Thursday, November 21.

FIRST DIVISION

[Lord Jerviswoode, Ordinary.

DUKE OF HAMILTON *v.* GRAHAM.

Proof—Onus probandi—*Superior and Vassal—Reservation of Minerals.*

A was superior of certain lands which had originally been feued out by his ancestors to different vassals, but without any distinct specification of boundaries. In some of the grants the minerals were reserved to the superior, but in others they were not reserved. The *dominium utile* of the whole lands having come to be vested in B, a question arose as to the boundaries of the parcels in which the minerals had been reserved, and A having raised an action of declarator to have these boundaries fixed, the Court *held* that, in the first instance, the *onus* lay upon him to prove to which lands the reservation of minerals applied.

Held, on a proof, that in the whole circumstances, A had sufficiently discharged the *onus.*

This was an action of declarator raised by the Duke of Hamilton against Mr John Graham Barns Graham of Cambuslang, in Lanarkshire. The object of the action was to have it declared that the pursuer had the whole and exclusive right and property of the coal and limestone in certain portions of lands of which the pursuer was superior and the defender vassal. The lands in dispute were part of the barony of Drumsargat, which had been originally feued out by the Duke's ancestors, who retained the superiority. By these grants the lands were not all feued out to the same vassal, but to different vassals, and in some of the grants the minerals were reserved to the superior, in some they were not, and the descriptions of the lands in the original grants were extremely vague, and did not fix the boundaries. In 1701, however, all the lands were united in the same person, and there consequently come to be considerable ambiguity as to what were the parts of the lands in which the superior had right to the minerals, and what the parts in which he had not that right. It was to clear up this ambiguity, and have the boundaries of the lands in which the minerals were reserved fixed by a decree of the Court, that this action was raised. The particulars of the case are clearly stated in the opinion delivered by Lord Ardmillan.

The Lord Ordinary prounced an interlocutor finding for the defender.

The pursuer reclaimed.

The only point of law before the Court was raised by the defender, for whom it was argued that the *onus probandi* rested with the pursuer. The grounds upon which this argument was based were, that as the pursuer represented the original granter of the feus, the *onus* of clearing up any ambiguity arising from the imperfection of the description in these grants lay upon the pursuers, and that as the right which he claimed to the minerals was founded on an alleged reservation, the *onus* lay upon him to prove to what lands these reservations applied.

At advising—

LORD ARDMILLAN — This case is voluminous, and must be to the parties important and interesting. I cannot, however, say that I view it as presenting much difficulty in point of law, though the questions raised are by no means easily disposed of. The argument, both by the junior and by the senior counsel, has been ample and able; and the Court has had the benefit of an elaborate and instructive report by Mr Marshall.

The real difficulty is in the question of evidence —in ascertaining and estimating the proof by which the reservation of minerals in the titles is applied to the several lands forming part of the defender's estate. That question of evidence is attended with considerable difficulty. I have given it my very best attention; and I shall now, as shortly as I can, state the conclusion at which I have arrived.

The first point which arises is, Where does the *onus probandi* rest? or, Is there any onus on the one party rather than on the other? On the whole, endeavouring to weigh the presumptions on either side, and to balance them as far as possible, I have come to be of opinion that the preponderance of burden—the especial pressure of onus—rests to some extent on the pursuer the Duke of Hamilton. He is the pursuer of the action, and *in petitorio.* He is superior of the whole property to which this action relates, which is all comprehended within the barony of Drumsargat, part of the estate belonging to the Duke and his ancestors. The defender Mr Graham is proprietor of the whole lands brought within the scope of this dispute, including Cambuslangton, Westburn, Gilbertfield, Overtoun, and Bellhouseside. The *dominium directum,* or superiority, is with the pursuer; the *dominium utile,* or property is with the defender. Within the estate thus belonging in property to the defender, but of which the pursuer is superior, there are several portions or parcels of land, some of which have been granted in feu and are still held under reservation of coal and limestone to the superior, and some of which are held without such reservation. In this action the pursuer seeks to have the reservation of the minerals declared and applied in reference to the different parcels of the defender's lands,—in other words, to obtain a judicial specification and division of the defender's lands, in relation to the reservation of minerals, to which some are subject, and from which others are free, so as to get an authoritative ascertainment of the area of reservation.

