butions of the members of the association, paid in in terms of the regulations applicable to these matters, and it is distributed by the managers of the Incorporation in terms of the bye-laws among decayed members, or the widows and children of deceased members, but the extent to which relief is to be given is to be entirely in the discretion of the managers. Strictly speaking, therefore, it is a benefit conferred upon the poorer families of the Incorporation in return for the money which they and the other members of the Incorporation have contributed towards the creation of the fund. In these circumstances I agree with your Lordship in thinking that it is not a charitable purpose in the sense in which that word is used in cases of this description. Reference was made to the case of the Fleshers' Incorporation of Glasgow, but there the rules were different, and the case has no direct bearing here. Because by those rules a fixed sum of money was provided for each widow when she became poor. There was, moreover, no discretion as to the amount to be paid, but an absolute right given to the widow, if she was poor, to have a certain fixed annuity paid out of the funds; and her title to sue was sustained on that ground. There was no question raised in that case similar to that which is here in dispute; and I do not think we are in the least degree trammelled by that decision.

Lord Shand—I am quite of the same opinion, and your Lordship has so clearly and exhaustively stated the ground upon which my opinion rests, that I should be guilty of repetition if I added a word to what your Lordship has said.

Lord Adam—I am entirely of the same opinion.

The Court disallowed the assessment to the extent of 5 per cent. upon the income of the sum of £320, and *quoad ultra* refused the petition and appeal, with expenses.

Counsel for Petitioners—R. V. Campbell—Ure. Agents—Maitland & Lyon, W.S.

Counsel for Respondents—Lord Adv. Macdonald, Q.C.—Darling—Young. Agent—David Crole, Solicitor of Inland Revenue.

Saturday, May 28.

SECOND DIVISION.

[Lord Fraser, Ordinary.

PENDER *v.* LIQUIDATORS OF THE BATHGATE OIL COMPANY, LIMITED.

Company—Lease—Landlord and Tenant—Fixtures—Power of Liquidators to Sell.

The liquidators of a company who were tenants under a lease of minerals, in connection with which works had been erected, having failed to dispose of the subjects as a going concern, presented a petition for power to dismantle the works and sell the buildings and machinery. The landlord objected, on the ground that what the liquidators proposed to sell were fixtures belonging to him. *Held* (*rev.* Lord Fraser) that the rights of the liquidators as in a question with the landlord were no higher than those of the tenants, and petition *refused*.

In 1884 John Pender of Seafield and Blackburn, let to the Bathgate Oil Company, Limited, for thirty-one years, the whole shale, coal, ironstone, and other minerals in and under the estates of Seafield and Blackburn, in the county of Linlithgow.

The *eighth* clause of the lease provided that at the natural or earlier termination of the lease the landlord should have right, at his option, to take the whole engines, machinery, plant, &c., belonging to the tenants, and connected with the working of the minerals, at a fair valuation to be made by arbiters. The tenants were taken bound to offer the engines, machinery, plant, &c., to the landlord six months before the termination of the lease, and if the landlord did not accept the offer, then the tenants were to be entitled to remove the engines, machinery, plant, &c. If the landlord accepted the offer, then when he paid the value of the machinery he was to be entitled to set-off against the price all rents and admitted or liquid claims for surface damages that might be due to him at the time. Further, at the end of the lease, the landlord was to have the option of taking over the moveable plant on payment of its value, and in the event of his not taking it over the tenants were to be entitled to remove it.

The *thirteenth* clause provided as follows—"In the event of the said company, or the tenants for the time, including any liquidator or trustee or adjudger, wishing to sell or assign the tenant's interest under this lease to any third party, and of their receiving a *bona fide* offer to purchase the same, they shall be bound first to make offer in writing to the landlord to assign the same to him for the same consideration and on the same terms as they propose to assign the same to such third party; and on the landlord's acceptance of such offer within thirty days after receipt thereof, they shall be bound to assign such lease to him in terms of such offer, without prejudice to his then outstanding claims against the tenants . . . . and in the event of the said company being wound up, or the tenants becoming insolvent, or their rights attached by adjudgers or creditors, then in the event of a sale of the tenants' interest (after previous offer to the landlord as herein provided) not being effected within one year from the date of the commencement of such winding-up or declared insolvency or attachment, it shall be lawful to the landlord, should he not himself have accepted an offer to assign to him as aforesaid, to declare this lease at an end, and to remove or otherwise deal with the tenants and enter into possession, all as if this lease had come to its natural termination."

The lease was recorded under the Registration of Leases Act in the Register of Sasines. The following securities were granted over it—(1) Bond and assignation in security by the company in favour of the Union Bank of Scotland, Limited, for £3500; (2) Bond and assignation by the company in favour of Anderson & Co., ironfounders, Musselburgh, for £3500.

