been satisfied that by the decree before them nothing more was conveyed to the spouses than a liferent allenarly. I think that we should follow that decision. We are not deciding any point of general importance. We are only called on to interpret a blundered deed. It is, I think, sufficient for us that it has been already interpreted by judicial decision.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court adhered.

Counsel for Pursuers—Rankine—Guthrie. Agent—F. J. Martin, W.S.

Counsel for Defenders — Lees — Guy. Agents—Macandrew, Wright, & Murray, W.S.

Wednesday, July 19.

SECOND DIVISION.

STRAIN'S TRUSTEES *v.* STRAIN.

Succession — Trust — Construction—"Free Annual Income and Produce."

A coalmaster in his trust-disposition and settlement directed his trustees to pay to his wife during her lifetime "the whole free annual income and produce of the residue" of his estate. He authorised his trustees, in the event of his sons not purchasing his colliery works, machinery, and plant from them, to sell the same, and he further authorised his trustees to carry on the works for such period as they might think proper.

When the truster died in 1891 he was tenant of certain leases of valuable coalfields which were being worked by him at that date. The last of these leases expired in 1906. The truster's sons did not purchase the works and they were carried on by the trustees.

Held—by a majority of Seven Judges (the Lord Justice-Clerk, Lord Young, Lord Adam, Lord M'Laren, Lord Kinnear, and Lord Trayner—*diss.* Lord Rutherfurd Clark, who thought the case ruled by *Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532)—that the net proceeds of the collieries, derived from the collieries as worked by the trustees, formed a part "of the free annual income and produce of the residue" of the truster's estate, and fell to be paid to the truster's widow.

Hugh Strain, coalmaster, Glasgow, died at his residence, Grahamshill, Airdrie, on 26th January 1891, survived by his widow Mrs Mary Woodhouse or Strain, and twelve children. By trust-disposition and settlement, dated 12th September 1887, and recorded 7th February 1891, Hugh Strain assigned and disponed to trustees, in trust for the ends, uses, and purposes therein specified, his whole means and estate, heritable and moveable. He appointed his trustees to be his executors.

By the fourth purpose of the trust the truster directed his trustees, in the event of his wife surviving him, "to make payment to her during all the days and years of her life of the whole free annual income and produce of the residue of my means and estate for her liferent alimentary use allenarly, payable at such time or times as my trustees may find most convenient and expedient, but burdened always with the maintenance of such of my daughters as may be unmarried and reside in family with her; declaring always that in the event of the free annual income and proceeds of said residue not amounting to £400 per annum or falling short in any year of the said sum of £400, I authorise and direct my trustees to encroach on and take from the capital of said residue such sum as is necessary to make up an annuity of £400 to my said wife, my intention being that the minimum annual allowance to be received by my said wife for the support of herself and such of my daughters as may remain unmarried and reside in family with her shall be the said sum of £400."

In the last place, the truster directed his trustees, "within three months after my decease, to make offer to my said sons John, Hugh, and James, or such of them as may wish to purchase the same, of my whole colliery works and whole machinery, plant, leases of minerals, and houses, office fittings, and coal depots of every description connected therewith, as a going concern, and that at such price or prices as may be mutually agreed on between my trustees and them, which failing, at such price as may be fixed by two arbiters to be mutually chosen, and whom my trustees and my said sons shall be bound to name . . . declaring that in the event of my said sons declining to purchase said works, or failing to pay the said price or any instalment thereof as it falls due, then my trustees may, without prejudice to the powers hereinafter contained in their favour, sell the same either by public auction or private bargain, in whole or in lots . . . with power to them to carry on and continue under the superintendence of themselves, or of any party they may appoint for that purpose, for such period and in such manner as they think proper, any or all of the businesses in which I may be engaged as sole partner at the time of my death, and to extend or contract the same, or let, or lease, or sell the same, and that at such valuations or prices, and on such terms and conditions, as my trustees in their sole discretion shall deem proper."

