time by this statute, and the language of the statute is such as clearly to indicate that the compulsory clause is to be carried out judiciously, discreetly, and even gently and tenderly. The parent is not to be punished for mere failure to provide with elementary education his children between the ages of five and thirteen, unless in the circumstances of each particular case the failure is gross and without reasonable excuse. There might, for instance, be a great difference in this matter between highland and lowland parishes, for even the Legislature could not overcome geographical limitations, except sometimes at incommensurate expense. It might in the present case be a subject of reasonable doubt whether the appellant has simply neglected his duty as a father; but, at least in the case of the younger child, I cannot conceive that there is any room for doubt on this other question, whether he has so failed grossly and without reasonable excuse. There may be *ex facie* cases of gross failure under this section, but the present is not one of them, and the public prosecutor has not laid before the Sheriff any evidence of gross neglect or want of reasonable excuse, which it was incumbent on him to do. The conviction must therefore be quashed.

The other Judges concurred.

Counsel for Appellant—Rhind. Agent — R. Menzies, S.S.C.

Counsel for Respondents — Asher — Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Friday, February 23.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

FERGUSON *v.* HUNTER AND OTHERS (FERGUSON'S TRUSTEES).

Succession—Mineral Lease—Capital and Income—Husband and Wife—Trust—Residue.

Circumstances in which *held* that a direction to trustees to pay over the free annual income of a truster's whole means and estate to his widow did not indicate an intention that she should have the whole profits of mineral leases wherein he was tenant, but merely the interest accruing on these profits.

Held that all such provisions must be interpreted according to the intention of the truster.

The pursuer of this action was the widow of James Ferguson of Weston, who died without issue on 2d March 1872, leaving a trust-disposition and settlement dated 17th February 1872, whereby he assigned and disponed his whole property, heritable and moveable, to certain trustees, the defenders of this action. The trust-deed, after providing various legacies, &c., proceeded as follows:—"In the fourth place, after satisfying or providing for the foregoing purposes, and after deducting the whole annual expense of maintaining the trust-estate and carrying on the trust, of which annual expense, both as regards amount and particulars, my trustees shall be sole judges, I direct my trustees to pay or apply a sum, not exceeding £250 yearly, out of the free annual income of the residue of my estate towards the education and maintenance of the family of the said Allan Andrew Ferguson (of M'Leod's farm, Picton, Nova Scotia), and that half-yearly or oftener as they see fit, so long, but only so long, as my trustees are satisfied that it is necessary or proper, of which they shall be sole judges; and to pay the balance of such free annual income of the residue of my estate to my said wife in case she shall survive me, half-yearly, during all the years and days of her life after my death, unless and until she enters into another marriage, whereupon she shall cease to have right to occupy either Auchenheath Cottage or Wiston Lodge, or to enjoy any provisions in her favour connected therewith, or to the said balance of income, and shall be entitled only, in lieu and in place thereof, to a free yearly annuity of £250 during the remainder of her life, payable half-yearly, at two terms in the year . . . but I provide and declare that so long as my said wife is entitled to the said balance of income, and the same shall in any year exceed £2750, she shall be bound to pay over one-fourth of the excess of each such year, but not exceeding the sum of £100, to my sister Mrs Margaret Ferguson or Reid, wife of John Reid junior, commission merchant in Glasgow, in case she shall then be in life; another one-fourth of said excess, but not exceeding the sum of £150, to my sister Mrs Eliza Ferguson or Davidson, wife of John Davidson, surgeon, residing in Newmilns, Ayrshire, in case she shall then be in life, and the remaining two-fourths, but together not exceeding £200, to the said Allan Andrew Ferguson, or his children in the event of his death equally among them."

The question at issue in this action turned upon the interpretation of this fourth purpose of the trust, the truster having been engaged at the time of his death in working the minerals in the estates of Auchinheath and Blackwood, in Lanarkshire, under leases with Mr Hope Vere, the proprietor, at a large profit, and these leases having five years to run from the date of his death, a question arose between the widow and the trustees whether the widow was entitled to receive the whole of the profits derived from these leases as income, or was merely entitled to the interest on the profits as they were realised.

The trustees were empowered to "sell and convert into money" the truster's means and estate as they might see fit, and were directed after the disposal of the liferent of his means to invest the whole in the purchase of lands to be entailed on a certain series of heirs. The leases were taken to James Ferguson "and his heirs, and any person or persons to be assumed by him or them as partners in the working of the minerals after mentioned, but expressly secluding all other assignees or sub-tenants, legal or voluntary, unless consented to by the said William Edward Hope Vere or his heirs or successors, by a writing under their hand."

At the date of the truster's death the annual profits from his mineral leases amounted to £20,000; since that date they had only yielded about

£8000 a-year. Without taking into account the profits of the mineral leases, the residue of his estate yielded an income very much in excess of £2750, and gave his widow a very much larger income even after the conditional annuities provided in the latter part of the fourth purpose were satisfied.

The pursuer pleaded—"(2) On a sound construction of the trust-disposition and settlement libelled, the profits earned by the defenders upon the coal and mineral workings since the date of the truster's death are income of the trust-estate, and the defenders are bound to pay or account for the same to the pursuer as part of the free annual income of the residue of the trust-estate."

The Lord Ordinary pronounced this interlocutor:—

"*Edinburgh*, 30*th May* 1876.—The Lord Ordinary having considered the cause, Finds that, on a sound construction of the trust-deed libelled, the pursuer is entitled to the profits derived from the leases mentioned in the record since the date of the death of the truster.

