her dying without issue. The case was ruled by *Lindsay's Trustees* v. *Lindsay*, 8 R. 281, as followed in *Dalglish's Trustees* v. *Bannerman's Executors*, 16 R. 559, and *Logan's Trustees* v. *Ellis*, 17 R. 425. This case was a contrast to the case of *Muir's Trustees* v. *Muir's Trustees*, 22 R. 553, inasmuch as there the direction to the trustees was "to hold for behoof of children" the shares being "to be set aside, and held and invested, and otherwise dealt with as after mentioned," viz., for the beneficiaries' liferent use allenarly with a fee to their children—*Fulton's Trustees* v. *Fulton*, 7 R. 566, if in point here, is now overruled by *Lindsay's Trustees, cit.* See *per* Lord Lee in *Dalglish's Trustees, cit.* at p. 564.

Argued for the third, fourth, and seventh parties—The daughter's right was to a liferent only. The rule in *Lindsay, Dalglish,* and *Logan, cit.*, was applicable solely to the case of an absolute and unconditional gift subsequently modified in a certain event which does not take place—See *Muir's Trustees, cit., per* Lord M'Laren at p. 557. That case was an authority in favour of these parties, because in the deeds here under construction the testator never gave anything except a liferent to his daughters. The cases of *Lindsay, Dalglish,* and *Logan* were, moreover, distinguished from the present, in respect that in all these cases there was present the element of repugnancy, which was absent here. This case was on all fours with *Fulton's Trustees* v. *Fulton, cit.* The fund therefore fell into intestacy, and passed to the testator's next-of-kin as at the date of his death.

At advising—

LORD JUSTICE-CLERK — If the question which comes before us in this case were open, there would be great room for argument on both sides, but I have no doubt that it is already decided by the case of *Lindsay's Trustees* and the other cases following upon it to which our attention has been directed. I think, therefore, that we should answer the first question in the affirmative, and I think it is unnecessary to answer any of the other questions in the case.

LORD YOUNG—I think so also. The question in the case of *Lindsay's Trustees* and in the other cases cited to us by Mr Dundas was one which it was then reasonable to raise and argue and have decided, but it has now been decided, and, if I may be permitted to say so, in my opinion, reasonably decided. At anyrate, we must follow these decisions. I think in this case that Miss Stewart's share was so vested in her as to be liable for her debts and deeds, and it must go according to her will. I think we shall satisfactorily dispose of the case by answering the first question in the affirmative, and leaving the other questions unanswered.

LORD TRAYNER—I agree. I think this case is ruled by the decisions in the case of *Lindsay's Trustees* and the other cases following upon it which have been quoted to us.

LORD RUTHERFURD CLARK was absent.

The Court answered the first question in the affirmative.

Counsel for the First Parties — James Reid.

Counsel for the Second Party—Balfour, Q.C.—Macfarlane.

Counsel for the Third, Fourth, and Seventh Parties—Dean of Faculty, Q.C.—J. H. Millar.

Counsel for the Fifth Parties—H. Johnston—Dundas.

Counsel for the Sixth, Eighth, and Ninth Parties—Rankine—E. H. Robertson.

Agents for all the Parties — Carment, Wedderburn, & Watson, W.S.

Thursday, January 23.

FIRST DIVISION.

(Before Seven Judges.)

[Junior Lord Ordinary.

LORD BELHAVEN AND OTHERS, PETITIONERS.

Entail—Provisions to Widow and Children—Aberdeen Act (5 *Geo. IV. cap.* 87), *sec.* 1—"*Free Yearly Rent of Lands*"—*Mineral Lordships—Valuation of Provisions.*

The Aberdeen Act authorises an heir of entail in possession to make provision for his widow by way of annuity out of the entailed estates, "provided that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates when the same shall be let, or of the free yearly value thereof where the same shall not be let . . . all as the same shall happen to be at the death of the granter."

Held, by a majority of Seven Judges (*diss.* Lord M'Laren), that for the purpose of ascertaining the maximum provision authorised by the statute, the lordships payable by the lessees of minerals for the year of the granter's death, formed part of the rents of the entailed estates, irrespective of the probable exhaustion of the minerals in the immediate future.

Contra by Lord M'Laren, who held that the lordships so payable did not exclusively represent rent, and that the capitalised value of the unexhausted minerals at the date of the granter's death ought to be taken as the basis of calculation in computing the yearly rent or value.

