payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law."

It has been found in England, in the case of *Wallis* (Law Reports, 5 Excheq., p. 62), that this clause only applies to tolls due for the use of the line. Had the case turned on this question, I should have been anxious to have had farther argument. My first impression was that that judgment could not be supported. The reverse was certainly assumed in the recent case of *Carter*, in the First Division, and has been very elaborately maintained by Lord Shand in the case of *Guild* v. *The Caledonian Railway*. But although I think the judgment by the English Court is placed on very narrow ground when rested on the meaning of the word "tolls," I wish to reserve my opinion as to the scope and construction of this clause. The clause does not appear to me intended to create any lien between carrier and customer, but to create a right of retention and sale between the owners of the railway and the carrier using it. It was intended to give the owners of the line a right against the carriages and goods of the traders carrying their own goods along the line, or common carriers using the line to carry the goods of others, and that for payment of the tolls due for the use of the line. The right is incident to the contract of hire, not to the contract of carriage; and when the Company became themselves common carriers, I doubt if the section applies. It certainly would not, as far as I see, without something in the Special Act, give any such claim to a railway company running over the line of another company; and I do not think it was meant to regulate the relations of carrier and customer at all.

But the words are general, and certainly ambiguous; and assuming that they have the construction contended for by the defenders, they have two important qualifications. The primary right created by this clause, in any view of it, is to enable the owners of the line to retain carriages and goods for payment of the dues of carriage for which they are liable at common law, and also to sell without judicial authority after a demand has been made. This last power is of course a stringent and important privilege. But as regards goods other than those, the tolls on which are in arrear, these are only subject to the terms of the clause—*first*, provided the goods primarily liable have been removed from the Company's premises; and *secondly*, when they are the property of the debtor.

It is thus seen that the clause does not introduce a general lien for a general balance over any goods in possession of the Company belonging to the debtor. The lien is, in the first instance, special over the goods, the carriage of which is unpaid; and it is only in the event of their being removed that the Company can have recourse to other goods within the Company's premises. The Lord Ordinary thinks that these words refer to improper or surreptitious removal. This is perhaps stating the proposition too broadly. I think it also includes the case of carriages and goods necessarily removed from the custody of the Company, owing to the nature of the service required. But I doubt greatly if this substituted or accessory lien will ever emerge if possession is voluntarily parted with without demand for the tolls, and much more if delivery be voluntarily made on an established course of credit, by which payment of the debt is conventionally postponed. A specific lien is discharged by credit being given for the debt; and though it may revive when the period of credit expires if the subject of it remain in the possession of the creditor, yet if possession be voluntarily parted with it is absolutely extinguished.

I have thought it right to indicate these views, because they seem very material on the construction of this clause, and would certainly prevent railway companies, which act as common carriers, combining a system of giving credit for their tolls with this substituted right of lien. But even supposing that the clause is to be construed as the defenders contend for, the ground on which I wish to place my judgment, coinciding as I do in the result at which the Lord Ordinary has arrived, and his forcible exposition of the views by which he reaches it, on the fact that these bales of goods could only be dealt with by the Railway Company as the property of their debtor, subject to the onerous right acquired in them by the consignee. The pursuers had an absolute right to delivery in any question with the carriers, whatever the rights of the latter might be, if they were only in a question with their debtor; and holding that the goods were not the property of the debtor in the sense of the statute, I think the case must be decided on the same principle and in the same way as the analogous case of *Ferguson*, to which we have been referred.

The other Judges concurred.

Counsel for Pursuers—Dean of Faculty (Clark), and Blair. Agent—J. Latta, S.S.C.

Counsel for Defenders—Solicitor-General (Watson), and Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Saturday, January 23.

SECOND DIVISION.

[Lord Young, Ordinary.

WARDLAW *v.* WARDLAW'S TRUSTEES.

Liferent—Mineral Rents—Intention.

Terms of settlement conferring a liferent o one-third of an estate, *held* to convey the mineral rents of old coal workings on the estate.

