Thursday, July 1.

SECOND DIVISION.

NAISMITH'S TRUSTEES *v.* NAISMITH AND OTHERS.

Trust—Mines and Minerals—Lease—Power of Trustees to Grant Lease of Minerals—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict., cap.* 97), *sec.* 2.

A testator who directed his estate to be held for liferenters and fiars, conferred on his trustees "all requisite powers" and "power to sell and dispose of the trust estate, heritable and moveable, real and personal, or any part thereof." The estate included an isolated parcel of land, ten acres in extent, the minerals in which, if to be worked from a pit in some adjoining land, could only be so worked by one party, who now sought a lease.

Held that the trustees had power to grant the lease, in as much as (1) such power was conferred under the trust deed, and (2) would have been implied under the Trusts (Scotland) Act 1867, section 2.

Succession—Fee and Liferent—Mines and Minerals—Royalties—Fixed Rent—Wayleave—Unopened Minerals—Rights of Liferenter and of Fiar.

A trust estate held for liferenters and fiars included three discontiguous parcels of land, the minerals in which though lying in the same mineral field could not be worked the one from the other. At the testator's death the minerals in one parcel were let and worked, paying royalties, in another were let but unworked, paying a fixed rent, and in the third were unlet.

Held (1), following *Dick's Trustees* v. *Robertson*, June 28, 1901, 3 F. 1021, 38 S.L.R. 744, that should the minerals in the second parcel be worked and royalties be paid exceeding the fixed rent, the whole royalties would fall to the liferenter; (2) that should the minerals in the third parcel be let, even though it were to the tenant in one of the other parcels, then any fixed rent or royalties therefrom would fall to be accumulated for the fiars, and the interest only on the accumulated fund paid to the liferenter, but any wayleave would fall to the liferenter.

In March 1909 a Special Case was presented by (1) James Naismith and others, the trustees acting under the trust-disposition, dated 22nd January 1892, and codicil, dated 21st April 1893, of the late James Naismith of Coatshill, Blantyre, who died on 19th September 1900, *first parties;* (2) the said James Naismith, who was the testator's only son, and who was unmarried, *second party;* (3) Mrs Mary Jane Thomson Naismith or Cleland, widow, who was the only other child of the testator, *third party;* and (4) William Cleland, the third party's son, and the said James Naismith and others, the trustees acting under the antenuptial marriage-contract of her other child Mrs Cleland or Brown, *fourth parties.*

The trust-disposition and settlement, after sundry bequests, directed the trustees —"*In the Sixth place,* To hold, apply, pay, and convey the whole residue, remainder, and reversion of my said estate and effects, heritable and moveable, real and personal, to my son the said James Naismith, in liferent for his liferent alimentary use allenarly, and to and for behoof of his children equally among them in fee, and that upon their respectively attaining the age of twenty-one years, and on the death of my said son, whichever event shall last happen, which is hereby declared to be the period of vesting of the provisions in their favour in this place, and that under the declarations hereinafter written; and failing my said son leaving children, or in the event of all of them and their issue dying before the said period of vesting of the provisions in their favour in this place, then to and for behoof of my daughter the said Mary Jane Thomson Naismith or Cleland, in liferent for her liferent alimentary use allenarly, and to and for behoof of her children equally among them in fee, and that upon their respectively attaining the age of twenty-one years and on the death of my said daughter, whichever event shall last happen, which, coupled with the above failure, is hereby declared to be the period of vesting of the provisions in their favour in this place."

The settlement also contained this provision:—"And to enable my trustees to carry out the purposes of these presents, there are hereby conferred on them all requisite powers, and particularly (but without prejudice to said generality) power . . . to sell and dispose of the trust estate hereby conveyed, heritable and moveable, real and personal, or any part thereof."