Wellwood v. *Wellwood*, 10 D. 1480, 11 D. 248, and *Douglas* v. *Scott & Yorke*, 8 Macph. 360, *doubted.*

In November 1894 a petition was presented to the Junior Lord Ordinary (Low) by the present heir of entail in possession of the entailed estates of Wishaw, under section 7 of the Aberdeen Act, to have the widow's and children's provisions granted by his

predecessor in the entail voided to the extent to which they exceeded the amount authorised by the Aberdeen Act. Answers were lodged to the petition by the Dowager Lady Belhaven and the children of the late Lord Belhaven.

The Lord Ordinary reported the petition and answers to the First Division of the Court.

His Lordship's opinion was as follows:—

Opinion—"The late Lord Belhaven, as heir of entail in possession of the entailed estates of Wishaw, granted a bond of annuity and provision, under the powers conferred by the Aberdeen Act, whereby he provided to his widow an annuity of £6000, or such other sum as should not exceed one-third part of the yearly rental of the estates; and to his children, if three or more, a sum not exceeding three years' free rent or value of the estates.

"Lord Belhaven died upon 6th September 1893, survived by his wife and seven daughters.

"The petitioner, who has succeeded as heir of entail to the Wishaw estates, has brought this petition under section 7 of the Aberdeen Act to have the provisions voided to the extent to which they exceed the amount authorised by the statute.

"The petitioner states in the petition that the free rental of the estate is £4424. The widow and children have put in answers, in which they aver that in addition to the rental of the lands given in the petition there are mineral rents and lordships, amounting to between £8000 and £9000 a-year, which fall to be taken *in computo* in fixing the amount of the provisions.

"The petitioner does not dispute that coal has in the past been, and was, when Lord Belhaven died, being worked to a large amount, but he avers that all the coal will, at no distant date, be entirely exhausted, and that to calculate the free rental upon the rents and lordships paid for the coal, either for the year during which Lord Belhaven died, or upon an average of years preceding, would in all probability result, before very long, in no part of the rental of the estates being available to the heir of entail in possession.

"The petitioner has, accordingly, put in a minute in which the position of the different collieries is stated as follows:—

"1. *Green Colliery*—The last lease of this colliery expired at Whitsunday 1893, and the tenant is now sitting from year to year. There is no fixed rent, only lordships. The minerals will be exhausted in the present year. The amount of the lordships paid for the year during which the late heir died was £666. If an average of years prior to that was taken, the amount would be considerably larger.

"2. *Clydesdale Colliery*—There is a lease of this colliery which does not expire until 1911, but there is a break every third year after 1892. The fixed rent is £500, and the lordships 7d. per ton. It is estimated that only 370,000 tons of coal remain in this colliery, which, at the average rate of working during the last four years, will be exhausted in seven years. The return for the year 1893-94 is stated at £2225, but in previous years the amount was less, in 1890-91 being only £247.

"3. *Glenclelland and Knownoble.*—It is stated that a lease of these collieries and also of part of the adjoining mineral field of Ravenscraig, was executed in 1893 for a period of twenty-one years from Whitsunday 1892, with a break every third year in the tenant's favour. There is a fixed rent and also lordships. The rent is to be £1000 for the first two years of the lease, and then £750 until the Knownoble coal and the main and splint coal in Glenclelland are exhausted, when the rent is to be reduced to £500. It is estimated that the Knownoble coal will be exhausted about 1897, and as the main and splint coal in Glenclellend are said to consist only of pillars containing some 48,000 tons of coal, it cannot be long before they also are worked out. It is also estimated that the whole coal in Glenclelland will be exhausted in seven years.

"4. *Over Johnston, Nether Johnston, Meadowhead, and Ravenscraig.* — There seems to have been difficulties in regard to these collieries. They were let to a Mr Cameron in 1892 upon a lease of nineteen years, with half-yearly breaks. The lease was terminated at Whitsunday 1893, when the collieries were again let upon a lease of nineteen years to the Messrs Watson. There was, however, a break at Martinmas of the same year, which was taken advantage of. Since that date the collieries have been in the petitioner's own hands.

"It is stated that Over Johnston contains coal sufficient to last for sixteen years at the same rate of output as in the years 1890-92, and that Nether Johnston and Ravenscraig will be exhausted in thirteen years at the average rate of working for the last five years. No information is given in regard to the amount of coal in Meadowhead, but probably that colliery has been worked along with some of the others which I have mentioned.

"5. The remaining collieries upon the estate are *North* and *South Netherton, Shieldmuir, Station,* and *Sunnyside.* These collieries appear to have been worked together under a lease until 1889. South Netherton, Shieldmuir, and Station are said to be now exhausted. North Netherton and Sunnyside are now being worked by the Glasgow Iron and Steel Company, and it is said that at the average rate of output the former will be exhausted in six years, and the latter in five years.