By disposition and settlement of 9th July 1833, and codicil of 20th May 1834, William Thomson of Stevenson's Beath conveyed in favour of his daughter Miss Agnes Thomson and her heirs and assignees one third *pro indiviso*, to his other daughter Miss Margaret Thomson and her heirs and assignees one-third *pro indiviso*, and to his granddaughter Mary Leechman, child of his daughter Mary Thomson, and afterwards Mrs Wardlaw, "in liferent for her liferent use allenarly, and her heirs, whom failing to the foresaid Agnes Thomson and Margaret Thomson, and their foresaids, equally in fee;" the remaining one-third *pro indiviso* of all and whole the several lands and heritages then belonging or that might belong to him at the period of his decease. The truster died

on March 11, 1837, survived by his widow, who died a few years after him. His daughter Margaret died on December 3, 1840, married, but without issue, leaving a settlement embracing her heritable estate, and particularly her one-third of the lands of Stevenson's Beath. This settlement was in favour of James Stenhouse of North Fod, her sister's husband, and her niece, the pursuer Mrs Mary Leechman or Wardlaw, Mrs Stenhouse and Mrs Wardlaw made up titles as heirs portioners, and conveyed the third share to their respective husbands. In addition, Mrs Mary Leechman or Wardlaw became proprietor in fee of the half of her aunt Mrs Russell's third of said land. The fee of the third liferented by her was destined by her father's settlement to the pursuer, her eldest son, as her heir-at-law. The said Miss Mary Leechman and Adam Low Wardlaw were married in November 1841. By mutual trust-disposition and settlement in 1858 the spouses, in implement of certain antenuptial contracts of marriage, conveyed in favour of each other and the survivor in liferent, for the survivor's liferent use allenarly, and to certain trustees under the reserved power and faculty in favour of Dr Wardlaw, their several heritable and moveable estates, and the deed contained a special conveyance by Dr Wardlaw of one half of the lands of Easter Fordel, the half of the lands of Garvock, and the park mansion house of Clifton. The same deed contained also a special conveyance by Mrs Wardlaw of her one-sixth part of the lands of Stevenson's Beath, Cowdenbeath, and Mowbray's Beath, her half of the lands of Wester Cleish, and her half of the corn-mill of the lands of Dowhill, in favour of her husband in liferent allenarly (with a certain power and faculty specified), and to her trustees in fee.

Mrs Wardlaw predeceased her husband and died in January 1865. Her husband, father of the pursuer, died in January 1873. Mr Wardlaw executed various testamentary deeds under which the pursuer acquired certain articles specifically bequeathed to him. His chief property was his interest under his wife's grandfather's will in the one third *pro indiviso* of the lands of Stevenson's Beath and others.

By lease dated 11th October 1841 between Mr and Mrs Stenhouse and Mr Wardlaw on the one part, and the Forth Iron Company on the other, the coal and ironstone in the lands of Stevenson's Beath, Cowdenbeath, and Mowbray's Beath, were let for 30 years from Martinmas 1849. This lease was superseded by another in 1867 between James Stenhouse junior and the pursuer, with consent of James Stenhouse senior and Dr Wardlaw, "for all right of liferent, courtesy, or other right or interest" competent to them, and Mr A. V. Smith Sligo, sole partner of the Forth Iron Company, for 31 years from Martinmas 1865. Down to the dissolution of their marriage, Dr and Mrs Wardlaw drew the rents or royalties paid by the Forth Iron Company effeiring to the one third *pro indiviso* of which Mrs Wardlaw had the liferent. The pursuer averred that the said minerals had not been wrought prior to 1849. The defender averred that they had been worked by the truster, the pursuer's greatgrandfather continuously, and that the mines were in operation at the time of his death. The pursuer, on his mother's death in 1865, entered into possession and drew the rents of the said one-third share liferented by his mother.

This suit was raised in 1874 by John Wardlaw against the testamentary trustees of his father and mother, in order to have it found and declared "that the said deceased Mrs Mary Leechman or Wardlaw, granddaughter of the said deceased William Thomson, was, from and after 1837, the date of her said grandfather's death, until the 9th day of January 1865, the date of her own death, entitled to a right of liferent, but of liferent allenarly, in one-third *pro indiviso* of All and Whole the several lands and heritages pertaining and belonging to him, or that might pertain and belong to him at the period of his decease, and specially without prejudice to the foresaid generality, in one-third *pro indiviso* of All and Whole his lands of Stevenson's Beath, Cowdenbeath, and Mowbray's Beath; that the pursuer, under and by virtue of the trust-disposition and deed of settlement of the said deceased William Thomson and the said Mrs Mary Inglis or Thomson, his spouse, became entitled upon the death of the said Mrs Mary Leechman or Wardlaw, the pursuer's mother, to the fee of the said one-third part *pro indiviso* of the said several lands and heritages above described, and to the rents, maills, duties, and profits thereof; and that the same, or the prices of such of them as have been sold, pertain and belong to him still: And, further, that the pursuer's said deceased mother, in virtue of her liferent of the said one-third part *pro indiviso* of the said lands and heritages, had no right to the coal, ironstone, lime, or other minerals in the same beyond what was necessary for her beneficial possession of the land; and that the rents, profits and royalties paid and received for the period between 11th March 1837 and 9th January 1865, being the date of the death of the pursuer's mother, for such coal, ironstone, lime, and other minerals within the same, belonged and belong to the pursuer; and on its being so found and declared, the defenders, as trustees and executors foresaid, ought and should be decerned and ordained, by decree of our said Lords, to exhibit and produce before our said Lords a full and particular account of the rents, maills, duties, profits, and royalties drawn and received by the said Adam Low Wardlaw, or by his said spouse, in respect of the coal, ironestone, lime, and other minerals of the said *pro indiviso* third part of the said lands and heritages, from March 1837 to the said 9th January 1865, and of the whole intromissions therewith had by the said Adam Low Wardlaw and Mrs Mary Leechman or Wardlaw, whether jointly or severally, whereby the true balance due by them, or either of them, and due by the defenders as representing them respectively, may appear and be ascertained by our said Lords; and the defenders, as trustees and executors foresaid, ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £10,000 sterling, or of such other sum more or less as shall appear and be ascertained by our said Lords to be due by the defenders as trustees and executors foresaid, as the balance of the intromissions had by the foresaid Adam Low Wardlaw and Mrs Mary Leechman or Wardlaw, and by the defenders themselves, with the rents, profits, and royalties, drawn and received by them or either of them in respect of the coal, ironstone, lime, or other minerals in the pursuer's one-third part *pro indiviso*, above mentioned, with interest thereof at the rate of £5 per centum per annum, from the several dates upon which such rents or profits and

