The Auditor having taxed the petitioning creditor's expenses as between agent and client, the liquidator lodged a note of objections maintaining that such expenses, there being nothing to the contrary in the interlocutor, must be as between party and party.

In the Single Bills counsel for the petitioning creditor moved for decree for the expenses as taxed. Counsel for the liquidator resisted, and the Court intimated that the Auditor would be communicated with.

At advising—

LORD PRESIDENT—This is a case in which a petition was presented for the compulsory winding-up of the Ballachulish Slate Quarries Company, Limited. Upon the same day as that petition was presented, a meeting was held at which an extraordinary resolution was passed by which the company was wound up voluntarily and a liquidator appointed, and the liquidator was directed to present a petition for the continuation of the voluntary winding-up under the supervision of the Court. These two petitions, with cross answers which were lodged, came to depend before Lord Kinnear, the Lord Ordinary on the Bills in vacation, and his Lordship after hearing parties dismissed the compulsory winding-up petition and pronounced an order in the other petition for the continuation of the voluntary winding-up subject to the supervision of the Court. He also pronounced an interlocutor finding the petitioner in the petition for the compulsory winding-up and the liquidator entitled to expenses out of the estate.

That is a perfectly ordinary proceeding and the usual interlocutor, and the reason of it is of course plain enough, that even although the Court in its discretion may hold that the better form of winding-up is not a compulsory winding-up but a winding-up under the supervision of the Court, the Court is still entitled, indeed bound in proper cases, to give the petitioner who comes into Court with a petition for compulsory winding-up, his expenses, as having brought the matter into Court, the view being that the whole parties concerned have the benefit of his initial proceedings in the liquidation which is then instituted.

Now, the expenses were taxed, and they were taxed by the Auditor upon the scale of agent and client, and the present question has arisen upon the objection taken by the liquidator that, inasmuch as the interlocutor does not in terms mention agent and client, the expenses ought to be taxed as between party and party. As to the general rule in ordinary actions upon this matter there can be no doubt. "Expenses" without any more being said means taxation upon the scale of party against party, and anyone who wishes taxation on another scale must take care that it is mentioned in the interlocutor. As to that there is no doubt. But upon inquiry there seems to be as little doubt as to the rule in the present case. The finding of expenses here really means taxation as between agent and client, because there is in the proper sense of the word no question of party against party. The petitioner here was not found entitled to expenses because he had been in any sense successful against his only opponent, the liquidator. As a matter of fact, so far from being successful, he was really unsuccessful, because while he contended that the order should be for compulsory winding-up, the liquidator contended, and with success, that it should be a supervision order. He was not found entitled to expenses as having been the victor in a litigation against another party. He was found entitled to expenses because it was his petition that initiated the whole matter and really formed the true basis of the liquidation, although technically it was found in this particular instance convenient to write on the other petition.

Now in this case the truth is there is no question of party against party to whom the rule is to apply. Accordingly, I think the Auditor here has done according to the ordinary practice and according to the right practice in allowing this petitioner the expenses he has incurred so far as reasonable, that is, his expenses taxed as between agent and client.

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

The Court repelled the objections and approved of the Auditor's report.

Counsel for the Petitioner—A. A. Fraser. Agent—William Calder, Solicitor.

Counsel for the Respondents—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Thursday, October 17.

SECOND DIVISION.

RANKEN'S TRUSTEES *v.* RANKEN AND OTHERS.

Succession—Fee and Liferent—Mines and Minerals—Rent and Royalties of Mine Leased after Testator's Death — Fixed Rent before Minerals Worked—Accumulations—Thellusson Act (39 *and* 40 *Geo. III, cap.* 98).

A testator who died in 1848 directed his trustees to divide the income of his whole estate into ten equal shares, and to pay these half-yearly to certain beneficiaries, and on the failure by death of all the beneficiaries to convey and pay over the fee of his whole estate to the person who should then be the heir-male of his father. The trust estate consisted of two landed estates fifteen miles apart, both of which contained coal. The coal in the one was being worked at the date of the testator's death, but that in the other had not been worked, nor was it let. The trustees let the latter for a fixed rent of £200 or royalties. While the fixed rent was being paid and before

working the coal had begun a special case was presented to decide how the said rent was to be dealt with.

Held that the mineral rent and lordships from the coal not being worked prior to the testator's death formed part of the *corpus* of the estate, and accordingly (1) fell to be retained by the trustees for the purpose of being ultimately paid over to the person entitled to a conveyance of the estate, and (2) was not affected by the Thellusson Act.

