The Court refused to give the respondent any expenses.

Agents for Appellant—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for Respondent—Ronald & Ritchie, S.S.C.

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*Saturday, June 29.*

SPECIAL CASE—GUILD AND OTHERS.

*Fee and Liferent—Mineral Rents.*

*Held* that the liferenter, and not the fiar, was entitled to the rent.

This was a Special Case between John Guild, merchant in Dundee, William Brown, merchant, Port Dundas, Glasgow, and William Guild, merchant, Newburgh, Fifeshire, a majority of the trustees acting under the trust-disposition and settlement of the deceased William Guild, brickmaker, formerly of Whitevale, Glasgow, on the first part; and James Guild, farmer, Balgonebarns, near North Berwick, brother of the deceased, a liferenter and fiar, and also the only trustee acting under the said trust-disposition and settlement of the said William Guild, other than the parties of the first part; Marion Guild or Learmonth, wife of John Learmonth, Whitehouse Terrace, Edinburgh, with consent of the said John Learmonth, as her administrator-in-law, and for his interest; Janet Guild, residing in Great Western Road, Glasgow; and Beatrice Guild or Lyon, residing in Oakvale Terrace, Hillhead, Glasgow, widow of the late George Lyon, engineer, Glasgow, liferentrices under the provisions of the said trust-disposition and settlement of part of the estates of the said deceased William Guild, on the second part.

William Guild died on 2d January 1866, unmarried, leaving a trust-disposition and settlement, and two codicils, dated respectively 20th August 1861, 13th July 1863, and 21st December 1865. Marion Guild or Learmonth, Janet Guild, and Beatrice Guild or Lyon, were the only sisters of the truster, and were aged respectively sixty-one, sixty-four, and fifty. Mrs Learmonth had no children. Under the trust-disposition and settlement, the trustees were directed to hold the residue of the truster's means and estate for behoof of the parties therein mentioned, and divide the same, *inter alia*, to the extent of one-fifth to each of his sisters for their liferent use allenarly. Besides personal property, which was insufficient to pay his debts, the truster's estate consisted of heritable property at Camlachie, in the municipality of Glasgow, comprising feu-duties, dwelling-houses, and about 12 acres of land, in which there existed near the surface a thick stratum of clay. Part of these 12 acres had been let for the purpose of excavating the clay, and had been wrought by Mr Hodge, brickmaker, Glasgow, from 1845 to 1855. From 1855 to 1864 Mr Guild, the truster, wrought and used the clay in the said part of the 12 acres for brick-making; and, shortly before his death, but before the execution of the last codicil, he gave up brick-making, and let the clay in the said portion of the 12 acres to William Steven, brickmaker, Glasgow, for ten years from Candlemas 1865. The extent of this brick-field was about 15,000 sq. yards. Another part of the said 12 acres, extending to about 31,000 square yards, had been wrought as a clay-field from 1854, first by Hodge & Macdonald for about ten years, and afterwards by Hodge & Son, under a new arrangement made by the truster with them, for a lease of eleven years from Candlemas 1864. The arrangements above mentioned were made by binding missives between the truster and each of the tenants, but no formal lease had been executed prior to the truster's death. Formal leases were subsequently entered into between the trustees and the tenants in implement of the said missives. The lease to Messrs Hodge & Son provided for a fixed rent of £150 per annum, payable whether the clay was worked or not, with a lordship for all bricks made exceeding three tables or 1,650,000 bricks per annum, in the proportion which that number bears to the fixed rent of £150. Mr Steven's lease was in similar terms, the fixed rent being £120. The gross income of the residue of the estate was about £750 per annum, about £270 of which was derived from the brick-fields. The remainder was made up of house rents and feu-duties. There were bonds over the property, and the nett income was about £400 per annum. The brick-fields were said to be steadily rising in value. The trustees had no power to sell any part of the heritable property till the testator's youngest nephew or niece alive should have attained twenty-one years, which could not be the case till December 1874. At the time of the testator's death, the fair value of the ground let to Mr Steven and Messrs Hodge & Son was £4600. Its present fair value was 6s. per sq. yard, subject to a deduction of thirty per cent., in consequence of the rubbish filled into the excavations not having as yet become sufficiently consolidated to sustain buildings. The truster was in the habit of furnishing returns to the lands valuation assessor, in which he stated the annual value of the brick-fields at the fixed rents payable by his tenants. The rents appeared in the valuation rolls as the annual value of the brick-fields, and on this valuation the testator paid taxes.

Down to the date of this case the liferentrices had been paid sums to account of their interest in the estate; but a question was raised as to whether they were entitled each to one-fifth of the whole clay rents, and, if not, what was the extent of their interests in the clay rents. The liferentrices claimed their proportion of the whole clay rents. The trustees were divided in opinion. Those unfavourable to the liferentrices' claim contended that they were only entitled to the interest of the clay rents, at the rate of five per cent. per annum.

In these circumstances, the opinion and judgment of the Court was requested on the following questions:—

"(1) Did the whole clay rents of the brick-fields form part of the annual income of the trust, divisible among the liferentrices to the extent of one-fifth each?"

And if this question should be answered in the negative,

"(2) To what proportion of the said rents were the liferentrices entitled?

M'Laren for the first parties.

Balfour for the second parties.

