegation of fraud is out of the question here. There is no evidence of fraud whatever. I agree also with your Lordship as to the question of title. It is mere matter of moonshine to say that these trade creditors cannot vindicate their rights. The title is in these creditors, or it is in the liquidators or both together, and all being here the title is good and sufficient. The whole matter is an important one to my mind, but as I so thoroughly agree with your Lordship on all the branches of it, I do not think it necessary to add more.

Lord Mure—I am of the same opinion as your Lordships. The three main questions that appear to have been argued before the Lord Ordinary were—(1) whether the trade creditors had a good title to appear in this action and maintain their rights? (2) whether there was any preferable security created by the debentures which were held by certain creditors over the moveables and leasehold property of the company? and (3) whether there was any relevant case for reduction at common law, on the ground of fraud, of any of these debentures? and these were all raised at the discussion in the reclaiming-note.

Upon the first point, as to the title of the trade creditors, I never could see that there was any substance in that objection. This is a competition in a multiplepoinding, and these trade creditors of all people have a right to be here to maintain their rights in this competition, and on the other hand I do not see how the company can object to their doing so on the ground of want of title, for it seems to me that they have a manifest interest beyond all question to enter into this competition. I observe that the Lord Ordinary in his note has laid stress on the circumstance that the company had gone into liquidation. I also see from the summons that the real raisers

who raised this question mention the different parties who are called to the action, and I see the liquidators are called on behalf of the ordinary creditors, but the liquidators seem to think that the creditors themselves, who are also called as parties, should appear and dispute this question, and the Lord Ordinary held on that ground that the title was good. I think it was plainly good, and if the liquidators did not appear to vindicate the rights of the trade creditors, I think they were entitled to see that this question was properly stated, and, if necessary, to carry through the competition themselves. I am therefore for repelling this objection.

The second question is as to whether a preference has been created by the debentures over the leasehold and movables; and on that point I do not think that any such preference was created over either of them, and I think that it is a well-settled rule of Scotch law that the assignations which preceded the debentures cannot have such an effect without possession, and that the case of *Cabbell* v. *Brock* and other cases to which your Lordship referred are conclusive of this. That question received the anxious consideration of the Judges of this Court and of the House of Lords, and a majority of the Court were clearly of opinion that the same rule applies to leasehold property. And then we have the Registration of Long Leases Act, which was passed in 1857, which provides for the registration of leases and also assignations thereof, and on that being done in the proper register a valid security may be created in the person of the holder on whose behalf the assignation is recorded. That Act was in existence at the time the assignation in this case was executed, and in order to give these debenture-holders a good title to these leases the assignation ought to have been recorded. Had that been done here it appears to me that the decision of this case might have been different. This case is very peculiar altogether, but, on the whole, I agree with your Lordship in the opinion that the mere execution of the debentures in the terms we have here cannot create a preference in the persons of the holders over the leases and movables of the company. And then it has been maintained that under the liquidation proceedings the company is divested of its property before the debenture-holders have got possession of it. I agree with your Lordship that liquidators are not in the same favourable position as the trustee in a sequestration, who gets possession of the estate of the bankrupt subject to all rights and liabilities, whereas in a liquidation the liquidators take possession of the estate by virtue of the 133d section of the Companies Act, subject to the rights of parties at the date of the winding-up order, and the proposal that something should be done now in favour of the debenture-holders in the way of affecting their security is excluded by the express provision of the 164th section of the Act.

In the circumstances I have come to be of opinion with the Lord Ordinary, so far as he holds that there has been no preference secured over the moveables, the right of the trade creditors to carry on this competition, and that there is no good ground of reduction on the head of fraud; but in regard to the leasehold property, I think, so far as that is concerned, that his interlocutor should be altered.

Lord Shand—This case undoubtedly raises questions of much importance and of novelty with reference to joint-stock companies. I have come to be of opinion with your Lordships that the general trade creditors are entitled to succeed as against the debenture-holders in reference to what is really the valuable and material property in dispute—I mean the right to the leases and the moveable effects which are upon the ground included in the leases.