"*Note.*—The first question in this case is whether the pursuer is entitled to the profits which since the death of the truster have been made from certain mineral leases. The defenders plead that she has right to no more than the interest of the profits as these were from time to time realised. But in the course of the discussion they appeared to surrender that position, and to contend that the leases should be valued as at the truster's death, and interest allowed on the amount of the valuation. They say that this is the rule which obtains in England when a right of liferent and of fee is given in a terminable estate, and when it does not appear by clear indications that the truster intended that the liferenter should enjoy the estate *in specie*.

"The Lord Ordinary has come to be of opinion that the widow is entitled to the profits of the leases. The trustees are directed to pay the annual income of the residue of the estate to the pursuer, and although there is a general power to realise, there is no direction to do so. It appears to the Lord Ordinary that the leases form part of the residue, and that so long as they are retained the profits thence arising form part of the income of the estate.

"It was maintained by the defenders that the profits could not be considered any part of the residue of the estate, because they would necessarily cease at the termination of the leases, and because the pursuer by receiving the profits might, if she lived long enough, absorb a portion of the estate itself. But the leases are not less parts of the estate because they are terminable, and they do not the less yield income though they do not yield it in perpetuity. When minerals are let liferenters have been found entitled to the rents due from mineral leases, which necessarily *pro tanto* exhaust the subject, and might altogether do so.

"The question must be determined by reference to the will of the truster; and the Lord Ordinary thinks that it is the soundest interpretation of the trust-deed to hold that he intended that the pursuer should receive the income arising from his estate whatever the condition of the estate might be which produced the income. The leases, so long as they are retained, are parts of the estate yielding income.

"The Lord Ordinary has not thought himself justified in applying the doctrines of the English law which were brought under his notice—first, because they seem to be confined entirely to personal estate; and second, because they have never been recognised in Scotland.

"The authorities cited in the course of the discussion were—*Wardlaw*, 2 Rettie 368, 1 Jarmyn 577-78; Lewin on Trusts, 263-67; *Howe*, 7 Vesey 137; *Thursby*, 19 L. R. (Equity) 395; *Brown*, 2 L. R. (Chancery) 751."

The defenders reclaimed, and argued—Questions of this kind must always be interpreted according to the intention of the truster. Now here the trustees were empowered to sell the leases, so that if the profits of the leases as they have been carried on are to be dealt with as income, the result is that the trustees could have given the leases or their profits to the fiars or liferenter as they chose. Mr Ferguson dealt with the profits of these leases as capital, investing them in land and stocks. Besides, he contemplates that his wife is only to have £2750 a-year; if she is to get what she now asks, the truster's intention must be presumed to have been that she was to have £20,000 a-year for four or five years, and then, although much less, still an income immensely exceeding £2750. The case of a mineral lease is very much the case of a purchase by anticipation, or of a sinking of capital in a terminable annuity. It is not like other leases, a right to enjoy the whole subject let *salva rei substantia*—but is rather the purchase of an uncertain quantity. In the case of *Wardlaw* the liferentrix prevailed because there was a conveyance of the whole estate, and because the interest disposed of was that of the landlord, which is of a much more enduring character. In the case of *Guild's Trustees* also there was held to be no danger of exhaustion.

The rule of English law is that where you have an asset admitting of immediate or gradual realisation, such as a colliery or terminable annuity, left to one in a liferent, and with remainder to some one else, unless there is evidence to the contrary the liferenter has only the interest on the proceeds of realisation.

Authorities—Lewin on Trusts, 6th ed. p. 263; *Waddel* v. *Waddel*, Jan. 21, 1812, Fac. Coll.; *Guild's Trs.* v. *Guild*, June 29, 1872, 10 Macph. 911; *Wardlaw* v. *Wardlaw's Trs.*, Jan. 23, 1875, 2 Rettie 368; *Cochrane* v. *Black*, Feb. 1, 1855, 17 Dunlop 321; *Laird v. Laird*, June 26, 1855, 17 Dunlop 984; *Howe* v. *Dartmouth*, 7 Vesey 137; *Meyer Simonson*, 5 De Gex and Smale, 723; *Brown v. Gellatly*, L.R., 2 Ch. App. 751; *Thursby*, 3 Hare 611.

Argued for the pursuer and respondent—The trustees were entitled to carry on these leases, and if they did the returns must be considered as income. Even without taking them into consideration, the widow's income is much above £2750, so that that provision does not throw any light on the truster's intention. This question, if it had been raised at the truster's death, could not have been solved, for the profits were unknown, and any speculative value, such as the defenders say should have been taken, would have been wide of the truth. The question is not affected by the lapse of time. The terms of the deed import that the truster intended his wife to have all the income

he had himself, and unquestionably these profits were income to him; he intended his trustees to carry on his leases, and indeed they were bound by the landlord to do so. The presumption is that where a testator uses the expression "income" he means what was income to him. That is the principle of *Waddel's* case, and although it was the landlord's interest that was there in question, the consumption of the *corpus* was a consideration as much present there as here. Lord Gillies and Lord Meadowbank in giving their opinions proceed upon the intention of the testator, not the length of the lease or the contingency of its being terminable. If the widow is only to get interest on the profits, she loses one of the sources of income, which may be precarious, but is not more so than any other investment might be. The rule of *Howe* v. *Dartmouth* only comes into play in the absence of all indication of intention, and it is a rule that has never been adopted in Scotland.

Authorities—*Bethune* v. *Kennedy*, 1 Mylne and Craig 114; *Rollo* v. *Irving*, M. 8282, 4 Paton's App. 521; *Acc. of Court.* v. *Baird*, June 29, 1858, 20 Dunlop 1176.