The codicil directed the trustees, in addition to certain bequests in favour of his daughter Mrs Mary Jane Thomson Naismith or Cleland, contained in the settlement, "to make payment to my said daughter, in the event of her surviving me, and only so long as she lives thereafter, of one-half part or share of the net amounts of the annual rents or lordships that may be payable to my trustees under: (*First*) Offer by William Baird and Company, iron and coal masters, One hundred and sixty-eight West George Street, Glasgow, dated the eleventh day of April in the year Eighteen hundred and ninety-two, to take in lease from me certain minerals within the lands and estate of Coatshill, and acceptance thereof by me, dated the said eleventh day of April Eighteen hundred and ninety-two; and (*Second*) Offer by Robert Addie & Sons, iron and coalmasters, Langloan Iron Works, Coatbridge, dated the seventeenth day of May in the year Eighteen hundred and ninety-two, to take in lease from me certain minerals within part of the lands of South Whitelaw Park, lying within the parish of Bothwell, and acceptance thereof by me, dated the

twenty-fourth day in the year Eighteen hundred and ninety-two, or under any leases that may in virtue of the said offers and acceptances be entered into between the said William Baird & Company and me or my trustees, or between the said Robert Addie & Sons and me or my trustees."

The Special Case set forth:—"4. Following upon the offer by Messrs William Baird & Company, a lease, which is dated 12th and 27th September 1894, was entered into between the truster and them. Under that lease, which is for thirty-five years, with breaks in the option of the tenant every five years, the minerals therein leased were being worked at the date of the truster's death, and have been and are still being worked. No formal lease has yet followed upon the informal offer by Messrs Robert Addie & Sons, which is for thirty-one years, with breaks in the option of the tenants every five years; nor have the minerals so let yet been worked. Messrs Addie & Sons have duly paid the fixed rent since 1892, and have not taken advantage of any of the three breaks which have been available to them since said date. The lordships in Messrs William Baird & Company's lease, and the fixed rent payable by Messrs Robert Addie & Sons under the let to them, were received by the truster, and treated by him as part of his income up to his death in 1900, and since then the lordships and rents have been paid by his trustees in terms of his said settlement and codicil, one-half to his son James Naismith, and the other half to his daughter Mrs Cleland. The said lordships and rents form more than one-half the income of the trust estate.

"5. The trustees have received an offer from Messrs William Baird & Company, Ltd., for a lease of the minerals in the Laighlands Grass Park, Bothwell, extending to about ten acres or thereby, part of the trust estate, and after certain negotiations the trustees have provisionally arranged with Messrs Baird & Company, Ltd., for a lease to the latter of the same for twenty-five and a-half years, from Martinmas last 1908, with a break in the tenants' option every three years from Whitsunday next, the fixed rent stipulated to be paid being £30 per annum, or in the landlords' option certain royalties, and also a wayleave of one penny per ton on all minerals carried through from other mineral fields belonging or let to said tenants.

"6. The truster's lands of Coatshill are in the parish of Blantyre, to the south of the river Clyde, while his remaining lands are in the parish of Bothwell, to the north of the river Clyde. Both Coatshill and the lands in Bothwell consist partly of feued and partly of unfeued lands. The minerals in Coatshill are worked by the tenants Messrs William Baird and Company, Ltd., from their Bothwell Castle colliery pits, Nos. 3 and 4, on the south side of the river, and the minerals under Laighlands Grass Park are proposed to be worked by them from pits Nos. 1 and 2 of their Bothwell Park Colliery. The lands of Laighlands Grass Park are discontiguous from the other lands of the truster, the nearest portion of his other lands being rather less than half a mile distant therefrom. The lands of South Whitelaw Park, the minerals in which are let to Messrs Robert Addie & Sons, the lands of Laighlands Grass Park, the minerals in which it is proposed to let to Messrs William Baird & Company, Ltd., and the said lands of Coatshill, are, however, all part of the same mineral field. The whole district is a mining one, and practically the whole minerals therein have been worked or are being worked.