Originally, all the lands now belonging to the defender, and which I have enumerated, were parts of the barony of Drumsargat, and were feued out by the Duke's ancestors, who retained the superiority. The terms of the original titles must be held as having been selected, or adopted, or approved, by the superior, the ancestor of the Duke. The description of the lands, generally and particularly, which he feued out, and more especially the description of the lands within which he, as superior, reserved to himself the minerals, was his doing. It must now be held that he described them as he thought fit. The conveyance was intended to be in perpetuity—the reservation was partial, affecting some of the lands, but not reaching to all the lands conveyed. It must be presumed that it was intended to distinguish between the different parcels of land, making it clear which of them were burdened with the reservation, and which were free from it. Description sufficient and accurate was of importance. If that description is so indefinite, doubtful or defective, that discriminating application of it cannot now be made after the lapse of a century, without proof to identify the parcels of land, and apply the descrip-

tion, it appears to me that the burden of that proof must rest on the superior. The liability of the description to loss of distinctness so as to render extremely difficult any application of the reservation of minerals to the several parcels of land, is a quality and a defect of the description, and as such is attributable to the superior, who by his deed created and conferred the *dominium utile*, and who stipulated for the reservation. If, by the lapse of time, the application of the description given by the superior has become quite impossible, the reservation cannot be supported; if it is difficult and unsatisfactory, and requires proof, the burden of such proof rests on the superior. This, however, is only at the outset. It may be that counter-presumptions arise from the titles, the possession, and the conduct of the parties. But, in the first instance, I think that the primary onus rests to some extent on the superior, who represents the granter of the titles, in the expression of which the difficulty of construction, and the consequent difficulty of applying the reservation, has arisen, and arisen after the lapse of more than a century. I have explained my view on this point in order to show that I have considered the evidence on the footing of recognising some degree of onus on the pursuer.

It is set forth in the summons that the £5 land of Cambuslangton, comprehending a £3, 12s. land, and a 12s. land, part of the barony of Drumsargat, were feued out by the ancestors of the superior under reservation of the minerals. This appears to be correct, and is instructed by the titles, particularly by the disposition by the Duchess of Hamilton of 28th September 1657, and by the charter of confirmation by the Commissioners of Douglas Duke of Hamilton in 1773. In regard to the exact position and boundaries of these lands, which are within the reservation of minerals, there is a question. But the fact that these lands of Cambuslangton were feued, and have long been held under the reservation that they formed part of the estate of Cambuslang, and since then of the estate of Westburn, and that they now belong in property to the defender Mr Graham,—the pursuer being the superior,—is not disputed. As the titles at present stand, these lands, part of the £5 land of Cambuslangton, if their position and extent can be ascertained, are within the scope or area of the reservation of minerals.

On the other hand, the £5 land of Gilbertfield, comprehending the five merk land of Gilbertfield, and the 40s. land of Overtoun or Little Cambuslang, appears to have been granted at a very early date—in 1489—to a James Park. It is made a question whether these lands of Overtoun were 40s. land of old extent, or a two merk land of old extent, which thereafter became a 40s. land of new extent. It does not occur to me that this controversy is of very great importance. I incline to think, concurring with the reporter Mr Marshall, that the pursuer's view of this question is right, and that the lands of Overtoun or Little Cambuslang, are of old or two merk land, and then a 40s. land of new extent; and that thus the £5 land of Gilbertfield, with the pendicle of Bransheochmuir, and the two merk land of Overtoun, passed in 1591 from the family of Park to the family of Cunningham, and were in 1701 sold to Hamilton of Westburn. Since 1701 both estates—that of Gilbertfield and Overtoun, and that of Cambuslangton—were owned and possessed by one proprietor under a charter of confirmation by the superior, dated 12th February 1701, and subsequent titles.