At advising—

Lord President—The pursuer of this action is the widow of the late James Ferguson, who was an extensive and very successful coalmaster at Auchenheath, in the county of Ayr, and who left a large estate. She is entitled under his settlement to the free annual income of his entire estate during her widowhood. The testator died on 2d March 1872, having made his settlement upon the 17th of the preceding month of February. The estate consists to a very considerable amount of invested funds, but there are also conveyed to his trustees certain leases of minerals — of gas coal in particular—which he held from Mr Hope Vere of Blackwood, and which have been of considerable endurance, and some of them prolonged in point of time by agreements between the landlord and tenant. But at the time of his death those leases had all of them just five years to run. The profits derived from those leases during Mr Ferguson's lifetime were very large, and they continued to be very profitable parts of his estate after his death, in the hands of his trustees. The Lord Ordinary has found that on a sound construction of the trust-deed the pursuer is entitled to the profits derived from the leases mentioned in the record since the date of the death of the truster. Now, the effect of that finding would be, that in addition to income derived from the invested portion of the estate, amounting to over £4000 a-year, the widow would be entitled to the entire profits of the collieries wrought under those leases for the five years immediately succeeding the testator's death, and that would give her apparently about £8000 a-year in addition. The question, as the Lord Ordinary's finding involves, depends entirely upon what was the intention of the testator in making his settlement, and therefore the first consideration here is, what is the general nature of that settlement, and what are the particular provisions which bear upon this matter of the widow's right?

The settlement is not one of an unusual or extraordinary kind at all. It is a conveyance to certain trustees of the *universitas* of the testator's estate, and it provides for the payment of debts and legacies, and also for the provision of some annuities besides that which the widow was to enjoy of the entire estate, and then, after all those provisions are satisfied, he disposes of the residue by directing that it shall be invested in land and that land settled in strict entail upon a certain series of heirs who are named in the settlement. The provision in favour of the widow is expressed in the following terms:—"In the fourth place," &c.—[*reads*]. The trustees entered into possession of this estate immediately upon the truster's death, and one of the first matters that necessarily occupied their attention was that very important part of the estate which consisted of going collieries. The leases excluded assignees and subtenants without the landlord's consent, and therefore the trustees were in this position, that unless they could make some arrangement with the landlord it would have been a matter of some considerable difficulty for them to enter into possession of the collieries and carry on the business to the termination of the leases. They had a power of sale given them by the deed, and they might have made an arrangement for selling those leases and realising the value of them; but it was also quite within their option, I apprehend, from the very nature of the estate which had been committed to their charge, that this portion of the estate should be realised in a somewhat different way—that is to say, that they should carry on the leases to their termination and make the most that could be made of them during that period—working out as much as could be wrought out availably and profitably of the mineral during the remaining years of the leases. Now, this latter was the course which they elected to take, and apparently they seem to have been very well justified in taking that course. It was suggested in the course of the argument that it was doubtful whether they were entitled under this settlement to carry on those leases to their termination. I cannot say that I see any room for doubting that. They were entrusted with the realisation of the testator's estate. They were to realise the estate in such a way as ultimately to convert it into money, and with that money to buy land and settle that land in strict entail, and of course the testator's object was that the residue so to be invested should be as large as possible. The trustees, therefore, might naturally be expected by the testator, and it was at all events their clear duty, to make the most of the estate. Without the landlord's consent they could not sell the leases, and therefore if he had refused his consent they had no alternative but to carry them on to their termination, which of itself, I think, is quite sufficient to show that in following that course they were not by any means exceeding their powers. Now, it appears that very large profits were in consequence made by the trustees from the collieries under lease, and the widow's income under the provision in her favour in the trust-deed will certainly amount to a very large sum indeed if those profits are to be dealt with as part of the annual income of the estate. I am of opinion that those profits cannot be dealt with as annual income. I think they are part of the capital of the estate, and for this reason—Those leases were terminable rights, and their duration after the death of the testator was very short. But during that short period a large amount was expected to be realised, and was in effect realised,