"7. The first parties are satisfied that it will be advantageous to the trust and in accordance with judicious administration thereof to enter into the proposed lease of the minerals in the lands of Laighlands Grass Park, as owing to the small area of said park the minerals could not be properly worked by themselves as a separate field but would require to be worked in conjunction with and from pits on an adjoining mineral field, and they consider that if this lease be not entered into such a favourable opportunity for the working of these minerals may not readily occur again. The minerals in said area are bounded entirely by the mineral fields of Messrs William Baird & Company, Limited, except (1) for a short distance on the west, where they are bounded by minerals belonging to various proprietors, which are under residential property, and are not in course of being worked; and (2) on the south-east, where they are bounded by a portion of the mineral field let to the Bent Colliery Company, Limited. There is, however, a fault or dislocation of the strata which prevents the minerals in Laighlands grass park from being worked from the south-east side.

"8. Questions have arisen as to the powers of the first parties to grant the proposed lease, and as to whether, in the event of such a lease being granted, the rent, lordships, and wayleave payable thereunder will fall to be paid to the liferenter the second party, or the contingent liferenter the third party, or to be held, at any rate so far as the rent and royalties are concerned, for the ultimate fiars. The first, second, and third parties maintain that the first parties are entitled to enter into the proposed lease; while the fourth parties on the other hand maintain that it is not competent for them to do so. Further, in the event of it being held that the first parties are entitled to enter into the proposed lease, the second and third parties maintain that the fixed rents, lordships, and wayleaves arising therefrom fall to be paid to the liferenter, while the fourth parties maintain that the said rents, lordships, and wayleaves, or at all events the said rents and lordships, fall to be accumulated and held by the first parties for the benefit of the ultimate fiars, and only the interest thereof paid to the liferenter. A further question also arises in regard to the lordships that may be paid under the said lease entered into by the truster of the minerals in the lands of South Whitelaw Park. The second and third parties maintain that in the event of Messrs Robert

Addie & Sons working the minerals in the lands of South Whitelaw park leased to them by the truster, and the lordships payable therefor being in excess of the fixed rent, the liferenter will be entitled to payment of said one-half of the lordships in excess of the fixed rent in addition to one-half of the fixed rent. The fourth parties on the other hand maintain that the one-half of these lordships in excess of the fixed rent will fall to be accumulated and held by the first parties for the benefit of the ultimate fiars, and that the liferenter will be entitled to only the interest thereon."

The *questions* for the opinion 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 Laighlands Grass Park? (2) In the event of the first question being answered in the affirmative, do (*a*) the rent and lordships, and (*b*) the wayleave arising under said lease, or any of these, fall to be accumulated and held by the first parties for the benefit of the ultimate fiars, and only the interest that may be earned thereon paid to the liferenter under the sixth purpose of the said trust-disposition and settlement? or (3) Do (*a*) said rent and lordships, and (*b*) said wayleave, or any of these, fall to be paid to the liferenter? (4) In the event of the minerals under the lands of South Whitelaw Park, at present let to Messrs Robert Addie & Sons, being worked, and the lordships payable therefor being in excess of the fixed rent, does one-half of the said lordships in excess of the fixed rent fall to be accumulated and held by the first parties for the benefit of the ultimate fiars, and only the interest that may be earned thereon paid to the liferenter under the sixth purpose of said trust-disposition and settlement? or, (5) Does one-half of whole said lordships, though in excess of said fixed rent, fall to be paid to the liferenter?"

