no honest man of intelligence would have given that advice. He gave plainly, I think, dishonest advice. I think Mr Low must have known perfectly well that if his advice was not acted upon and the person to whom the advice was given did see an agent no bond would ever have been granted. Therefore the only other question is whether Thomson in pressing that advice on the cautioner was acting for Low. I think it is satisfactorily made out that he was, and that he was in the same position as Low who had given advice which certainly was not honest advice in such a case. Therefore I agree that the judgment of the Lord Ordinary is right.

The Court pronounced this interlocutor:—

"Refuse the reclaiming-note and adhere to the interlocutor reclaimed against and decern."

Counsel for the Pursuer and Respondent—W. Campbell, K.C.—Constable. Agents—Blair & Cadell, W.S.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—M'Lennan. Agent—John Baird, Solicitor.

Friday, June 21.

SECOND DIVISION.

MEIN'S TRUSTEES *v.* MEIN.

Succession — Liferent — Residue — Capital and Income—Profits from Lease of Colliery—Free Annual Income and Produce of Residue.

By trust-disposition and settlement a testator directed his trustees to pay the free annual income and produce of the residue of his estate to his widow during her lifetime. The trustees were empowered to carry on for behoof of his whole estate any business in which he was interested. At his death he was tenant of a colliery, and his trustees carried it on.

Held, that the net profits derived from the colliery business were part of the free annual income and produce of the residue of the estate, and fell to be paid by the trustees to the widow during her lifetime without any deduction being made from them in order to secure that the amount, at which the deceased's interest in the colliery was valued as at the testator's death, should be extant as part of the capital of the estate at the end of the lease.

Strain's Trustees v. *Strain*, July 19, 1893, 20 R. 1025, *followed.*

Alexander Mein junior died on 23rd June 1899, leaving a trust-disposition and settlement dated 7th May 1897, and a codicil dated 18th March 1899.

By his settlement he assigned and disponed to trustees for the purposes thereinmentioned his whole means and estate, heritable and moveable. The fourth purpose was in the following terms:—"I direct my trustees to hold and apply, pay or convey, the free annual income and produce of the residue of my means and estate for behoof of my said wife in the event of her surviving me, during all the days and years of her life, and that at such terms as they may think proper, having reference to the dates of receipt by themselves of the income, and that in liferent for her liferent alimentary use allenarly: Declaring that it shall be in the power and option of my trustees to apply from time to time, and in such way as they may think proper, in addition to the income, such portion of the capital of my means and estate as they may think necessary for the comfortable support of my wife."

By the codicil he directed his trustees to apply and convey the residue of his estate to and for behoof of such charitable and benevolent institutions connected with Glasgow as they might select, including certain institutions named by him, in such amounts as they might think proper. By this codicil, in addition to wide powers of management, investment, and sale conferred on the trustees by the trust-disposition and settlement, the testator empowered his trustees "to carry on and continue under the superintendence of themselves, or of any party they may appoint for that purpose, for behoof of my whole estate, for such period of time, and in such manner as they may think proper, any or all of the businesses in which I alone am interested at the time of my death, and that either by themselves alone or along with a partner or partners, whom I hereby authorise and empower them to assume on such terms and conditions as they shall think proper; . . . and generally to do in regard to any business or businesses in which I may be interested as aforesaid whatever in the circumstances they may deem most beneficial to my estate though not herein expressed: Declaring that in connection with their transactions or intromissions in regard to said business or businesses my trustees shall be free from all blame or responsibility further than that they acted in good faith and with ordinary judgment."

The net value of the testator's estate, including his interest in the colliery and lease after-mentioned, amounted to £26,587, 19s. 11d. At the time of his death the testator, as sole partner of the Barnsmuir Coal Company, was tenant of a coalfield in Stirlingshire under a lease from Robert Inglis, Avonbridge, for twenty-one years from Whitsunday 1882, with power to the lessees to put an end to the lease at Whitsunday 1885, Whitsunday 1888, Whitsunday 1890, and every third year thereafter, on giving six months' written notice to the proprietor. The lease would expire at Whitsunday 1903 unless Mr Mein's trustees should avail themselves as tenants of the above-mentioned power to terminate it at Whitsunday 1902. The lease expressly excluded assignees and sub-tenants except with the consent of the proprietor. The value of the deceased's interest in the colliery at the date of his

death, including the value of the tenant's rights under the lease amounting to £2593, was £8625, 7s. 7d. The net profits derived from the colliery for the half-year from the testator's death in the end of June 1899 to 31st December following amounted to £2062, 6s. 8d. The net profits of the colliery for the year ending 31st December 1900 amounted to £5195, 2s. 11½d. In making up the accounts which brought out the said two respective sums of £2062, 6s. 8d. and £5195. 2s. 11½d. as net profits, a deduction of 5 per cent. was made for depreciation of plant.