The trust-estate was a mixed one, consisting of heritable and moveable property including going collieries held under six mineral leases, in which the truster was tenant, which terminated at various periods, the last expiring in the year 1906. The capital value of the residue of the whole estate was about £31,000. Apart from the profits from these collieries the residue of the estate as at the date of the truster's death yielded an income of from £400 to £450 annually, but as part of that income was derived from miners' houses

used in connection with the collieries, and if the collieries were stopped that source of revenue would diminish, this might bring the income below £400. The said residue was made up as follows—(1) Heritable and moveable residue apart from the collieries £9472; (2) Capital in the collieries, including estimated value of leases, £21,575—£31,057. The collieries and leases and plant were as a going concern of the value of about £18,000, and the breaking-up value of the plant, but exclusive of waggons, was £5236, 10s. 10d., and the break-up value of the same as at the date of the exhaustion of the coal leased was £3419. These two valuations of £5236, 10s. 10d. and £3419 were exclusive of value of 288 waggons, which could be removed and sold at any time. These waggons were valued at about £7000.

As directed in the trust-deed, the trustees made offer to sell or lease the collieries, &c., to the truster's sons John, Hugh, and James, but the latter declined to purchase or lease. The trustees continued to carry on the collieries under the mineral leases entered into by the truster, the profits amounting to between £2000 and £3000 a-year.

In these circumstances a question arose as to the income to be paid to the widow under the fourth purpose of the deed. The widow maintained that on a sound construction of the deceased's settlement, and particularly in the absence of any direction, and, as she contended, of any necessity to accumulate the capital, she was entitled to the free annual profits derived from the whole collieries. The trustees maintained, that having regard to the terms of the settlement they were not bound to pay to the widow in respect of the said collieries more than the interest at 4 per cent. accruing on the annual profits thereof.

A special case was presented to the Court by (1) the trustees, (2) the widow, and (3) the children of Hugh Strain, for the decision of the following question of law—"On a sound construction of the trust-deed, does the direction to the first parties therein, to make payment to the second party during her lifetime of the whole free annual income and produce of the residue of the truster's means and estate, for her liferent alimentary use allenarly, give her right, *inter alia*, to the whole free profits arising subsequent to his death from the collieries held under the mineral leases in which he was tenant at the date of his death?"

The case came before the Second Division, who, after hearing argument, appointed the case to be argued before themselves and three Judges of the First Division.

Argued for the first and third parties—The profits derived from the collieries were capital. This had been conclusively decided in *Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532. That case ruled the present. The leases of the collieries were valuable assets, and were terminable portions of the estate. A portion of the leases was used up every year. This made the profits derived from them capital. If it was held otherwise, viz., that the proceeds of the mines were income, then a case might easily occur in which the whole estate was composed of mineral leases, and if the truster in such a case left a liferent of his estates to his widow, she might survive the exhaustion of the whole estate. The case of *Campbell* v. *Wardlaw*, March 15, 1882, 9 R. 725, July 6, 1883, 10 R. (H.L.) 65, did not apply, as there the mines were opened after the death of the truster. The terms of the present will also showed that the intention of the testator was that his widow should get about £400 annually, which sum was the profits of the residue excluding the collieries. If the truster had desired to leave the proceeds of the mines to his wife he would have done so in direct terms, as was done in the case of *Baillie's Trustees* v. *Baillie*, December 8, 1891, 19 R. 220.

Argued for the second party—The profits under the mineral leases were produce of the estate, and therefore were distinctly left by the terms of the will to the widow. The case fell under the rule laid down in *Campbell*, and the case of *Ferguson* did not apply in view of the later decision. The case of *Ferguson* might also be distinguished from the present, because in that case only "the free annual income" was left to the widow, while here "the free annual income and produce" was left. About £1200 was invested in the plant at the collieries, and this large sum would be producing no income at all if the view of the trustees was sound. The trustees asked that "income and produce" should be read "income of produce," which was ridiculous.

At advising—

LORD JUSTICE-CLERK—The truster Mr Strain directed his trustees to make payment to his wife (the second party) during her lifetime of "the whole free annual income and produce of the residue" of his estate. When he died he was tenant, under certain leases, of valuable coalfields, which were being worked by him at that date; and with regard to these leases he directed his trustees to offer them, with his whole colliery works, machinery, and plant, to his three sons, or such of them as might wish to purchase the same, at such price as might be mutually agreed on or be fixed by arbitration. Failing his sons or any of them purchasing said works, the trustees were authorised to sell the same by public auction or private bargain; and lastly, the trustees were authorised to continue and carry on the works for such period as they might think proper. The truster's sons did not purchase, and the works were carried on by the trustees. What the trustees so carried on was the business of the truster; they were trading with part of the truster's estate, and whatever the works or business so carried on by the trustees produced as profits was part of the "annual income and produce of" the trust-estate. Such annual income or produce is directed, in terms, to be paid to the truster's widow. It is only, however, the free annual income and produce of the truster's residue which is to be