As to the title of the ordinary unsecured creditors to maintain the claim they here do, I have no doubt whatever. The question really is one between them on the one hand, and the debenture-holders, who claim the property as falling under their security, on the other. Technically it may be true that the liquidators are the proper persons who should vindicate the right of the general trade creditors, but I think that technicality of no consequence here, because we have the liquidators in this process, and in so far as necessary they give their title to the unsecured creditors for recovering this estate as assets of the company to be distributed amongst the creditors. I should hold that the liquidators were bound to give that title, and if it were refused, that the trade creditors would be entitled to vindicate the right themselves. The liquidators are administrators for them, and bound to act on their behalf. I think it is unnecessary to say anything more about that.

The second argument maintained, which appears also to have been submitted to the Lord Ordinary, was that the debenture-holders were entitled to succeed in this question, because they had not only got a security over the property in dispute, but the property had been delivered to them by the liquidators—that it had never been in the possession of the liquidators, but that it had been in the possession of the bondholders, who had sold and realised it. It rather appears, I think, that at the date when these properties were exposed for sale and sold the parties had not quite realised what their different rights and claims might be. But in the petition which the bondholders presented to the Court for authority to sell the property the concluding part of the prayer is that the balance of the said proceeds should be consigned in the hands of the Court, subject to the same rights of security in favour of the said debenture-holders as they have over the said subjects and others, and that the said balance should subsequently be distributed either in this or some subsequent proceeding among the parties having right thereto." And in a subsequent note which they gave in, dated 22d January 1881, they ask for authority "to consign the balance of the price of the said subjects and interest thereon in the Bank of Scotland, or other chartered bank, on a deposit-receipt, subject to the same conditions of security in favour of the debenture-holders (for whom the petitioners act as trustees) as existed over the said subjects before they were sold, and in favour of any other parties having an interest in the same, there to remain subject to the orders of Court in any action of multiplepoinding or other proceeding that may be instituted for the distribution of the free proceeds of the said sale." The liquidators were called as parties to the application, and I think they were thus plainly informed by the petitioners who presented these applications

that what they had in view was the realisation of the property, reserving the rights of all parties. The order of Court which was pronounced was in terms of that reservation, and I hold it therefore to be clear that we are here in a question as to the proceeds of this sale, without any party having established a right thereto by virtue of the procedure under the petitions, with the rights of all parties reserved, and that it is still for the Court to say what is to become of these proceeds.

Having disposed of these two points, the material question on the merits of the dispute between the parties arises; and as I understood the argument urged by the debenture-holders, their case was presented in two distinct aspects. In the first place, it was said that the bondholders were entitled to vindicate the possession of the leases and the corporeal moveables which were upon the ground let, because they had a contract with the company which entitled them to delivery, and even after the liquidation the liquidators were bound to give them possession of these leases and moveables, to be realised by them for their own behoof in virtue of their security. Secondly and alternatively, it was maintained that even if the liquidators were not under obligation from the contract of parties to hand over these leases and moveables, the directors of the company were truly trustees for the debenture-holders—that having got debentures by which their debts were made a charge upon the property in dispute, the directors of the company, from the nature of the security, were really trustees for the debenture-holders, and that the debenture-holders were therefore entitled to a preference in the distribution of the estates.

