v. *Geils*, 1 Macq. 255. But in accordance with the decision in that case his plea would have been overruled. It is the pursuer in the present action who pleads *res judicata*, with the view of avoiding an order for proof in support of her averments in the present action of cruelty by her husband. She wishes to import into the present case, not the proof that was led in the action of divorce, but the judgment of the Court assoilzieing her from the conclusions of that action. This, however, she cannot be permitted to do. It may be an important fact for her to prove in this action of separation that she defeated her husband's demand for divorce on the ground of desertion, but that will not free her from the necessity of establishing substantively her right to demand judicial separation, which requires proof of personal violence or threats of personal violence, while a proof of lesser ill-usage would justify a defence against an action of adherence or divorce for desertion. The two actions have totally different effects. If the pursuer obtained decree of judicial separation, the *jus mariti* and right of administration of her husband would be excluded, and her domicile would no longer follow that of her husband, as is expressly provided by the Conjugal Rights Act. At present, though she successfully resisted the action of divorce, the *jus mariti* and right of administration are effectual, and the wife's domicile is that of her husband. The point to be determined in the present action was not determined by the judgment in the divorce action, and the husband is now entitled, when he is put upon the defensive, to vindicate himself by adducing other and additional evidence—if he possess it—than what he was able to produce in the action of divorce."

The pursuer reclaimed.

The Lords, without calling on the defender's counsel, and without delivering opinions, unanimously adhered and found no expenses due.

Counsel for Pursuer (Reclaimer) — Nevay. Agent—James Barton, S.S.C.

Counsel for Defender (Respondent)—Rhind. Agent—William Officer, S.S.C.

Wednesday, March 15.

FIRST DIVISION.

SPECIAL CASE—CAMPBELL'S TRUSTEES *v.* CAMPBELL.

Trust—Liferent and Fee—Extent of Liferent Right—Mineral Leases.

Held that a direction by a truster to his trustees to pay to his widow "the whole annual produce and rents of the residue and remainder of my means and estate" did not import any alteration of the general rule of law whereby a liferenter is entitled to the rent under leases of minerals in course of being worked at the death of the truster, or under renewals of such leases, but not of any mineral field subsequently opened up.

30 *and* 31 *Vict. c.* 97 (*Trusts (Scotland) Act*), *sec.* 2—*Power of Trustees to Grant Mineral Leases.*

Question, Whether this section gives power to trustees to grant leases of new mineral fields?

The late Sir George Campbell of Succoth, Bart., died on the 17th of February 1874. He left a trust-disposition and settlement dated 22d October 1873, whereby he assigned and conveyed to certain persons therein named his whole property, heritable and moveable, in trust for the ends and purposes therein specified. The trustees and executors under the said trust-disposition and settlement were the parties hereto of the first part. The said Sir George Campbell left no issue. He was survived by his wife, who was the party hereto of the second part.

The trust-estate consisted of the residue of the *universitas* of the testator's property, the nett annual proceeds of which, after payment of debts, legacies, and expenses, amounted to £13,000 per annum. The estate comprised, *inter alia*, lands in the counties of Dumbarton and Lanark, in which there were valuable minerals. The coal and ironstone contained in one portion of these lands was being worked under leases which were current at the time of Sir George Campbell's death.

In 1879 the trustees, in virtue of the powers conferred upon them by the second section of the Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), granted a lease for a term of years of the ironstone and other minerals in portions of the lands which had never previously been let. By the fifth purpose of the trust-deed the trustees were directed to "pay over to the said Lady Campbell, my wife, in the event of her surviving me, 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." As part of "the annual produce and rents of the free residue" of the trust-estate the trustees had paid to Lady Campbell the rents received under the leases of the minerals current at the date of Sir George Campbell's death.

A question thus arose upon the opening of the new fields, whether Lady Campbell was also entitled under the said purpose of the trust-deed to the fixed rent or lordship payable in respect of minerals which were not let out or worked during the truster's lifetime, or whether such rent was to be treated as capital, and formed part of the residue of the trust-estate?

The question for the opinion and judgment of the Court was—"Whether under the fifth purpose of the said trust-disposition and settlement the party of the second part (Lady Campbell) is or is not entitled to the lordships or rent of minerals in seams which were not let or worked during the truster's lifetime, but which are now being worked under the lease granted by the parties of the first part (the trustees) in virtue of the powers conferred by the Trusts (Scotland) Act 1867?"

Argued for the first party—This was to a large extent a question of intention. The widow was not entitled to the rents under leases entered into subsequent to her husband's death. The money ought to be accumulated for the benefit of the fiar. Apart from express grant, the liferenter cannot get more benefit from the estate than the truster was deriving at the time of his death. The words used in the fifth purpose, "whole

annual produce and rents of the residue," are simply equivalent to "liferent," which very word is used in a subsequent clause of the same purpose. The rents of minerals, which are an equivalent for substance removed, differ materially from the rents of land. Of the former a proper liferent cannot be had. There is nothing in this deed to show that the truster intended that the remainder of the minerals on the estate were to be worked for the benefit of the widow.