Questions having arisen as to the amount to which Mrs Mein was entitled from the profits of the colliery, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees, and (2) Mrs Mein.

The special case set forth—"(8) If at the expiry of the lease at Whitsunday 1903, or earlier termination thereof, the sum at which it was valued at the testator's death falls to be made forthcoming and available as capital of the estate, this can to a substantial and even to a large extent be provided from the realisation of the colliery plant and machinery; but in so far as the proceeds thereof may fall short of the said sum of £8625, 7s. 7d., that amount would fall to be made up from the profits made in carrying on the colliery. This, however, would not require the whole amount of the profits, and after laying aside a sufficient amount out of profits to provide for this there would remain a considerable sum of profits to be disposed of in accordance with the directions in the testator's settlement. (9) The second party maintains that under the direction to the trustees in the fourth purpose of the trust-disposition and settlement—to hold and apply, pay or convey the free annual income and produce of the residue of the testator's means and estate for her behoof during all the days and years of her life—she is entitled to the net profits derived from the colliery business calculated on the basis on which the respective sums of £2062, 6s. 8d. and £5195, 2s. 11½d. are brought out, so long as the said colliery continues to be carried on. Alternatively, she maintains that she is entitled to said net profits after a sum is laid aside sufficient, along with the sum to be realised from the colliery plant and machinery, to secure that the amount at which the colliery business was valued at the testator's death shall be extant as part of the capital of the trust estate at the end of the lease. On the other hand, the first parties maintain that the net profits from carrying on the colliery till the expiry of the lease fall into capital, and must be retained and invested by them so as to be available for distribution amongst the residuary beneficiaries on the death of the liferenter, and that the second party is entitled only to the income or revenue which shall be derived from the investment of these profits. In the event of the questions between the parties being decided in favour of the alternative contention of the second party, the parties will arrange between themselves as to the amount to be set aside out of the profits each year to secure the value of the colliery as at Mr Mein's death."

The questions of law were—"(1) Is the second party entitled to demand, and are the first parties bound to pay her, the net profits arising from carrying on the business of the Barnsmuir Colliery subsequent to the death of the testator Alexander Mein junior? or otherwise, Is the second party entitled to demand, and are the first parties bound to pay her, the net profits arising from carrying on the business of the Barnsmuir Colliery subsequent to the death of the testator Alexander Mein junior, after setting aside from these profits such sum as, along with the amount which shall at the expiry of the lease be realised from the colliery plant and machinery, shall then provide a sum equal to the value of the trustees' interest in the said colliery and lease, as this was ascertained at the death of the truster? (2) Is the second party entitled to demand, and are the first parties bound to pay her, only the interest which shall be derived from the investment by the first parties of the profits arising from carrying on said business subsequent to the death of Alexander Mein junior? or otherwise, What are the rights of the second party in reference to said colliery profits?"

Argued for the first parties—The profits derived from the colliery ought to be treated as capital. The case was ruled by that of *Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532. The provisions of the will in both cases were almost exactly the same. The provisions in the codicil empowering the trustees to carry on the business "for behoof of my whole estate," distinguished this case from *Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025. The latter case did not establish an absolute rule —*Freer's Trustees* v. *Freer*, June 28, 1897, 24 R. 437. The case of *Ferguson* had never been expressly overruled.

Argued for the second party—The present case was ruled by the decision in *Strain's Trustees*, which had practically overruled the case of *Ferguson*, *cit.*

At advising—

LORD JUSTICE-CLERK — We have heard the best that could be said on behalf of the trustees, who are anxious to carry out the wishes of the testator and to protect the estate for the benefit of the several charities which they are to select. I think the whole question, and the sole question, before us is, whether this case is ruled by the case of *Strain's Trustees*, decided in a Court of Seven Judges. I see no substantial difference between the two cases. I therefore think the decision in *Strain's* case should be applied here, and that we should answer the first question in the affirmative.

