LORD MURE—I am of the same opinion, and have nothing to add. I should like to reserve my opinion upon the operation of the Trusts Act in regard to the power of giving long leases of new mineral fields.

LORD SHAND—I agree with your Lordships in the result of your judgment and in the reasons which you have given.

It has been settled certainly since the beginning of the century that a liferenter of an estate is entitled to the benefit of the income derivable from mineral leases existing at the date of the truster's death, and I think, whether that has been in terms decided or not, that the right extends to renewals of existing leases. It is clear that the law has not gone further in favour of a liferenter, and it appears to me that it would require very clear language upon the part of a testator to confer any higher right. "If once minerals are leased," as is well said by Lord Neaves in the case of *Wardlaw* v. *Wardlaw's Trustees*, *ante*, vol. ii. p. 374, "they are brought into the category of a subject bearing fruits. By granting such a lease the proprietor turns his right of bare property into a right to receive the prospective fruits." And therefore in a question as to the extent of a liferenter's rights, if a proprietor has granted mineral leases during his lifetime, he has shown that the rents derivable from these are to be considered as fruits to be enjoyed by the liferenter. It is a very much larger assumption that because a power has been given by Act of Parliament to lease subjects never before worked, the rents of these have been thereby converted into fruits which will fall to the liferent estate. Whether there might be a distinction in the case of a special direction in a trust-deed raises a different question.

In regard to the powers given by the Trusts Act, I think it right to say that I do not entertain any doubt that a power to lease minerals never before worked is included. The words of the section (sec. 2 and sub-sec. 3) are as plain and unrestricted as they can be. It cannot, I think, be suggested by their terms that they are to be confined to minerals previously let.

The Lords answered the question in the negative.

Counsel for the First Party — Trayner — Macfarlane. Agents—Tait & Crichton, W.S.

Counsel for the Second Party — Murray. Agents—T. & F. Anderson, W.S.

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*Thursday, March* 16.

## FIRST DIVISION.

### SPECIAL CASE—THE DUKE OF PORTLAND *v.* THE DUKE OF PORTLAND'S TRUSTEES.

*Trust—Tailzie—Intention of Truster.*

The proprietor of large heritable and moveable estate in Scotland conveyed the whole to trustees, with directions to settle the heritage, "as soon as practicable" after his death, on a series of heirs in strict entail; the corporeal moveables on the lands he directed his trustees to settle upon the same series of heirs, "under strict prohibition against selling or disposing of the same, except such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms;" all other moveable estate he directed to be invested in land, to be entailed on the same series of heirs. The trustees having in the course of management of the farms sold certain crops and stocking—*held* that the price so obtained fell to be paid to the first of the series of heirs of entail, the exception above quoted being an exception from the prohibition only, and not from the conveyance.

By trust-disposition and settlement, dated 17th January 1871, the late Duke of Portland conveyed to trustees his whole estate in Scotland, with directions to settle, "as soon as practicable" after his death, the whole landed estate in strict entail on a certain series of heirs. He further provided—"In the third place, my said trustees shall settle upon the same series of heirs all corporeal moveables belonging to me situated in Scotland, under strict prohibition against selling or disposing of the same, except such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms, or my harbours at Troon, or elsewhere out of doors on my landed estates in Scotland. And in the fourth place, my said trustees shall realise my other moveable or personal estate in Scotland, and shall dispose of the same in such way as I shall by any writing under my hand direct and appoint; and failing such direction or appointment, my said trustees shall invest the same in the purchase of lands in Scotland, in the counties of Ayr and Caithness, or wholly in one of these counties, and shall settle the lands so to be purchased, by deed or deeds of strict entail, upon the series of heirs pointed out in the second purpose of this trust." He further gave his trustees "power to manage and administer the trust-estate hereby conveyed during the subsistence of this trust, and to do and execute all acts and deeds that shall be necessary and proper for fully carrying out the purposes hereof; and as it may be desirable to exchange certain of the lands now belonging or which may belong to me at my death for other lands more conveniently situated . . . . I hereby specially empower and authorise my trustees, with consent of the heir for the time entitled to the beneficial use and enjoyment of my said estates, to exchange such parts of the lands now belonging or that may belong to me at my death, as they may think proper, for other lands which it may appear to them are more conveniently situated as aforesaid, and to execute all deeds necessary for that purpose."

At the time of his death the late Duke held in his own occupation several of the farms on his Ayrshire and Caithnesshire estates, as also the harbours at Troon and Lybster, and certain furnished houses. On his death his successor, the present Duke, resolved not to manage the farms himself, but to let them to tenants. With this view, the crop, stock, and implements on those farms were sold by the trustees, with the consent and approval of the Duke, and realised £12,000.

