and in Greenock; and although no doubt it is practicable to convey those heritable subjects to that number of beneficiaries, it certainly is most expedient that that should be done, and it is impossible to shut one's eyes to the fact that when a division of these subjects takes place the properties should be sold and the prices distributed. But then a more striking instance of the same thing occurred in the case of *Duncan's Trustees*, which was cited to us in the course of the argument, reported in 9 R. 730—a case which came before the other Division of the Court—where I find that certain heritable subjects had to be disposed of among fifty-two beneficiaries, and where it was also held that the properties were heritable, although some of the Judges in their opinions thought that the only practical way out of this distribution was to sell the properties and distribute the prices, rather than by conveyances to the beneficiaries. But I do not see my way, looking to the authorities, to differ from the opinions which have been expressed by the majority of their Lordships; and it may be that the matter is one in which, if there is to be a remedy, must be found in legislation rather than in different decisions. In the case before the Court the testator left his property (it was practically heritable estate that he left) to his trustees, and in order to the reclaimers succeeding in the argument they must show that there is a conversion of that heritable estate into moveable; and so it appears to me that in order to show that they must make out either one or other of two things. They must show that within the provisions of this deed there is a direction to sell the properties with a view to the distribution of the estate among the beneficiaries—a direction which no doubt may be found there by strong implication as well as by express words; or they must show, if they cannot point to any express or clearly implied direction to sell, that at all events, in the circumstances of the trust, a sale is indispensable in order to the execution of the trust. Unless one or other of these things can be shown, the estate is heritable, and must be dealt with as heritable.

Now, I do not mean to go into the provisions of the deed as your Lordships have done, but I may just say that I agree in thinking that there is no direction to sell here either expressed or implied. It is true that there is a discretion vested in the trustees to retain the heritage, and that the property has been held under that discretion for, as your Lordship has pointed out, upwards of half a century. That circumstance does not weigh much with me, because the argument in the case is not that the trustees were not entitled to keep the property unsold for fifty years or so long as the liferenter lived—for it is admitted that the administration of the trustees was quite proper; but the argument is that the property having been kept for such a length of time—that depending upon the life of the liferenter—whether at her death there is either an implied direction to sell or a necessity to sell. The element that the property has all along been held as heritage does not affect the question. The question is whether at the time when the distribution occurs—and it was quite proper to keep it up to that time—there is a direction to sell or a necessity to sell. As I have said, I do not think there is such a direction; and therefore the only thing that can be pointed to as of the nature of necessity for a sale is that the property requires to be sold in order to be divided among the beneficiaries, and that owing to their number it would be less difficult to divide the prices than convey the properties to them. And here I am met with the case of *Duncan*, where the other Division, reversing the decision of Lord Adam, held that it was a case where there was no actual necessity for a sale. If I were to hold that the large number of beneficiaries among whom that estate fell to be divided, constituted an expediency for realising it and dividing the proceeds, I could not hold that in such circumstances there was an actual indispensable necessity for a sale of the trust property. Here we have seven subjects and eleven beneficiaries, and I may just say that if the earlier case of *Duncan* had not been decided before the present, and if your Lordships had been disposed to hold the present case as one disclosing an expediency for a sale, I should have been disposed to agree; but as I do not find that to be the state of your Lordships' opinions, and although I do not agree with the decision in that case of *Duncan*, I refrain from stating an opinion on the point. There is enough for my opinion in the fact that there is here no direction to sell, express or implied; and that being so, I do not think we should be justified in interfering with the discretion conferred by this truster on his trustees, and which they have exercised for so long without objection. I therefore agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for Reclaimers—J. P. B. Robertson—Patten. Agents—J. & J. Patten, W.S.

Counsel for Respondents—Mackintosh—Pearson—D. Robertson. Agents—Ronald & Ritchie, S.S.C.

HOUSE OF LORDS.

Friday, July 6.

(Before Lords Blackburn, Watson, Bramwell, and Fitzgerald.)

CAMPBELL *v.* WARDLAW AND OTHERS (CAMPBELL'S TRUSTEES).