Argued for the second party—To exclude the second party from the benefit of these lordships and rents clearly expressed intention was necessary. The technical word liferent is not used by the truster, but whole annual produce and rents of the residue. This is the settlement of a *universitas*, with ample powers vested in the trustees. The deed having been executed in 1873, subsequent to the passing of the Trusts Act, the truster must have intended his trustees to enjoy all the powers, and his widow all the benefits, thereby conferred. The truster intended his widow to get everything he could give her, and the words he uses in the fifth purpose are merely a definition of the legal word liferent. The conveyance is to trustees for the benefit of the liferentrix; during her life there is no devolution upon the fiar.

Authorities referred to — Stair, ii. 2, 74; Erskine, ii. 9, 57; Trusts (Scotland) Act (30 and 31 Vict. c. 97), sec. 2, sub-sec. 3; *Lady Preston*, 1677, M. 8242; *Swinton*, February 1, 1814, F.C.; *Roxburghe*, January 19, 1816, F.C.; *Waddel*, January 21, 1812, F.C.; *Guild's Trustees*, June 29, 1872, 10 Macph. 911; *Wardlaw*, January 23, 1875, 2 R. 368; *Ferguson's Trustees*, February 23, 1877, 4 R. 532.

At advising—

Lord President—The first thing to be ascertained in this case is the nature of the right which is conferred upon Lady Campbell by her husband's trust-disposition and settlement. That is not left in doubt. Sir George appoints the trustees to allow his widow the free liferent use of the mansion-house of Garscube with its contents, and in the fifth place he directs them to pay her, in the event of her survival, "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." This amounts in simple words to a universal liferent of the entire estate of the granter. It is a right which does not depend upon infeftment nor require infeftment in order to its completion. It is not a question of heritable property as regards the rights of liferenter and fiar under a feudal investment, but it is one of those cases with which we are familiar of a universal liferent of her husband's estate being left to the widow. There is no peculiarity in it except that the whole free income belongs to the liferenter.

The question which we have to decide is, whether the free income embraces the rents or lordships of minerals in seams which were not wrought during the testator's lifetime. There is nothing peculiar in the deed from which we can gather the testator's intention. The question, therefore, must be settled upon a rule of law which, if not established by positive decision, appears to run through all the cases, and has been taken to be settled in all the recent examples. Where a mineral field has been opened up and made part of the fruits of the soil, or has provided an income during the lifetime of the testator, the liferenter of the estate is entitled to continue to have these fruits as part of the free income of the estate. But when it has not been opened up in the lifetime of the testator, but has become a source of revenue since his death, the liferenter is not entitled to enjoy it. I do not think it necessary to go over the cases. I shall only say that the result I have stated is thoroughly established by the series of these which has been referred to in the argument. So that, apart altogether from the powers conferred by the Trusts Act, Lady Campbell cannot be held to be entitled to the benefit of the produce of a mineral field which was not worked during her husband's lifetime.

But then it is said that the granter must be held to have had in view the powers conferred by the Trusts Act 1867, and the possibility of the opening of new mines by the trustees under these powers. I am not altogether clear whether the power to let minerals upon long leases under subsection 3 of section 2 of the Trusts Act includes a power to open up and let new fields or not. But I can quite understand that a testator may be, like myself, in doubt as to the effect of the Act in this matter. If, therefore, a testator makes such a bequest of the liferent of his estate as we have in this deed, are we therefore to assume that he has left it to be settled upon a construction of the Act of Parliament what is the extent of the bequest? I think we should be giving to the Act of Parliament the effect of introducing a change in the law beyond what the Legislature contemplated, and we should further be obliged to ascribe to the granter of the deed a purpose and an intention which he may never have had if we were to hold that the liferenter is to have any higher right in consequence of the provisions of the Act. I can quite understand that if the truster had given a power to open up new minerals it might have been argued that a mineral field which had been opened up under the directions of the truster may have been intended to add to the income of the widow, and therefore, in the absence of any such power being given by the truster, I think that the general rule of law must apply.

Lord Deas—It has been understood that a widow or any other party to whom a truster has given a universal liferent of his estate is not entitled to the mineral rents unless the minerals have been wrought during the truster's lifetime. There is a whole series of decisions to that effect in addition to the opinions expressed by the institutional writers. It does not follow that a truster is not entitled to give a bequest of the annual income of minerals which are not bearing fruit at the time of his death, but at any rate it must be done expressly in clear language showing the intention of the testator. The presumption of law is against the validity of such a bequest. It is quite impossible to spell such an intention into the deed with which we are now dealing.

I do not like to touch upon questions which are not raised by the case itself. But my leaning would rather be in favour of the view that the granting of a power to open fresh minerals is not contrary to the terms of the Trusts Act.