A question arose between the present Duke and the trustees of the late Duke as to the disposal of this sum in accordance with the provi-

sions of the above-mentioned deed of settlement, and the present Special Case, to which the Duke was the first party and the trustees were the second parties, was adjusted, and the opinion of the Court asked upon the following questions—"(1) Does the exception contained in the third purpose of the said trust-disposition and settlement apply only to the prohibition against selling and disposing? (2) If so, do the moneys realised from the sales of the corporeal moveables which have been sold, as above mentioned, fall to be handed over to the first party in lieu of the articles so sold? or (3) Does the exception apply to the articles themselves directed to be settled, so as to bring the excepted articles under the operation of the last purpose of the settlement?"

Argued for the first party—The scheme does not admit of the trustees stepping in and administering at all. There was no intermediate administration provided for. The moveables should, like the heritage, have been conveyed so soon as practicable after the death of the Duke of Portland, and the accident of the conversion of these moveables into money should not affect the right of the beneficiary.

Argued for the second party—The whole purpose of the truster must be taken into view, without looking to the details of the machinery by which it is to be carried out. The main object is to tie up upon the heirs of tailzie the whole estate, heritable and moveable, as far as that was possible. The Duke did contemplate an intermediate administration, for he makes a provision for excambion, and for the expense of management.

Authorities—*Graham* v. *Stewart and Another* (*Lynedoch's Trustees*), March 15, 1852, 15 D. 558; *Kinnear* v. *Kinnear*, March 20, 1877, 4 R. 705; *Marquis of Bute* v. *Lady Bute's Trustees, &c.*, December 3, 1880, 8 R. 191; Ersk. ii. 2, 1 and 3.

The Lords made avizandum.

At advising—

LORD PRESIDENT—The purpose of the settlement of the late Duke of Portland, dated 17th January 1871, was to settle his whole estate in Scotland. For this purpose he conveys that whole estate to trustees, with instructions to settle the whole landed estate in strict entail. As regards the moveable estate, he distinguishes between what he calls corporeal and incorporeal moveables, and with regard to the former his purpose and desire is to entail them along with the lands. That cannot be done, and the question is, what is to be done under the two clauses in the settlement with reference to the moveables of both classes? These clauses are:—"In the third place, my said trustees shall settle upon the same series of heirs all corporeal moveables belonging to me situated in Scotland, under strict prohibition against selling or disposing of the same, except such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms, or my harbours at Troon, or elsewhere out of doors on my landed estates in Scotland. And in the fourth place, my said trustees shall realise my other moveable or personal estate in Scotland, and shall dispose of the same in such way as I shall by any writing under my hand direct and appoint; and failing such direction or appointment, my said trustees shall invest the same in the purchase of lands in Scotland, in the counties of Ayr and Caithness, or wholly in one of these counties, and shall settle the lands so to be purchased, by deed or deeds of strict entail, upon the series of heirs pointed out in the second purpose of this trust." Now, the effect of this is that the corporeal moveables belong to the Duke of Portland, who is the first of that series of heirs called in the destination of this estate, and these moveables are his absolute property.

But the exception in the third provision of the settlement raises a question of some little difficulty. "In the third place, my said trustees shall settle upon the same series of heirs all corporeal moveables belonging to me situated in Scotland, under strict prohibition against selling or disposing of the same, except such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms or my harbours at Troon, or elsewhere out of doors on my landed estates in Scotland." These may be, and to a certain extent have been sold. Are those articles excepted from the conveyance, or from the prohibition against selling? Now, I am of opinion that the exception is against the prohibition, and not against the conveyance. It seems a very natural exception against the prohibition. The corporeal moveables in this deed mean everything that has a *corpus*. Light is thrown upon this by another part of the deed. He conveys "all and sundry moveable or personal means and estate in Scotland, corporeal and incorporeal, of every kind and denomination." Then follow words including a variety of things, and things clearly incorporeal, viz., "moneys belonging to me lying in bank or elsewhere in Scotland, and shares, stocks, funds, debts, arrears of rent and feu-duties," &c., &c. All that is an enumeration of incorporeal moveables. Consequently "corporeal" means everything that has a *corpus*. "Corporeal" and "incorporeal" have no technical meaning in the law of Scotland. They must be taken in their popular sense, which is much the same as that of the Roman law.

By the third provision he intended that the trustees should convey everything that had a *corpus*, but then it occurred to him that if he prevented all power of sale inconveniencies would arise. Certain articles would get worn out in time and become useless. The exception to the prohibition to sell related only to "such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms or my harbours at Troon, or elsewhere out of doors on my landed estates in Scotland." He intended to except farm implements, stocking, apparatus, &c. There was no reason why these should not be conveyed to the heir under "corporeal moveables," but it was necessary to give a power of sale to prevent embarrassment. The exception is equivalent to a power of sale; and the money realised belongs to the party to whom the corporeal moveables belonged prior to the sale, namely, to the Duke of Portland. I am therefore for answering the first and second questions in the affirmative. The third question is superseded.

