partner not exercising the said option to purchase the interest and share of the bankrupt partner, the winding-up of the firm should be in his hands alone. Upon the 17th August 1903 the said William Cunningham was charged, at the instance of Abel Wightman, draper, Lockerbie, to make payment of the balance due under a bond and assignation in security granted by him in favour of the said Abel Wightman.

The petitioner stated that the days of charge had been allowed to expire without payment of the said balance having been made by the said William Cunningham; and that the said William Cunningham was thus notour bankrupt; that the petitioner had intimated to the said William Cunningham that he had exercised the option conferred upon him in these circumstances by the tenth clause of the said deed, and had dissolved the firm; that he had called upon the said William Cunningham to concur with him in the steps necessary for the notification of the said dissolution and the winding-up of the said firm, but the latter refused, or at least delayed to do so, and that the application had been rendered necessary. The application was made at common law and under the Partnership Act 1890 (53 and 54 Vict. cap. 39).

The prayer of the petition was in the following terms;—"And thereafter, upon resuming consideration hereof, with or without answers, to find and declare that the said firm of Logan & Cunningham is dissolved, and to decree a dissolution thereof, and to find and declare that the winding-up of the business of the said firm shall be in the hands of the said David Logan, and that the said David Logan has right to purchase the share and interest of the said William Cunningham at the figure at which the said share and interest stood in the last balance-sheet, with interest thereon at the rate of 5 per cent. per annum from the date of the said balance-sheet to the date of the said dissolution, under deduction of all sums drawn out by the said William Cunningham since the date of the last balance-sheet."

Cunningham lodged answers. He averred that in furtherance of a scheme conceived by the petitioner to bring about a dissolution of the partnership on terms advantageous to the petitioner, the bondholder's agent, who was also the petitioner's agent and the firm's banker, had taken the proceedings under the bond, and had dishonoured a cheque for the sum demanded, which had been drawn by the respondent on the firm's account; that the balance at his credit with the firm entitled the respondent to draw this cheque, and that, if the state of the firm's bank account justified the cheque's dishonour, this was due to the petitioner having drawn out more than his share of profits; that the respondent was not insolvent, and that he was ready and able to pay the sum charged for if the creditor himself really required payment.

The Lord Ordinary on the Bills (KYLLACHY), after hearing counsel, dismissed the petition, and delivered the following opinion—"There seems to me to be no authority for holding an application like the present, at all events in the circumstances disclosed in the petition and answers, to be competent in the Bill Chamber. A Judge in the Bill Chamber is entitled to deal with questions regulating possession or the preservation of copartnery or other estates which might go to waste if a judicial factor or other like officer were not appointed. He has also power in petitions for sequestration to appoint interim factors on bankrupt estates, but these are special rights conferred by statute or by well-established practice. It does not follow that a Bill Chamber Judge can grant a decree of declarator either at common law or under the copartnery deed, decreeing the dissolution of a firm and declaring that the winding up shall be in the hands of one of the partners. The petitioner's proper remedy seems to be an ordinary action of declarator in the Court of Session. The respondent, judging from his statements in the answers, may quite possibly have a good defence to the plea that he is notour bankrupt. His averments amount to this, that the petitioner, with the assistance of his agent, who was also the firm's banker, 'engineered' his bankruptcy. It seems to me that if it were proved that he was made notour bankrupt by reason of his partner having drawn on the funds of the firm to a larger extent than he was entitled, his answer would probably be a good one. But in the Bill Chamber I have no means of judging as to this, as proof would be required. I have never heard of such a proof being allowed or led in the Bill Chamber. I have therefore, I think, no alternative but to refuse the petition, with expenses."

Counsel for the Petitioner — J. A. T. Robertson. Agents—Pairman, Easson, & Miller, S.S.C.

Counsel for the Respondent—D. Anderson. Agent—J. A. B. Horn, S.S.C.

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*Tuesday, November* 10.

## FIRST DIVISION.

[Lord Low, Ordinary.

## LIQUIDATORS OF LINLITHGOW OIL COMPANY, LIMITED *v.* EARL OF ROSEBERY.

*Landlord and Tenant—Hypothec—Royalties under Mining Lease.*

The landlord's hypothec covers royalties under a mineral lease.

On February 13th, 1902, at an extraordinary general meeting of the shareholders of the Linlithgow Oil Company, Limited, it was resolved that the company should be voluntarily wound up, and Messrs John Scott Tait, C.A., Edinburgh, and John Young, Glasgow, were appointed liquidators. On February 22nd, 1902, the liquidation was placed under the supervision of the Court.

The company held a lease of their oil-field from the Earl of Rosebery, under which the landlord was entitled to a certain fixed rent, "or otherwise in lieu of the said fixed rent and in his option" to lordships at certain rates.