Succession—Fee and Liferent—Liferent of Whole Amount Produced—Mineral Field opened after Testator's Death.

A testator who had opened up and wrought part of the minerals in his lands during his life, directed his trustees in the event (which happened) of his wife surviving him, to pay over to her "the whole annual produce and rents of the residue and remainder of my estate, heritable and moveable, during all the days and years of her life." After the testator's death his trustees opened a new

mineral field. *Held* (*affirming* judgment of the First Division) that the testator's widow was not entitled to the rents derived from this mineral field.

Trust (*Scotland*) *Act* 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 2, *sub-sec.* 3.

This section gives trustees, where such act is not at variance with the terms or purposes of the trust, power to grant mineral leases of a duration not exceeding thirty-one years.

Observed (*per* Lord Watson) that this provision merely gives power to trustees entitled under their trust to let minerals, to let them for the period allowed by the statute, and confers no new power of letting minerals upon trustees.

This Special Case is reported 15th March 1882, *ante*, vol. xix. p. 498, and 9 R. p. 725.

The second party (Lady Campbell) appealed.

The respondents' counsel were not called on.

At delivering judgment—

Lord Blackburn—My Lords, in this case we do not think it necessary to call upon the counsel for the respondents. Everything has been said upon the appellant's side which by any ingenuity could be said, but without ever producing in my mind the slightest doubt, I must own, as to the propriety of the decision in the Court below, although I do not know whether I can say quite the same of all the noble and learned Lords who are present. From the moment that I understood what the case was I never had the slightest doubt that that decision was right and should be affirmed.

The principle upon which the whole matter depends is the same both in English and in Scotch law, and I should be inclined to think that it would be very much the same in every country, for it is the nature of things that causes it to be so. Where there is "produce" (such as minerals), which when once taken away is never replaced, it is in a very different position from, I may say, apples or fruits of that kind, which are annually reaped, and which replace themselves. That they are different in the nature of things is obvious enough. When there is an estate consisting partly of minerals, or things of that sort, and partly of annual produce in the other sense, such as fruits and the like, and that estate comes to a person with a limited interest, the remainder being in somebody else, the question would arise, What is to be done with the produce? The law of England—and I believe of every country—the feudal law and the civil law too—would say that in that case the person who has the limited interest takes beyond all doubt the annual produce—the grass, the apples, and things of that sort—and applies them to his own use as he pleases, as long as his interest lasts. But it would follow, from the strict rule which I have mentioned before, that minerals, whether the mines had been opened or not, would remain a part of the soil belonging to the person who was to have the ultimate interest in the soil; the remainderman as he would be called in England, or the fiar as he would be called in Scotland, would take them all.

But very early there was introduced this in favour of the person who takes a limited interest, that where, at the time when the person having a limited interest comes into possession, minerals have been already opened, whether coal-pits, or quarries, or the like, the person who has that limited interest shall be at liberty to continue to work those coal-pits or quarries which have already been opened. That was laid down by Lord Coke, and apparently not long afterwards, in a case which has been cited from Craig—I do not know the exact date of that case, whether it was afterwards or before, but at about the same time at all events—it was laid down in Scotland in precisely the same way, that a person who has a limited interest may continue to work opened pits. I pass by and do not say anything at all about applying timber to building houses, or using minerals, such as lime, for improving land. That introduces different principles, and I pass it by.

I am inclined rather to agree with what Mr Davey's argument implies, that the original ground of all that was that there was supposed to be an irresistible indication of intention that he who conveyed the property for a limited time to a person with a limited interest intended him to work the opened minerals. I am inclined to think that it was upon that ground that the Courts originally acted throughout, and I quite agree with what Mr Davey has said, that when there is a sufficient appearance of intention in the instrument to show either that that should be restricted or that it should be extended, that intention would govern. But it must be a sufficient indication of intention. I do not agree at all with what Mr Davey has repeatedly said, and made in fact the basis of his argument, that in Scotch law it turns at all upon the technical meaning arising from the word "liferenter." I do not think that that was the reason or substance of it, or that that was at the bottom of the matter at all; but I believe that it was because it was presumed to be the intention of him who conveyed the property, either generally or specifically, for a limited interest, with opened mines upon it, that the person having that limited interest was to be at liberty to work those opened mines.