LORD DEAS—It is quite plain that the Duke who made this deed thought that he could make

subject of entail certain things which he could not. To see what the different articles were we must look to the deed. I agree with my Lord President that the exception is not from the conveyance but from the prohibition. I also agree that in order to see what "corporeal moveables" are in the deed the sense in which the truster used these words elsewhere in the deed must be looked to. His other expressions form a sort of glossary.

LORD MURE—I concur. The phraseology is a little peculiar in a deed framed with reference to the law of Scotland.

LORD SHAND—I only add that this reading and construction is confirmed by the direction to his trustees to settle his landed property by deed of entail "as soon as practicable after my death." The truster had thus no idea of management by these trustees for any length of time.

The Lords answered the first and second questions in the affirmative.

Counsel for the First Party — Robertson — Pearson. Agents—Melville & Lindesay, W.S.

Counsel for the Second Parties—Mackintosh—Gillespie. Agents—Gillespie & Paterson, W.S.

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*Thursday, March* 16.

## SECOND DIVISION.

[Lord Adam, Ordinary.

### DUNCAN OR THOMAS *v.* LITTLEJOHN AND OTHERS.

*Succession—Vesting.*

Terms of deed under which *held* (*rev.* Lord Adam) that vesting had taken effect *a morte testatoris*, and was not deferred until the period of division.

*Heritable and Moveable—Conversion.*

Terms of deed in respect of which *held* (*rev.* Lord Adam) that notwithstanding the large number of persons who were to participate in an heritable estate which trustees had power to sell, conversion from heritable to moveable was not operated.

Henry Duncan died on 4th July 1830 survived by a widow, one son, and seven daughters. He left a trust-disposition and settlement dated 12th February 1823, and three codicils dated 20th April 1824, 30th April 1825, and 30th October 1828. His estate consisted chiefly of house property in Edinburgh. By the trust-disposition and settlement he conveyed to Henry Duncan, his son, and certain other persons, as trustees for behoof of his said son Henry Duncan, and of the seven daughters of the truster, "equally among him and them in liferent, for his and their liferent uses allenarly, and to the lawful child or children procreated and who may be procreated of his and their bodies equally among them in fee (that is to say, the whole children of my said son and daughters shall have right equally among them *per capita* and not *per stirpes* to the fee of the whole subjects immediately hereinafter disponed for behoof of my said son and seven daughters in liferent)," certain heritable property in Edinburgh. By another provision of the deed he conveyed certain other subjects in Edinburgh (under burden of an annuity to his widow) to the same trustees for behoof of his son and his five daughters Rachel, Eliza, Robina, Isabella, and Ann. These subjects were conveyed for behoof of those persons in terms precisely similar to those just above quoted. To his son the testator also conveyed a long lease of a dwelling-house called Comely Gardens. He further conveyed to the trustees for behoof of his son and the five daughters above named in liferent allenarly, and their children equally among them *per capita* in fee, the whole residue of his heritable and moveable estate. The deed went on to provide—that "with respect to my heritable estate generally, above conveyed (exclusive of what is specially conveyed), now belonging or which belongs to me at the time of my decease, I hereby authorise my said trustees, in the order foresaid, either to hold the same undisposed of in their own names for behoof of my said son and of the said Rachel, Eliza, Robina, Isabella, and Ann Duncan in liferent, for his and their liferent uses allenarly, and of his and their children equally among them *per capita* in fee, as aforesaid, or, with consent of my said five daughters last above named, or the children of any of them who may be dead before me, to sell and dispose thereof, and to grant the necessary dispositions or other conveyances to the purchasers, who shall be nowise concerned with the application of the price or prices, and either to purchase other heritable property with the prices thereof, or to lend out the proceeds on good heritable securities, one or more, and to take the rights and securities thereof to my said trustees, in the order foresaid, for behoof of the said Henry Duncan himself and of my said five daughters last named equally among them in liferent, for their liferent uses allenarly, and to his and their children equally among them *per capita* in fee, as aforesaid: And further, I hereby direct and appoint my said trustees, in their order, to convert the whole of my moveable estate before conveyed into cash as soon as conveniently may be after my decease, and to lay out the same either in the purchase of heritable property or properties, or to lend it out upon good heritable securities, one or more, and to take the rights, titles, and securities thereof to the said trustees themselves in their order, also for behoof of the said Henry Duncan and my said five daughters last above named equally among them in liferent, for his and their liferent uses allenarly, and to his and their children equally among them *per capita* in fee, as aforesaid." It was then provided that the trust "shall as to all the property, heritable and moveable, hereby conveyed, remain and subsist during the lifetimes of my said son and of the whole of my said seven daughters, and the survivor of them; and upon the death of the survivor of them and my said son my said trustees shall be bound to denude in favour of the persons who shall then have right to the different subjects hereby conveyed in terms of this deed, the said trustees being always entitled to be reimbursed and relieved of all necessary expenses and obligations which they may have incurred in the management and execution of this trust: And it is hereby specially