The argument having been presented in these alternative views, I think it desirable to deal with them separately. In regard to the first of them—I mean the claim to delivery of the property on the footing that the company though now in liquidation are under obligation to deliver,—it was admitted that if this had been a case of bankruptcy and sequestration in which the trustee represented creditors, the claim could not be maintained. But it was said there was a vital difference in the position of liquidators winding up a company and a trustee in a sequestration. As your Lordships have already said, there can be no doubt that there is a great distinction between a trustee in a sequestration and a liquidator under a voluntary liquidation or a winding-up order. I think Lord Mure and I took occasion, in the recent case of *Gray's Trustees* v. *The Benhar Coal Company*, in noticing that distinction, to point out that a trustee for creditors acquired a separate and independent title to the property of the bankrupt, which vests that property in him in virtue of the express provisions of the Bankrupt Statute, and that absolutely; he has an independent title and a right to possession of the whole estate, subject only to securities completed before the sequestration. A liquidator, on the other hand, is an administrator only, the company remaining in existence for the purpose of being wound up under his management and administration. But although that be true, it must be taken with this important qualification, that while liquidators are administrators only, yet the statutes under which they become liquidators, and from which they derive their powers, give express directions as to the way in which they must deal with the property of the company. Where you have a resolution to wind up, or a judicial order that the company should be wound up, and at least where you have such a resolution or such an order pronounced because of the insolvency of the company, or, to use the language of the statute (sec. 129), "because the company cannot by reason of its liability continue its business," very important effects follow—effects in many respects quite as far reaching as in the case of a bankruptcy. In the first place, as we have had occasion frequently to notice, no change can be made on the status of the partners or contributories of the company after that date—at least no such change can be made without the consent of the liquidators or of the Court, which consent, I presume, would only be given where it could be shown that no prejudice will occur to the company by such change. That is the effect of the provisions of sections 131 and 135 of the Companies Act of 1862. Again, the important effect of other provisions of the statute is that the rights of creditors with reference to the assets of the company are finally fixed—so that after the passing of a resolution to wind up, or the date of a winding-up order, it seems to me to be plain, looking to the whole provisions of this statute, that no advantage which a creditor has not legally secured previous to the date of the resolution or order to wind up can be allowed. That, I think, is the result of a series of sections. In the first place, there is section 133, which provides for the *pari passu* ranking of creditors, excluding, as I think, obviously, the right of one set of creditors to take away the goods or the assets of the company to the prejudice of the others, and thereby to secure, it may be, twenty shillings in the pound, to the prejudice of all the other creditors who have to rank for dividends in money. By section 153 any transference of the property or effects of the company except under special order of the Court after the winding-up has commenced shall be void. Section 163 practically prohibits diligence against any part of the property of the company. Section 164 in its terms renders ineffectual any attempt to create preferences after the commencement of the winding-up, while section 17 provides that no action or process shall be raised against a company or proceeded with after the date of the order except with the leave of the Court. It appears to me that taking these provisions as a whole, although there is no bankruptcy or sequestration, or the special effects of either of these, you have very much the same effects produced by statute in all material respects. Keeping that in view, what is the claim which the debenture-holders in this branch of their argument make? They maintain that even after the liquidation had commenced they were entitled to get possession of the leases and moveables, although previously they had no such possession, and possession is necessary to make their security effectual. It appears to me that such a claim is entirely against the spirit and the letter of the provisions of the statute. The debenture-holders are creditors having merely the obligation of the company to give delivery of certain of their assets, just as the other creditors have obligations of the company for the payment in full of the debts due to them respectively. All the creditors holding obligations only by the com-

pany must now be treated alike, none being entitled to an advantage not already secured over the others. As I have already pointed out, if these debenture-holders were now to have important assets handed over to them, the liquidators would be practically giving them a ranking in violation of the provisions of the statute, which declares that there shall be *pari passu* ranking on the estates only. It is obvious in this case that if the debenture-holders should succeed in their claim they would obtain the whole assets for division amongst them, and the other creditors would be left without any assets on which to rank. We were informed that the law was different in England in such cases as this, and that the Courts there, notwithstanding that the liquidation had commenced, would order that the estates should be delivered to the security creditors. But I find there is an important authority which seems to me to show that the law in England on this point is not as was represented. I refer to a case which was not cited in the argument—*ex parte Pearson in re The Wiltshire Iron Company,* which will be found in the Law Reports, 3 Chanc. App. 443. That was a case which came before Lord Cairns, and afterwards before Lord-Justices Page Wood and Selwyn, and it will be only necessary to read the rubric of the report to show how directly it applies to such a case as we have now before us. The rubric is to this effect—"*Bona fide* dispositions of property of a company in the ordinary course of its trade, made after the presenting of a petition for winding-up, and completed before the winding-up order, will, as of course in the exercise of the discretion given to the Court by the Companies Act, sec. 153, be confirmed. Where, however, such dispositions are incomplete, and rest on contract at the time of the winding-up order, the Court has no discretionary power to order the contract to be fulfilled, and the person with whom it was entered into, though he has paid his money, has only a general claim as a creditor for damages in respect of the breach of contract. Where the customer of a trading company had *bona fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices after the presenting of the petition but before the winding-up order—Held that the disposition of the property was complete before the winding-up order, and the goods ordered to be delivered to the customer."