The company went into liquidation, Mr David Nicolson Cotton and Mr William Veitch Turnbull being appointed liquidators. On 2d June

1886 the Court, on the petition of the liquidators, authorised them to expose for sale by public roup the oilworks of the company on the estate of Seafield, including workshops, offices, engine-house, retorts, scaffolds, engines, and other machinery and mines, and that at such upset price as should hereafter be fixed by the Court. On 6th July the Court fixed the upset price at £10,500. The subjects were on 14th July exposed for sale under articles of roup. There was no offer, and the sale was adjourned. On 30th September the liquidators lodged a note in which they stated that from their knowledge of the state of the oil trade the subjects as already exposed could not be disposed of as a going concern, and they craved authority, under reservation of the rights and preferences of the landlord and holders of securities, to sell the subjects for the purpose of being dismantled, broken up, and removed by the purchaser, or, in the event of no sale being effected, to dismantle, break up, and remove the said oilworks, including workshops and offices, engine-house, retorts, scaffolds, engines, and other machinery, together with the building known as the Patent Fuel Works, and formerly occupied by the Patent Seafield Fuel Company.

Answers were lodged for John Pender, the landlord, in which he stated that besides paying no rent, the company and the liquidators had never made any payment for surface damages, and that the claims of the respondent and the agricultural tenant amounted to £1093, 14s. 1d. The answers contained this further statement—"The said buildings and machinery are fixed to the soil, and belong to the respondent at common law; the said company and liquidators thereof have no right thereto except under the special stipulations of the lease, which have not been implemented by them, and must be held to have been departed from. In any view, the respondent is entitled to the option of purchase given him by the lease if the liquidators do not intend to continue the lease, as now appears for the first time to be the case. The proposal for sale is made by the liquidator entirely in the interests of the bondholders, whose only right to the preference which they claim is as assignees of the recorded lease, and before taking any benefit as such assignees they are bound to implement the whole prestations of the lease to the respondent, and on their doing so he would agree to the said machinery and buildings being sold." The respondent accordingly submitted that the prayer of the note should be refused, at all events *hoc statu*.

On 4th May 1887 the Lord Ordinary on the Bills (Fraser) pronounced this interlocutor:—"Under reservation of the rights and preferences of the landlord and holders of securities over the said lease, as such rights and preferences now exist, (1) Grants authority to the liquidators to sell by public roup on 14th June next, and after such advertisement as they may consider proper, the oilworks of the company on the estate of Seafield, including workshops and offices, engine-house, retorts, scaffolds, engines, and other machinery, together with the building known as the Patent Fuel Works, and formerly occupied by the Patent Seafield Fuel Company, with a view to dismantle, break up, and remove the same from the ground, and that at the upset price of £3500, or such larger price as may be obtained, and under such articles and conditions as the liquidators may deem necessary; (2) in the event of no such sale being effected, grants authority to the liquidators to dismantle, break up, and sell by public roup or private bargain the said oilworks, including workshops and offices, engine-house, retorts, scaffolds, engines, and other machinery, and the said buildings known as the Patent Fuel Works, in detail, and in such lots as the liquidators shall think right, and grants authority to them to expend such sum or sums as they may consider necessary or expedient in doing this."

Pender reclaimed, and argued—The Lord Ordinary's interlocutor was not only unjust but unsound in law. The company were the reclaimer's debtors to a large amount, irrespective of sums in name of damages for non-fulfilment of the prestations of the lease and injuries to the surface. He had never pressed for payment, as he did not want to embarrass the company in its difficulties. All he wanted now was some security for payment of a fair ranking with other creditors. What the liquidators proposed now to do would deprive him of this. They proposed not only to remove tenant's fixtures, but erections which were *partes soli*, and belonged to the landlord. They were not entitled to do this, as they had no higher right than the company, who were his tenants. In any view, if the company pleaded the conditions of the lease, they must fulfil the whole conditions of the lease, and until this was done by payment of rent and damages for injury to surface they were not entitled to succeed.

The respondents maintained that under the order of the Lord Ordinary the rights of the landlord were reserved.

At advising—

Lord Justice-Clerk—I think it is quite plain that the landlord is not to be deprived of his security, if he has any, over the plant and other articles which are affixed to the ground. The liquidator has no right to demand that he should be so deprived. The tenant's fixtures are in a different position, because the tenant has a right to remove them. I think it will be for the parties to consider what steps can be taken to arrange for a sale of the articles on the ground with as little loss as possible to both parties. But we cannot sustain this interlocutor in so far as it gives the liquidator a power to break up and remove that which the tenant could not do. I think the liquidator has no such right.

Lord Young—I am entirely of the same opinion. I think the case of the liquidators in support of the interlocutor is not arguable. The Lord Ordinary cannot authorise the liquidators to do as liquidators of the tenant's estate what the tenant could not have done in a question with his landlord. Such an extraordinary power has not been conferred on them by statute. The tenant could certainly not remove things affixed to the soil in a question with the landlord. The authority granted by the Lord Ordinary must therefore be recalled, leaving it to the parties themselves if they can come to an agreement to arrange a sale in the interest of them both.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court recalled the interlocutor reclaimed against and remitted the cause to the Lord Ordinary.

Counsel for Reclaimer—Balfour, Q.C.—Jameson. Agents—R. R. Simpson & Lawson, W.S.