A separate parcel of land, a 6s. 8d. land, called Bellhouseside, was granted in 1657 to Robert Cunningham, younger of Gilbertfield. This land was also sold in 1701 to Hamilton of Westburn. I do not pause to consider the question, whether the 6s. 8d. land of Bellhouseside and the 6s. 8d. land of Kirkhill are the same subject under different names, or whether they are separate subjects. If that question were important, I should think it difficult. But, in the view which I take of the case, this question does not appear to me to be essential.

When, in 1701, the lands of Gilbertfield, Overtoun, and Bellhouseside were thus acquired by Hamilton of Westburn, they became part and portion of the united estate popularly known as Westburn. Hamilton of Westburn thus became the proprietor of all the lands now in question; and it is important to observe that Gabriel Hamilton of Westburn acquired a title to these estates, including Gilbertfield and Overtoun, in 1731, and was infeft; and that John Hamilton, his son, made up his title, as heir of his grandfather Archibald Hamilton, to the £3, 12s. land and the 12s. land, parts of Cambuslangton; and made up his title, as heir of his father Gabriel Hamilton, to the lands of Gilbertfield, Overtoun, and Bellhouseside. From the date of the acquisition of Gilbertfield and Overtoun, the estates to which I have alluded were united, and after 1701 were possessed by Hamilton of Westburn. Now, Gabriel Hamilton of Westburn was obviously the person who, of all others, must have known the extent, position, and boundaries of these estates, and in any question relating to the area or the identification of such lands, the writ or the conduct of Gabriel Hamilton must supply very important evidence.

In 1827 another change of property takes place. We have a precept of *clare constat* from the superior, of 5th August 1827, in favour of Gabriel Hamilton Dundas, eldest son of John Hamilton of Westburn, for infefting him a heir of his father in the whole of these lands: and in November 1827 they were all purchased by the trustees of Adam Graham of Craigallian; and they now belong to the defender Mr Barns Graham.

There is no dispute as to the proprietorship of these lands, nor is there any doubt that the Duke of Hamilton is the superior. The question raised relates to the identification of several parcels of land in reference to the reservation of minerals.

In the titles to the £3, 12s. land and the 12s. land, parts of the old £5 land of Cambuslangton, there appears to be, and in this case we must assume that there is, a reservation of coal and limestone to the superior, in accordance with the old feu-rights. In the titles to Gilbertfield, Overtoun, and Bellhouseside, we must hold that there is no such reservation, the same having been improperly introduced into the titles by progress, where the original rights contained no such reservation. One part of the defender's estate, viz., Gilbertfield, Overtoun, and Bellhouseside, is thus free from the reservation of minerals. Another part, viz., the £3, 12s. land and the 12s. land of Cambuslangton, is subject to that reservation. In the discriminating identification of the several parcels of land, so as to apply the reservation, inference, implication, tradition, and conjectures have been pressed upon us, and it is here that the difficulty of the case arises.

As I have already explained, I think some degree of *onus* rests, in the outset, on the pursuer.

But the evidence on which he founds, both written and parole, must be considered one piece of evidence, to which I shall now advert, as furnished by the feus granted by Gabriel Hamilton in 1735, is very important. We have before us an extract from the Ordnance map, which is produced and referred to by the pursuer, who alleges that on that plan the area of the reservation of minerals which he claims is coloured red. On looking to that plan, the importance of the evidence supplied by the feu-rights of 1735 will at once appear. There is no doubt that these feus are on the disputed ground, and it is urged that they are on that part of the disputed ground alleged by the Duke to be subject to the reservation. Is this contention of the pursuer right? To which estate do these lands so granted in feu belong? On that point there is now no doubt. The feus granted in 1735 by Gabriel Hamilton of Westburn, and granted generally with advice and consent of his father Archibald Hamilton of Westburn, afford, in my opinion, written evidence which on this point is extremely important. These feus, I think seven in number, and appearing on the plan as Nos. 13, 14, 15, 16, 17, 18, 19, are all conveyances of portions of land, of which boundaries are given, which must have been known at the time, and all of which are described as "part of the £5 land of Cambuslang," or of "the £5 land of Cambuslangton."