"In these circumstances the petitioner contends that if the method which has hitherto been adopted of ascertaining the free yearly rental or proceeds of an estate in minerals—namely, taking the average returns for a certain number of years prior to the death of the granter of the provisions—was adopted, there would not be secured to the heir of entail in possession the two-thirds of the free rental or proceeds, to which under the Aberdeen Act he is in all circumstances entitled. The petitioner therefore suggests that the amount to be

brought *in computo* in fixing the provisions should be arrived at by ascertaining the capital value of the minerals unexhausted at the time of the late Lord Belhaven's death, and allowing interest at a fair rate upon the capital sum.

"The respondents, upon the other hand, contend that it is incompetent to inquire what is the life of the coalfield, and that it being admitted that at the date of Lord Belhaven's death, and previously, rents and lordships were being received from the collieries, the mineral rent must be fixed at the average amount actually received during a reasonable period of years prior to the date of death.

"In the well-known case of *Wellwood* (10 D. 1480 and 11 D. 248) it was settled that the produce of a coal mine is for the purposes of the Aberdeen Act a part of rents and proceeds of the entailed lands and estates. It was also held that where lordships are paid—the amount of which varies from year to year, and depends upon the quantity of coal which the tenant chooses to put out in any year—the yearly value may be fixed by taking the average returns over such a period of years as in the circumstances may be reasonable.

"The respondents argued that although the judgment in *Wellwood's* case allowed an average of past years to be taken, it did not authorise any investigation as to what the mineral yield would be in the future. That view apparently was taken by Lord Benholme (in a case to which I shall presently refer), but taking the case of *Wellwood* alone, I find nothing to sanction the idea that the probability or certainty of the exhaustion of the minerals in the immediate future cannot be taken into consideration. It was there laid down that where the proceeds of an entailed estate varies from year to year as in the case of mineral lordships, the duty of the Court is to ascertain what is the yearly value of these proceeds taking one year with another. *Prima facie* it is difficulty to see how the yearly value can be fixed upon that basis without considering the future in a case in which it appears that there will soon be no estate from which any proceeds can be derived. And I find that in the earlier report of *Wellwood* Lord Jeffrey did refer to the possibility of minerals being almost exhausted when the granter of the provisions died. He said—'The annual value is a mere measure, and in such a case we must reduce it to something like the average production of an ordinary year. If the coal has been almost wrought out when the provision was made, and it was offered to be proved that a year afterwards there was a final cessation of all profit in working it, it would be hard to put upon the Act so rigorous a construction as to hold that we were bound to take it as producing that last rent for all the years that the widow might survive, and, as if we had goggles on, look neither behind nor before, but fix our regards upon the one year alone.'

"In the case of *Douglas* (8 M. 360) the method of taking an average of years prior to the date of death was also followed. Various methods of fixing the yearly value, and among others a valuation by a man of skill, appear to have been suggested. The Lord Justice-Clerk (Moncreiff) said that although *Wellwood* settled that the question might be solved by an estimate, it did not follow that that estimate is necessarily to be calculated by an average. 'I could imagine,' his Lordship added, 'cases in which it would be right to arrive at the result by a valuation conducted on ordinary principles.' His Lordship, however, did not indicate what kind of case he had in view.

"Lord Cowan expressed the opinion that where minerals, extensively worked up to the date of death, were almost or altogether exhausted, they should not be taken *in computo* in ascertaining the amount of the provisions.

"Lord Benholme, on the other hand, said (and this is the opinion to which I have already referred)—'After some doubt as to the applicability of a valuation by scientific men to a question of this kind, to fix the value of the minerals as at the date of the granter's death, I am unable to see that such a principle of valuation could in any case be applicable. The elements on which the average to be struck depends are, what is, and in time has been, the annual value of the mineral yield, and I do not think that the Court is entitled to give effect to a valuation, for that would be to introduce considerations of what the value of the minerals will be in time to come. There are doubtless questions in the solution of which the element of prospective rent may be taken into account, but I cannot think that such an element can be allowed to influence us in a case like this. To do so would be to supersede a calculation intended by the statute to be founded on events that had happened, by a calculation proceeding on events that were to happen.'

"There is next the case of *Christie* (6 R. 301) which is a most important decision as regards the present question.

"In that case a lease was current, at the death of the granter of an annuity to his widow under the Aberdeen Act, of the freestone in the lands, at a yearly rent of £200. The lease continued, and the rent was paid for five years after the granter's death, and during that period the heir in possession paid to the widow an annuity equal to one-third of the rental including the mineral rent. He subsequently, however, presented a petition to have the annuity restricted, on the ground that the lease had come to an end; that as matter of fact no stone had ever been worked under it, as it was found that it could not be worked to a profit; and that there were not then, and never had been, stone or minerals in the estate capable of being worked to a profit. He therefore asked that the old mineral rent should be struck out in fixing the amount of the widow's annuity.