royalties were periodically received by them, or either of them, until payment; or, in the event of the defenders, as trustees and executors foresaid, failing to produce an account as aforesaid, they ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £20,000 sterling, which shall in that case be held to be the balance of the said intromissions, with interest thereof at the rate foresaid from the 27th day of January 1873 until payment: And further, the said defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £500, or such other sum, less or more, as may be found in the course of the process to follow hereon to be due to him in respect of legitim, with interest thereon at the rate foresaid, from 27th April 1873, being three months after the date of the death of the said Adam Low Wardlaw, until payment."

The pleas in law for the pursuer were,—"(1) The right of the pursuer's mother under the settlement of her grandfather, Mr Thomson, to one-third *pro indiviso* share of the lands thereby conveyed, having been a right of liferent only, the pursuer is entitled to decree of declarator to that effect, in terms of the first conclusion of the summons. (2) The pursuer being eldest son and heir of his mother, the succession to the fee of the said one-third part *pro indiviso* of the said lands, by her decease, opened to him in terms of Mr Thomson's settlement, and the pursuer is entitled to decree in terms of the second declaratory conclusion of the summons. (3) The pursuer's mother having been merely a liferenter, she was not entitled to grant a lease of the coal, ironstone, and other minerals in the said lands, or to work the same, or cause them to be worked beyond what was necessary for her beneficial possession of the lands; and the pursuer is accordingly entitled to decree in terms of the third declaratory conclusion of the summons. (4) The said Adam Low Wardlaw, or his wife Mrs Mary Leechman or Wardlaw, having received payment of the rents or royalties of the minerals belonging to the pursuer, the defenders are bound to count and reckon with the pursuer, in terms of the conclusion to that effect."

The defenders pleaded—"(1) Under Mr Thomson's disposition and settlement the pursuer has only right to an equal share of the one-third of the lands of Stevenson's Beath and others liferented by Mrs Mary Leechman or Wardlaw, his mother, along with the other children or issue of her body. (2) Under the terms of the marriage articles entered into between the pursuer's father and mother, the legitim claim of the children of the marriage is impliedly discharged, and this construction of their marriage articles is confirmed by the discharge contained in their mutual disposition and settlement. (3) Mrs Wardlaw had right to one-third *pro indiviso* of the produce of the coal and ironstone mines in the said lands during the period of her survivance, in respect (1) that she was a testamentary liferentrix; (2) that the mines were open mines at the commencement of her possession; and (3) that Mrs Wardlaw's two aunts, as proprietors of one-third each, and after Mrs Russell's death Mrs Wardlaw herself and the deceased James Stenhouse jun., as proprietors of one-sixth each of the lands, had power to work the minerals, and that the sum which the pursuer claims is the produce of mineral workings in operation independently of the act of the liferentrix. (4) Mrs Wardlaw having *bona fide* uplifted and consumed the said rent and royalties on a probable title, her representatives are not liable in repetition. (5) The action is barred by *mora* and acquiescence on the part of the pursuer. (6) The defenders are in no view liable in payment of interest on the said rent and royalties. (7) The defenders are entitled to impute the amount of their counterclaims, or such parts thereof as they may establish, in compensation of any payments in which they may be found liable to the pursuer."