in the shape of the profits of the collieries. But to say that that is part of the annual income of the estate is, I think, altogether to misapprehend the nature and effect of such a provision as was made for the widow in this settlement. I think that when a testator directs that his widow shall receive the free balance of the income of his estate, or, as it is expressed here, the balance of the free income of the residue of his estate, the idea which is in the mind of the testator is that the natural produce of the capital of his estate shall be paid over to the widow. In short, it comes just to the same thing as if the estate had consisted of a sum of money, and that the widow was to receive the interest, at a fair rate, accruing upon that capital sum. In a case of this kind, where the *universitas* of the estate is conveyed to trustees for the purpose of ultimate realisation and conversion, and where the income is given to the widow, that is, I think, the natural, and it appears to me also to be the fixed, principle of construction. It is the principle which is at the foundation of a very recent case with which your Lordships are familiar, namely, the case of *Wood* v. *Menzies*, May 26, 1871, 9 Macph. 775. In that case the testator directed his trustees to convert his whole estate, heritable and moveable, into money, and after paying debts, &c., to invest the residue in parliamentary stock, public funds, or heritable securities, and to pay over to his wife the free annual proceeds "of my said whole means and estate during all the days and years of her life." That is just such a settlement as we have to deal with here. At the testator's death on 3d January 1861, part of his estate consisted of consols, the dividend on which became payable on 5th January. The widow survived for some years, and died on 19th April 1866. It was held, on a sound construction of the terms of the deed, that it was the testator's intention that his widow's annuity should be computed on the footing of its being a liferent of a sum of money of which the interest accrued to her *de die in diem*, and therefore (1) that she was only entitled to the proportion of the dividend effeiring to the period of time between 3d and 5th January 1871, and (2) that she was entitled to the proportion of dividends due after the half-year current at her husband's death corresponding to the period from 5th January 1866 to the date of her death.—*Observed* that the question being one of intention, as gathered from the trust-deed, the rule applicable to the ordinary case of settlement of consolidated annuities in liferent and fee did not apply. In that case I observe that Lord Deas in giving judgment said—"It is a mistake to suppose that this question depends on anything else than the will of the testator, although there may be certain presumptions which aid us in construing that will. This is not a case of heir and executor falling within the rules of intestate succession. Neither is it like a case of liferent which existed independently of the will of the testator, or the case of one heir of entail succeeding to another under a deed by a third party. The deceased was the unlimited fiar of the whole means and estate dealt with by his deed. He voluntarily bequeathed the liferent of the whole to his widow, and the question simply is, what was his intention in doing so? If, indeed, the deceased had given his widow the liferent of these consols alone, the fair inference might have been that the provision was given with all the incidents usually attaching to subjects of that particular kind. But that was not what he did. He gave her a universal liferent of his estate, which consisted of heritable and moveable subjects of different kinds, the incidents of which were also different, and the question is, when did he intend that liferent to commence? So far as I know, the practice is to hold that such a provision vests *de die in diem*, unless some reason appears for thinking that a different period of vesting was meant. Here anything special in the deed goes the other way." And I may also mention that in my own observations in that case there occurs a passage which appears to me to have a very direct bearing upon the present question—"If certain consolidated annuities are settled on one person in liferent and on another in fee, that is, if after the lapse of the liferent the consolidated annuities are to belong absolutely to the fiar, I think the rule of law is, that the annuities which become payable during the continuance of the liferent will belong to the liferenter, and only those which fall due after the death of the liferenter will belong to his successor who takes the fee. But that rule applies to cases where there is a proper settlement in liferent and fee, and it arises from the nature of the subjects so settled. In the case of consols there is really no capital sum; the whole estate is annuity, and the annuity belongs to him who is in right when the annuity becomes payable. The rule, therefore, which fixes that interest on money vests *de die in diem* has no application. Here we have to deal, not with a single settlement of consolidated annuities, but the settlement by Menzies of his whole estate, only a small part of which was in the shape of consolidated annuities; and in dealing with the destination of his estate we must regulate our judgment by his intention. Now, when we find that he directs a conversion of his entire estate into money and then provides that that estate which is to be so converted is to be liferented as *universitas* by his widow, I cannot avoid the conclusion that his intention was that she was to enjoy the proceeds of that estate as one estate, consisting of money bearing interest; and that being so, the mere question that part of it was in the form of consolidated annuities cannot affect the ultimate question." Now, I apprehend that the rule there adopted, and which is by no means adopted there for the first time, but which is perfectly well-known in our practice, is this, that where a widow or other person is entitled to a liferent in the *universitas* of a mixed estate left in trust, the right of the liferenter is to be considered as being just in the same position as if she was entitled to the interest accruing upon a capital sum.

Now, applying that case here, I think there is nothing in the deed in the slightest degree adverse to the application of such a principle. On the contrary, it appears to me to be quite consonant with the whole frame and scheme of the settlement, and with the view that was obviously in the mind of the testator, particularly in framing the clause applicable to his widow's provision, that she should have the free balance of the income, in the proper and reasonable sense of the term, of his entire estate.

I agree with the Lord Ordinary in thinking that it is not very safe in a case of this kind to resort to the rules of equity established in the Court of Chancery in England, because we are very well

aware that in cases of this kind the Courts of Equity in England have adopted many artificial rules, which are somewhat repugnant to the principles upon which we administer our equitable jurisdiction. In a case of this kind, for example, I do not think we have any settled principle to which to ascribe our judgments, except the intention of the testator. Everything depends upon that, and the case of *Wood* v. *Menzies*, while it establishes a principle that is applicable to cases of this kind generally, is yet founded entirely upon what is supposed to be the intention of the testator in making his trust-settlement. Now, it must be observed that this class of cases is quite different and very easily distinguishable from another class in which there is either a settlement in liferent and fee of a particular subject, or where, supposing there are various subjects conveyed, there is an intention, expressed or implied, upon the part of the maker of the settlement that the liferenter shall enjoy a particular subject *in specie*. In both of these cases the conclusion may be the very reverse of what I am disposed to arrive at here. For example, in the case of a proprietor of land, who gives to his widow a liferent of his landed estate, or of a portion, it may very well be that the widow would be entitled to the rents or lordships accruing under leases of minerals, because that depends upon a different consideration altogether from what must regulate our judgment here. It depends upon what are the legal rights of the liferenter and fiar *inter se* in a subject of that kind. If a proper right of liferent and fee be created by the testator, the intention of the testator cannot regulate beyond this, that it was his intention to create a proper right of liferent and fee. The law will determine what are the rights of the liferenter and fiar *inter se*. Again, it is quite possible to conceive a case where in the settlement of a lessee, like Mr Ferguson here, under mineral leases, the intention of the testator may be fairly disclosed that his widow, or the liferenter who is to benefit by his settlement, shall enjoy those leases *in specie*, even though they may be part of the trust-settlement. The direction to the trustees may be so clear and distinct to put his widow or liferenter in possession of the leases so as to enable her to carry them on, as to leave no doubt whatever of his intention that the profits accruing from those leases were to belong to the liferenter. But in the absence of specialties of that kind, and where you have to deal with a trust-settlement conveying and settling the *universitas* of a mixed estate, I apprehend the rule which I have already suggested is the only safe one for our guidance, and applying that rule here, I confess it does not leave me in any doubt at all that the true conclusion is that the profits arising from those leases as they come to be realised form part of the capital of the testator's estate, and that the widow is only entitled to interest upon those profits.