"The Lord Ordinary (Adam) took the view that, assuming the petitioner's averments to be true, to take the mineral rent *in computo* would be to give to the widow, and to deprive the heir in possession of more than one third of the free yearly rent

or proceeds. His Lordship therefore reported the case to the First Division, with the opinion that there should be inquiry in regard to the alleged impossibility of working the minerals to a profit.

"The learned Judges of the First Division, however, took an opposite view, and held that as the lease continued and rent was paid under it for five years after the granter's death, the mineral rent had at that date such a reasonable permanence, that inquiry was excluded, and the rent fell to be taken *in computo* in fixing the amount of the widow's annuity.

"If it was the case that the minerals were not workable to a profit, the rental of the estate was only £700 a-year, and yet the result of the judgment was that the heir in possession was compelled to pay the widow £300 a-year during life.

"I may observe that Lord Shand in his opinion expressly saved the case of minerals which had been worked, being exhausted at the time of the granter's death.

"I do not think that there is any difference in principle between a case in which there are no minerals which can be made available, and one in which all the minerals have been taken out. It therefore seems to me that the case of *Christie* is an authority for saying that the question whether the annual proceeds of the collieries which were being worked, or capable of being worked, when Lord Belhaven died, should or should not not be brought *in computo*, depends upon the degree of permanency of the proceeds. In such a case as the Green Colliery, which the petitioner avers had only a life of two years at the date of the death, it may be clear enough that the necessary degree of permanency is not present, while the reverse may be equally clear in the case of Over Johnston which has admittedly sixteen years to run. But between the two there are a variety of cases in which it is very difficult to find any principle upon which to determine what is a reasonably permanent source of annual proceeds and what is not so.

"I am unable to assent altogether to the view pressed either by the respondents or the petitioner. The respondents argued that, as there was admittedly a large return from minerals when Lord Belhaven died, and as upon the petitioner's own showing, the minerals in the estate will continue to be of an annual value for many years to come, it is incompetent to inquire as to the state of the mineral field, and that all that can be done is to take the average of the proceeds for a suitable number of years prior to Lord Belhaven's death.

"Now, if that course was adopted, and the petitioner's averments are true (as at this stage they must be assumed to be), the result would be that almost immediately the widow's annuity would become, by reason of the exhaustion of coal, more than one-third of the free rental, and would be increasingly greater than one-third of the free rental as years went on, until at last it might absorb the whole free rental. I do not think that a course which would probably lead to that result can be within the statute.

"On the other hand, the petitioner's proposal that the annual value should be taken to be the interest upon the capitalised value of the coal remaining, is one for which there is no authority. Further, I doubt if it would be within the provisions of the statute, because the result would probably be that at first the widow would get much less than one-third of the actual annual proceeds, while as time went on she would get a great deal more.

"The case appears to me to be one of great difficulty. It is also a case of importance, not only to the parties, but as a question of law and practice which is not unlikely to occur again, seeing the extent to which the minerals have been worked out in many parts of Scotland. Further, if the view taken by the respondents is sound, nothing more will be necessary than to take an average of the lordships for a suitable number of years, while if the petitioner's averments are relevant, a wide and expensive inquiry will be necessitated.

"In these circumstances I have thought it right to follow the course adopted by Lord Adam in the case of *Christie*, and to report the matter to the Inner House."

The Court ordered the case to be heard before Seven Judges.

Argued for petitioner—If mineral rents were to be included in the "free yearly rent," they should be computed as the interest of the capitalised value, and not on the average rental in former years. The Court had in previous cases departed from the hard and fast rule laid down by the statute as to computing the rent as that actually received in the year of the death of the granter—*Wellwood* v. *Wellwood*, July 12, 1845, 10 D. 1480, 11 D. 248; *Douglas* v. *Scott & Yorke*, December 17, 1869, 8 Macph. 360. In *Christie* v. *Christie*, December 10, 1878, 6 R. 301, the refusal of the Court to allow an average of years to be taken was based on the special facts of that case. Though mineral as well as agricultural rents might be included under the Aberdeen Act, they were essentially different in character, and must accordingly be computed differently—*Campbell* v. *Wardlaw*, July 6, 1883, 10 R. (H. of L.) 65, opinion of Lord Blackburn; Stair ii. 3, 74. There were two classes of cases analogous to the present one, which supported the petitioner's contention—(1) Those in which a testator bequeathed the whole annual produce of his estate. In *Strain's Trustees* v. *Strain*, July 19, 1893 20 R. 1025, it was held that the "free annual interest and produce" included the nett proceeds of collieries, but in *Ferguson* v. *Ferguson's Trustees*, February 23, 1887, 4 R. 532, it was held that rents realised from collieries formed part of the capital. There was an analogous decision in *Campbell* v. *Wardlaw*. (2) In cases concerned with the calculation of rental for the purpose of paying composition the petitioner's contention was supported—*Allan's Trustees* v. *Duke of Hamilton*, January 12, 1878, 5 R. 511, where the terminable nature of minerals was taken into account. In *Sivright* v. *Straiton Estate Company*, July 8, 1879, 6 R.