so paid, and accordingly from the gross proceeds of the collieries there falls to be deducted all the outlay which was necessary to the production of such income, such as rent or royalty to the landlord, wages of workmen, and other expenses of carrying on the works, interest on the capital invested on plant, and a fair deduction for the deterioration of the plant by use. But provision being made for such deductions, the remainder is the free income of the estate, and belongs to the widow, the second party to this case. It must be kept in view that if the trustees in their discretion carry on the works, the source of the widow's income continues to be risked in the colliery business, exposed to all the fluctuations in value and risks of failure which necessarily attach to such a speculation. To give effect to the contention made here against the widow would be to hold that she must take the risk of her income being diminished or lost in a hazardous business, but to withhold from her the profit of its successful prosecution, which would, in my opinion, be contrary to the intention of the truster as expressed in his will.

The only difficulty I have had arises from the decision pronounced in *Ferguson's* case. If that decision is regarded as one proceeding upon the special terms of the will there under construction, and of the testator's intention as there evinced, then the difficulty to a large extent, if not altogether, disappears. Nor would it be a decision conflicting with the present if it is regarded as a case where there was only delay in the realisation of the trust-estate by the trustees administering it, and where the produce of the estate during the period occupied in realising it was treated as an increment of the residue, and not as proper income or produce. I have considerable difficulty in thinking that that was the view taken of the case, looking to the opinions expressed by some of the learned Judges who decided it. But if it decided that the produce or profit resulting from the authorised use and employment by the trustees of the truster's estate was not income but capital, I very respectfully dissent from the judgment. In the present case I think the truster, in language which is not open to construction, directed his trustees to pay his widow the free annual income of his residue, and the profits derived from the collieries as worked by the trustees form, in my opinion, a part of that income, and falls to be paid to Mrs Strain.

LORD YOUNG—I am of the same opinion. I think any profits produced by a use which the truster has authorised his trustees to make of his estate are free annual income and produce of the estate, and seeing that the truster has expressly directed that such income and produce is to be paid to his widow, I do not think anything more is to be said on the subject.

LORD RUTHERFURD CLARK—When I first heard this case I thought that a rule had been settled in the case of *Ferguson*, and that that rule should be followed. I still remain of that opinion.

LORD ADAM—The question is, whether, as the second party to this case maintains, it was the intention of the truster on a sound construction of the trust-deed, to give to her the whole free profits arising from the collieries in question subsequent to his death? or whether, as is maintained on the other hand by the first and fourth parties, she is only entitled to the interest accruing on these annual profits?

Now, I cannot doubt that the capital invested in these collieries is part of the residue of the trust-estate, and it is clear that the truster contemplated that that capital might either be realised by his trustees by a sale of the collieries to his sons or otherwise, or might remain invested in the collieries either until the expiry of the leases or so long as the trustees should think proper. Had the trustees sold the collieries the widow would undoubtedly have been entitled to the income derived from the purchase prices which would have formed part of the residue of his trust-estate.

The trustees, however, have not taken that course, but in exercise of the power conferred on them by the truster have carried on the collieries and have allowed the capital in question to remain invested in them.

I cannot see that the profits derived by the trustees from these collieries is anything else than the produce of the capital so invested. It is just the return for the capital invested in that particular business. But that capital is just a part of the residue of the trust-estate, and the profits in question are just the income or produce of that part of the residue of the estate which is so invested, and I cannot see why the widow should not be entitled under the express direction of the truster to that income or produce just as much as she is entitled to the income or produce of the rest of the residue of the estate, however it may be invested.

The proposal of the first and third parties that she should be paid only interest on the annual profits in question appears to me to be a proposal to pay her, not, as the truster has directed, the produce of the residue of his estate, but only the income of the produce of that residue. I am therefore of opinion that the question should be answered in the affirmative.

With reference to the case of *Ferguson's Trustees*, the Court held on the construction of Mr Ferguson's settlement that it was not his intention that his widow should have the profits of the collieries carried on by him at the time of his death. It is unnecessary to say whether or not I should have arrived at the same conclusion in that case. But construing the settlement with which we have to deal, I am quite satisfied that it was the truster's intention that his widow should have the profits of the collieries in question.