And when it is said that there is to be a separate and different construction put upon the trust—when, as it is here, it is a trust to trustees to pay over to the truster's "wife in the event of her surviving me the whole annual produce and rents of the residue and remainder of my means and estate," during her life—I cannot put any different construction upon it, or think that the testator intended a different construction to be put. If, instead of saying "My said trustees shall pay over to my said wife the whole annual produce and rents of the residue and remainder of my means and estate during her life," he had said that they were to give her an interest as liferentrix in the minerals lying underneath the surface of his estate, the two things would have meant the same. In the one case it would have been expressly saying that she had to take the annual produce and rents, and in the other case it would have been making her a liferentrix who would take the annual produce and rents. In either case it would remain to see whether an unopened mine was turned into produce and rents or not.

Now, the numerous cases which bear upon this subject, beginning apparently with the case in Craig and going downwards, all say that if a

mine is opened, unless there is something to show a contrary intention, which there may well be, the intention is that the person with a limited interest shall take the annual produce. I do not think that it would be confined to a liferenter, but if the limited interest were for a term of twenty years, I should be inclined to suppose that it would be much the same thing, although I do not know that that has ever been decided. Unless restrained by something or other which shows a contrary intention, or by the general law with regard to exhausting minerals, and so on, which may restrain it, the person with that limited interest would take the opened minerals, but he would not take the unopened minerals. It seems to me that that would be the meaning of those words taken by themselves.

Then, is there anything here to show an intention in fact that the appellant was to have the benefit of the unopened minerals if they were thereafter opened? Now, the first thing that Mr Davey argued was, that inasmuch as the testator in his lifetime opened some minerals in some parts of his estate, it is to be assumed that his intention was to open the other minerals in the other parts of his estate, and that the consequence of his having opened the minerals in a part of his estate is that there is no difference at all between opened and unopened minerals, but that all are to be considered as if they had been opened in his lifetime, because his opening of a part shows that he intended in due course to open the others afterwards. I do not myself think that that is a fair conclusion as to his intention, and I think that it is quite clear that to presume such an intention as that would be at once to repeal and make of no effect all the numerous cases which draw a distinction between opened and unopened mines, for there would be none whatever, and if any minerals had been opened at all it would be the same as if they had all been opened.

Further than that, it was argued that there was such an intention, because the Act of 1867 had been passed, which gives to trustees the powers amongst other things to grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands and thirty-one years for minerals. That power is given to trustees whether the trust-deeds under which they are appointed were executed previously to the Act or subsequently to it; but in all cases such a power is given to trustees, not for the purpose of altering the incidents of the property, but, as the Act says, for the purpose of facilitating the administration of the trust. I should be inclined myself to say that the meaning of that is that wherever a trustee might previously make a lease at all, he may now make a twenty-one years' lease or a thirty-one years' lease, and that it was not intended to say either that a trustee should have power to make leases which he had not before, or that if he had the power before to make leases he should exercise it in such a way and to such an effect as to change the beneficial enjoyment of the property. Now, that is what the argument really comes round to, that because this Act was passed and existed before the trust-deed was executed, we are to read it into the trust-deed, and to say that that trust-deed, which would have given Lady Campbell no interest in the unopened minerals without the Act, shall, in consequence of the introduction of these terms of the Act, be read as showing the intention and producing the result that she should have an interest in those unopened minerals. I cannot myself follow that reasoning at all. I do not think that it is just. I do not enter into the question which seems to have been glanced at (apparently Lord Shand and the Lord President are not quite at one about it), as to whether the Act would give the trustee a power to grant a lease of an unopened mine or not. I do not think that it has much bearing upon the present case, and I do not mean to enter into that question; but I do think that the Trust Act of 1867 never was intended to produce any such effect as to change the nature of the beneficial enjoyment of the property which is conveyed by the trust-deed.