1205, this point was considered, and the method of computation desired by the petitioner was adopted. In *Sturrock* v. *Carruthers' Trustees*, May 21, 1880, 7 R. 799, the method was not adopted only because there was a fixed rent for the colliery and a degree of permanency. Lord Ormidale, at p. 801, supported the view contended for by the petitioner. In this class of cases the statute (1469) under which the questions arose was analogous to the Aberdeen Act. Accordingly if this course were followed, the Court would not be overruling the spirit of the Act, but would really be equitably applying the rule by which minerals were included. By this method the true value per year of the collieries to the heir in possession would be ascertained, and that was the true criterion, not the royalties obtained in a given year, which might hereafter cease to be paid in the case of each field which became exhausted.

The petitioner reserved his right to argue in the House of Lords that mineral lordships were not to be calculated at all in estimating the free yearly rent for the purposes of the Aberdeen Act.

Argued for the respondents—(1) Section 1 of the statute limited the mode of computation absolutely to the rent paid in the year of the death of the granter, and it was inadmissible to go behind that rule and to introduce equitable considerations such as those contended for by the petitioner. The 13th section of the statute was intended to give the heir in possession a remedy should the 1st section press hardly upon him, and this relief must not be extended further. The fact that the rents might fluctuate from year to year was not taken into account by the statute, which laid down as a standard the amount actually obtained during a given year without any consideration as to the permanency or exhaustion of the subjects. Such a method of calculation might be rough-and-ready, but it was preferable to the large field of inquiry which would be opened by the petitioner's proposal. (2) Accepting the authority of *Wellwood* and *Douglas* as showing that the Court had in some cases allowed a computation on the basis of an average of past years, these cases were no authority for the proposition of the petitioner that future years were to be taken into account, as would be done by his proposal of taking the interest of the capitalised value. Certainly the concession allowed in those cases must not be extended further. In *Wellwood* the ground for granting it was a special one, viz., "the hopeless impoverishment of the heir" which would have been produced if the Court had construed the Act too strictly. The cases of wills quoted by the petitioner had no analogy to the present, being questions of the intention of the testator, while this was one of the interpretation of a statute. The case of *Ferguson* was the only one which helped the petitioner, and it had been criticised and reviewed in the more recent case of *Strain*. The petitioner was endeavouring to introduce for the first time into Scotch law the rules of the English cases quoted in *Ferguson*, which even in England applied merely to subjects such as terminable annuities, where there was no *corpus*, and which could not have any analogy to the fruits of an estate. Nor did the composition cases help the petitioner, being based not upon the construction of a particular statute, but on "use and wont." In estimating casualties it was the custom always to rate as low as possible, while in cases such as this there was no occasion to do so.

At advising—

LORD PRESIDENT—The minerals to which the present question relates form part of the entailed estate of Wishaw. When the late Lord Belhaven died on 6th September 1893 these minerals were being wrought by tenants under leases of various terms of duration. In each case the return actually made to the landlord was in the form of lordships. It was not maintained in argument by the petitioner that in no case are the minerals of an entailed estate, which are actually worked by the heir in possession or his lessees, to be taken into account in ascertaining the amount of the provisions which may be made by him under the Aberdeen Act. The nature of mineral property which is consumed by use gave rise in former days to the contention that the proceeds of collieries were not to be treated as part of the annual produce of an entailed estate. The learned counsel for the petitioner expressly stated that they could not ask the Court to adopt that conclusion, and accordingly we heard no argument on the subject. If, then, the yield of going collieries is not to be left out of account in questions under the Aberdeen Act, the mode of dealing with it must be found in the 1st section, and no other section has been pointed to. The section distinguishes between lands let and lands unlet. If the lands are let, then it is the free yearly rent that is to be taken; if they are unlet, then it is the free yearly value. In either case certain deductions are to be made from rent or value alike, and the whole is to be calculated, as things may happen to be at the death of the granter. Now, assuming, what is conceded, that for the purposes of the Aberdeen Act collieries form part of the entailed estate, this is the rule, and the only rule applicable. The collieries in question were let; and therefore it is the rent that is to be taken, and it is the rent as it happens to be at the death of the granter. That the word "rent" covers royalties has been decided, and seems clearly sound, as the system of royalties is merely the way of calculating the rent to be paid. If this be so, then I see no other difficulty in the way of the application of the statutory rule to the case in hand. The petitioner's argument is rested on the fact that while all the collieries now in question were actually being worked at the time of the death of the granter under current leases, yet, in all, or at least in some, the minerals were more or less nearly approaching exhaustion. Striking illustrations were given of the

