Friday, June 28.

SECOND DIVISION.

DICK'S TRUSTEES *v.* ROBERTSON.

Succession — Fee and Liferent — Minerals Leased by Testator but never Worked, and no Rent Drawn in his Lifetime—Trust—Administration—Power to Grant Leases of Minerals—Trusts Scotland Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 2 (3)

A testator directed his trustees to hold the residue of his estate for behoof of his children in liferent allenarly and their issue in fee. He gave his trustees power to sell the trust-estate. He did not in terms give them power to grant leases of minerals. Before his death he had leased the minerals on part of his lands in return for a fixed rent and certain royalties, but had not drawn any fixed rent, the first half-year's rent being current at the time of his death. The tenants ultimately gave up the lease without having opened up the minerals or paid any royalties thereunder. A question having subsequently arisen between the liferenters and the fiars as to the power of the trustees to grant a new lease of the same minerals to another tenant, and as to their respective rights in the rents and royalties payable under such lease if competently granted, *Held* (1) that it was within the power of the trustees to grant such a lease; and (2) that the rents and lordships arising therefrom fell to be paid to the liferenters under the testator's trust-disposition and settlement.

Alexander Dick of Lumloch died on 10th September 1871, leaving a trust-disposition and settlement dated 27th January 1870, whereby he conveyed his whole estate, heritable and moveable, to certain trustees for the purposes therein specified.

By the fifth purpose he directed his trustees to hold and apply the residue of his estate for behoof of his children, equally among them in liferent allenarly, and for behoof of their respective lawful issue, equally among them, and the survivor and survivors of them, share and share alike, in fee.

By the sixth purpose he directed that in the event of the death of all his children without issue or, failing such issue, before the period of the final division of his estate, that the trustees should hold and apply the residue for behoof of Matthew Dick his brother in liferent allenarly, and of his children, equally among them, in fee.

The testator empowered his trustees to sell any part of the trust estate either by public roup or private bargain. He did not in terms give them power to grant leases of minerals.

The testator was survived by two daughters, viz., Charlotte, wife of the Rev. Eric Sutherland Robertson, who had one child; and Isabella, wife of Dr William M'Lennan, who had three children. Matthew Dick died on 7th December 1878, leaving three children.

At the date of the testator's death on 10th September 1871 he had let the minerals in the lands of Wester Lumloch to James Dunlop & Company, iron and coal-masters, Glasgow, on a lease for thirty years from Whitsunday 1868, at certain lordships, and with a fixed rent of £300 per annum. The lease was dated 4th May 1868, and there were breaks in the tenants' favour at Whitsunday 1873 and every fifth year thereafter. Under the said lease Messrs Dunlop & Company had power to work the minerals by pits on their adjoining lands of Robroyston and Balornock. No fixed rent was exigible for the first three years of the lease or began to run until Whitsunday 1871. At the date of the testator's death he had not therefore drawn any fixed rent for the minerals, but the first half-year's rent was running. The fixed rent due under the lease was paid to the trustees down to Whitsunday 1878, at which date Messrs Dunlop took advantage of the break in their favour, and the lease was terminated. The rents were credited and paid to the liferentrices up to that time. None of the minerals in the lands of Wester Lumloch were ever wrought by the said tenants under the said lease, either from the adjoining lands of Robroyston and Balornock or otherwise, and the mineral area of Wester Lumloch was not entered upon or opened up by said tenants under the said lease.

In 1900 the Carron Company offered the trustees to lease for twenty years from Whitsunday 1900 the minerals in the lands of Wester Lumloch, part of the same subjects as were under lease at the time of the testator's death, for a fixed rent of £150 per annum and certain royalties. The trustees were satisfied that it would be in accordance with judicious administration of the estate to enter into the proposed lease; but as questions had arisen as to whether they had power to grant such a lease, and also whether the rent and royalties fell to be paid to the liferentrices or to be held for the ultimate fiars, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) the trustees of Alexander Dick the testator; (2) Mrs Robertson and Mrs M'Lennan, the testator's daughters; (3) the children of Mrs Robertson and Mrs M'Lennan; and (4) the surviving children and the only child of a deceased child of Matthew Dick who died in 1878.