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"*Edinburgh, October* 21, 1874—The Lord Ordinary having heard counsel for the parties, and considered the closed record and proof—(1) Finds and declares that the pursuer, under and by virtue of disposition and deed of settlement, dated the 9th day of July 1833 and 20th day of May 1834, and registered in the books of council and session upon the 31st day of May 1837, granted by William Thomson, Esq. of Stevenson's Beath, in the parish of Beath and county of Fife, and by Mrs Mary Inglis or Thomson, his spouse, became entitled, upon the death of Mrs Mary Leechman or Wardlaw, the pursuer's mother, to the fee of one-third part *pro indiviso* of all and whole the several lands and heritages pertaining and belonging to him, or that might pertain and belong to him at the period of his decease, and, especially without prejudice to the foresaid generality, of one-third *pro indiviso* of all and whole his lands of Stevenson's Beath, Cowdenbeath, and Mowbray's Beath, houses, biggings, yards, tofts, crofts, parts, pendicles, and whole privileges, teinds, and pertinents thereof, lying within the parish of Beath and shire of Fife; and to the rents, maills, duties, and profits thereof, and that the same pertain and belong to him still: (2) Finds and declares that the pursuer is entitled to *legitim* out of the free moveable estate of Adam Low Wardlaw, his father, with interest thereon at the rate of five per centum per annum from 27th April 1873; and appoints the defenders within ten days from this date to lodge in process a state showing the amount of the free moveable estate aforesaid, and of the share of *legitim* due to the pursuer, in terms of the above finding: (3) Finds that the minerals in said lands of Stevenson's Beath and others had been wrought by or on behalf of the testator during his own lifetime, and were at the time of his death under lease granted by him: Finds that, according to the sound construction of the said disposition and deed of settlement, it was the said testator's intention that his granddaughter, the said Mrs Mary Leechman or Wardlaw, the pursuer's mother, under her right of liferent should be entitled during her life to the rents and royalties of the minerals pertaining to the one-third *pro indiviso* share of said lands and others; Finds accordingly that she was entitled during her life to said rents and royalties, and that the pursuer is not entitled to count, reckoning, and payment therefor; Appoints the case to be enrolled with a view to the application of these findings, and for further procedure, and decerns: Finds no expenses due to or by either party."

The pursuer reclaimed.

Authorities quoted—Stair ii. 1, 22; ii. 1, 74; Ersk ii. 1, 25; Bankton 2, 6, 6; Bell's Prin. 1048; Bell's Comm. 1, 60, 61; *Warren*, M. 15,863; *Waddell*, Jan. 21, 1812, F. C.; *Swinton*, Feb. 1, 1814, F. C.; *Guild*, 10 Macph. 911.