A purchase of iron had been made while the company were just about to be wound up, and the price had been paid in cash. The iron appeared to have been laid aside, and even to have been sent to the railway station for despatch to the purchaser, on a day between that on which the petition for winding-up had been presented and the day on which the winding-up order was made, and Lord Cairns found in these circumstances, and in the absence of evidence that the delivery of the iron to the railway company had been notified to the purchaser, that the claim to delivery could not receive effect. His Lordship explained that if it had appeared upon the evidence taken or admitted that the purchaser had been a party to the delivery to the railway company so as to transfer the property, he would have come to a different conclusion, and it was with reluctance that his Lordship refused to give effect to the purchaser's claim. Subsequently additional evidence was admitted before the Lord-Justices, who took up the case afterwards, and it was thereupon decided, in accordance with Lord Cairns' view, that the additional evidence enabled the Court to give the purchaser delivery of the iron. The decision, however, proceeded on the footing that it was proved that there had been such a delivery as passed the property of the iron to the purchaser, and it will be observed that the claim was sustained only because the transaction had taken place between the day on which the petition was presented and the day on which the winding-up order was pronounced. The general view of the law is stated in a passage of Lord Cairns' opinion, which is to this effect—"If before the winding-up order was made there was no change or disposition of property, if the iron remained the property of the company, and all between the company and Pearson continued in contract, open and executory, then the 153d section has no application. Pearson is simply in the position of any other person having a claim against the company on a broken contract, and the iron being assets of the company, must under the Act be applied *pari passu* for the benefit of all creditors, without any discretionary power on the Court to hand it over in fulfilment of a particular engagement." Upon this branch of the argument I have no doubt that the law of Scotland is in accordance with your Lordship's opinion, and it appears to me that nothing more apposite can be cited than the case of *ex parte Pearson* to show that the law of England is the same so far as this point is concerned.

It is further maintained, however, that even if there be no valid claim to delivery of the subjects of the leases and moveables because there was a contract to give delivery, that the debentures are notwithstanding effectual in another view, viz., that by the terms of the deeds, together with the declaration of trust that followed, there was a charge at once created upon this property, effectual by virtue of these deeds alone, and that thereby they were through the company or its directors themselves the possessors or holders of the property described in the deeds, and so entitled to continue that possession after the liquidation, and realise the subjects in payment of their debts. I am of opinion with your Lordships that this argument also is unsound. In the case of an ordinary mercantile company it is too clear for remark that no such power exists or could be assumed. A company while retaining possession of the leases and moveable property could not possibly grant debentures affecting these subjects, which would be effectual. There is no principle more deeply rooted in the law than this, that in order to create a good security over subjects delivery must be given. If possession be retained no effectual security can be granted. In order to the argument being sustained, some statutory enactment must be adduced which gave the company a power or privilege denied by the common law. Now, the debenture-holders have been, I think, unable to point to provisions in any of the statutes which give any such power. We have statutes which do give that power. The Companies Clauses Act of 1845, for example, carefully provides in its enactments, and the relative schedules appended to it, for the granting of mortgages or debentures. The statute authorises

companies incorporated under any statute by which the clauses of that Act are incorporated to grant mortgages which shall affect their whole undertaking; so that companies which come under that Act, such as railway companies and others, have power by statute to grant debentures by which the whole undertaking is affected, and the creditors without possession (other than that of the company itself or its directors) acquire an effectual security over the whole property of the company. There is no such provision in the Companies Act of 1862 or subsequent Acts, and no provision which by implication can be held to give such important powers. Ordinary joint stock companies have not, so far as I can see, the peculiar privilege to create securities over moveable property or leases of which they retain possession. It is said that by their articles of association, or by special resolution—which is equivalent to an article of association—a company may resolve to grant debentures, retaining possession of the property, which shall be effectual to creditors. It appears to me that such articles of association or resolutions must be ineffectual so far as regards the law of this country, unless it can be shown that there is statutory power given to create effectual securities in this way. It may, I think, quite as well be maintained that by articles of association or by special resolution a joint stock company may effectually provide that its property shall not be liable to the diligence of poinding, or subject to arrestment. A company cannot by the terms of its own constitution abrogate the general law of the country regarding legal diligence as regards its own property. So, in like manner, it appears to me to be clear that without statutory authority a company cannot by its articles of association make a law for itself, contrary to the common law, for the creation of securities over its property which shall be effectual though wanting the ordinary and essential requisites, such as possession in the case of moveables. The only provision that was referred to as supporting the view that the company had statutory authority to grant debentures which would be effectual was the 43d section of the Act of 1862, which provides that the company shall keep a register of all mortgages and charges affecting the property. It was said that creditors had thus the means of seeing what mortgages were granted by a company, and that this section of the statute authorised such securities to be granted. This section of the statute does not, however, authorise the granting of mortgages or debentures over the whole undertaking of the company, or over its moveable property *retenta possessione*. It appears to me to be designed merely for the purpose of enabling creditors readily to see the particulars of those effectual securities in ordinary form which the company have granted from time to time, not to authorise the granting of a class of securities ineffectual in the case of ordinary companies.