Lord Rosebery, who had on 11th February 1902 executed a sequestration of the company's effects under his hypothec as landlord, lodged a claim in the liquidation claiming a preferable ranking for the sum of £1596, 18s. 2d. in respect of lordships. The liquidators rejected this claim, but allowed a preferential ranking for £535, 2s. 4d., being the amount of the fixed rent payable under the lease. In a note the liquidators expressed their reasons as follows:—"The claimant claims a preferable ranking for the sum of £1596, 18s. 2d. in respect of lordships. Under the lease between the claimant and Thomas Spowart and others, dated 2nd and 23rd April, and recorded in the Division of the General Register of Sasines applicable to the county of Linlithgow, 27th May, all in the year 1884, the landlord is entitled to a fixed rent, 'or otherwise in lieu of the said fixed rent and in his option' to lordships at certain rates. The claimant has elected to claim lordships in lieu of rent, and as there is no hypothec or preference given to a landlord in respect of lordship, the claim for a preferable ranking must accordingly be rejected."

The liquidators presented a note to the Court *inter alia* for approval of this deliverance. Lord Rosebery lodged answers in which he submitted that he was entitled to a preferable ranking in terms of his claim.

On 22nd July 1903 the Lord Ordinary (Low) pronounced the following interlocutor:—"Recals the deliverances of the liquidators in so far as they have refused to the respondent a preferable ranking in respect of royalties or lordships, and remits to the said liquidators to give to the said respondent a preferable ranking in respect of the royalties or lordships to the extent to which they may be entitled thereto, upon the footing that the landlord's right of hypothec applies to royalties and lordships as well as to fixed rents: *Quoad ultra* sustains and approves of the said deliverances: Appoints the said liquidators to lodge in process amended deliverances giving effect to this interlocutor, and reserves in the meantime consideration of the question whether the respondent is entitled to immediate payment of the whole sums for which he is entitled to a preferable ranking or only to a substantial payment to account thereof."

*Opinion.*—"The first question which was argued was whether in a lease of minerals the landlord's hypothec secures royalties beyond the amount of the fixed rent.

"I take it to be settled that the hypothec can be used to secure payment of any sum due by the tenant to the landlord which is truly rent. The question therefore appears to me simply to be whether royalties can be regarded as rent? I am of opinion that they are rent and nothing else, because they are the stipulated return due by the tenant for the possession and use of the subject of the lease. In my judgment therefore the liquidators were wrong in holding that 'there is no hypothec or preference given to a landlord in respect of lordship.'"

[*His Lordship proceeded to deal with other questions in the case turning on the terms of the particular lease.*]

The liquidators reclaimed, and argued—The question whether a landlord had a right of hypothec for lordships on royalties had never been decided. It ought now to be decided in the negative, because the hypothec of a landlord was an anomalous right which should not be extended to cases which were not covered by authority—Hunter, Landlord and Tenant (4th ed.), ii. 359; Rankine, Leases (2nd ed.), p. 339; *Robertson* v. *Clark*, June 1, 1842, 4 D. 1317; *Withan* v. *Young's Trustee*, July 20, 1866, 38 Sc. Jur. 586. No case could be found in the history of hypothec in which it had even been claimed for royalties. It did not extend to a contract for cutting down trees—*Muirhead* v. *Drummond*, May 16, 1792, reported in 2 Bell Com. (M'L. ed.), 27. Admitting that royalties had been held to be covered by the term rent under the Aberdeen Act and in questions of estimating a composition, it was not every form of rent that was covered by hypothec. The distinguishing point with regard to royalties was that their amount could not be ascertained by other creditors from the terms of the lease.

Argued for the respondent—Although there was no direct decision that royalties were covered by hypothec, yet it appeared that such a claim had been sustained in *Lindsay* v. *Earl of Wemyss*, May 18, 1872, 10 Macph. 708. But even if the question were looked upon as new the Lord Ordinary was right. Once it was settled that the return from mines was to be regarded as rent, which was now settled—*Weir's Executors* v. *Durham*, March 17, 1870, 8 Macph. 725; *Allan's Trustees* v. *Duke of Hamilton*, January 12, 1878, 5 R. 510, 15 S.L.R. 279; *Earl of Home* v. *Lord Belhaven*, July 19, 1900, 2 F. 1218, 37 S.L.R. 990, *rev.* May 25, 1903, 40 S.L.R. 607—there was no distinction between lordships and fixed rent. The lordship was simply rent calculated in a particular way.

