Thursday, June 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MUNGALL *v.* BOWHILL COAL COMPANY, LIMITED.

Lease — Mineral Lease — Wayleave — Construction — Wayleave for Minerals Wrought in Lands "Let" to Lessees —Availability of such Wayleave for Minerals Wrought in Lands Owned by Lessees.

By a lease of the minerals lying under certain contiguous estates the proprietors gave to the lessees full power "to communicate any of the workings or mines in connection with the minerals hereby let with those of the other properties the minerals under which are let or may hereafter be let to the lessees," and to draw or carry minerals worked in said properties through or over any of the properties thereby let without payment of wayleave. The lessees were owners of lands which adjoined the subjects leased by them. In an action of interdict brought by one of the lessors, *held* that the lessees were not entitled to carry minerals wrought in the property belonging to them through or over the lands which they held under the lease, and interdict granted accordingly.

The Bowhill Coal Company, Limited, Fife, were proprietors of the estate of Wallsgreen. By lease dated 20th and other days of May 1895, between the company and John Clark Goodall, proprietor of the estate of Balgonie, and the proprietors of certain other estates, which all adjoined Wallsgreen, the lessors let to the company the coal and other minerals lying in the lessors' lands therein mentioned. The lease contained the following clause:—"The lessees shall have full power to communicate any of the workings or mines in connection with the coal, ironstone, oilshale and fireclay hereby let with those of the other properties the minerals under which are let or may hereafter be let to the lessees, and the lessees shall be entitled to draw and carry coal, ironstone, oilshale and fireclay worked by them in any of the said properties through the underground passages, workings, or mines, or over the surface of any of the properties hereby let, and that without payment of any wayleaves, but without prejudice to the claim for surface damages as aftermentioned, and expressly declaring that this exemption from wayleave shall endure only so long as this lease shall continue of the said subjects respectively."

The lease also contained the following clause:—"Third. Over and above said rents and royalties, the lessees bind and oblige themselves to pay for all damage done to the surface of the ground or the buildings, drains, dykes or fences thereon, or to the wells or runs of water or in any manner of way, during the currency of this lease, by any of their operations in working the minerals hereby let, or in working the adjoining minerals which may be the property of or be leased to the lessees."

In 1895 the company acquired right by lease to the minerals under the estate of Balgreggie, which adjoined the lands of Wallsgreen and Balgonie. In 1898 Henry Mungall purchased the estate of Balgonie from John Clark Goodall, and thereafter he presented the present note of suspension and interdict against the Bowhill Coal Company, in which he craved the Court to interdict the respondents from carrying through the underground passages, workings, or mines, or over the surface of the lands of Balgonie, any mineral other than that worked by the respondents in the lands of Balgonie, or in any other properties the minerals of which were or might be let to them, and in particular to interdict them from so carrying minerals worked by them in the lands of Wallsgreen.

The respondents admitted that they had carried coal worked out of their property of Wallsgreen, and also led traffic connected with the working of Wallsgreen over the railway line on Balgonie.

The respondents pleaded, *inter alia*, (3) "The respondents being entitled to do the acts complained of should be assoilzied, with expenses."

On 25th October 1899 the Lord Ordinary (KINCAIRNEY) passed the note and granted interim interdict; and on 22nd February 1900 he pronounced the following interlocutor:—"Finds that the lease does not confer right on the respondents to carry through or over the lands of Balgonie, belonging to the complainer, minerals not worked in the mineral fields let to the respondents, and does not confer on them right to convey through or over the said lands minerals worked in the lands of Wallsgreen: Therefore declares the interim interdict already granted perpetual, and interdicts, prohibits and discharges, in terms of the note of suspension and interdict, and decerns: Finds the complainer entitled to expenses," &c.

Opinion.—"The question is whether the respondents the Bowhill Coal Company have right, in virtue of a mineral lease, to carry minerals worked in lands called Wallsgreen, belonging to them, through the mineral roads or over the surface of the lands of Balgonie, belonging to the complainer.

"The lease in question, which is dated on various days in May 1895, is a lease to the respondents of the minerals under five adjoining parcels of land called Murrayknowes, Inglishall, Little Thornton, Balgonie, and Smithyhill, and it is granted by the proprietors of these subjects, each proprietor letting the minerals under his own property. From the plan annexed to the lease it appears that the lands of Wallsgreen, which belong in property and at the date of lease belonged to the respondents, the Bowhill Coal Company, adjoin the other subjects, and along with them may be said to form a group of mineral fields. Further to the east, but still adjoining

these subjects, is a property called Balgreggie, larger than the other subjects, the minerals in which are also let to the respondents, but by a different lease. They are not included in the lease in question.