LORD M'LAREN—The facts of this case do not raise any serious doubt as to the

intention of the testator, but it is desirable, especially in view of the fact that in a previous case a different decision was given with reference to a testamentary direction not very different from the present, that we should, if possible, find a principle upon which cases of this description may be solved.

The testator in this case has indicated very clearly his intention that his widow should have right to the income of his estate in its existing state of investment, because he has not only given to her, under the form of a direction to his trustees, "the whole free annual income and produce of the residue" of his estate, but he has empowered his trustees "to carry on and continue, under the superintendence of themselves, or of any party they may appoint for that purpose, for such period and in such manner as they think proper, any or all of the business in which I may be engaged."

The deceased Mr Strain is designed as a coalmaster, and the various leases under which his business was carried on terminate at various periods, the last of them expiring in the year 1906, and so it is plain that there is room for the continuance of the truster's business for a substantial period subsequent to his death, and perhaps a possibility of a further continuance should the trustees and the parties beneficially interested be willing to come to terms with the owners of the minerals.

The first and third parties to the case contend, as I understand the argument, that because a lease of minerals, or rather a right to work minerals under a lease, is a terminable interest, its value ought to be capitalised, and that the second party, the truster's widow, is only entitled to interest on the capitalised value of this part of the trust-estate.

It appears to me that the trustees, and those beneficiaries who concur with them, are here making a wrong application of a principle which is true within certain limits. If a testator or truster makes a general conveyance of his estate for testamentary purposes, and without conferring any unusual administrative powers on his executors or trustees, merely directs them to pay over the income of his estate to a wife or daughter or other object of the trust for life, it may reasonably be maintained that he has treated the residue of his estate as an aggregate subject capable of producing an income which shall leave the capital unimpaired for the benefit of the fiars or substituted legatees. In such a case it would seem that if the residue should be found to include terminable annuities, leaseholds, or other "wasting" subjects, it would be the right of the trustees in the exercise of their ordinary powers of administration to sell the terminable or "wasting" interests, and to invest the price in securities of a permanent character, such as heritable bonds or Government stock. This being done, it follows that the right of the liferenter or legatee of the income for life would be a right to receive the income of the estate when put into a proper state of investment.

This, as I understand, is the view which has always been taken by the courts of equity in England; and in the leading case of *Howe* v. *Earl of Dartmouth*, the principle was not in dispute; only it was contended on behalf of the legatee of the income, that as the annuity had not in fact been sold, she was entitled to the income which had accrued on these obligations, so long as they were in fact held by the truster's representatives. But this argument was rejected by Lord Eldon, who held that the case was governed by the principle, *quod fieri debet infectum valet*. But it was considered by that eminent judge that there might be cases where the terms of the will imported a gift of the income of the estate in its existing state of investment, and Lord Eldon qualifies his judgment so as to leave such cases to be dealt with on their merits. It is stated in Whyte and Tudor's analysis of the cases that the English rule applies to leasehold as well as to personal estate, and it does not appear to depend on any technical peculiarity. The later English decisions exemplify the rule and its exceptions, but it is unnecessary to refer to them more particularly, because decisions on the particular provisions of a will are not in general of much value as precedents, except in so far as they illustrate the principle that the will of the testator, when clearly expressed, ought to be followed in preference to inferences deduced from the general rules of trust administration.

While I do not suggest that the rules of the Courts of Equity in England are in any way binding on this Court, I do think that in the absence of special directions to the contrary it would be the duty of a trustee in Scotland, as in England, to realise terminable interests where it could be done without loss to the trust-estate, even though the effect of such sale would be to reduce the income payable to a liferenter. We are not called on to give an opinion as to the merits of the judgment of the First Division of the Court in the case of *Ferguson's Trustees*. There was a difference of opinion between the Court and the Lord Ordinary as to the construction of the will But one view shines out conspicuously in that judgment, viz., that their Lordships were not of opinion that the testator in that case intended that his widow should take under the name of income the short remainder of an expiring lease. In the present case, as it appears to me, the testator was willing that in certain contingencies his widow should have the benefit of the income which might be derived from the continuance of his business as a coalmaster after his death. In the event of his sons declining to take over these lands, the trustees are empowerrd to carry them on, and I see no indication in the will of any other reason or motive for granting this unusual power except the motive of retaining his capital in its then state of investment in order to provide a larger income to his widow. In coming to this conclusion, we do not, as I think, inter-

fere with the authority of the case of *Ferguson's Trustees*. That case exemplifies the general rule, and the present case illustrates the qualification of that rule depending on declared intention. My opinion is that the question ought to be answered in the affirmative.