The Lord Advocate did not dispute that great weight is due to the evidence furnished by these feus; and, in regard to the particular parcels of land so feued, he admitted that they must be held as within the £5 land of Cambuslangton; and the admission could scarcely have been avoided. But the evidence goes further than the admission. The position of these parcels of land, as appearing on the plan, and the fact that the granter of the feus was Gabriel Hamilton, gives great importance to this piece of evidence. This is written evidence, 130 years old, under the hand of Gabriel Hamilton, in favour of the averment maintained by the pursuer, that these lands were and are part of the old £5 land of Cambuslangton, and not part of the lands of Gilbertfield or Overtoun. Now, no one could have had better means of knowledge, or can now be presumed to have had better knowledge of the facts, than this Gabriel Hamilton. What he has stated is unequivocal, and his means of knowledge cannot be doubted. But there is confirmation of the evidence to be found in the process.

The estate of Gilbertfield is an old possession, and there is a mansion or castle of Gilbertfield. The castle and the lands adjacent are in the plan delineated as lying to the south of a farm marked on the map, and called "Bransheochmuir." So far as we can judge, the castle must have been a place of some importance, most probably with some arable land round or near it, to which the name of "the Mains" might naturally be given.

In November 1731—an important period, being in the time of this Gabriel Hamilton, and not long before the date of the feus,—we have a "decree of valuation of teinds of Gilbertfield," where we have mention of "the Mains," one-half of which is said to be "possessed by William White," and the other half "possessed by the said Gabriel Hamilton himself." I think the subject described in this valuation in 1731 as "the Mains" must be the Mains of Gilbertfield. I am not able to give it any other meaning. One of the old witnesses examined, James Bowman, speaks of a person of the name of White who, "in his young days," or above 70 years ago, lived near Gilbertfield, and he was a member of "a family living there," which carries it still further back. And I think it appears that Gabriel Hamilton did reside at Gilbertfield. Now, it was the very Gabriel Hamilton mentioned in this valuation of 1731 as the owner of Gilbertfield, and as possessing "the Mains," who was the granter in 1735 of the feu-rights in which all the lands feued, being within the area now disputed, are described as "part of the £5 land of Cambuslangton." The inference which I draw from these two pieces of evidence is—(1) That the feus were part of the £5 land of Cambuslangton, and were known by the proprietor of Gilbertfield to be so; and (2) that if it is maintained that any part of the estate of Gilbertfield extended into the midst of the Cambuslangton lands, and even down to the Clyde, it is clear that it cannot be "the Mains," or any part of "the Mains" of Gilbertfield. Some other part of Gilbertfield must be intended or suggested as the land to which the defender refers, and to which the witnesses for the defender refer, and I am quite unable to perceive or understand what part of Gilbertfield that can be.