My Lords, there only remains one thing, and that was mentioned the very last of all. *De facto* here, after the death of the truster, the trustees opened these minerals and made a lease of them, and it was argued, I think, as well as I could follow it, that because that lease was *de facto* made, therefore those who made it (I do not think that these were the words used, but this appears to be very much the idea) are conclusively precluded or estopped from denying that the testator had intended it to be made. I do not see that they are at all. It seems to me the most reasonable thing in the world that a man who being of full age, will, if he lives long enough, be the fiar ultimately (all his rights in the meantime being contingent), when he finds that it would be more advantageous to work the minerals now than it would be to work them afterwards, should say, and should join with the trustees in allowing them to say, "We will make a lease for thirty-one years under which the minerals shall be worked, and the produce which is thus obtained" (it is what they have actually said) "we will not treat as spending-money which Sir Archibald may spend now, but we will treat it as an accumulating fund, of which the interest will go to Lady Campbell." Probably he would be quite right in allowing that. I do not say how that would be.

The result is, my Lords, that it seems to me that the decision of the Court below is perfectly right. I have not been shaken at all in that belief; and the consequence is that I now move that the interlocutor appealed against be affirmed and the appeal be dismissed with costs.

Lord Watson—My Lords, in this case Mr Davey and Mr Murray have adduced every possible argument that could have been addressed to your Lordships on behalf of the appellant; but notwithstanding they have not satisfied your Lordships that the interlocutor against which this appeal has been taken is erroneous. There can be no doubt that minerals, so long as they remain imbedded in the soil, are to all intents and purposes *partes soli*, and that even when removed from the strata in which they repose—and brought to the surface for the purpose of being sold—they are not, either in law or in fact, fruits. I think that that is the doctrine of the Scotch law, not only enunciated by our early institutional writers, but also as authoritatively repeated in recent cases by distinguished members of your Lordships' House. Earl Cairns,

in the case of *Gowans* v. *Christie* (Feb. 14, 1873, 11 Macph., H.L., 1), said, speaking of mineral leases —"There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil."

Now, had that view been strictly adhered to in the administration of the law, the result would have been that no person having a limited or a usufructuary right and interest in the soil would have been entitled to enjoy those fruits as a part of that right or interest. But there has been introduced into the law this provision, that if the owner of the soil, the fiar, creates a mineral estate bearing fruits, by working or letting a particular seam of minerals, he thereby brings it within the right of usufruct. That applies where merely the right of liferent is given—a right which does not require to be conferred in any artificial terms. In the present case the right is given by a trust-deed—it is not given directly to the appellant, the usufructuary—it is given to her through a body of trustees. The direction given to the trustees in the deed is to permit her to enjoy that which had it been given to her directly would admittedly not have included a right to the fruits of the mineral lease which is in question in this case. And therefore I think it is incumbent upon the appellant to show that within the four corners of the trust-deed there are some powers conferred upon the trustees, or powers incidental to their office, which enable them to enlarge the appellant's right by giving to her that which is not included in it, and necessarily taking away to the same extent from the right of the fiar, to whom also they are directed to give the estate, including the minerals in question.