At advising—

LORD JUSTICE-CLERK—The question, whether a title to the fruits of an heritable subject conveys to the grantee the right to the annual produce of coal workings in the property has been a question ever since the days of Sir Thomas Craig. That acute and ingenious writer discusses the question whether a widow is so entitled in respect of her terce, and although he resolves the question by assimilating the produce of coal mines to growing timber, and against the right of the widow, he refers to a case in which, in his own time, the reverse was very deliberately decided. Lord Stair treats this question with his usual discrimination, and lays down the principle which, with more or less consistency, our lawyers have followed ever since. The principle seems to be this, that unworked minerals cannot be considered as falling under a liferent by constitution, because they remain simply parts of the heritable subject itself, *partes soli*, and accessories of the land, but that when a fiar has himself worked the minerals, and let them on lease, the minerals themselves cease to be mere accessories, become a separate rent-yielding subject, and therefore are presumed to pass to those to whom the fruits of the subject are conveyed. No doubt this doctrine is laid down with two reservations—first, that there is no danger of exhaustion of the minerals; and secondly, that the measure of the fiar's use shall not be exceeded. But these after all are only elements, which in the question of intention, as such questions under settlements necessarily are, are only exceptions to the general presumption, which I take to be—that where the fiar of an estate containing coal workings which had been let under lease, conveys a liferent of that estate, he must be presumed to give the right to those mineral rents which he himself had treated as the fruits of the heritable subject, unless the reverse is established by expression or presumption of contrary intention. If the mineral be in danger of exhaustion, and be shown to be so, that element may indicate the contrary intention on the part of the granter. The measure of the former workings is a much more slender presumption, and in the general case it is more easy to presume that the granter contemplated the letting of his minerals for what they would bring, and that there is no danger of exhaustion, than that the liferenter was to lose the accruing benefit which a better market and enhanced prices would give. We had occasion to consider the authorities in the recent case of *Guild*, which, however, was decided on the question whether the workings complained of diminished the value of the estate. But on the very able review of these authorities which we had from the bar, I have come to be of opinion that in the general case it is to be presumed that a liferenter is intended not only to enjoy the rent of going collieries, but to let new leases as long as there is no substantial danger of exhausting the mineral. It is a presumption of intention and nothing more, but one which derives much additional strength in the present day from the increased mercantile value of the commodity and the much larger proportion which such rents generally bear to the income of an estate. In the case of *Waddell*, in which the very able opinions of great Judges seem entirely to sanction the views I have expressed, Lord Gillies says—"It is said the minerals are more valuable than the lands themselves, and when the testator gave the total liferent I cannot conceive that he meant that she should want the most valuable part of it." Mr Bell in his Principles indicates very clearly his opinion that the case of *Waddell* substantially affirmed the doctrine which I have deduced from it. I think this is the general presumption as regards the intention of the granter of such a universal right, because my observations have been directed to a universal liferent—a general liferent of a whole estate. In the present case I have no doubt of that whatever. The testator divided his estate into three *pro indiviso* parts; two of these he left to his two daughters and their heirs and assignees in fee; the third he left to his granddaughter in liferent and to the heirs of her body in fee; whom failing to his two daughters. There was a lease of the minerals current at the testator's death. There can be no doubt that the testator intended that the liferentrix should enjoy the rent under that lease. There seems as little doubt that he intended that whatever the fiars enjoyed as the produce of the lands during their lives the liferenter should enjoy during hers, and that when the mineral lease expired she should have her share of any renewed use of the subject, whether it yielded more or less than it did before. If the question of legal right be solved, the question of intention seems to exclude any other theory. He never could have intended that on the expiration of the current lease this source of revenue should terminate. The opposite view, which was contended for with an earnestness which contrasted rather with the singular nature of its results, came to this, that the liferentrix, while she could not help the coal being worked and the rents being paid, was under an obligation to accumulate the latter for the benefit of a possible but uncertain heir, seeing that until her death it could not be known who the heir might be; that the testator intended to lay her under an obligation to accumulate these rents for the benefit of her aunts in case she herself had no family; and that after the expiration of the lease, as she had no right as liferentrix to enter into a new lease, it was intended that she should prevent the minerals from being worked, and to force the division of the subject—the only other alternative in that view being, that as administratrix for this unknown heir she was entitled to combine with the other two in letting the lease, but she was clearly under no obligation to do so, and as she could get no benefit by it, the probability is that she would not. And it is now maintained in this action that as she did not do these unusual things, her representatives are to be liable to account for all the profits which the mineral yielded during her life. This contention carries the doctrine, or at all events carries the example, of a fiduciary fiar to a practical extent to which I know of no precedent. On the hypothesis of the argument, Mrs Wardlaw had no interest of any kind in these coal workings, and we are asked to presume that the testator meant her to undertake the labour and responsibility of collecting and accounting for these rents during the whole period of her life, which extended to twenty years after the death of the testator, for which she was not to receive a single farthing of profit. I cannot affirm a proposition which seems to have so little foundation either in law or in intention. And therefore I am prepared to adhere to the Lord Ordinary's interlocutor on that first and general ground. In regard to the question of *bona fide* perception, for my own part I

would rather not be driven to express an opinion upon that matter. The *bona fides* of Mrs Wardlaw is clear enough, but if the views that were contended for on the other side in regard to her fiduciary character are correct, which I think they are not, there would be some difficulty in principle on the question, how far that was a title on which *bona fide* perception could be pleaded at all? But without indicating an opinion on that matter, the first ground is enough for judgment, and on that my opinion proceeds.