On this point also the law of England was appealed to by the debenture-holders. It is stated that there is a series of cases that show that securities of the kind here in question are effectual in England, and that a joint-stock company may grant mortgages or debentures which will be effectual as a security over the undertaking of the company, the directors being trustees for these creditors, and continuing in possession of the whole subject of the security. It rather appears that in England the law is to the effect stated, but assuming it to be so, there are distinctions in principle between the common law of England and the common law of Scotland which are, I think, sufficient to account for the difference in result as to securities such as those now in question. By the law of England the sale of a distinct subject which can be identified passes the property to the purchaser, while in Scotland the property will remain in the seller. By the law of England the *jus in re* passes by the sale, while in Scotland it is merely a *jus ad rem* that is created. The distinction between our law and that of England in regard to sales is fully stated in Bell's Principles, sec. 1299, and was recently commented on by Lord Blackburn in the case of *M'Bain* v. *Wallace*, 8 R. (H. of L.) 106. So it appears further, from some of the authorities that were cited in the argument, that according to the common law of England a person may grant a security over moveables, retaining possession of them, with the result of passing the *jus in re*, which undoubtedly cannot be done in this country. I think that is clearly the result of the following passage from Addison on Contracts, p. 813:—"If goods are assigned to the mortgagee upon trust to permit the mortgagee to hold and enjoy them until default has been made in payment of the mortgage debt and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagee has the legal right of possession encumbered with the trust as well as the right of property, and may maintain an action against anyone who wrongfully converts them to his own use. A proviso in the mortgage of chattels, that after default made in payment of the mortgage debt after notice, it shall be lawful for the mortgager to receive and take into possession, and thenceforth to hold and enjoy, the mortgaged chattels, and to sell and dispose of them, and that until default it shall be lawful for the mortgager to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee. The latter is the legal owner whether in or out of possession." Nothing can be more opposed to the principles of Scots law than the law thus laid down by Mr Addison, and which I see is also stated by Mr Coote in his work on the Law of Mortgages, at p. 429. The distinction between our law and that of England in regard to sales is fully stated in Bell's Principles, sec. 1299, and was recently commented on by Lord Blackburn in the case of *M'Bain* v. *Wallace*, 8 R. (H. of L.) 106. So that assuming the law of England in regard to the debentures of joint stock companies to be as stated, the variance between the law of the two countries may be accounted for by the different principles to which I have referred—delivery of the moveable subject being necessary in this country to give the *jus in re*, which is not so in England. It appears to me that legislation such as we have in the Companies Clauses Act would be necessary in order to give directors of joint stock companies power to grant effectual debentures over property while the possession is retained. It may well be questioned whether the granting of such powers to all joint stock companies would be for the benefit of the public or of these companies generally. If such powers were given, the

general creditors of a company dealing in the ordinary course of business would have no security at all either against the shareholders or the property of the company in cases where the shares had been fully paid up and the assets of the company fully charged with debentures; and for my part I do not think that would be desirable.

Some argument was offered as to whether a case of fraud had been made out against the holders of certain of the debentures, but upon that I think it is unnecessary to say anything, because it is plain that the heritable property, which is of small value, has been admittedly secured by the registration of the conveyance in the register of sasines in the usual way, and the value of that property will be fully exhausted by debentures open to no such objection. The general trade creditors have thus no interest now to raise any question of that kind.