Now, my Lords, had this deed contained an express or an implied direction by the late Sir George Campbell that these minerals should be worked by the trustees in the course of their administration, I should have been prepared to hold that it was within his contemplation that when they were so worked his widow might enjoy the rents or lordships arising from their working as part of her usufructuary right. But I am quite unable to find any such direction, either express or implied. Still further, dealing with this deed apart altogether from the terms of the Statute of 1867 (the Trust Act of that year), I have heard no argument at the bar to show that apart from the enactments of that particular statute these trustees had in themselves any administrative power arising from or incidental to the office of trustee which could enable them to grant such a lease. In Scotland the powers of trustees to grant leases have not been very strictly defined; but the limit which has always been placed upon these powers may be described thus. They have been permitted to use all those administrative powers and faculties which are necessary to the extrication and fulfilment of the purposes of the trust-deed, but not to use administrative rights and powers which instead of giving effect to and carrying out the purposes of the truster would tend to defeat or confuse those purposes as appearing from the deed itself. And if I am right otherwise in my construction of the rights and powers contained in this deed, the granting of a lease of these minerals to the effect of bringing the fruits of them, the mineral rents, within the liferent or usufruct of the widow, would be at variance with the direction plainly given in the deed as the law construes it, namely, to give the widow the fruits during her lifetime of those portions of the mineral field which were let by the truster during his lifetime, and to hand over at her death or re-marriage the whole remainder of the mineral field intact to the fiar. Any such assumed power of administration would be an illegal power, a power plainly in excess of the trustee's rights—plainly in excess of them, because, instead of promoting, it would defeat the purposes of the deed. And therefore, my Lords, I add this observation, which seems to me to be a just one, that such being the terms of the deed itself, such being the rights and powers of the trustees, either derived directly from the deed or incidentally conferred upon them by law for the purpose of working out the deed, it cannot be assumed (apart from the statute, upon which I have yet said nothing) that anything done in violation of these rights and powers, or in excess of these rights and powers, would be an act within the contemplation of the truster in any reasonable sense. The truster cannot be held to have contemplated workings under a lease granted in excess of or contrary to the plain import of his own deed.

But then we have here undoubtedly a lease granted; and no exception is taken by the parties having the interest to the substance of that lease—they agree that working shall take place under it, and that the tenant shall have his right. It is not a lease confined to the period for which alone the trustees at common law could have granted any lease within their powers, namely, terminable upon the death or second marriage of Lady Campbell—it is a lease given for a longer period, for a period such as is contemplated by the third sub-section of the second section of the Trust Act of 1867. But does it follow that because a lease has *de facto* been granted which was not in the contemplation of the truster or within the ordinary administrative powers of the trustees under his deed, therefore these rents are to go to the liferentrix, as if the minerals had been let under the sanction, express or implied, of the truster himself? I apprehend, my Lords, that there is no reason or principle why such a result should follow. Still less can it be considered that such a result should follow when we take into account what I think we must consider to have been the real cause of granting that lease. Although the trustees in the course of their ordinary administration would not have power under a deed like this to let the coal or minerals which are destined to their fiar upon the determination of the ordinary usufructuary right, circumstances may emerge which, in the interest of the fiar for the protection of his estate in the sense of protecting it from depreciation in value, may render it expedient in the highest degree at once to convert his coal or his ironstone into money, and to give him money instead of giving him his coal or ironstone. But is the

exercise of a power which may be implied, and which must be exercised for the benefit and with the consent of the fiar, to have the effect of making it a lease for a totally different purpose, namely, a lease in the contemplation of the truster for the purpose of maintaining his widow, instead of a lease for the purpose of giving to the fiar in another form the estate which the truster intended that he should take and said that he should have? My Lords, I can see no reason whatever for coming to such a conclusion. I can see no reason whatever for supposing that the granting of this lease, with such a result as that contended for, is made legitimate by the concurrence of the fiar, for whose benefit it must be presumed to have been granted; and I see no reason to doubt that if these trustees had endeavoured to convert, without the sanction, express or implied, of the truster, this mineral field into a fruit-bearing mineral estate for the benefit of the widow, the fiar would have been entitled to interfere by interdict and to stop any such proceeding.

But then, my Lords, it is said that the Act of 1867 introduced an entirely novel rule; and if the provisions of the Act are to the effect described by the learned counsel at the bar, they may be properly said to be very novel provisions. That Act was passed in 1867. Its provisions were made applicable not only to future trust-deeds, and not only to trusts which might come into operation under deeds then existing, but also to every trust which had come into operation, however long it had subsisted before the passing of the Act. There is to my mind a very strong *a priori* probability against the Legislature having intended to give to trustees who had not previously the power a right to work the estate of the fiar for the purpose of handing over the proceeds to the liferenter; and I cannot see a distinction in the nature of the power, because it is given in precisely the same terms to trustees who were administering trust-deeds when it passed, as well as to trustees who come to administer under trust-deeds subsequently made. Still more, I am quite unable to find in the terms of this Act any warrant for saying that it gives to trustees acting under any deed, of whatever date, a general and unqualified power to work and let minerals. In construing a deed like this and an Act like this, which was passed professedly not for the purpose of disturbing the interests of beneficiaries taking beneficial interests under trust-deeds, but for the purpose merely of facilitating administration without disturbance to those interests, I think your Lordships must look to the nature of the evils or of the mischiefs which beset administration and made it difficult before.