The Lord Ordinary has not followed out his view of the case to any practical conclusion in figures, and we are not yet in a position, from the argument that has been addressed to us, to say what precisely the effect of this judgment may be; but upon that we shall be glad to have the assistance of parties in the further determination of the case.

Lord Deas—The late Mr James Ferguson, as your Lordship has said, was an extensive and successful coalmaster. He held leases of minerals, under which he made very large profits. At the time of his death he held the lease or leases which have given rise to this action, and that lease or those leases had still five years to run. His settlement was made very recently before his death, and was made under circumstances very much the same as those that existed at the time of his death. The profit which he had been making under those leases had reached the amount of some £20,000 a-year. At the date of his settlement that profit was not nearly so large. As generally happens with coal leases, the lessee takes a lease for a period in the course of which he expects either to work out the coal substantially or at all events to work out the best and most profitable parts of it; and it is quite intelligible, therefore, that during the last five years of the leases the profit should have been much less than it had been during the earlier stages of the leases. Accordingly it appears that for the years which have elapsed since the death of the testator the average amount of profit has been only about £8000 or £9000 a-year in place of the much larger sum which had been formerly realised. Well, he leaves the whole estate, heritable and moveable, to trustees, and after providing for a variety of legacies, annuities, and outgoings and expenses of the trust, he provides that his widow, so long as she does not enter into a second marriage, shall have the liferent of the whole residue of his estate —that is to say, the whole residue of his estate heritable and moveable, including of course those leases which were an heritable subject. Now, I agree with your Lordship, and also with the Lord Ordinary, that the whole question is, what was the intention of this testator? Did he intend the widow to get the whole income that was to be derived from those leases so long as they lasted, or did he look upon the profits of the leases as a part and portion of the residue of his estate which was only to be liferented? The Lord Ordinary says the question must be determined by reference to the will of the truster. I think that is quite sound. The Lord Ordinary goes upon a right principle; and then he says he does not think himself justified in applying some doctrines of English law in some cases which have been quoted to him, and I think he says that rightly, because this is a question of the construction of a Scotch deed, prepared by a Scotch conveyancer, and it is the deed of a domiciled Scotchman, and it deals with heritable property—for the leases are all heritable property—and therefore there is certainly, to say the least of it, no occasion for resorting to any foreign law whatever for light in construing this particular deed. We might go wrong in doing that, but it is quite clear we could not be any better by doing it, because it is not required. The question is, What on the face of that deed, and taking the terms of it along with the surrounding circumstances, is to be held as the will of the truster?

Now, the main surrounding circumstances, apart from the terms of the deed, were what the truster himself had been doing in the course of his life. What he had been doing was to carry on those leases, and from the large income he derived from them to accumulate capital. He would not have been a man of common sense if

he had been spending the whole of that temporary income and realising no capital. But he was realising capital to a large amount, and his intention plainly was (as we see from the deed) that when all other purposes were satisfied with reference to that capital, it should be invested by his trustees in the purchase of an estate, to be entailed upon a certain series of heirs. He left a widow but no family, and his object was to provide for her and then to immortalise his own memory by a great estate being purchased and handed down to a long series of heirs of entail. Therefore I think the principle upon which the Lord Ordinary proceeded was perfectly right, but while the principle was perfectly right, I think he has come to a wrong conclusion. Construing the deed according to the intention of the testator, in the light of the surrounding circumstances, I think the true conclusion is that he looked upon the value of those leases as a part and portion of the capital of his estate which he meant to be liferented.

It was suggested that the trustees in carrying on those leases in the profitable manner in which they did were acting altogether without authority and contrary to their duty. My opinion in favour of the trustees is founded upon the very opposite view. I think they were perfectly entitled to carry on those leases. It may be they would not have incurred any legal personal obligation if they had not done it—that is to say, if they had made some arrangement and got the leases disposed of in some way; but your Lordship has well pointed out they could not have done that without the consent of the landlord, because assignees and subtenants were expressly excluded by the lease. In any event, they, as the representatives of the deceased, were bound for the rents and lordships to the landlord, and they had no means of getting quit of the leases if they had desired to do so. But I am very clearly of opinion that they were not only entitled to carry on those leases in the way they did, but that it was their duty to the truster and to the beneficiaries to do so—by which I do not mean that they would have incurred any legal liability if they had not done it, but that there are duties which trustees owe to the truster and beneficiaries beyond their mere legal duties. There are duties of the kind that a parent owes to his children and that a child owes to his parents, which the truster naturally expects that his trustees shall perform even though they would incur no legal liability by not doing so. I cannot doubt for a moment, morally speaking, that if they had not carried on those leases in the way in which he himself had done, and realised those large profits, they would have done wrong. That he expected they would carry on the leases to a termination I have no doubt whatever, and I cannot doubt that if they had thrown up those leases they would have been doing that which the truster never expected them to do, and which he was entitled to expect them not to do. I do not know if it would have made any difference in the result though they had not been carrying them on. The beneficiaries would all have had equally the same rights in the result as they have here. But that is not the way in which it is to be taken. The way in which I take it is, that they did that which the truster intended them to do, and which they were quite legally as well as morally entitled to do.