Parole testimony to instruct something like a tradition or old understanding on this subject has been resorted to by the defender. That evidence deserves consideration. I think it is not to be overlooked or lightly set aside in such a question and under such circumstances as are here presented; but it is not all on one side, and it is to be cautiously received; and after giving my best attention to the proof adduced, I am of opinion that the proof is not sufficient, and that the defender's averments on the subject must be held not to be well founded. Loose casual conversation, doubtful hearsay, and indefinite traditions, are not sufficient to instruct such an averment. I see no ground for believing—I cannot indeed suppose it possible—that the estate of Gilbertfield stretched out northward through all the lands delineated on the plan to the Clyde; and I think it worthy of notice that, as I shall afterwards explain, the defender, as proprietor of Gilbertfield, did not make such claim when he had good opportunity of doing so. But an attempt has been made to support this theory by an able and earnest argument for the defender, to the effect that, as the old valuation of Gilbertfield and of Cambuslangton was the same, viz., a £5 land, and as Gilbertfield was situated on higher ground, and with a muir—Bransheochmuir, in the neighbourhood—it was probably of less value per acre than Cambuslangton, and therefore must have been more extensive, and that, in point of fact, it was more extensive. The matter remains in doubt. I cannot think that this is altogether satisfactory, either as matter of proof or of inference. I rather suppose that the castle and estate of Gilbertfield must in old times have been a more important place—a place of more consideration as a residence—than Westburn or Cambuslangton; but I cannot perceive sufficient grounds for presuming that the value per acre was then inferior and the extent greater; and the argument by which Mr Pearson, on the part of the defender, sought to establish the greater extent of Gilbertfield, though very ingenious, is conjectural and unreliable. On the other hand, the amount of composition in 1778, and the rentals given in or accepted in the localities of 1782, 1802, and 1819, were founded on by the pursuer to show that Westburn was the

larger property. But these do not appear to me to present satisfactory evidence of the relative value or extent of the two estates, even in the days to which they refer, and still less in earlier days. The Reporter seems to think that Gilbertfield was the least extensive and the least valuable of the two. It may be so; all that I can say is, that there is no such proof of the greater value and extent of Gilbertfield in proportion to Westburn, as to support the suggestion that the estate of Gilbertfield did reach, or may have reached, to the Clyde. I am quite unable to come to that conclusion. I see no evidence and no argument on which I can rely in support of the defender's plea to that effect. The history of the proceedings of the defender himself, on and after the purchase of the estates, has a more important bearing on the question before us.

With a view to the sale of the united estates by Mr Hamilton Dundas to Mr Graham, a plan of the whole estate was prepared by a land surveyor named Crawford in 1826. The divisions and subdivisions of the lands are there laid down, and I understand that these now appear on the plan (No. 6), which is an extract from a map of the Ordnance Survey. Then in 1827-28 it was found necessary, with a view to arrangements for an entail, to divide the united estates into two portions,—the one portion to be entailed, and the other to be held in fee simple. The whole estates were valued by a Mr Lawrie, and a line of division was adjusted. The deed of entail proceeded on this ascertainment of the boundaries and this division of the estate. The lands to the north of the Hamilton Road are comprehended in the entail as the £3, 12s. land, and the 12s. land of Cambuslangton being part of the £5 land of Cambuslangton, and within the barony of Drumsargat; and the lands conveyed in fee simple are described as the five merk land of Gilbertfield, the 40s. land of Overtoun, and the half-merk land of Bellhouseside, with some pendicles. The only lands north of the Hamilton Road except an admitted part of Overtoun, included within this conveyance, are two parks—Langland Park and Southbank Park—which are described as "part of the lands of West Cambuslangton," and which are specially excepted from the conveyance in the deed of entail, where the conveyance is limited to the £3, 12s. land and the 12s. land of Cambuslangton, a description and a conveyance which, but for the exception, would have included these subjects of Langland Park and Southbank Park. Nor is this all. It had been ascertained that the reservation of minerals to the superior had been irregularly introduced into the charters by progress forming the Gilbertfield titles. An action of declarator was accordingly raised against the superior for obtaining relief from this reservation; and the position assumed by the present defender in that action cannot be otherwise than important. I do not think that the pleas of the defender in the suit with the Duke of Hamilton in 1840-1841, in regard to the application of the reservation to the lands of Gilbertfield, Overtoun, and Bellhouseside, in which the present defender succeeded in obtaining the liberation of these lands from the reservation, can operate as a bar to the pleas proponed by him in this action. But the whole course of proceeding in that action of declarator, and particularly the division of the lands, and the limitation of the conclusions to Gilbertfield and lands south of the Hamilton Road, except an admitted part of Overtoun, is important as evidence of the defender's own opinion of the matter,—an opinion on which, in the action of declarator, in his entail arrangements, and in the framing of his own recent titles, he acted. It is clear that at that time the defender did not maintain, and, so far as we can see, did not imagine, that the estate of Gilbertfield or Overtoun extended to the Clyde, or indeed (with the exception above mentioned) extended to the north of the Hamilton Road. The pursuer now founds on this action, and on the defender's procedure, as evidence in support of his averments. I think that, to some extent, though not to the full extent pleaded, he is entitled to do so. It is not a bar to the defender's plea. Nor is it conclusive evidence taken by itself. Nor are the expressions, or even the admissions in the pleadings, to be held as binding the defender now. But the history of the whole matter is not without importance, to be considered along with the other evidence in the case. It is scarcely credible, scarcely conceivable, that if Mr Graham knew, or believed, that Gilberfield extended to the north of the Hamilton Road, and stretched on to the Clyde, he would have limited the action of declarator of freedom from the reservation, as he did.