LORD YOUNG—I am of the same opinion. I had a difficulty at one time on the question spoken to briefly, but not too briefly, as to whether any deduction should be made in respect of depreciation of the residue of the estate, but I

am now clearly of opinion that there is no room for such deduction. The object of the testator's bounty was to give some special legacies and the income of the residue to his widow, and then to provide that if there is any residue that shall go to such charities as "my trustees shall select." I think this is not a case for making any deduction from the income and produce resulting from the trustees acting in the discharge of the duty imposed on them by the deed of carrying on the business. I think they have carried on the business properly under the direction of the deed, they being of opinion that that was the most profitable thing for those interested in the estate. Now, the interest of the widow in the estate, according to the case of *Strain*, is the whole income and produce resulting from the carrying on of the business, and I gather it was the testator's intention that nothing should be deducted from that in order really to increase the residue for charitable purposes.

LORD TRAYNER—I think with your Lordships that this case is ruled by the case of *Strain*. I see no distinction between these two cases. In this case, as in *Strain's* case, the testator authorised his trustees to carry on his business, which happened to be that of a coalmaster, and he directed that the whole income and produce of that estate should belong to his widow. It happens that in the two years in question there have been very large profits, but they might have been small if circumstances had been different. The testator meant his widow—the business being carried on by the trustees—just to get the profits as he had been getting them himself. Whether the profits of the business turned out to be much or little, it was the testator's intention that his widow should get them. With regard to the other point, viz., whether a sum should be set aside by the trustees out of the profits in order to keep up the capital of the estate to the value as at the date of the testator's death, I think the widow's right is not subject to any deduction with that view. She is no more bound to keep up the value of the estate in that way than she would be bound to make good any deterioration in value, such as might arise on a fall in the market price of stocks or shares forming part of the testator's estate.

LORD MONCREIFF — I am of the same opinion. On the first question, we must follow the case of *Strain*, which cannot be distinguished from the present. On the second point, we are told that the result of this business being carried on is that the capital value has been diminished to a certain extent, but that is a matter which the trustees had no doubt under consideration when they resolved to carry on the business. They were entitled to carry on the business if they thought fit, but the result of that was that the capital value has been diminished to a certain extent. If they did carry on the business the widow was entitled to the whole profits and interest resulting therefrom. Therefore I think there is no ground for making any deduction from those profits.

The Court answered the first alternative of the first question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First Parties—W. Campbell, K.C. — A. M. Hamilton. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Second Party—C. N. Johnston — Grainger Stewart. Agents — J. & A. Campbell & Lamond, C.S.

Saturday, June 22.

FIRST DIVISION.

WATSON *v.* CALEDONIAN RAILWAY COMPANY.

Expenses — Taxation — Fees to Medical Witnesses — Precognitions of Medical Witnesses.

In an action of damages for personal injury, which was settled the day before the day fixed for the trial upon condition, *inter alia*, of the defenders paying the pursuer's expenses as taxed, the Court *allowed* a fee of one guinea to each of two doctors for a report obtained before the raising of the action, and a fee of one guinea to each of the same two doctors as for a second report obtained on the eve of the trial, and also a fee of two guineas to each of two doctors who were called in for consultation shortly before the date fixed for the trial; and *disallowed* charges for drawing precognitions of medical witnesses, and sums charged for payments to medical witnesses.

On 3rd January 1901 Andrew Watson raised an action of damages for personal injury against the Caledonian Railway Company.

After the accident by which his injuries were sustained the pursuer was attended by Dr Nicoll and Dr Grant, who supplied his agents with a report as to his condition. These two doctors attended the pursuer until shortly before the date fixed for the trial of the case, when Dr Knox and Professor Glaister were called in for consultation, the latter as a specialist, on account of symptoms which revealed lesion to the spinal cord. Dr Knox made two visits and Professor Glaister made one visit to the pursuer.

The trial was fixed for 23rd March 1901, but on 22nd March the action was settled upon condition, *inter alia*, of the defenders paying the pursuer's expenses as taxed, and the pursuer's account of expenses was taxed by the Auditor. The Auditor allowed the following charges in that account, namely—(1) For a report by Dr Nicoll and Dr Grant in December 1900 as to the pursuer's injuries, £2, 2s.; (2) For drawing precognitions in March 1901, Dr Grant £3, 10s., Dr Nicoll