That being the state of the case, when the trustees have all those profits they have realised that portion of the estate. It is the duty of executors and trustees generally to realise the estate, but the time taken to realise it and the mode in which it is to be realised, depend entirely upon the estate, and upon the circumstances, and upon the duties of the trustees. And when parties are appointed, not merely executors but, likewise trustees, to hold the whole heritable and personal estate of a deceased person, I know no law and no reason whatever why they should be bound to realise forthwith in the same way as they would sell some perishable article or perishable subjects. They may take the time that is necessary, whatever it is, in order to realise. I think the proper and legal way of realising this portion of this estate was to carry on those leases to their conclusion, and that being done, I think the trustees made a most fair and liberal proposition when they stated that, assuming that to be the result, they were quite willing to account to this lady for the whole proceeds which they had actually received as capital, and allow her the annual income of those proceeds. I think that is the most favourable mode of dealing with her which she could possibly expect, and when that is understood and fixed, the only thing that remains to be arranged or fixed is how the thing is to be dealt with, in respect that it is what we may call backhand money which has been got by the trustees before it has been paid over to her. If she had had a smaller income, and had been in want of the money from time to time for her aliment, a different kind of arrangement might have been required. That is not the least necessary here. She did not contend for that; but, of course, the circumstance that it was the half-yearly income intended for her is to be taken into account when you come to the question of accounting as to the precise amount of money that shall be paid to her. I agree with your Lordships that that is a matter in which the Court are fairly entitled to expect the assistance of the parties, and I have no doubt, from the liberal spirit which has been already shown by the trustees in anything that has been proposed, that it will be easily arranged.

I entirely agree with everything your Lordship has said, both generally and specially, with reference to this case—that it is a question of the intention of the truster, to be decided entirely by the terms of the deed and by the facts and circumstances which surround that deed as affording indication of what his intention was; and I am clearly of opinion that his intention was that the trustees should realise the coal as part of the capital of the estate, and that it should form part of that to which the widow is entitled to the liferent.

Lord Mure—I have come to the same conclusion with your Lordship upon this question. I agree with your Lordship that the question is to be disposed of according to what appears to be the intention of the truster as disclosed in his trust-deed. The words with which we have to deal are those under the fourth head, where the testator provides that his widow is to get "the free annual income of the residue of my estate," and the question is, What does that mean? Does it give to the widow the whole profits arising from those valuable leases, or is she only to be

entitled to get the interest upon those profits capitalised as they accrue? The question is no doubt one of difficulty; but, in the first place, taking the words by themselves, I am disposed to think that where there is no specific provision needing some other interpretation to be put upon it, the income of the residue, generally speaking, means the income of a capital fund. The residue of a trust-estate is what is realised after the ordinary general purposes of the trust have been complied with. Taking the words of the deed by themselves, I do not think they must necessarily he held to import that this testator intended them to be sufficient to carry to his widow the profits of a going colliery which was to go on for about five years from the time of his death; and upon that ground alone I should be disposed to hold that she is entitled only to the interest accruing upon those profits.

But there are other clauses in the deed which tend to confirm that view; because the main object of the deed was to realise the estate in order to create an entailed estate, and there are anxious provisions made in the deed for the investment of the money and the management of the estate by the trustees in order to carry out that object. What he directs to be entailed is the residue, the free income of which is to go to his widow; and he also directs that on her death the income of the residue shall be paid to his sister during her lifetime, and upon the death of his sister the residue is to be applied, so far as it does not consist of land, in the purchase of lands in Scotland, to be entailed upon a certain series of heirs. Now, I do not think it is natural to suppose that the testator intended that his sister should get this very large income out of these collieries, and that the profits of the collieries were to be so absorbed, instead of the income or interest going first to his widow and then to his sister, and the capital being entailed. I do not think there is anything to show that that was the intention of the gentleman who made this trust-deed; and, again, when we look at the clause relative to the provision he makes in the event of the income exceeding a certain sum, we find he fixes that sum at £2750. He makes provision as to what is to be done with a portion of the excess beyond that sum, which certainly is a peculiar clause, because even at that time the realised estate was calculated to yield a larger income than £2750. But still it indicates that it never was in his mind that the income was to be increased to the extent of £10,000 or £12,000 a year by the profits of these collieries. That appears to me to be out of the question altogether. But further, supposing that the trustees had made an arrangement with the landlord and had sold the leases, it is certain that the widow would have got only the interest upon the sum realised by the sale; and that goes so far to strengthen the view that the intention of the person who gave the power of converting the leases into money was, that the thing to be converted should not be used up or absorbed by his widow in the event of the trustees not being able to arrange with the landlord, and therefore being obliged to work the collieries, as they in point of fact have done.

On these grounds I concur in the result at which your Lordship has arrived.