Argued for the first, second, and third parties—(1) The trustees were entitled to grant the proposed lease. The settlement conferred on them all requisite powers, and in particular power to sell the estate. That included power to grant a lease and certainly a mineral lease, which was really more of the nature of a sale of a portion of the land—*per* Lord Cairns in *Gowans* v. *Christie*, February 14, 1873, 11 Macph. (H.L.) 1, at p. 12, 10 S.L.R. 318, at p. 319, approved *per* Lord Watson in *Campbell* v. *Wardlaw*, July 6, 1882, 10 R. (H.L.) 65, at p. 68, 20 S.L.R. 748, at p. 751. Further, trustees had certainly power to grant a lease of minerals which had been worked in the lifetime of the testator, and that applied to the proposed lease of a part of the same mineral field as had been worked before the testator's death. (2) The rents and lordships under the proposed lease would fall to be paid to the liferenter. It was no doubt true that as a general rule the rents of minerals not opened in the testator's lifetime were to be treated as capital—*Ranken* v. *Ranken's Trustees*, 1908 S.C. 3, 45 S.L.R. 10, but if the lease were of minerals in the same field as minerals leased or opened in the testator's lifetime the proceeds would fall to be paid to the liferenter—*Nugent* v. *Nugent's Trustees*, November 20, 1899, 2 F. (H.L.) 21, 37 S.L.R. 618; *Dick's Trustees* v. *Robertson*, June 28, 1901, 3 F. 1021, 38 S.L.R. 744. In any event the wayleave was payable to the liferenter. (3) In the event of the minerals in South Whitelaw Park being worked under the lease granted by the testator, the lordships would be payable to the liferenter. There was no distinction between lordship and fixed rent, *per* Lord Ardwall in *Ranken* v. *Ranken's Trustees, cit.*, and the fixed rent was undoubtedly payable to the liferenter.

Argued for the fourth parties—(1) The trustees had no power to grant the proposed lease. The settlement conferred no such power, and it could not be implied—*Campbell* v. *Wardlaw, cit. per* Lord Blackburn, Lord Watson. (2) If the lease could be granted, the rent and lordships would belong to the fiar—*Campbell* v. *Wardlaw, cit., Ranken* v. *Ranken's Trustees cit.* The minerals in the proposed lease could not be regarded as opened. They were situated in lands quite discontiguous from the testator's other lands. In the case of *Nugent* v. *Nugent's Trustees* the lease was of minerals which had formerly been worked. (3) It was not disputed that lordships payable under the lease of South Whitelaw Park would be payable to the liferenter.

LORD LOW—The first question which is put in this case is whether the first parties, who are the trustees of the late James Naismith, are entitled to lease the minerals of Laighlands Grass Park, which form part of the trust estate, to Messrs Baird & Company. Now there is no express power conferred in the trust deed upon the trustees to grant a lease either of land or minerals; but a power to grant leases may be implied by virtue of the second section of the Trusts Act of 1867, which confers such a power upon trustees provided it is not at variance with the terms or purposes of the trust. It is therefore necessary to turn to the trust deed to see how that matter stands. The trust is a continuing trust. The estate is held for a liferenter (it may be for a succession of liferenters) and for the children of the liferenter or liferenters in fee. The trust accordingly may continue for many years, and the trustees may be expected to have power to do such acts of administration as are necessary in the case of a continuing trust. Now the truster recognises that, because he expressly provides that "to enable my trustees to carry out the purpose of these presents, there are hereby conferred upon them all requisite powers," and among these powers specially conferred, although there is no power to grant a lease, there is power "to sell and dispose of the trust estate, heritable and moveable, real and personal." Now it was pointed out with much force by Mr Fleming that a lease of minerals is practically a sale of these minerals, because the lessee exercises his right not by merely reaping the fruits of the subjects which are let to him, while

leaving the subjects themselves untouched, but by consuming the subjects; so if power to sell is given, one would think that *a fortiori* the truster intended his trustees to have power to grant leases. Indeed, I think that the general power conferred upon the trustees, which I have quoted, may be read as including a power to grant leases, as such a power is *ejusdem generis* with the powers expressly conferred. But there is also this further consideration, that it is plain from the admitted facts that unless the lease proposed is granted, in all probability these minerals will never be realised in any way whatever. The piece of land in which they are situated is a small piece of land—some ten acres in extent. Owing to its position the minerals in it can only be worked in one way, viz., by disposing of them to Messrs Baird & Company, who are the owners of the adjoining minerals, so that in proposing to grant the lease to Messrs Baird & Company the trustees are really taking the only course by which they can ever turn this part of the estate to valuable account. Now I think that is plainly a case which falls within the second section of the Trusts Act of 1867, and that by that Act a power to let the minerals is incorporated into the trust-disposition and settlement. Therefore I am of opinion that the first question should be answered in the affirmative.