Counsel for Respondents—Young. Agent—J. Knox Crawford, S.S.C.

Tuesday, May 31.

FIRST DIVISION.

[Lord Trayner, Ordinary.

INGLIS' TRUSTEES *v.* INGLIS AND OTHERS.

Error—Election—Legitim.

Under the trust-disposition and settlement of a person who died on 10th January 1884, survived by a son and daughter, the latter was entitled to a liferent provision of £3458 per annum, and a capital sum of £20,000. The whole moveable estate of the deceased amounted to £152,779. Both son and daughter were trustees.

On 28th January 1885 a letter was written by the daughter's law-agent, upon her instructions, to the law-agents for the trustees, stating that she had "now decided to claim her legal rights in place of the provisions under the settlement." In so making her election the daughter proceeded upon the assumption that she would be entitled to the whole legitim fund, or upwards of £70,000. The trustees at their meetings, when the son and the daughter were present, and in the written communications of their law-agents, had dealt with the matter upon this footing. After the daughter had made her election, the son, on 5th February 1885, for the first time, informed the trustees' agents that in April 1884 he had been advised by a separate agent, that in the event of his sister claiming legitim he would be entitled to one-half of that fund, without collation. According to this view the daughter would only have got about £35,000. Upon receiving intimation of this from the trustees' agents, the agent for the daughter at once wrote to them saying that the election must be held as "still in abeyance." *Held*, in a multiplepoinding raised to determine the rights of the son and daughter *inter se*, that the daughter had been under essential error in fact when she claimed her legal rights, and was not barred from claiming the provisions in her favour contained in the settlement.

Opinion (*per* Lord Shand) that the daughter would not have been bound by her election even if the error had been in law.

Anthony Inglis, engineer and shipbuilder in Glasgow, died at Partick on 10th January 1884, leaving a trust-disposition and settlement dated 8th August 1883, by which he conveyed to trustees his whole estate, heritable and moveable. He was survived by a son, John Inglis junior, and a daughter, Mrs Margaret Inglis or Breen, both of whom were trustees. The whole moveable estate left by the deceased amounted to £152,799. Under the provisions of the settlement Mrs Breen was entitled to an income of £3458 per annum in liferent, and also to a capital sum of £20,000. Shortly after the death of the testator a question was raised as to whether Mrs Breen would accept the provisions in her father's settlement or claim legitim, and information was furnished to her by the trustees as to the estate of the deceased to enable her to make her election.

On 28th January 1885, in consequence of a resolution of the trustees passed at a meeting on 14th January preceding, calling upon Mrs Breen to make her election, Mr Kidston, Mrs Breen's law-agent, wrote to the agents for the trustees stating that Mrs Breen had "now decided to claim her legal rights in place of the provisions under the settlement." The receipt of this letter was duly acknowledged by the agent for the trustees, and both letters were read at a meeting of trustees held upon 3d February following, and were engrossed in their minutes of meeting of that day. The trustees had up to this time, both at the meetings of trustees, at which Mr John Inglis, junior, and Mrs Breen were present, and in the letters written by their law-agents, dealt with Mrs Breen upon the footing that if she elected to take her legal rights she would be entitled to one-half of the moveable estate.

Upon 5th February 1885 Mr Roberton, the agent for the trustees, wrote to Mr Kidston in these terms—"As I believe that in electing to take at common law instead of under the trust-disposition and settlement, Mrs Breen has been going on the assumption that she is entitled to the whole of the legitim fund, I think it proper to acquaint you that Messrs Bannatyne, Kirkwood, M'Jannet, & France have advised Mr John Inglis junior that he is entitled to participate in that fund, and this without his being liable to collate the heritage." It appeared from the evidence *infra* that Mr Inglis had consulted Mr France in March 1884, but that he did not tell Mr Roberton of the advice Mr France had given him until 3d February 1885. To this letter Mrs Breen's agent replied upon the same day—"I have to-day your letters of yesterday and this date. With reference to the latter, you expressed an opinion to Mrs Breen in which I concurred—that she would be entitled to the whole of the legitim fund—and her intention to make the election was based upon the assumption that that would be the case. I am also informed by Mrs Breen that in September last, at a meeting of trustees, when both she and Mr Inglis were present, her legal rights were explained to her and Mr Inglis to be a claim to one-half of the moveable estate as legitim. Had Mr Inglis given earlier intimation of his claim to participate in the legitim without collating, I would not have written in the terms of my letter to you of the 28th ulto. The trustees will therefore be good enough to hold Mrs Breen's election as still in abeyance."

This was an action of multiplepoinding to settle the rights of John Inglis junior and Mrs Breen *inter se*. Mrs Breen claimed the provisions in her favour contained in her father's settlement, or alternatively one-half of the free moveable estate as legitim. She averred that her election was made in reliance on information communicated to her at various meetings of the trustees, at which the law-agents of the trustees, in the hearing and with the assent of her brother John Inglis junior, informed her that she was entitled under her legal rights to the full one-half of the free moveable estate, which was shown by the