Now, it was fairly enough admitted at the bar that until the passing of the Act of 1867 trustees who had had from the truster power to work minerals themselves and a power to let minerals, could only do so at a great disadvantage, because they could not give an effectual lease for a period beyond the date of their own administration; and therefore it became necessary to enable them as prudent managers to have the option of letting minerals as well as lands for the customary period, although that period should outrun the termination of their trust—to grant leases binding upon the fiar who took when the trust came to its close. I do not think that the statute does anything more; and the power, such as it is, is only to be exercised in terms of the qualification expressed in the first part of the section. These Acts which are sanctioned in the sub-sections are only authorised so far as they "are not at variance with the terms or purposes of the trust." From what I have said before, I think it will be apparent now, that, according to my view, a lease made under this trust for the purpose of handing over the fiar's estate to the liferentrix would be at variance with the purposes of the trust; and I think that to grant a lease of minerals for thirty-one years under a trust-deed which neither expressly nor by implication sanctions the working by the trustees of a single ton of mineral, or the letting it to a tenant for a single day, would be emphatically the granting of a lease for thirty-one years "at variance with the terms or purposes of the trust." If it was plainly the purpose and intent of the trust that the minerals should not be worked or let, I do not think that it was the purpose of this Act to give any right whatever to work or let them. It supplies most usefully a *lacuna* in the administrative powers of trustees, because it enables trustees who are letting minerals to let them upon the same favourable terms as those upon which they are let by other mineral proprietors.

My Lords, I think it unnecessary for me to add anything further to what has already been said by my noble and learned friend now on the woolsack (Lord Blackburn), and I entirely concur in the motion which his Lordship has proposed to the House.

Lord Bramwell—My Lords, I concur in the advice which has been given to the House, on the grounds stated by my noble and learned friend who has last addressed your Lordships (Lord Watson). I cannot think that it could have been the intention of the Legislature to give, or that it can in any way have given, any right to these trustees, or that the truster could have intended to make an arrangement by which possibly the entire benefit of these minerals should be transferred to this lady, because she might live so long (I do not know what her age is) that her life might continue during the whole course of the lease, and during that time the whole of the minerals might be worked out. It seems to me to be impossible to say that, looking at it as a question of intention to be found in the trust-deed, the truster could have intended that. It is impossible to say that he has expressed such an intention, or that he has used words which show or indicate such an intention.

As to the lease itself, if it is invalid, I cannot see that it gives the appellant any right. If it is valid it must be so, either with or without her consent. If she has given her consent, we must look at the terms on which that consent has been given. I know that there is no such consent mentioned in the deed before us, but I am putting it as a dilemma—either she has consented or she has not. If she has consented we must see the terms on which she has consented. If she has not consented, and if her consent was necessary, she must take such remedy as she would be entitled to.

Lord Fitzgerald—My Lords, the very able and exhaustive opinions which have been de-

livered by the noble and learned Lord on the woolsack (Lord Blackburn), and by my noble and learned friend opposite (Lord Watson), render it almost inexcusable on my part to add anything; nor would I do so if this was a question of Scotch law; but it is not a question of Scotch law; it stands upon grounds which affect the whole United Kingdom (with the exception of the point raised regarding the Trust Act, which I shall presently advert to).