I have a similar observation to make in regard to the action, still more recent, at the instance of the defender Mr Graham against the Duke of Hamilton, regarding the working of minerals near the Clyde, and the transit of minerals by the tenants of the Duke, under Mr Graham's lands, an action decided in the House of Lords in July 1871. In regard to this action, also, I do not hold the pleas or the procedure of Mr Graham to be a bar against the pleas he now maintains. But the position in regard to these very lands which he then took cannot be overlooked; and, as a piece of evidence indicating Mr Graham's own view and knowledge of his rights, it is impossible to disregard the fact, that if the estate of Gilbertfield had extended to the Clyde, as he now maintains, then he had a great interest and a strong motive, and a competent and available opportunity, for saying so in that action. Yet he never did say anything of the kind, nor did he maintain or suggest any plea that implied it.

I agree with the Reporter in holding that the defender's property of Bellhouseside, coloured yellow on the plan, is proved to reach beyond the space so coloured yellow, and to extend from Vicars Land on the west to Howie's Hill on the east, and that the intervening parcels of land are, as part of Bellhouseside, not subject to the reservation of minerals. Indeed, I think that the counsel for the pursuer did not dispute this at the bar.

We have an admitted northern boundary of Overtoun marked on the plan JKL. We have, as I think, all the seven feus east of Bellhouseside now sufficiently instructed to be part of the £5 land of Cambuslangton, and extending as far as the east boundary of Bowman's feu. This fact is, as I have already explained, of great importance.

Then it is proved, in regard to the different subjects north and east of Bowman's feu, in so far as situated to the north of the Hamilton Road, that they have never been held in connection with, or considered as associated with, the estate of Gilbertfield at all, nor with the estate of Overtoun, until you come as far east as the line delineated on the plan MNEO. Some of these parcels of land appear to have been personally possessed by the proprietor of Westburn; and, in regard to other parcels, we have some evidence that persons of the names of Finlay, Turnbull, and Anderson, were tenants on

the estate of Cambuslangton, and that these persons and their ancestors had occupied several of the different subjects within the disputed ground, coloured red on the plan. Taking the parole evidence of this possession along with the titles, and with the evidence to which I have already adverted, I am of opinion that all the parcels of land coloured red lying north of the Hamilton Road, and north and east of Bowman's feu, up to the said line of boundary with Overtoun, are subject to the reservation of minerals.