unfairness of calculating an annuity which might burden the estate for many years by a rental on the eve of disappearing. It is probable that equally glaring anomalies may occur in the opposite direction, and several were suggested; some of these are incidental to mineral estates, and others are common to all landed estates. But the real answer to this objection lies in the terms of the statute, which by the words "all as the same may happen to be at the death of the granter" seems to make a frank confession that the rule prescribed is more or less rough and ready, but that it is to be followed through all vicissitudes. The safeguard provided by the 13th section seems a further recognition of the risks of the heir in possession. I fully appreciate the hardships of particular cases. But all the arguments *ab inconventi*, all the instances of the last year of the lease where the coal is all but worked out, all the cases of no reasonable permanence (so far as these are peculiar to mineral rents), are really arguments against coal being ever treated as part of the annual proceeds of the entailed estate. They furnish no warrant for the establishment of a separate rule for ascertaining the yearly proceeds of a colliery, when the statute has prescribed but one rule for all subjects falling within its scope.

The First Division appointed this case to be heard before Seven Judges, because in two reported cases (*Wellwood* and *Douglas*), a mode of calculation different from that expressed in the statute had been adopted, viz., an average of years; while in a third (*Christie*) it had been assumed, in the opinions of the learned Judges, that the statute permitted that course. The present petitioner does not propose an average of years previous to the death of the granter, because, as it happens, the last year of the granter's life is more favourable to him. His proposal is to take into account years subsequent to the granter's death. What we are asked to do seems a wider departure than has yet been made from the terms of the statute. While the point thus raised is therefore new, it seems to me that the true answer to the petitioner's demand is to be found in the fact that the terms of the statute warrant no departure in either direction from the condition of things as they happen to be at the death of the granter. Upon that ground my present judgment is based, and, in my opinion, the lordships payable during the year of the leases in which the late Lord Belhaven died must be held to form part of the rents of the entailed estate, for the purposes of the present application.

LORD ADAM—It was decided in the case of *Wellwood* that the annual rent or annual value of coal mines was to be taken *in computo* in estimating the amount of the annuity which an heir of entail was entitled to provide for his widow under the Aberdeen Act. That is to say, that mines and minerals formed part of the entailed lands and estates to which that Act applied, and no argument was offered to us that that decision, so far, was not well founded.

Assuming that to be so, it appears to me that in estimating the annual rent or annual value of mines and minerals which is to be taken into consideration in fixing the amount of the widow's annuity, the rule which must be followed is that which is prescribed by the statute with reference to the entailed lands and estates generally, of which they form a part. There is no authority for estimating the rent or value of one part of the entailed lands and estates in one way, and another part in another way.

Now, the Act appears to me to lay down a clear rule. It declares that the widow's annuity shall not exceed one-third part of the free yearly rent of the lands and estates where the same are let, or of the free yearly value thereof where the same are not let, after deducting public burdens, &c., all as the same shall happen to be at the death of the granter. It is the free yearly rent or the free yearly value, as that may happen to be at the granter's death, and nothing else, which is to be taken into consideration in estimating the amount of the widow's annuity.

The Judges who decided the case of *Wellwood* seem to have thought that this was not an equitable rule when applied to such subjects as the rents or lordships derived from mines and minerals, looking to their great variation from year to year, and that a more equitable rule would be to endeavour to find out what, *communibus annis*, the free rent or value of such subjects was, and to take that as giving the measure of the widow's annuity. Accordingly, in *Wellwood's* case they took an average of the lordships for the seven preceding years, and in *Douglas'* case of the three preceding years. It appears to me that if the amount so arrived at was greater or less, it could not possibly be the yearly rent or value of the subjects as that happened to be at the granter's death.

This may or may not be a more equitable way of proceeding than the rule of the statute, but it appears to me that the case is not one into which equitable considerations enter at all. The statute has relaxed the fetters of the entail and empowered the heir of entail in possession to provide an annuity to his widow of a certain amount, to be ascertained in a certain way prescribed by statute, but no further. It appears to me that the way prescribed by statute must be followed whether it be equitable or not, and that the Court has no power to authorise any deviation from it.