I listened very attentively to the argument of Mr Graham Murray yesterday, who, I think, opened everything that has been brought before us to-day, and I listened to that argument with (if a Judge should ever have an inclination one way or the other) an inclination to come to a conclusion in favour of the appellant if I could do so according to law; because if I had been allowed to conjecture, and had put the question to the truster, whether or not he had intended that his widow should have the annual produce in the shape of the rents of unopened mines, possibly he would have answered in the affirmative, as by the trust-deed he was giving to her the benefit of, or the rents derivable from, those mines which had already been opened. But in a case of this kind, of course, there is no opening for conjecture or guess; we must determine the case according to the settled rules of law.

My Lords, I do not propose to consider any of the technicalities or limitations or difficulties which may beset a liferenter in Scotland, such as a widow seeking her terce, but I shall deal with the case upon the ground of a settlement in England or a trust-deed in Scotland. And I think that the laws of both countries are precisely the same—that is to say, a tenant for life as we should call him here, and a liferenter as he is called in Scotland, namely, the person to benefit under the trust-deed, stand in precisely the same position; each is entitled to the whole produce and profits derivable from that life estate, whatever they are; but in both countries equally he is subject to this limitation, that, as we say in England, he must not destroy the *corpus* of the estate, or, as it is more correctly expressed in Scotland, the substance of the estate is to be preserved and not destroyed; and in both countries it is subject to this also, that the settler may in either case expressly indicate a contrary intention—he might have said in this case that his widow should, if she had the rents derivable from opened mines, equally have the rents derivable from mines which were unopened That is the law of both countries, but that intention must either be expressly shown upon the face of the settlement or trust-deed, or it must arise by fair and reasonable implication. Now, I have looked at this trust-deed, and have read it over several times to see if there was upon the face of it anything that would express or indicate any such intention on the part of the truster, and I can find nothing but the words which have been relied upon by Mr Davey to-day, namely, that in the fifth place the widow is to have "the whole annual produce and rents of the residue and remainder of my means and estate, heritable and moveable, during all the days and years of her life." The words are not "produce and rents," but "annual produce and rents" of the estate. "Annual produce" means something arising and renewing itself *de anno in annum*, and is subject equally to the same limitation. If you were to put upon it the construction contended for by the appellant, then under the term "annual produce" you might take away in a few years the whole *corpus* of the estate. I can find, therefore, in the trust-deed no indication at all of an intention to carry it outside the settled rule of law in both countries, namely, that the *corpus* or substance of the estate is to be preserved, while, subject to that, the tenant for life or liferenter is to have all the annual produce from it.

My Lords, the only question which remains is as to the Trusts Act. At first I was a little puzzled, and induced to feel a doubt by the statement of Lord Shand, that he does "not entertain any doubt that a power to lease minerals never before worked is included" in the Trusts Act. But that Trusts Act is not to alter existing rights, but to facilitate the administration of trusts; and if the testator had indicated any intention, or given any authority to his trustees by the deed of trust to open mines, then the Trusts Act would have stepped in and enabled them to make leases for thirty-one years; or rather, if they had power to open mines, then it gave them power to make a lease for a certain period, viz., thirty-one years, instead of a lease for an uncertain period, namely, a tenancy for life. It was with that view that I asked Mr Graham Murray yesterday if he could point out in the trust-deed anything which enabled the trustees to deal with unopened mines; because if he could have established that point, it would have advanced him a step towards establishing his proposition; but he could not point out a word of the kind in the trust-deed; and I apprehend that giving to the Trusts Act the construction and effect which Mr Davey contended for would be taking a very wide line indeed. We must put a reasonable and proper construction upon it, and that falls very far short of what has been contended for here.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellant—Davey, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.—Grahames, Currey, & Spens.

Counsel for Respondents—Lord Advocate (Balfour, Q.C).—Macfarlane. Agents—Tait & Crichton, W.S.—William Robertson & Co.

COURT OF SESSION.

Tuesday, July 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LEVY & COMPANY *v.* J. & J. THOMSON.

Arbitration—Clause of Reference—Reference of Disputes as to the "Rights of Parties under the Contract"—Exclusion of Ordinary Action.

In a contract to build two steamships it was stipulated that failing delivery by a certain date the builders should pay liquidated damages at a certain rate per day, unless the delay was owing to causes beyond their control. The contract contained this