At advising—

Lord Justice-Clerk—The question raised in this Special Case relates to the right of certain liferenters under a general settlement to participate in rents drawn from surface clay workings under a lease granted by the testator some years before his death, and terminating in 1875. It is

contended for the flars that, as the clay is *pars soli*, the right to these rents is in the flar, and not in the liferenters, who are bound to use the subject *salva rei substantia;* and they maintain that these rents must be capitalised, and that the interest only can be drawn by the liferenters.

The general rule, that the right to work coal or quarries does not pass with such legal liferent as terce, or with localities in lieu of terce, may be held as settled in our law, although the authorities are meagre, and our earlier writers, Craig and Stair, do not lay down the law quite so stringently. Stair rather seems to favour the liferenters' right when the minerals were in the course of being worked by the granter, and there was no danger of exhaustion. There is also a text in the civil law favourable to the right of a usufructuary to work mines which had been opened and worked by the father of the family; 7 D., 1, 13, 5. But probably the cases of *Preston* and the *Duchess of Roxburgh* may be held to decide that in such circumstances the liferenter has only a usufruct, and cannot appropriate the produce of mineral workings as being a diminution of the capital or substance of the land.

The case is different, however, with a liferenter by reservation, and it is also different, as was found in the case of *Waddell*, when a liferent is constituted not in specific lands, but in the *universitas* of the granter's estate. In that case the testator had granted to his sister a right in liferent to his whole means and estate. Prior to his death he had let a mineral field for 999 years. On a very deliberate advising, and a review of all the authorities, the Court sustained the liferenters' claim to the rent, not on any specialty, which was disclaimed by the bench, but on the intention of the testator as disclosed by the terms of such a settlement. The main ground relied on by the Judges was, that the minerals had truly ceased to be an adjunct or accessory of the land, and constituted a separate estate, bearing an annual money return, and that it could not be supposed that the testator intended to exclude his sister from this important source of income. I think Mr Bell in his Principles rightly states the authority of this decision as applicable to cases of general settlement, although, of course, in all such cases the intention of the granter must prevail. If a liferent of a mineral field were specifically given, or if the granter of the general settlement had no estate but mineral rents, I do not suppose the question would be doubtful. But, looking to the special facts in this case, I entertain no doubt that the liferenters must prevail.

The subject is one in the immediate vicinity of Glasgow, and within the municipality. The ground in question is building ground, which is rising rapidly in value, but cannot be so used pending the lease of the clay on the surface. The rent derived from the clay is more than a third of the whole free rental of the testator's property, but is less than the annual return which would arise from the building value of the ground. It is plain from the facts stated that even now the use of the ground as a clay field is not the most valuable to which it might be put. In two years the trustees will be entitled to sell the ground, and it is expected to bring about £10,000 as building ground. This would yield a return exceeding the clay rent by more than £120. I look therefore on the clay lease as being only a temporary mode of occupying the surface, which in no respect impairs the capital or substance of this estate, but leaves it as valuable as it was before; and that there is no ground for excluding the three ladies to whom this liferent has been left from a benefit which they were certainly intended to enjoy.

The other Judges concurred.

Agents for First Parties—J. & R. D. Ross, W.S.
Agents for Second Parties—J. & A. Peddie, W.S.

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*Tuesday, July 2.*

## FIRST DIVISION

### MACALINDAN *v.* ADDIE & SONS.

*Discharge—Reduction.*

A workman was injured by the falling of a cage in the shaft of a pit, and he afterwards accepted £6 from his employers, and granted a receipt therefor, the receipt bearing to be "in full of all demands at that date." A proof having been led, the Court *held* that this payment had been made and received as full payment of all the workman's demands against the employers, and that he was thereby debarred from suing an action of damages against them.

This was an action of damages, brought in the Sheriff-court, for personal injury sustained by the pursuer Patrick Macalindan in June 1870, at one of the defenders' pits near Inchinnan, in the county of Renfrew, in consequence of the falling of a cage in which he was descending the pit, whereby he was precipitated to the bottom. The pursuer averred that the accident was the result of defect or insufficiency of the slides for the cage, consequent upon the culpable negligence of the defenders. The defence was, that after the accident the pursuer agreed to accept £6 in full of all demands against the defenders, and was thereby debarred from suing the action. In support of this defence two documents were produced. In the first place, an agreement (No. 7 of process) dated 2d December 1870, in these terms:—"I, Patrick M'Lundie, do hereby agree to accept of the sum of six pounds stg. for damages received in No. 1 Pit shaft on 10th June 1870, and this in full of all demands at this date. "PAT. M'LIENDEN.

"£6, 0s. 0d."

And in the second place, a receipt (No. 8 of process) dated 3d December 1870, in these terms:—"Received from Messrs Robert Addie & Sons the sum of six pounds stg. for damage received in No. 1 Pit shaft on 10th June 1870, and this in full of all demands at this date.

"*Signed on Stamp*,
"PATRICK M'LONDEN.

"£6, 0s. 0d."

The Sheriff-Substitute (COWAN) pronounced the following interlocutor:—

"*Paisley, 12th December* 1871.—Having heard parties' procurators, and considered the closed record and productions, before answer allows defenders a proof in support of their preliminary defence, and to pursuer a conjunct probation; grants diligence to parties; and appoints the proof to proceed upon the 11th January next, at 11 o'clock A.M.

"*Note.*—While the Sheriff-Substitute is of opinion that such a document as the alleged agreement of No. 7 of process does not require a stamp, it appears to him that in the case of the pursuer, who may be an illiterate and uneducated man, it