The next question relates to the rents and lordships, and also to a wayleave which may become payable under the lease to Messrs Baird & Company when granted, and the question is whether these rents or lordships and the wayleave fall to be accumulated and held for the benefit of the ultimate fiars, only the interest that may be earned upon the accumulations being paid to the liferenter. Now as regards the rents and lordships, I am clearly of opinion that this question must be answered in the affirmative. It was contended that by letting minerals in other parts of the estate the truster must be regarded as having opened up the minerals of his whole estate, and that accordingly the minerals under the Laighlands Grass Park must be regarded as opened minerals. I think that contention is plainly unsound. The truster's estate consisted of three separate parcels of ground situated from half a mile to a mile from each other. He let before he died the minerals in two of the three parcels of ground, and it is the minerals in the third parcel which are in question now. Now that is a separate piece of land altogether. It is quite plain that the minerals in it cannot be worked from the workings in which the minerals in the other two parcels of ground can be worked, and the fact that the firm to whom the minerals are now proposed to be let is the same firm as became lessees of the minerals in one of the other parcels of ground is a mere accident. I think therefore it is plain that this is a new mineral working which it is proposed to open, and that accordingly the rents and lordships must be accumulated for the benefit of the fiars, the liferenters only getting the interest.

There is one other question, and that relates to the lordships of the minerals in a small piece of ground which was let during the truster's lifetime to Messrs Addie & Sons. It seems Messrs Addie have not worked these minerals, but have contented themselves with paying the fixed rent. The question put to us is whether if they in the future work the minerals and pay the lordships, these lordships are to be treated as capital or income; but it is admitted now that that question is settled by the judgment in *Dick's Trustees* v. *Robertson*, 3 F., p. 1021, and that the truster having let the minerals they are minerals which were opened in his lifetime even although they were not worked, and that accordingly rents and lordships go to the liferenters.

I forgot to mention, in referring to the second question, the point of the wayleave. I think a wayleave is in a totally different position from the rents and lordships derived from minerals, because a wayleave is the rent which is paid for the use as a road through the spaces from which the coal has been taken, and it is in no sense like a lordship, which is a price paid for that part of the subject which is taken away. Accordingly the first question should be answered in the affirmative; the second in the affirmative as regards rent and lordships, and in the negative as regards wayleave; the third question in the negative as regards rents and lordships, and in the affirmative as regards wayleave; the fourth question in the negative; and the fifth question in the affirmative.

LORD ARDWALL—I am of the same opinion. The first question is whether the trustees have power to grant a lease of the minerals in the lands of Laighlands Grass Park. I have no doubt that they have. The truster expressly confers upon his trustees "all requisite powers" for carrying out the purposes of the trust. In the circumstances of this case I think that in order to carry out the proper administration and realisation of this estate it is requisite and essential that they should have power to grant a lease of these minerals. As was pointed out by Mr Fleming, and as appears from the facts stated in the case, if they have not this power, and if they cannot let these minerals, these minerals must, as far as one can see, be lost to the estate and to the beneficiaries entirely. But if there was any doubt whether they had the power under the clause to which I have adverted, I think the power to sell, which the deed expressly confers on them, remedies any difficulty, because their power is "to sell and dispose of the trust estate hereby conveyed, heritable and moveable, real and personal, or any part thereof." Now these minerals are undoubtedly part of the trust estate. It has been settled in many cases, and particularly upon very high authority in *Gowans* v. *Christie* (11 Macph. (H.L.) 1), that a lease of minerals is really a sale of a portion of the *solum* of the land, and that being so I should say that this