Campbell v. *Campbell's Trustees*, July 6, 1883, 10 R. (H.L.) 65, 20 S.L.R. 748, *followed*.

James Ranken of Glenlogan and Whitehill, in the county of Ayr, died in 1848, leaving a trust-disposition and settlement, dated 12th December 1845, and recorded in the Books of Council and Session 7th June 1848.

By his trust-disposition and settlement Mr Ranken conveyed his whole estate, heritable and moveable, to trustees, and directed them, after making provision for payment of his debts and the expenses of managing the trust, and for delivery of certain articles and a certain liferent to his sister Jane Ranken, to "divide the clear annual income of his whole estate before conveyed into ten equal shares, and that half-yearly as the same shall be realised," and to pay them to the different beneficiaries therein described; and on the failure by death of all the parties to whom he had directed a share or shares of the income of his property to be paid, he directed his trustees "to convey and pay over the fee of my whole property, heritable and moveable, to the person who shall, on that event taking place, be heir-male of George Ranken of Whitehill, my father, and to his heirs and assignees whomsoever."

The trust estate under the management of the trustees consisted of two landed properties — Glenlogan and Whitehill — situated about fifteen miles apart. Both of these estates contained coal of considerable value. At the date of the testator's death the coal in the estate of Glenlogan was being worked, and it had continued to be worked ever since. The coal in the estate of Whitehill had not been worked or let before the testator's death, but subsequent thereto it was let by the trustees for a fixed rent of £200 or royalties. The tenants paid the fixed rent but did not begin to work the coal. They were tenants of an adjoining property upon which they had a pit, through which they proposed to work the coal in Whitehill. It was not expected, however, that they would begin to work it for a considerable time. In these circumstances, questions having arisen as to the disposal of the mineral rent from Whitehill, a special case was presented.

The parties to the case were (1) John Mackenzie Bow and others, the testator's trustees, *first parties;* (2) Thomas Ranken, heir-male of the said George Ranken of Whitehill; who was also heir-at-law of the testator; and who was also the eldest son of the testator's deceased nephew George Ranken, mentioned in his trust-disposition and settlement, and as such in receipt of certain shares of the income of the testator's estate, *second party;* (3) Robert Limond Ranken and others, the persons by whom the liferents of the remaining shares of income were being enjoyed, *third parties.*

The parties of the first and second part *maintained* that as the minerals of Whitehill had never been worked prior to the death of the testator, and as his trust-disposition and settlement contained no direction to work them, the rents and lordships payable therefor did not fall to be paid over to the parties entitled to the income. The parties of the first part maintained further that said rents and lordships being the proceeds of the *corpus* of the estate were in their nature capital, and fell to be retained by them with a view to being paid over to the person ultimately entitled to conveyance of the estate. The party of the second part further maintained that said shares of income derived from the rents and lordships payable in respect of the minerals of Whitehill were not disposed of by the testator in the circumstances which had occurred and had fallen into intestacy, and that he as heir-at-law of the testator for the time being was meantime entitled thereto. The parties of the third part maintained that said mineral rents and lordships were income of the estate, and fell to be divided and paid over to them and the second party accordingly. *Separatim*, they contended that so long as the coal in Whitehill remained unworked they were entitled to the fixed rent paid by the tenants in respect of the tenancy of said minerals.

The *questions of law* submitted for the decision of the Court were—"(1) Are the mineral rents and lordships payable from Whitehill income of the trust, and do they fall to be paid over to the second and third parties accordingly? or (2) Are said mineral rents payable to the second and third parties as income of the trust only so long as the said minerals are not worked? or (3) Do said mineral rents and lordships form part of the *corpus* of the estate, and do they accordingly fall to be retained by the first parties for the purpose of being ultimately paid over to the person entitled to a conveyance of the estate? or (4) Is the accumulation of said rents and lordships struck at by the Thellusson Act, and do they accordingly fall to be paid over in the meantime to the second party as possessing for the time the character of heir-at-law of the testator, and heir of George Ranken, entitled to conveyance of the estate?"

Argued for the first parties—(1) The rents and royalties of minerals which had not been worked prior to the testator's death were not income but capital—*Campbell's Trustees* v. *Campbell*, March 15, 1882, 9 R. 725, 19 S.L.R. 498, *affd.* July 6, 1883, 10 R. (H.L.) 65, 20 S.L.R. 748. They were part of the *corpus* of the estate—*Gowans* v. *Christie*, February 14, 1873, 11 Macph.