Lord Mure—I am of the same opinion, and have nothing to add. I should like to reserve my opinion upon the operation of the Trusts Act in regard to the power of giving long leases of new mineral fields.

Lord Shand—I agree with your Lordships in the result of your judgment and in the reasons which you have given.

It has been settled certainly since the beginning of the century that a liferenter of an estate is entitled to the benefit of the income derivable from mineral leases existing at the date of the truster's death, and I think, whether that has been in terms decided or not, that the right extends to renewals of existing leases. It is clear that the law has not gone further in favour of a liferenter, and it appears to me that it would require very clear language upon the part of a testator to confer any higher right. "If once minerals are leased," as is well said by Lord Neaves in the case of *Wardlaw* v. *Wardlaw's Trustees*, *ante*, vol. ii. p. 374, "they are brought into the category of a subject bearing fruits. By granting such a lease the proprietor turns his right of bare property into a right to receive the prospective fruits." And therefore in a question as to the extent of a liferenter's rights, if a proprietor has granted mineral leases during his lifetime, he has shown that the rents derivable from these are to be considered as fruits to be enjoyed by the liferenter. It is a very much larger assumption that because a power has been given by Act of Parliament to lease subjects never before worked, the rents of these have been thereby converted into fruits which will fall to the liferent estate. Whether there might be a distinction in the case of a special direction in a trust-deed raises a different question.

In regard to the powers given by the Trusts Act, I think it right to say that I do not entertain any doubt that a power to lease minerals never before worked is included. The words of the section (sec. 2 and sub-sec. 3) are as plain and unrestricted as they can be. It cannot, I think, be suggested by their terms that they are to be confined to minerals previously let.

The Lords answered the question in the negative.

Counsel for the First Party — Trayner — Macfarlane. Agents—Tait & Crichton, W.S.

Counsel for the Second Party — Murray. Agents—T. & F. Anderson, W.S.

Thursday, March 16.

FIRST DIVISION.

SPECIAL CASE—THE DUKE OF PORTLAND *v.* THE DUKE OF PORTLAND'S TRUSTEES.

Trust—Tailzie—Intention of Truster.

The proprietor of large heritable and moveable estate in Scotland conveyed the whole to trustees, with directions to settle the heritage, "as soon as practicable" after his death, on a series of heirs in strict entail; the corporeal moveables on the lands he directed his trustees to settle upon the same series of heirs, "under strict prohibition against selling or disposing of the same, except such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms;" all other moveable estate he directed to be invested in land, to be entailed on the same series of heirs. The trustees having in the course of management of the farms sold certain crops and stocking—*held* that the price so obtained fell to be paid to the first of the series of heirs of entail, the exception above quoted being an exception from the prohibition only, and not from the conveyance.

By trust-disposition and settlement, dated 17th January 1871, the late Duke of Portland conveyed to trustees his whole estate in Scotland, with directions to settle, "as soon as practicable" after his death, the whole landed estate in strict entail on a certain series of heirs. He further provided—"In the third place, my said trustees shall settle upon the same series of heirs all corporeal moveables belonging to me situated in Scotland, under strict prohibition against selling or disposing of the same, except such articles and portions thereof as shall be necessary to be sold or parted with in the usual or ordinary course of business in the management of my farms, or my harbours at Troon, or elsewhere out of doors on my landed estates in Scotland. And in the fourth place, my said trustees shall realise my other moveable or personal estate in Scotland, and shall dispose of the same in such way as I shall by any writing under my hand direct and appoint; and failing such direction or appointment, my said trustees shall invest the same in the purchase of lands in Scotland, in the counties of Ayr and Caithness, or wholly in one of these counties, and shall settle the lands so to be purchased, by deed or deeds of strict entail, upon the series of heirs pointed out in the second purpose of this trust." He further gave his trustees "power to manage and administer the trust-estate hereby conveyed during the subsistence of this trust, and to do and execute all acts and deeds that shall be necessary and proper for fully carrying out the purposes hereof; and as it may be desirable to exchange certain of the lands now belonging or which may belong to me at my death for other lands more conveniently situated . . . . I hereby specially empower and authorise my trustees, with consent of the heir for the time entitled to the beneficial use and enjoyment of my said estates, to exchange such parts of the lands now belonging or that may belong to me at my death, as they may think proper, for other lands which it may appear to them are more conveniently situated as aforesaid, and to execute all deeds necessary for that purpose."

At the time of his death the late Duke held in his own occupation several of the farms on his Ayrshire and Caithnesshire estates, as also the harbours at Troon and Lybster, and certain furnished houses. On his death his successor, the present Duke, resolved not to manage the farms himself, but to let them to tenants. With this view, the crop, stock, and implements on those farms were sold by the trustees, with the consent and approval of the Duke, and realised £12,000.

A question arose between the present Duke and the trustees of the late Duke as to the disposal of this sum in accordance with the provi-