Lord Neaves—I am of the same opinion. This is a question of importance, and it has been long under the consideration of our authorities, but I think the law is settled in the way your Lordship has represented. No doubt, if they stand unworked, minerals of all kinds are parts of the soil as much as the earth above them; but it has been laid down, and particularly from the time of Lord Stair it has been laid down upon the highest authority, that the original proprietor, who is the plenary fiar of the estate, and whose will with reference to its disposal must guide the Court in regard to any settlement which he makes, may so deal with the estate in his own person that it shall become, not a subject of the sale of individual portions from time to time of the minerals which may be extracted out of it, but that it shall become the subject of a lease. Now, I have not heard it maintained, and I don't think it can be maintained, that a lease is not a proper right as applicable to minerals. If there is a lease of minerals, what does it mean? It means that what is due under it is of the nature of fruits. It means that the *naturalia* of a lease takes place, and may be forfeited in the usual way, and it is to be dealt with according to the usual rules of warning and removal. I have heard no doubt thrown upon that subject; and if once you make it a lease you bring the produce or the subject of that location into the nature of fruits, because a lease can only be of the fruits, and in making a lease of the coal and minerals the proprietor who is entitled to do so turns it into a prospective right to fruits according to the terms of the bargain that he has entered into. If it was not a lease, and if they were not the fruits, it would come to this extraordinary fiction—for it would be nothing but a fiction—that it was a periodical sale to the lessee, or nominal lessee, of the portion of the minerals he had taken out, and that the sum paid was a price. That is not the law surely, and it receives no countenance from the law; but that is what the party is driven to who says it is *pars soli*, and that it is just a partial sale of a portion of the soil for a price. That being excluded, and it being brought to a lease, it comes to this, that it implies what Lord Stair has said,—the power of the proprietor to turn his prospective right of advantage from this subject into a series of rents, which reduce the subject itself to the category of fruits. That was done here; and there can be no doubt that the liferenter was entitled to these fruits during his life, just as he would have been entitled to any other fruits yielded by the subject. I think the circumstance of the other two fiars in this case is a very strong specialty in favour of the liferentrix, because it is quite plain that the three-thirds of the estate were to be managed in the same manner. Now, were the two fiars not to have the ordinary power of fiars with reference to this matter? Were they to be crippled by the inability of the third party, who was liferentrix on the one hand, but through when the fee was given to a possible heir? Was it not to be administered in the same way as if there had been a third fiar habile to concur with the others in what was necessary to be done. If it is said that she could not let the minerals again, it must come to this, that the other two fiars could not do so either practically, because although theoretically they might have done so, how was it possible to carry out a lease of two-thirds of the minerals by them. Or if it was to be said that they were to divide the fee, were they to have a division into parts of the subterranean elements, and each to have her own pit, and that one of them might lie idle while the others were worked. But if she had the power to concur and join in a lease again of the third that she was liferentrix of, where is the obligation on her to account to anybody for the proceeds? The fact of there being a possible existent heir does not necessarily imply accumulation. The parent of the future possible heir must herself be supported, and I cannot hold that she was to be a mere steward for uplifting the rents and paying them into a bank or investing them in some other way. On these grounds, and on the general principle already mentioned, the subject having been converted by the testator himself into a subject yielding annual fruits from this mineral, I consider that the interlocutor of the Lord Ordinary is right. I think it better to refrain from entering into the question of *bona fide* perception, though my inclination, but not without some difficulty, would also be that, upon the authorities, the receipt of these as fruits, if *bona fide* believed to be so, was sufficient to protect her from repetition.

Lord Ormidale—It appears to me that the question in this case may be stated in this way,—What was the intention of the testator, looking at the terms of his settlement, at the nature of the subject, and the other circumstances which are before the Court in which that settlement was executed? I can quite understand that he might have so expressed himself as to have made it plain that he intended that no part of the fruits of this colliery, which was working at the time of his settlement, should go to the liferenter. On the other hand, he might have made it equally plain that the liferent was to include the annual rents and lordships derived from the working colliery. He has not expressed himself so as to make that perfectly clear, but from the expressions used by him, the nature of his settlement, the nature of the subject, and all the other circumstances, we are entitled—putting ourselves in his position at the time he made the settlement—to ascertain as well as we can what really was his intention. Now, I cannot doubt, and very much upon the grounds stated by both your Lordships, that he intended here to put his granddaughter, with whose third alone we have to deal at present, into the same position as far as the profits or beneficial enjoyment during her life was concerned, as the other parties. She was not entitled to dispose of the fee of her third; that is perfectly clear; but it appears to me that looking at all the circumstances, she was intended to be put in the same position as his two daughters who had the other two-thirds, but her right in her third was to be limited to her own life. I entirely concur with your Lordships in thinking that the first and