Lord Shand—The cases which have hitherto occurred on which questions have been raised in regard to the returns from mineral fields have, I think, all been of one class—I mean where the testator has been the owner of lands having minerals leased, and the question has arisen, who was the party entitled to the rents of those minerals? The three leading cases which were referred to in the discussion were those of *Waddell*, *Gill's Trustees*, and *Wardlaw*—all of them cases of the same kind. In those cases, just as here, I think the principle upon which the decision turned was, what was the intention of the testator? But, then, in ascertaining that, the Court, with reference to mineral rents, have come to the general conclusion that if minerals have been let by the owner of lands,—at least if they have been let for a considerable period of time,—the lands are brought into the category (as Lord Neaves puts it in the case of *Wardlaw*) of a subject bearing fruits; so that those cases really settle nothing more than this, that mineral rents in that position are to be regarded as fruits of the lands, and if a liferentrix has a liferent of the lands she shall receive those mineral rents which are part of the fruits. This case appears to me to raise an entirely different question. The truster was not the owner of minerals under lease; he was a tenant under leases. He was not drawing a rent or return from the lands, but was drawing profits from a going colliery business. In the case of the landlord you have a direct return from the lands, and nothing else, and the lands themselves form part of the residue. Those returns are part of the proper income of that residue. In the other case, while you have no doubt a lease of minerals as an important element, yet, truly, what is income is not the mere fruit of the lease but the result of trading. You have a business carried on involving risks,—the business of raising coals, with all the outlays connected with it,—and the trading in those coals after they are raised, depending upon market prices to be earned. The case of a coal mine is not different from that of a tenant under an agricultural lease, or that of a partner in a manufacturing or mercantile business, who is bound by his contract to remain in that business as a partner for several years to come. In that class of cases it appears to me, concurring with the statement of principle by your Lordship in the chair, that where the *universitas* of an estate, heritable and moveable, is given to trustees, so that the general residue shall be held by them for one person in liferent and another in fee, the general rule must be that the profits of such a business as I have referred to shall go into the residue—shall form part of the capital of that estate—unless there be a contrary intention to be inferred from the terms of the deed; and I think that must be so, because I regard the profits which are to be received from such a business as a colliery business or an agricultural lease, or a mercantile business, as not proper interest on residue, but as part of the residue itself,—part of that capital of the trust itself which has been left by the truster to his trustees,—and, indeed, in many cases of estates which one has seen in practice, such profits really and practically form the whole of the estate that a person leaves. And I may also say that I concur with your Lordships that that is the principle

upon which *Wood* v. *Menzies* was decided. It is of course an entirely different case if you have not, as here, the *universitas* of the estate given to a body of trustees, but the liferent given directly of specific subjects, such as a conveyance of those leases themselves to a beneficiary. In that case you have a distinct indication of intention that the beneficiary shall have the whole benefit of that specific subject so conveyed; and I think the contrary intention may be more readily presumed in favour of the liferenter if the right of producing the profits is not, as here, a terminable right ending after a short period, but is to be one of long duration.

With that as the general principle, the next question is, applying that, What is the result with reference to the provisions of this deed? We have here those leases conveyed as part of the *universitas* of the estate to trustees. We have it that they have been producing very large sums,—from £18,000 to £20,000 a-year,—immediately before the truster died, and that after his death, and after the trustees have renounced one of the leases, the profits have still amounted to about £8000 a-year. The liferent or income of the residue of this estate is given, in the first place, to his widow, and upon her death, subject to certain legacies, the liferent of that same estate is given to the truster's sister. There is a power of sale and conversion of the property; and, taking those different provisions together, I see nothing to lead to the inference that there was any intention to give this lady the large profits which were to be be realised in carrying on this colliery business. It was suggested in the argument that the trustees might have been violating their duty in carrying on this business as they did. If the deed had expressly or by inference provided that they must wind up this business at once, and if in violation of that the trustees had carried on the business, I should think the claim of this widow would obviously have been one that could not be sustained; but I agree with your Lordships in thinking that that is not the true position of the case,—that in the circumstances in which the trustees were placed, and looking to the very special destination in those leases, the trustees were fairly entitled to carry them on to their close. But then in doing so it appears to me, upon the grounds I have stated, that they were really realising the capital of the estate by the realisation of those profits, and that the profits so realised were part of the residue that was to be liferented. It was said that the profits that were realised from the business were income to Mr Ferguson during his life, and no doubt that is perfectly true; but I think it becomes a totally different question whether you can represent the profits that are being ingathered after his death as income at all in the same sense. You then have a trust-estate, and I do not think that the profits which are being ingathered as part of the trust-estate are income at all in the same sense; and I do not know that one can have a better illustration of that than the consideration what would have occurred if the trustees, under that power of sale which they had, had thought fit to dispose of those leases, making arrangements with the landlord and with a suitable tenant, and had received a large sum for the leases themselves and a large sum for the goodwill of this going business. It is conceded on the part of this lady that in that case what she would have received, and what alone she would have received, would have been the interest upon the money that was received—that she would not have been entitled to take the benefit of the profits of that sale as being truly hers in the character of liferentrix, but realised in a different way. I think that goes a long way to show that those profits were not of the nature of proper income or interest of residue at all, but were part of the residue itself. I think it very difficult to maintain that in the one case she was to be entitled to get the whole profits to herself, and in the other case that others were to get those profits, and that she was merely to obtain the interest upon them.

So much for the general provisions of the deed; but I concur with the observation of Lord Mure, that there are other clauses which strengthen the view I entertain even upon the general provisions. One of these is the clause which seems to refer to this lady's income being possibly about £2750. It was said that in any view that sum would be considerably exceeded. Well, take it so—that it might be exceeded by £1000 or £2000—but it is a very different thing to say that the testator in putting such a sum in his deed could by possibility have contemplated that the large amount of £20,000 a-year—or £8000 a-year as it was reduced—should go to his widow from this one subject alone, when he contemplates so shortly before his death that her income might be only a little above £2750. Again, I think that if there had been an intention to give her profits, we should have had a different expression from what we have in this residue clause. It is the "income of the residue," which is a very suitable expression for the interest on the capital of the estate. Again, you have the fact that if this lady died, his sister was to become the liferentrix. Is it to be supposed that upon the accident of one or other of those ladies being in life at a particular time she was to get the benefit of this large estate, amounting to £20,000 or £8000 a-year? These are all considerations upon the special terms of the deed, which go to support the view I entertain from the general clauses of the deed, that it was not intended to give this lady the profits of those leases.