At advising—

LORD PRESIDENT—Two questions were argued before us—first, whether the respondent, the landlord, is entitled to a preferable ranking in respect of royalties or lordships beyond the fixed rent, upon the footing that the landlord's right of hypothec extends to royalties or lordships as well as to fixed rents, and second, whether the lease granted by the respondent the Earl of Rosebery to the company should be held to run from Whitsunday to Whitsunday or from Martinmas to Martinmas.

In regard to the first question, I am of opinion that the landlord's hypothec extends to royalties or lordships as well as to fixed rents, becouse they are equally the return or consideration which the tenant agrees

to give to the landlord for the privilege of occupying and dealing in a particular way with the subjects let. It is no doubt true that mineral royalties or lordships are paid not for the use of the subjects let *salva rei substantia*, but for the right to dig and remove part of the estate, but the consideration paid to a landlord for the power to excavate minerals on his estate has been assimilated to rent paid for the use of the estate, leaving the *corpus* of it undiminished. A similar argument was urged against holding that mineral royalties should be taken into account in ascertaining the amount of the provisions which an heir of entail in possession is entitled to make for his widow and children, but in the case of *Lord Belhaven and Stenton*, 23 R. 423, it was held that in estimating the provisions which an heir of entail is entitled under sections 1 and 4 of the Aberdeen Act to make for his widow and children, the royalties payable under mineral leases during the year current at the death of the heir fell to be taken as part of the "free yearly rent" of the entailed estate, irrespective of the fact that the minerals were nearly exhausted. It was argued that the treatment of mineral rents or lordships as rents was only introduced by custom, but even assuming this to be so, it seems to me that the custom is now so well established, and in itself so reasonable, as to make it law. Again, in the case of *Robertson* v. *Clark*, 4 R. 1317, it was held (it is true by a narrow majority) that not only the fixed rent stipulated in a lease, but pactional rent payable in the event of divergence from the prescribed course of management, is secured by the landlord's hypothec. I am aware that this decision has been doubted, but even if a different view were taken of the point there decided it would not, in my judgment, affect the present case, as a penalty for breach of contract is very different from the return stipulated to be paid for the use and enjoyment of the subject let. For these reasons I concur with the Lord Ordinary in thinking that the liquidators erred in holding that the landlord in the present case has no hypothec or preference in respect of lordships or royalties.—[*His Lordship then dealt with the other question raised in the case.*]

LORD ADAM—I am of the same opinion. The first question stated by the Lord Ordinary is whether royalties are to be considered as rent. It seems to me that the moment it is settled that fixed rents under a mining lease are secured by the landlord's hypothec the pursuer's case here is hopeless, because it has been decided over and over again that royalties are just as much rent as fixed rents.

LORD M'LAREN—I also concur. I consider that these royalties are to be regarded as rent in accordance with the decisions, and also in accordance with the philosophical definition of "rent" and with the terms of this particular contract. As regards the decisions it may be observed that the inclusion of royalties under rent does not depend upon the use of any particular word or phrase, because the same determination was given in the case under the Aberdeen Act, where the words used are "rent or annual value," and under the Scottish statute giving right to a composition, where the words are "a year's maill as the lands are set for the time." I see no ground for distinction (in the question what is to be included under the term rent) between questions as to the landlord's security for rent and as to the measure of the superior's composition. We know that, taking a general survey of the different kinds of property—pastoral, agricultural, and mining—very different modes of payment of the landowner's share of profit are prevalent in different countries. Under our law the right of hypothec is intended to give the landlord a preference for this share of profit, on the ground that the tenant could earn no profit at all unless he had the use of the land.

Theoretically I should include under rent whatever is paid to a landlord as a consideration for the use of the land, or as his share of the profits derived from the land.

If, again, we take the economical definition of rent as being the difference between the return from the particular subject and that derived from the poorest land under cultivation, that applies equally to the case of royalties from a mine. The royalties vary with the quality of the ore, and may be taken to represent the difference between the returns from the particular mine in question and those from the poorest mine which it would pay to work. In that sense it is quite immaterial whether the return takes the form of royalty or of fixed rents.

Then in this particular contract, which, like other mining leases gives alternative returns by means of fixed rents or royalties, it seems impossible to predicate of these alternative considerations that the one is rent of the subjects and the other is not rent, or that the one is covered by the hypothec for rent and the other is not.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Liquidators—Salvesen, K.C.—Grainger Stewart. Agents—Mitchell & Baxter, W.S.

Counsel for the Appellant—Fleming, K.C. —Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

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*Tuesday, November* 10.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## MILLER *v.* OLIVER & BOYD.

*Arbitration—Decree—Lump Sum Awarded where Claims not ejusdem generis Referred—Examination of Arbiter to Explain Award—Proof—Parole to Explain Writing—Competency.*

An agreement for the transference of the goodwill and plant of A's business to B, and A's future employment by B