LORD KINNEAR—I agree with the opinion of Lord Adam.

LORD TRAYNER—I concur in the opinion of your Lordship in the chair.

The Court answered the question in the affirmative.

Counsel for the First and Third Parties—Dundas—C. N. Johnstone. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Second Party—Dickson—Cooper. Agent—John A. Cairns, S.S.C.

Thursday, July 20.

FIRST DIVISION.

LIQUIDATOR OF PROPERTY INVESTMENT COMPANY OF SCOTLAND, LIMITED, PETITIONER.

Company—Liquidation—Reclaiming-Note—Expenses.

The liquidator of the Property Investment Company of Scotland, Limited, presented a note to the Lord Ordinary for sanction of a compromise made by him with the directors of the company, the prayer of which was granted.

Mr Hugh Blaik and others, shareholders of the company, who objected to the compromise, unsuccessfully reclaimed to the Inner House.

Held that on account of certain peculiarities in the case the reclaimers should not be found liable in the expenses of the reclaiming-note.

LORD PRESIDENT—I should be slow to encourage the idea that when the Lord Ordinary, who is the Court in a liquidation, pronounces a judgment it is the right of any of the parties to adjourn the discussion to the Inner House, and there go over the same questions, but there are peculiarities in this case, on account of which I propose that we should give no expenses in the reclaiming-note, and leave the expenses in the Outer House as the Lord Ordinary has done. In giving no expenses I wish, however, to guard against the idea that a discontented shareholder may in the ordinary case take the case to the Inner House without being found liable in expenses if unsuccessful.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel for the Liquidator—H. Johnston—Gloag. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for Blaik and Others—W. Campbell—M'Lennan—Trotter. Agent—W. Ritchie Rodger, S.S.C.

Thursday, July 20.

FIRST DIVISION.

[Lord Low, Ordinary.

LESLIE *v.* J. YOUNG & SONS.

Copyright—Time-Tables—Interdict.

In an action by the proprietor of a local time-table to have the proprietors of a rival time-table interdicted from publishing his work as being a breach of the complainer's copyright, the question was whether the respondents, instead of compiling a time-table for themselves from common and public sources of information, took advantage of the complainer's labour, and substantially copied his time-table. After a proof, the Lord Ordinary (Low) *affirmed* this proposition and *granted* interdict, but the First Division recalled this interlocutor and *refused* the prayer of the note.

Observations upon the nature of copyright in a time-table, and the use which may legitimately be made of such a publication by the compilers of a similar work.

Duncan Leslie, wholesale stationer, bookseller, and printer, Perth, the proprietor and publisher of a monthly publication called "Leslie's Time-Tables and Diary," entered at Stationers' Hall, brought an action of suspension and interdict in July 1891 against J. Young & Sons, printers, Perth, praying the Court "to interdict, prohibit, and discharge the respondents from selling or exposing to sale, circulating or distributing a publication printed by the respondents, entitled 'J. Young & Sons,' Perth, "A B C" Time-Tables,' and containing, *inter alia*, time-tables for the month of July 1891, and further to interdict, prohibit, and discharge the respondents from printing, publishing, selling or exposing to sale, circulating or distributing any time-tables or other publication copied or only colourably different from the publication known as 'Leslie's Time-Tables and Diary.'" Of consent, and upon the respondents undertaking to keep a correct statement and account of the sales of the book complained of, and the profits derived therefrom, the note was passed, but interim interdict was refused.

A record was made up in which the complainer averred that the information in his time-table "was gathered and arranged in systematised form at great expense, and as the result of great labour, skill, and experience. Many of the details are not to be found in the ordinary railway and steamboat guides. These were obtained by the complainer from other sources, and were the result of much labour and expense. Great accuracy has been secured by continual revision from month to month. After many years of care and skill the complainer has obtained for his time-tables a very wide circulation and a high reputation. In consequence of said reputation respondents have deliberately adopted his