"This action is by the proprietor of one only of the properties, viz. Balgonie, and the complainer seeks to interdict the respondents from carrying through or over Balgonie the minerals raised in Wallsgreen. The terms of the prayer are somewhat wider, but that is practically the only matter in question.

"The complainer has quoted on record the only clauses in the lease which are directly applicable. The material words are these:—[*His Lordship quoted the wayleave clause ut supra.*] Unless the power to carry the minerals of Wallsgreen under or over the other mineral fields or properties is conferred by these words, it is not said that there are any other words in the lease which can confer it. Neither party moved for a proof, and both were agreed that the question was a question of construction of the lease. When one looks at the plan annexed to the lease, and observes the proximity of Wallsgreen to the other subjects, it is impossible to deny that apparently it would have been a most natural thing, and a thing to be expected, that the lessees would have stipulated for power to carry the minerals of Wallsgreen through or over the other properties. There may, however, have been reasons for not doing so, and the question is whether it is possible to read the words of the lease as conferring that power, and I think it is not. It is possible that the matter may have been overlooked, but I cannot construe the clause as giving the power. The greater part of the clause refers unambiguously and expressly to the lands and minerals let by that lease, and nothing else. The only words which can by possibility refer to any other lands or minerals are 'with those of the other properties which are let or may hereafter be let to the lessees,' and in the following sentence there are the words 'said properties,' which may refer to these other properties, not being properties included in that lease. The complainer maintains that properties which are let to the lessees cannot possibly be read as including properties belonging to the lessees, and I think the argument sound, and that it would be going wholly beyond construction and inadmissible to read 'let to' as meaning 'owned by.' The respondents contended that that construction was admissible because a lease of minerals was not properly a lease, but was really a sale which conferred on the lessees a right of property—*Gowans* v. *Christie*, February 14, 1873, 11 Macph. (H. L.) 1, *per* Lord Cairns, p. 12, so that the lessees have as much right to the minerals which they hold under a lease as to those which they hold as their own property, and that therefore the word 'let' might without much straining be held to include 'belonging.' But I cannot agree in that view. There might be some cause for speaking of minerals let as minerals belonging to the lessee; but to speak of minerals which belonged to a person in property as minerals let to him would be extremely unnatural and unaccountable. In this deed there is no trace of such a mode of expression. The respondents are never alluded to as tenants of Wallsgreen. Where Wallsgreen is expressly mentioned it is spoken of as 'the lessees' property; and property and tenancy are contrasted in other parts of the deed.

"The respondents referred to other clauses of the deed as supporting their view. I have read the deed carefully, and I think there are none. There is only one which I think it needful to mention. It is the third clause, and refers to damage caused to the surface 'in working the adjoining minerals, which may be the property of or be leased to the lessees.' Here minerals held in property are distinguished from minerals held in lease, and the clause does not refer at all to roadways on the surface but to injury done to the surface and the buildings on it by mineral workings, and such injury might be caused by working the minerals of Wallsgreen to the lands adjacent.

"On the whole, I think the lease cannot be legitimately construed as contended for by the respondents, and that if they find it desirable to remove their Wallsgreen minerals in that manner I fear they will have to acquire the right to do so."

The respondents reclaimed, and argued—The Lord Ordinary had adopted too strict a construction of the lease. The proximity of Wallsgreen to the other subjects made it unlikely that it was intended to exclude minerals wrought there from being carried through Balgonie. If the respondents had not bought but leased Wallsgreen their right could not have been doubted. The word "let" had not the same fixed meaning in a mineral as in an agricultural lease. It was a misnomer as applied to minerals, the contract being really one of sale, the minerals becoming the property of the lessee—*Gowans* v. *Christie*, February 14, 1873, 11 Macph. (H.L.) 1. The word was thus open to construction, and it was not straining language to read it as meaning "belonging."