In this case, as I understand, the coal pits were all let at the time of the granter's death; that being so, I think that the rent, which has to be taken into consideration in fixing the widow's annuity, is the amount of the lordships received during the year then current.

LORD M'LAREN—As my opinion has no influence on the decision of the case, I shall not elaborate it, but will indicate the steps of the argument by which I conclude that the widow's annuity ought to be calculated upon the actuarial or present annual value of the existing minerals.

I observe, first, that the Aberdeen Act makes no express reference to mineral estate, and that the case contemplated in the statute is the ordinary case of an estate producing an annual return, whether in the shape of rent to a proprietor who lets his estate, or of annual value to a proprietor who occupies his own land.

I hold, in common I believe with the other members of the Court, that the Aberdeen Act was rightly held to extend to the case of returns from minerals. But then I take note of the fact that the return which is received by a proprietor of minerals in the shape of royalty is not a consideration for the mere usufruct of the lands, as in the case of agricultural rent, but is a payment or consideration for the right of removal of part of the subject. Such royalties, I conceive, ought to be treated as being in part payments made for the use of the land or the privilege of removing the mineral, and in part for the value of the mineral or corporeal subject which is removed.

Now, as the Aberdeen Act contains no special provisions with respect to mineral estates, I think that in applying the Act to such a case it is necessary to ascertain how much of the payment made in the shape of royalty is to be regarded as annual rent or annual value. In the case which we are considering we are informed that some of the coal-mines held under leases from the late Lord Belhaven will be exhausted in a very few years. I cannot hold that the royalties to be received during such a short period are of the nature of rent or annual value within the meaning of the Aberdeen Act. As to how the true annual value is to be ascertained I do not wish to anticipate. But, supposing the whole capital value of the remaining minerals to be ascertained by the report of an expert, I should say that the interest at the rate of 5 per cent. on the capital value so ascertained, would be the fair annual value of the mineral estate; at least it would be a much nearer approximation to the true value than what is given by the crude proposition, that the actual return within the year is always and necessarily the annual value.

We are familiar with actuarial calculations in other branches of the law of entail. These are not expressly required by statute. In the case of compulsory disentail the Court is required to value the "expectancy" of the heirs-substitute whose interests are considered, and it has been held without doubt or question that the algebraic value of the heir's chance of succession is the "expectancy" to be considered. It is just as easy, or rather very much easier, to compute the present value of a tract of unwrought coal capable of measurement, and thence to find the annual value to the proprietor of this capital sum, supposing it to be put into a proper state of investment.

I understand that the Court attach importance to the words of the Aberdeen Act, "all as the same may happen to be at the death of the granter." There is a question whether those words apply to the immediate antecedent, viz., the deduction of the public burdens, annuities, and interest on debts, or whether the expression qualifies the whole clause, including the ascertainment of annual value. But waiving this question, I hold that the mode of valuation which I propose is a true valuation as at the death of the granter, because my proposition is, that the coal remaining unwrought at the death of the granter is to be valued; that is, its capital value is to be ascertained at the granter's death, and the annual return which that capital sum is capable of producing is to be taken as the annual value of the subject.

I agree with your Lordships in holding that it is open to this Court to consider the decisions of the Inner House in this branch of the law; that is, in virtue of the statutory provision by which cases of "difficulty and importance" may be referred to a Court of Seven Judges. But then the result of my consideration is, that I find that the Court has recognised a distinction between wasting subjects, and subjects which produce a return in perpetuity, and as I think that this is a well-founded distinction, my view is that it should be recognised, and, if necessary, extended.

I may also say that I disclaim all intention of introducing equitable considerations to modify the construction of the Aberdeen Act. My view is that royalty for minerals, especially in the case of a mine which is approaching exhaustion, is neither annual rent nor annual value, but is inclusive of these elements; and that the sum paid by the tenant for the *corpus* of the mineral, or for the privilege of removing it, is only one of the elements from which the true annual value is to be deduced. In the case of a coalfield of great extent, and which is not likely to be exhausted within the lifetime of the annuitant, the royalties paid might be taken as a sufficient approximation to the true annual value for practical purposes. In the case of a field which is approaching exhaustion, I think that they cannot be so treated, and that the heir is not bound in payment of a provision for life which he has not the means of satisfying out of the estate.

The Lord Justice-Clerk, Lord Young, Lord Trayner, and Lord Kinnear concurred with the Lord President and Lord Adam.

The Court pronounced the following interlocutor:—

> "The Lords having resumed consideration of this case, with the assistance of three Judges of the Second Division, and heard counsel for the parties upon the minute for the petitioner and answers thereto and the whole cause, after consultation with the said three Judges, and in conformity with the opinion of the majority of the Seven Judges present, Find that the lordships payable during the year in which the late Lord Belhaven died formed part of the rents of the entailed estate for the purposes of the present application, and remit to the Lord Ordinary to proceed:

Find neither party entitled to expenses in the Inner House; and decern."