On the whole, I am of opinion that the general creditors are entitled to the securities claimed by the debenture-holders, other than the small heritable property which was conveyed to them and secured to them by the registration of the conveyance in the public register of sasines.

The following interlocutor was pronounced:—

"The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for the reclaimers, the claimants George Wilson Clark and others (debenture-holders of the West Calder Oil Company), against the interlocutor of Lord M'Laren of 3d February last, Recal the said interlocutor: Find that the disposition dated 8th December 1875 and 21st January 1876 having been duly recorded in the register of sasines before the commencement of the liquidation, constitutes a valid security in favour of the debenture-holders over the heritable subjects thereby conveyed: Find that the assignation dated 8th December 1875 not having been followed by possession, either of the subjects contained in the leases thereby assigned, or the moveables thereby assigned, created no valid or effectual preferential security in favour of the debenture-holders in competition with the other creditors of the company in liquidation: Find that there are no relevant averments to support the 2d and 3d pleas-in-law for George Bennie & Co. and others, and the 3d plea-in-law for David Fraser Wishart: Repel the said pleas: Remit to the Lord Ordinary to proceed further in the cause as shall be just."

Counsel for Reclaimers — Solicitor-General Asher, Q.C.—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Liquidators of City of Glasgow Bank — D.-F. Macdonald, Q.C. — Lorimer. Agents—Davidson & Syme, W.S.

Counsel for George Bennie & Co. (Trade Creditors)—Gloag — Mitchell. Agents — Hagart & Burn Murdoch, W.S.

Counsel for Liquidators of West Calder Oil Co. —Mackintosh—Rankine. Agent—W. S. Harris, L.A.

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*Friday, June 30.*

## SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Craighill and Rutherfurd-Clark.)

### SPECIAL CASE—FLEMING'S TRUSTEES AND FLEMING'S TUTORS.

*Apparent Heir—Statute* 1695, *c.* 24—*Delivered Deed—Onerosity.*

An *inter vivos* deed granted by an heir possessing on apparency, delivered and acted upon for twenty years, is a "debt or deed" in the meaning of the Statute 1695, c. 24, and will bind a succeeding heir who passes over the apparent heir and serves to a remoter ancestor.

*Opinions* that a deed granted by the eldest son of a family, who was his father's heir, but had made up no title, on the narrative of a desire to carry out his father's known intentions, conveying certain heritable subjects to trustees for his mother in liferent and himself and the rest of the family equally in fee, was an onerous deed, and therefore fell under the scope of the statute.

Thomas Fleming, Alexander Fleming, and James Fleming were infeft in certain shares of heritable property in Edinburgh. By a deed dated 1st October 1829 Thomas renounced all right to his share in favour of his brothers, equally between them. James predeceased Alexander, who was his heir, and took his shares of the subjects in question. In 1862 Alexander died, and his son Thomas Cleghorn Fleming was served heir in general to him. Upon his father's death, in the course of the same year, Thomas Cleghorn Fleming conveyed to trustees the whole heritable property belonging to his father, to be held by them for his mother in liferent and himself and his brothers and sisters in fee. This deed proceeded on the following narrative:—"Considering that the said Alexander Fleming died possessed of certain heritable properties which he intended to dispone to his widow in liferent, and to his children equally amongst them in fee, but having died without carrying his said intention into effect by executing any deed for that purpose, I, as his eldest son and heir-at-law, am entitled to take up said estates; and being desirous to carry out the intentions of my deceased father, I have resolved to execute these presents in manner underwritten: Therefore," &c. It also contained this clause:—"I bind and oblige myself to procure myself infeft or invest in said subjects, in terms of the Titles to Land (Scotland) Act, and thereupon to infeft or invest my said trustees and their foresaids therein; but in trust always, and for the ends, uses, and purposes after specified, viz.—First, That my trustees shall pay the expense of procuring me served and decerned heir as aforesaid to my deceased father and uncle, and vesting me in the estates above conveyed."

At the date of the deed the truster had three brothers and two sisters, who were with the exception of the youngest brother all grown up. The father left no moveable estate, but in addition to the heritable properties in question in the pre-