perhaps the main consideration in regard to the circumstances entitling us to come to this conclusion is the state of the subject at the date of the settlement or at the date of the death of the testator. There is at that time a going colliery, which cannot properly in itself be divided into three parts: that is to say, it cannot be wrought by merely one of the parties who has a third, and not by the others. I don't see that that is possible. It must be wrought by them all and for them all, or at least for those who have an interest in the colliery. Now, suppose that there were not three parties here, but that the whole of the colliery and estate had been left in liferent allenarly to the grandchild, and the fee to the heirs of her body. In that case, would she not be entitled to go on working the open colliery which was going at the time of the testator's death, and to enjoy the rents and lordships which were truly annual fruits during the period of her life? If so, what would be the result? Was she to allow the colliery to be closed,—to become drowned, and to go to wreck and ruin? If she was not entitled to interfere with it at all that would be the inevitable result, and very speedily. The machinery and other things, which must have cost a great deal of money, and which was put in for the purpose of working the colliery, would all have gone for nothing, and the colliery itself, being inundated with water, would have been in such a condition when the fiar was entitled to come into possession that it might have been entirely worthless to him. I cannot suppose that any such result was contemplated by the testator. And is the case rendered at all different by his leaving the absolute fee to the extent of two-thirds to his two daughters, and the other third in liferent allenarly to his granddaughter. The two daughters are entitled to go on with the colliery, and it is impossible that that could be done without at the same time working for the liferenter. There is no indication so far as we can see in the settlement that the testator intended that the liferenter should have no beneficial right herself, but that the produce of the colliery should go for the benefit of some unknown future heir who might come to have a right to the fee. That, I think, would be a very extraordinary result to arrive at. I think it is a conclusion that we cannot very well come to on any fair consideration of this settlement. That would be imposing on the liferentrix a very large and a very serious obligation indeed. If she is to be held as a fiduciary fiar, bound to work the colliery merely to satisfy the legal fiction in regard to making up feudal titles, her share must be wrought also; and is there any obligation upon her to superintend the working by some person acting for her, and who must be paid, and to realize her share of the coal by selling it, and then to accumulate the money? Or is she to accumulate the coal itself, and keep it for the unknown fiar? I see nothing in the settlement to lead me to the conclusion that there is any such obligation upon her at all, and I don't think that that is a view that we can possibly take of the intention of the testator, or of his settlement. On the contrary, it appears to me that the only conclusion which we can arrive at is that the annual fruits derived from the colliery, whether yearly rents or lordships, were intended by him to be enjoyed by the liferenter herself during the period of her life. It seems to me that that view is quite supported by the authorities, and established by he dictum of Lord Stair, as it has been understood by Mr Bell, and illustrated by the case of *Waddell* and the case of *Guild.* The only doubt that has occurred to me on the subject is whether the liferentrix was entitled, along with the two daughters who had the other two-thirds, to prolong the leases. Is that not exceeding—to use the language of Lord Stair—the measure and use which the testator himself had and exercised in regard to this colliery? Now, I think that would be a very narrow view to take of the expression of Lord Stair, and I think it is more consistent with reason to hold that, there being a working colliery, the parties were entitled when the existing lease, which had a good many years to run at his death, came to an end, or preparatory to that event taking place, to continue, by a prolongation of the lease or by a new lease, the same working which had previously taken place. It may be quite true that the workings may have increased, and that a much larger rent or lordship may be derived under the new lease from the mine, but I see no evidence that there was any additional working authorised. It may be that there is an enhanced price for the coal itself, and it may be wrought fairly and reasonably enough to a much larger extent in the same colliery, just as it had existed before. There is no allegation on the part of the pursuers, so far as I have seen, that there was any unreasonable or undue working of the colliery; and therefore I rather think that the mere fact of prolonging the lease and carrying on a colliery which had existed in the time of the testator himself, and which was left by him as a going colliery, is not, in the language of Lord Stair, any undue working of the colliery beyond the measure and the use of the testator, which he had exercised himself. Upon all those grounds, therefore, I concur with your Lordships in thinking that the Lord Ordinary's interlocutor ought to be adhered to. There is a question raised on the record about *legitim.* The Lord Ordinary has held that the pursuer is entitled to legitim, and he has appointed a state to be put in which will show the amount of it, and I rather understood from the opening on part of the defenders that they gave up any objection to that part of the interlocutor, so that the Court does not require to trouble itself upon that subject. In regard to the other alternative plea as to *bona fide* perception and consumption of the coal, I concur with your Lordship in the chair that it is not only inexpedient to enter upon it, but I doubt whether we can very well do so. If we determine that the liferentrix had an unquestionable right to enjoy the produce of the colliery during her life, there is an end to the other question, assuming that she had no such right, whether or not she is protected from the obligation to account on the principle of *bona fide* perception and consumption.

LORD GIFFORD—I am of the same opinion. I think the Lord Ordinary's interlocutor is quite sound and ought to be affirmed. I take this case to be a little different from the case of the disposition of a special subject to a person in liferent and a fiar *nominatim* in fee. I rather think the sound ground is that suggested by all your Lordships, that it is a simple question of intention, what did the testator intend to give to his granddaughter by the deed of settlement now before us? and in getting at that intention we must place ourselves as far as we can in the position of