Counsel for Petitioner—Mackay—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—Balfour, Q.C. —C. K. Mackenzie — Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, January 15.

SECOND DIVISION.

[Lord Moncreiff, Ordinary.

H. FISCHER AND COMPANY *v.* AKTIESELSKABET TREMASTET SKONNERT "MOLLY."

Process—Decree in Absence—Mandate to Lodge Defences.

Defences were lodged to an action in the name of a foreign defender upon the instructions of a party whose authority to act for the defender was denied by the pursuer. The Lord Ordinary, without pronouncing an order for the production of a mandate, granted decree in absence.

Held that the procedure was irregular, and the decree *set aside.*

Arrestment—Amendment of Summons—Validity of Arrestment upon Dependence prior to Amendment—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 20.

An action was raised at the instance of five pursuers concluding for payment to each of separate sums, and arrestments were used upon the dependence of the action. A minute was thereafter lodged by the pursuers craving that the names of four of the pursuers should be struck out of the summons along with the conclusions relating to the sums claimed by them, and that this having been done, decree should be pronounced for the sum claimed by the remaining pursuer. Decree was pronounced in terms of this minute.

Held that the action as originally raised was incompetent, and that the arrestments upon its dependence were therefore without warrant, and could not be validated by the subsequent amendment of the summons so as to prejudice the rights of competing creditors.

In July 1895, H. Fischer & Company raised an action against Aktieselskabet Tremastet Skonnert "Molly," the registered owners of the "Molly" of Svendborg, Denmark, arrested at Grangemouth, to have the ship sold and the proceeds divided.

The ship was sold by public roup at Grangemouth under order of the Court on 3rd September 1895 for £675. Of this sum over £400 was found due to various persons having preferable claims. As to the balance there was a competition between J. R. Andersen, shipbuilder, Svendborg, Denmark, and H. Fischer & Company, depending upon the priority and validity of the arrestments on which they respectively founded.

The claimant J. R. Andersen founded on an arrestment dated 8th April 1895, on the dependence of an action raised at the instance of himself and Thorvald Hansen, J. Anderskouv, R. Skraep, and H. L. Kroyers Enke, four other tradesmen and merchants at Svendborg, against the company registered as owners of the "Molly," and Hans Iversen, G. Christensen, and H. Fischer, three members of the company. The summons concluded for payment to the pursuer J. R. Andersen, of £311, 15s. 7d., and to each of the other pursuers of separate sums for work done on and furnishings made to the "Molly." The summons was served edictally on the owners of the "Molly," which was at that time lying at Grangemouth. Defences were lodged in name of the registered owners by the instructions of H. Fischer, pleading, *inter alia*, that the action was incompetent. Before the case was called the pursuers annexed to the summons a minute of restrictions, in which, in respect that the defenders Aktieselskabet Tremastet Skonnert "Molly" were a registered company capable of being sued in their own name, they restricted the summons to the conclusions directed against the company. When the case was in the adjustment roll, the pursuers objected that Fischer had no mandate to lodge defences for the owners of the "Molly." The Lord Ordinary (STORMONTH DARLING) granted three adjournments extending over a period of three weeks till 22nd June, to admit of a mandate from the company being obtained. On that date a minute was tendered for Fischer to the effect that he was managing owner of the company, and held a majority of the shares, and asking that the time for lodging a mandate should be extended till a meeting of the company could be held. The Lord Ordinary refused to receive this minute. On 25th June the pursuers lodged a minute in which they "craved leave of the Lord Ordinary to strike out of the summons the names of the pursuers, the said Thorvald Hansen, J. Anderskouv, R. Skraep, and H. J. Kroyers Enke, and the second, third, fourth, and fifth conclusions of the summons, and on this being done, to grant decree in favour of the pursuer the said J. R. Andersen, in terms of the first conclusion of the summons."

On the same date the Lord Ordinary decerned in absence against the defenders Aktieselskabet Tremastet Skonnert "Molly" in terms of the first petitory conclusion of the summons as restricted by the minute annexed thereto and the minute of 25th June.

The claimants H. Fischer & Company founded on an arrestment dated 7th May 1895. They maintained that J. Andersen's arrestment, although prior in date to their own, was invalid; and pleaded—"(4) The claimants are entitled to be ranked and preferred for all their claims in priority to the claim of the said J. R. Andersen, in respect (1st) the decree in absence on which he founds was irregular and should be set aside, and (2nd) in any event, the decree proceeded on an amendment which was