The Lord Ordinary has observed, and indeed his judgment seems to proceed upon this view, that it appears to him that the leases form part of the residue, and so long as they were retained the profits thence arising formed part of the income of the estate. I think, with deference to his Lordship, that this expression is somewhat misleading and fallacious. It proceeds upon the view that the leases, as documents giving an heritable right, are part of the residue. No doubt the leases are part of the residue; but it is the leases as giving right to those profits that are part of the residue, and the profits themselves, being the natural result of those leases, seem to me to become necessarily part of that residue. If you take the case of a truster dying after conveying to his trustees his share in a going mercantile business of which he must remain a partner by the contract for four or five years, the share of that business is no doubt conveyed, and one may fairly say the contract of copartnery is conveyed as part of the residue of the estate in the same way as a lease is; but I think it would be extravagant to say that, because the contract of copartnery is conveyed, it thereby follows that

the liferenter is to get the whole profits that are to come in from the business.

Upon these general views I concur with your Lordship in thinking that the Lord Ordinary's interlocutor should be recalled, and that this lady should be found entitled, not to the profits of the minerals, but to the interest of the residue, including in that residue the profits which have been realised upon those leases since her husband's death.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Rutherfurd Clark's interlocutor of 30th May 1876, Recall the said interlocutor so far as it finds that 'on a sound construction of the trust-deed libelled the pursuer is entitled to the profits derived from the leases mentioned in the record since the date of the death of the truster': Find that the pursuer is not entitled to the profits derived from the mineral leases mentioned in the record as being part of the free annual income of the residue of her deceased husband's estate provided to her during her viduity by his trust-settlement: Find that the said profits form part of the residue of the trust-estate realised by the defenders as trustees under the powers and directions of the trust-settlement: *Quoad ultra* adhere to the interlocutor complained of: Remit to the Lord Ordinary to proceed further as shall be just, and consistent with the above finding; and find neither party entitled to expenses incurred since the date of the Lord Ordinary's interlocutor."

Counsel for the Pursuer—Asher—Pearson. Agents—Webster & Will, S.S.C.

Counsel for the Defenders—Lord-Advocate (Watson)—Balfour—R. V. Campbell. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, February 24.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

OCHTERLONY *v.* OCHTERLONY, *et e con.*

Entail—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 43—*Trust—Erasure* in essentialibus.

A truster directed his trustees to purchase lands and convey them under the fetters of a strict entail in favour of a certain series of heirs. The trustees purchased lands, and executed in 1840 an entail in the terms directed, but defective in the prohibition against alienation. The entail therefore became invalid and ineffectual as regarded all the prohibitions on the passing of the Rutherfurd Act in 1848. The institute, after possessing the estates on this entail for thirty-seven years, brought a declarator to have it found that he was entitled to possess them in fee-simple in terms of the 43d section of the said Act.—*Held* that he was not entitled to decree, having no right to possess the estates otherwise than under the conditions of the trust-deed, and the invalid entail being *ultra vires* of the trustees, who had no power to convey the estates otherwise than under conditions of strict entail.

The first of these actions was at the instance of Sir Charles Ochterlony of Ochterlony, Baronet, the heir of entail in possession of the estates of Ochterlony, against his eldest son David Ferguson Ochterlony and the other heirs of entail, for declarator that the entail under which the pursuer held the estates was not valid and effectual in terms of the Act 1685, cap. 22, and that the pursuer was entitled to the lands in fee-simple in terms of the 43d section of the Entail Amendment Act 1848. The pursuer founded upon a defect in the clause of the deed prohibiting alienation, the word "irredeemably" in that clause (which was in the form usual in entails) being written upon an erasion or otherwise vitiated. It was not ultimately disputed that the word "irredeemably" was erased, and that the deed was therefore invalid as a strict entail.

The said deed of entail had been executed in the following circumstances:—In 1824 Sir David Ochterlony, Baronet, a Major-General in the East Indian Army, and residing at Delhi, executed a trust-deed of settlement and commission, whereby he empowered his trustees and commissioners therein named to purchase lands in Scotland, and gave the following directions to them as to the settlement thereof—"And which lands when so purchased, whether taken in my name directly or in their own in the first instance but for my behoof, as may be thought most advisable, I farther hereby direct and appoint and authorise and empower my said trustees and commissioners foresaid to settle by strict entail on myself and the heirs hereinafter pointed out, and to execute such deed or deeds of entail with all prohibitory, irritant, and resolutive clauses, conditions, and provisions required and usually inserted in the strictest entails, and all other deed and deeds, instrument and instruments (with liberty to me to revoke or alter the same by any writing signed by me or by my authority), as shall or may be necessary by the law of Scotland." The destination in the deed of entail to be executed by the trustees was to be in favour of the truster and the heirs-male of his body, whom failing to the heirs-female of his body, whom failing to the eldest lawful son of the body of Roderick Peregrine Ochterlony, then deceased, the truster's natural son, and to the heirs-male of the body of such eldest son of the said Roderick Peregrine Ochterlony, whom failing to various other substitutes.

Sir David Ochterlony died in 1825, leaving no lawful issue, and before his trustees had purchased lands in Scotland in terms of the trust. The pursuer, Sir Charles Metcalfe Ochterlony, was the eldest lawful son of the said Roderick Peregrine Ochterlony.

The trustees having purchased certain lands in Scotland (now called Ochterlony), and Sir Charles Ochterlony having come of age, the lands were conveyed to him as directed by the trust-deed, by disposition and deed of entail dated 28th March 1840. Under this deed of entail Sir Charles Ochterlony possessed the estates until 1876, when the defect in the clause prohibiting