(H.L.) 1, *per* Lord Cairns at p. 12, 10 S.L.R. 318. The fact that the coal was not yet being worked, and that a fixed rent and not royalties was being paid, made no difference. The fixed rent was part of the price for being allowed to take away coal. (2) The fixed rent being capital and not income, the Thellusson Act (39 and 40 Geo. III, cap. 98), section 1, made applicable to heritable property in Scotland by the Rutherfurd Act 1848 (11 and 12 Vict. cap. 36), section 41, had no application.

Argued for the second party—(1) If the fixed rent were to be regarded as in no different position from royalties, he adopted the argument of the first parties that it was not income but capital. The settlement had not disposed of rents for coal which was not being worked. As heir-at-law he was entitled to the fixed rent as being undisposed of. Reference was made to *In re Scarth*, L.R., 1879, 10 Ch. D. 499. (2) Fixed rent was not in the same position as royalties. No coal had been taken away, and there was no obligation to work the coal. Accordingly in this state of matters the fixed rent paid was not the price paid for a wasting subject, but was similar to money paid for an option, and the accumulation of it was struck at by the Thellusson Act. The rents fell therefore to be paid to the second party as the party who would have been entitled to the beneficial enjoyment of the estate had not accumulation been directed.

Argued for the third parties—No coal had been taken away. The £200 did not represent the price for the exhaustion of the *corpus* of the estate, but represented the natural increase in the value of the property, and was income not capital, like duplicands of feu-duty—*Ross's Trustees* v. *Nicol*, November 22, 1902, 5 F. 146, 40 S.L.R. 112—and fell to be paid to the third parties.

LORD LOW—I think this case is ruled by the decision in the case of *Campbell* v. *Campbell's Trustees* in the House of Lords. That case established the rule that where a testator leaves the income or liferent of his estate to certain persons, the income to which the beneficiaries are entitled includes the produce of any minerals which were worked during the lifetime of the testator, but does not include the produce of mines which were opened after his death. No doubt there may be a modification of this rule if the special terms of the trust deed require it, and show that it was the intention of the testator to include minerals that might be worked in future. But here the trust deed simply directs the trustees to divide the income among certain beneficiaries. Therefore I have no doubt that the rule laid down in *Campbell's* case applies, and that the rents in question do not fall within the income directed to be divided among the beneficiaries. I accordingly suggest that the third question in the case should be answered in the affirmative.

The only other question which requires an answer is the fourth, and that is whether the accumulations of the said rents and lordships is struck at by the Thellusson Act. Now I think the answer to the one question solves the other, because if we answer the third question in the affirmative on the ground that these rents are capital, and not income, it follows that they cannot be struck at by the Thellusson Act, which refers to income only. Therefore I think that the Thellusson Act has no possible application to this case, and that the fourth question ought to be answered in the negative.

LORD ARDWALL—I concur with my brother Lord Low and have little to add. It has been argued that the rents in question do not fall under the rule laid down in the case of *Campbell*, because the minerals are not being worked and are still in the ground, and that although the rents were to be handed over to the liferenters the capital value of the estate would remain undiminished as no coal has been removed. With regard to this argument I have to observe that in entering on a mineral lease the parties take into consideration the time when the working of the minerals is likely to be begun, the propinquity of such minerals to pits already opened, and so on, and the parties having these matters before them adjust the rents and lordships and the periods when they shall become payable accordingly. But that does not alter the fact that the only consideration for which the rents are paid is coal under the soil and forming *pars soli* whatever the arrangement as to the time or manner of the rents being paid or the minerals being worked. Accordingly I think that the argument to which I have adverted is ill founded, and that it should be rejected. I hold that the rents are part of the consideration given for the coal in the estate whether it is worked immediately after the lease is signed or after the lapse of a period of years, and that therefore these rents whenever paid fall under the rule laid down in the case of *Campbell*, and must be kept in the hands of the trustees as forming part of the fee of the landed estate, and not paid over to the liferenters.

The LORD JUSTICE-CLERK concurred.

LORD STORMONTH DARLING was not present.

The Court answered the third question in the affirmative, the fourth in the negative, and found it unnecessary to answer the first and second questions.

Counsel for the First Parties—Chree. Agents—Elder & Aikman, W.S.

Counsel for the Second Party—Lyon Mackenzie. Agents—Elder & Aikman, W.S.

Counsel for the Third Parties—Cochran Patrick. Agents—White & Nicholson, S.S.C.