the testator, and keep in view the whole circumstances of the case. Now, doing that as much as we can upon the evidence before us, I really have no difficulty whatever in holding that the testator intended his grand-daughter to enjoy under the liferent which he gave her not only the agricultural rents of the subject, but the mineral rents. And I reach that conclusion upon the considerations which have been suggested by your Lordships. In the first place, this is an old colliery. We have leases as far back as 1816, and I think it appears from the proof that it was a going colliery long before that. It was not a new colliery opened, it was not an unwrought mineral subject, but a colliery which had been producing some kind of produce from time immemorial. Then it was a colliery always under a lease; and that is a very important point, for another set of elements might have come in if it had been wrought by the proprietor himself to a limited extent, or for certain limited purposes. In the second place, the deed of settlement confers a universal liferent. It is a liferent of a third of the whole estate. That is a very important element, for I rather concur with the argument of Mr Millie, that a liferent of this kind is always nearer a liferent by reservation than a liferent by constitution. The thing he gives is what he was enjoying himself, and in the deed he says, "Reserving my own liferent in the premises." In the third place, there is no provision and no direction for accumulation. That is the only alternative which was contended for on the other side; because it could hardly be said that there was anything illegal either in receiving the current mineral rents under the leases current at the testator's death, or in renewing these leases afterwards. No trustees are appointed who might be the instruments for accumulation, with directions where the funds were to be put, and there is no presumption of any kind that there was to be such accumulation. Then, if the existing lease was for behoof of the liferentrix, as I think it must be held to be, it would be very strong indeed to hold that she could put an end to this old colliery when that existing lease came to an end. Therefore, in the whole circumstances, I think it was the intention of the testator that his grand-daughter should enjoy the liferent, and as there was no illegality in it, the intention must receive effect. I agree that there is no necessity in this case for going into the question of *bona fide* perception and consumption, but I cannot help saying that I agree with Lord Neaves that if it had been necessary to decide that question, as there has been unquestionably *bona fides* here, there has been sufficient to protect the liferenter from repetition.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for John Wardlaw against Lord Young's interlocutor of 21st October 1874—Refuse said note, and adhere to the interlocutor complained of: Find the reclaimer liable in expenses since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the same and to report; further, remit the cause to the Lord Ordinary to proceed with the same, and with power to decern for the expenses now found due."

Counsel for Pursuer—Dean of Faculty (Clark) Q.C. and Pearson. Agents—Dewar & Deas, W.S.

Counsel for Defender—Solicitor-General and Millie. Agents—Macgregor & Ross, S.S.C.

Friday, January 15.

FIRST DIVISION.

[Lord Gifford, Ordinary.

HAMILTON *v.* GARRAWAY AND OTHERS.

Municipal Elections—35 *and* 36 *Vict. c.* 33, § 22, *subsection* 2—25 *and* 26 *Vict. c.* 101, § 48—3 *and* 4 *Will. IV., c.* 76.

Held that the 48th section of "the General Police and Improvement (Scotland) Act, 1862" is not repealed by sub-section 2 of the 22d section of "the Ballot Act 1872."

Municipal Election—35 *and* 36 *Vict. c.* 33, § 22, *subsection* 2—25 *and* 26 *Vict. c.* 101, § 50.

Held that the annual elections of Commissioners in a town which has adopted the "General Police and Improvement Scotland Act, 1862" are rightly held on the same day of the same month as the first election, in terms of section 50 of the said Act, which is not in that respect repealed by subsection 2 of section 22 of the Ballot Act.

Process—Summons—Competency—Party.

Held that objections to the manner of conducting an election of Commissioners of Police for a burgh, which if sustained would have the effect of annulling the entire election, could not be disposed of under a summons which only called one of the Commissioners, the clerk to the Commissioners of the burgh, for himself and as representing them and the returning officer.

This was an action of reduction and declarator at the instance of Gavin Hamilton, writer, Dunoon, against James Garraway, Dunoon, and David Gray, clerk to and on behalf of the Commissioners of Police of the burgh of Dunoon, for himself and as representing them, under "The General Police and Improvement (Scotland) Act, 1862; and Robert Leslie Smith, Dunoon, senior magistrate and returning officer for the election of commissioners for the said burgh on 20th October, 1873. The reduction and declaratory conclusions of the summons were to the following effect—"That is to say, the said defenders to bring with them, exhibit and produce before our said Lords, the packets of counted and rejected ballot papers, tendered votes list, list of votes marked by presiding officer, statements relating thereto, declarations of inability to read, and packets of counterfoils, and marked copies of register, specified or referred to in 'The Ballot Act, 1872,' and in use at the election on the taking of the poll for the election of Commissioners for the burgh of Dunoon on the 20th day of October last 1873; as also a pretended declaration of the poll, or other writing or minute, whereby the defender, Robert Leslie Smith, the senior magistrate and returning officer foresaid, on or about the said 20th day of October, declared that William Campbell, builder, William Whitesmith, feuar, John Martin, draper, and Robert Walkinshaw Young, Royal Renfrewshire Militia, Dunmore, Kirn, had been elected Commissioners for said