The first and second parties maintained that the leasing of the minerals was within the powers of the first parties, subject always to the provision as to the duration of the lease contained in section 2 (3) of the Trusts (Scotland) Act 1867, and that the first parties were accordingly entitled to conclude the proposed arrangement with the Carron Company. The second parties further maintained that all payments to be received under the said lease, whether of fixed rent or royalties, fell to them as liferentrices, or at all events that they were entitled to the interest to be derived from the investment of such payments. The third and fourth parties maintained that

the leasing of the minerals by the first parties was not authorised by the trust-deed, and would be at variance with the terms and purposes of the trust, and that the trustees were not entitled to let the same. Alternatively, they maintained that the proceeds of the proposed lease, in the event of the first parties being held entitled to enter into it, must be accumulated and held by the trustees for behoof of the fiars, and only the interest thereon paid to the second parties.

The questions of law for the opinion and judgment of the Court were—"(1) Are the first parties entitled in the circumstances before set forth to enter into the proposed lease of the minerals in the lands of Wester Lumloch? (2) In the event of the first parties having such power, are the rents and lordships arising therefrom to be paid to the second parties, or are they to be capitalised for the benefit of the ultimate fiars, and only the interest thereon paid to the second parties?"

Argued for the first and second parties—The intention of the testator was to be inferred from the manner in which he had dealt with the minerals, and in the absence of any contrary indication the legal presumption was that what he had made a profit-bearing subject should be enjoyed by the liferenters — *Wardlaw* v. *Wardlaw's Trustees*, January 23, 1875, 2 R. 368; *Campbell's Trustees* v. *Campbell*, March 15, 1882, 9 R. 725, 10 R. (H.L.) 65; *In re Kerneys-Tynte* (1892), 2 Ch. 211. That principle was not affected by the accident that the minerals had not in fact been worked and that the testator had drawn no profit—it was enough that the testator had made them a profit-bearing subject by granting a lease.

Argued for the third and fourth parties—The testator had not directly given his trustees power to lease the minerals. From the fact that he had given them power to sell the inference was that he did not intend them to have power to lease, which he might easily have expressed. The legal presumption of intention, where the testator had himself leased the minerals, was an exception to the general rule that minerals belonged to the fiar, and should not be extended to such a case as the present, where the minerals had never been worked.

LORD JUSTICE-CLERK—I think the case as presented is ruled by previous decisions. The testator had himself granted a lease of the minerals in his property, and although the minerals had not been actually worked by the lessees yet at his death they were in the position of having been made profit-producing subjects, and therefore in the position to which the decisions apply. It is said that the trustees could not enter into a lease, but they had power to continue the estate in the condition in which it was at the testator's death. I put the question to Mr Macmillan whether they were not entitled to grant an agricultural lease, and he could not deny that they were, for that would only be continuing the condition of the estate as they received it.

The case of minerals is no doubt different, for it is only by a fiction of law that minerals are regarded as fruits of an estate, but it is settled that when minerals are leased they are fruits of the heritable subject. I would therefore answer the first question in the affirmative, and the second by declaring that the rents shall be paid to the second parties.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court answered the first question in the affirmative, and the second question by declaring that the rents and lordships should be paid to the second parties.

Counsel for the First Parties—C. K. Mackenzie, K.C.—Guy. Agents—Alexander Morison & Co., W.S.

Counsel for the Second Parties—Guthrie, K.C.—Orr. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Third and Fourth Parties—Rankine, K.C.—Macmillan. Agents—Auld & Macdonald, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Lord Low, Ordinary.

MACKENZIE *v.* MAGISTRATES OF MUSSELBURGH.

Reparation—Negligence—Safety of Public Streets and Roads — Responsibility of Magistrates of Burgh—Obstruction in Street in Burgh — Projecting House — Footpath—Injuries to Children—Road—Burgh.

In an action of damages brought by a miner against the Magistrates of a burgh for the death of his pupil son, who was run over and killed in one of the streets of the burgh which was under the management and charge of the defenders, the pursuer averred that at one point of the street a house projected into the road, that the footpath terminated at the south end of the projecting house, and that there was no continuation of the footpath on the west side of the road to the northward of that point; that his son was sent by his mother on an errand that took him along the street, that the boy kept to the footpath on the west side until he reached the projecting house, that he then proceeded to cross the street to the footpath, which from that point northwards was on the other side, and that while crossing he was run over and killed by a horse and van travelling along the street in the opposite direction. The pursuer further averred that the street was dangerous at the place where the accident happened, because persons walking along the footpath towards and upon the same side as the projecting house were prevented by the house from seeing