Argued for the complainers—The Lord Ordinary was right. The wayleave granted was in favour of properties "the minerals under which are let or may hereafter be let to the lessees." These words were unambiguous, and did not include lands belonging in property to the lessees. The intention of the parties to the contract must be ascertained by interpreting the words they had used according to their ordinary and natural meaning, and it was not legitimate to speculate what it was probable they might have meant, looking to the relative situation of the properties. The wayleave granted for minerals in lands which were leased was gratuitous, and it was not to be presumed that the lessor intended to extend it to other properties with which he had no concern. The clause referred to by the Lord Ordinary respecting surface damage done by working "adjoining minerals which may be the property of

or be leased to the lessees," showed that the distinction was present to the minds of the parties to the contract.

At advising—

LORD JUSTICE-CLERK—I have come to the conclusion that the interpretation which the Lord Ordinary has put upon the clause in question is the only interpretation which is sound, looking to the terms of the lease. Therefore I am for adhering to his interlocutor.

LORD TRAYNER—I agree. I think the construction of the Lord Ordinary is the correct construction, and it is fatal to the contention of the reclaimers.

LORD MONCREIFF — The construction adopted by the Lord Ordinary may at first sight appear somewhat strict, but after reading the whole of the lease I am satisfied that it is correct. No wayleave being charged the clause must be strictly construed against the lessees.

The word "let" will not bear the meaning of "belonging in property to." Neither in legal nor in popular language is the word so used.

Although the question must be decided on the terms of the lease, it is legitimate in illustration or explanation of its meaning to observe that while the fact that Wallsgreen belonged to the lessees not in lease but in property is noted in the lease, they were known to be about to obtain a lease of the adjoining minerals in Balgreggie. No doubt the allusion to "minerals which may hereafter be let to the lessees" referred chiefly to those minerals.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Complainer—Dundas, Q.C.—Clyde. Agents—Dundas & Wilson, C.S.

Counsel for the Respondents—W. Campbell, Q.C.—Graham Stewart. Agents—Wishart & Sanderson, W.S.

Friday, June 22.

FIRST DIVISION.

[Lord Low, Ordinary.

KIRKCALDY AND DISTRICT RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY.

Contract — Construction — Agreement to Contribute to Expenses of Promoting Railway Bill—Relief or Primary Obligation—Railway.

The Caledonian Railway Company being anxious to obtain direct access into the county of Fife, agreed with the Kirkcaldy and District Railway Company that the latter should promote a bill for the construction of four railways. It was agreed between the parties that in the event of the bill authorising the construction of the railway not receiving the Royal Assent from any cause other than the withdrawal therefrom of the support of the Caledonian Railway Company, that company should "contribute towards the expense of the said bill (1) two-thirds of all outlays incurred in connection with the promotion of the bill; and (2) one-third of the professional charges . . . in connection with such promotion." The House of Lords held that the preamble was not proved so far as it related to the three railways, Nos. one, two, and four included in the bill. These three were the only ones in which the Caledonian Railway Company were interested. The preamble was held to be proved as regards railway No. three.

In an action at the instance of the Kirkcaldy Railway Company against the Caledonian Railway Company for payment of the proportionate amount of expenses connected with the bill, in accordance with the agreement between the parties, the defenders maintained (1st) that the bill had in fact received the Royal assent, and that on a sound construction of the agreement they were not liable for any portion of the sum claimed; and (2nd), that their obligation was one of relief only, and that as the whole expenses had been paid by the North British Railway Company and not by the pursuers, the claim of relief must fail.

Held (1) that the bill had not received Royal assent within the meaning of the agreement, and that the terms of the agreement applied to the case; (2) that the obligation of the defenders was not one of relief only, but was an unqualified obligation to pay a share of the expenses of the bill, and that it was therefore unnecessary for the pursuers to show that they had personally paid or were liable to pay the expenses; and (3) that, as any agreement between the pursuers and the North British Company was *res inter alios acta* and *jus tertii* for the defenders, even if it were proved that the expenses had been paid by the North British Railway Company, the defenders would not thereby be released from their obligation.

The Kirkcaldy and District Railway Company were incorporated under the name of the Seafield Dock and Railway Company in 1883, for the purpose, *inter alia*, of constructing a deep-water dock at Kinghorn, and two small railway lines. By the Seafield Dock and Railway Act 1888 the name of the company was changed into "The Kirkcaldy and District Railway Company." By a further Act passed in 1890 the company obtained power to construct eight other railways, being a continuation of their system authorised in 1883. They commenced the construction of certain of the works, and being unable to carry them on as expeditiously as desired, approached the Caledonian Railway Company with the