power covers a lease of minerals, and that accordingly in granting such a lease the trustees are well within the powers of the trust deed taken as a whole. On the other questions I agree with your Lordship. The case of *Campbell* v. *Wardlaw* (10 R. (H.L.) 65), which was quoted to us, does not, I think, rule this case as regards the power to grant a lease; for in that case, in the first place the powers of administration were not so wide as here, and in the next place there was no power to sell in the trust deed which was there under consideration. Now with regard to the other matter, namely, the distribution of the rents and lordships between liferenters and fiars, I think the case of *Campbell* and the case of *Ranken's Trustees* v. *Ranken* (1908 S.C. 3), are the ruling authorities, and we must decide this present case in conformity with these as proposed by my brother Lord Low. I further agree that any revenue derived from wayleaves forms just part of the ordinary rent of the estate, and is in quite a different category from rents and lordships, and falls to be paid to the liferenter, and also that, following *Dick's Trustees* v. *Robertson* (3 F. 1021), any lordships which may become payable in respect of the small portion of minerals under South Whitelaw Park let to Messrs Addie & Sons fall to be paid to the liferenter.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the First Division.

The Court answered the first question in the affirmative; the second, branch (*a*), in the affirmative, branch (*b*) in the negative; the third, branch (*a*), in the negative, branch (*b*) in the affirmative; the fourth in the negative; and the fifth in the affirmative.

Counsel for the First, Second, and Third Parties—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Fourth Parties—Wark. Agents—Laing & Motherwell, W.S.

Tuesday, June 15.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

LYONS & COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Deposit—Railway—Left Luggage Office—Ticket—Reference to Conditions Endorsed on Back of Ticket—Condition of No Liability where Goods over Certain Value unless Declared—Liability where Goods Stolen.

L., a traveller for L. & Co., deposited with a railway company at their left luggage office at a station three hampers containing ladies' clothing, and received a ticket bearing in legible type a statement that the company only received the articles "upon the conditions expressed upon the back of this ticket." One of these conditions was—"The company will not be responsible for the loss of any parcel, package, or other article when the value . . . exceeds £5 unless at the time of delivery . . . its true value is declared to exceed £5," and a further percentage charge paid in addition to the ordinary charges. L. read and understood the statements printed on the face of the ticket, but did not read the conditions printed on the back thereof. He did not declare the value of any of the hampers to exceed £5, and made no additional payment, although the value of each was over £5. On presentation of the ticket for delivery, one of the hampers was found to have been stolen. L. & Co. brought an action against the railway company for £84, the value of the hamper.

Held (1) that the pursuers were bound by the conduct of L. as their agent, and were precluded from denying that the goods in question were deposited with the defenders on the terms contained in the ticket; and (2) that the defenders accepted the goods on deposit on the conditions specified, and were not responsible for any loss or damage suffered by the pursuers from their loss.

Authorities reviewed.

Lyons & Company, wholesale merchants, Watling Street, London, raised an action in the Sheriff Court at Edinburgh against the Caledonian Railway Company for payment of the sum of £84, 19s.

The following narrative of the facts and circumstances which gave rise to the action is taken from the interlocutor of the First Division, who found in fact:—"(1) That on 15th February 1907 the pursuers' traveller, Mr R. H. Lyons, deposited with the defenders at their left luggage office at Buchanan Street Station, Glasgow, three hampers, or skips, containing ladies' clothing, and received from defenders a ticket specifying the articles deposited, being No. 10 of process; (2) that on the face of the said ticket there was printed in legible type a statement in the following terms, viz., 'The company only receive the herein-mentioned articles upon the conditions expressed on the back of this Ticket'; and that on the back of the same there were printed certain conditions, one of which, being the fourth, was a condition to the following effect, viz., 'The company will not be responsible for the loss of . . . any parcel, package, or other article when the value of such parcel, package, or other article exceeds £5 . . . unless at the time of the delivery of such parcel &c. to them, its true value is declared to exceed £5 on a form to be supplied by the company, and signed by the party delivering such parcel &c.,' and further, that payment at the rate of one penny per £ in respect of such value should be made in addition to the ordinary charges; (3) that the said R. H. Lyons read and understood the statements printed on the face of the ticket, but did not read the conditions printed on the back thereof, or otherwise