But, in regard to the lands lying to the south of the Hamilton Road, beyond the feus, and to the east of Bowman's feu, and up to the line delineated PQR on the plan, I feel considerable difficulty. I am not satisfied that the pursuer has instructed his allegation in regard to these subjects. Taking the most favourable view for the pursuer, he has left the matter in doubt, and some degree of *onus* does rest on him as pursuer of the action, and as superior representing the granter of the rights, from the imperfect expression of which the difficulty has arisen. I have already explained that the history of the defender's proceedings in the division of the estates with a view to entail, and in both the actions at his instance against the Duke of Hamilton, tends to support the view that the Hamilton Road was recognised as the boundary. There being very feeble proof in support of the pursuer's averment in regard to land south of the Hamilton Road, I think that the evidence afforded by the history of the defender's proceedings must turn the balance. The seven feus being proved to have been parts of Cambuslangton, are, although south of the Hamilton Road, held as separated from Gilbertfield, and brought within the scope of the reservation of minerals. But with that exception, I am of opinion that none of the parcels of ground situated to the south of the Hamilton Road are subject to the reservation of minerals, while all the ground coloured red situated to the north of the Hamilton Road, and also the seven feus situated to the south of the Hamilton Road, are or were parts of Cambuslangton, and are subject to the reservation of minerals.

On the whole matter, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and that the Court should pronounce findings giving effect to the views which I have endeavoured to explain.

LORD PRESIDENT and LORD DEAS concurred.

Counsel for the Pursuer—The Solicitor-General and Keir. Agents—Tods, Murray & Jamieson, W.S.

Counsel for the Defender—The Lord Advocate, Watson, and Pearson. Agents—Graham & Johnston, W.S.

Thursday November 21.

FIRST DIVISION.

SPECIAL CASE—REV. JOHN HOPE AND OTHERS (MORIN'S TRUSTEES) AND ROBERT SCOTT.

Vesting—Survivorship—Destination over—Construction.

Held that where final division of the fee of a trust-estate was directed to be made after the occurrence of three events, vesting took place not *a morte testatoris* but when the last of these events had taken place.

This case arises out of the trust-disposition and settlement of the late John Morin of Allanton, in the county of Dumfries, who died on 9th August 1854, being survived by his wife Jane Newall or Morin, his son John Morin junior, and five grandchildren, the children of the said John Morin junior. Of these Mrs Morin died on 1st April 1870, John Morin junior on 12th December 1871, and Mrs Mary Morin or Scott, the testator's youngest grandchild, and wife of Robert Scott the second party to this case, on 21st April 1871.

By trust-disposition and settlement and codicils annexed thereto, all recorded 19th August 1854, the testator conveyed his heritable property to trustees, and by a similar deed and codicils, recorded of same date, he conveyed his moveable estate to the same trustees, who were directed to apply the income of the heritable and moveable property in a certain manner, but to make no final division of the fee until the occurrence of three events—the death of the testator's widow, the death of his son, and the attainment of majority by his youngest grandchild. When these three events had all happened, the trustees were directed to settle the estate of Allanton on one of the grandchildren, and to divide the remainder of the testator's estate among the rest. The youngest grandchild Mrs Mary Morin or Scott attained majority and predeceased her father John Morin junior, and on the death of the latter, Mrs Scott's husband, who is the second party to this case, asserted his claim to her share, as being her executor. The question for the judgment of the Court was as follows:—

"Had the deceased Mrs Mary Morin or Scott a vested right under her said grandfather's settlements, and is the said Robert Scott, as her executor, entitled to:—

"(1) A fifth share or portion of two-thirds of the free annual income of the trust-estate, for the period since the date of the death of the said Mrs Mary Morin or Scott to the date of the death of the said John Morin junior?

"(2) A fourth part or share of the free residue of the trust-estate (including therein the accumulation of the share of the income formerly paid to the deceased Mrs Jane Newall or Morin), or otherwise to any and what share or portion of the said income and residue, or either of them?"

Argued for the trustees that, although Mrs Scott might have dealt with unapplied balances of income which was apportioned to her yearly, previous to the closing of the trust, she had no such right in regard to any part of the fee, because it was not until the concurrence of certain events, and the winding up of the trust, that any right vested in her.