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.

Argued for Mr Scott, that the period of vesting must be held to be the death of the testator. The word "surviving" was inserted in the deed merely to secure that all those between whom division was to be made should have attained majority and be able to give a discharge.

Pretty v. *Newbigging*, March 1, 1854. 16 D. 667; *Carlton* v. *Thompson*, July 30. 1867, 5 Macph., H.L. 151; *Hendry's Trustees* v. *Hendry*, Jan. 31, 1872, 10 Macph. 432; *Wellwood's Trustees* v. *Johnston*, Nov. 13, 1868, 7 Macph. 109; *Donaldson's Trustees* v. *Richardson*, Feb. 14, 1862, 4 Macq. 314.

At advising—

Lord President—In deciding this Special Case we are called upon to construe the testamentary deeds of the late John Morin, who died on 9th August 1851. He left a widow, and an only child, John Morin junior, who had five children.

The object of his settlement was to provide for his widow, son, and grandchildren. The period appointed for the distribution of his estate is very distinctly specified in the settlement. It is to take place after the death of the longest liver of his widow and son, and after the youngest of the grandchildren has attained majority. In short, these three events must all have taken place before the distribution can be set about by the trustees.

The widow died on 1st April 1870, and the son, John Morin junior, died on 12th December 1871. At the death of the latter his children had all attained majority. Accordingly, by the death of John Morin junior the period had arrived for the final distribution of her estate and the winding up of the trust.

The claim that is made by Mr Scott is as executor of his deceased wife, Mrs Mary Morin or Scott, a daughter of John Morin junior. The question substantially is, Whether any, and what, portion of the estate had vested in Mrs Scott previous to her decease, she having died on 21st April 1871, without issue?

In proceeding to construe the settlement of Mr Morin, it is necessary to attend to a deed by which he disposed of his heritable property, of the same date as another deed disposing of his moveable property. The heritable property is conveyed to trustees. By the first purpose of the trust the rents of his heritable estate, from the term of Whitsunday or Martinmas which shall first happen after his decease, during the lifetime of his widow and son, and until the yonngest child of his son shall attain majority, are to be applied and disposed of in terms of the provisions contained in the other deed. The second purpose of the trust is—"After the decease of my said spouse and son, and on his youngest surviving child arriving at the age of twenty-one years complete, my said trustees are, subject to the conditions and provisions herein contained, to convey and make over the aforesaid heritable property according to the destination following, viz." Then follows a destination to grandchildren in their natural order, whom all failing, to his wife, and failing her, to his brother-in-law Adam Newall, and his heirs whomsoever.

It is important to bear in mind that the rents of the heritable estate, from the first term after the testator's death until the period of final division, are to be managed and disposed of along with his moveable property. The heritable estate itself, in the meantime, is to remain vested in the trustees, and is not to be parted with by them until the period of final division of the moveable estate. Then they are to convey to the persons named, in their order.

The deed disposing of the moveable estate conveys everything which the testator possessed, with the exception of the heritable property conveyed by the other deed, and in particular the rents of the heritable property conveyed in that other deed from the first term after the testator's death until the death of his widow and son, and until the youngest grandchild should attain majority. The first purpose of the trust is the payment of debts. The second purpose contains a variety of provisions with regard to furniture, plate, pictures, and other articles, most of which are to be liferented by the widow, and are not to be disposed of finally until what the testator himself calls 'the final division of the fee of my property.' The 3d purpose is expressed thus, "The free residue and remainder of the rents, interest, and annual produce of my estate and effects hereby conveyed, and the rents, maills, and duties, and income arising out of the heritable property conveyed to my said trustees by the before-mentioned codicil executed by me of the same date with these presents, and annexed to said trust-disposition and deed of settlement of my heritable estate, I direct and appoint my said trustees to pay, apply, and dispose of as follows." That which is to be disposed of is the entire income of the estate, both heritable and moveable, the rents of the heritable estate being thrown into the hands of the trustees to be dealt with along with the moveable estate. The income is to be divided into four parts. One fourth is to be paid to the widow. If she dies before the winding up of the trust, her share is to be accumulated, so as to fall into the general fund for division at the close of the trust. In like manner, another fourth part is to be paid to John Morin junior, and in the same way, if he dies before the winding up of the trust, that portion of income is to fall into residue, and form part of the fund for division. The other two-fourths, or one-half, is to be applied for the benefit of the children of John Morin junior. "And as to the two remaining two-fourth parts or shares of said residue, I direct and appoint my said trustees, yearly and each year, to divide and set apart the same equally, share and share alike, among the lawful children of my said son John Morin, and in the event of any of said children dying and leaving lawful children, such children shall receive and succeed equally to their deceased parent's share." The disposal of this half of the income is to be equally among the children of John Morin junior, with the issue of those who have predeceased coming in place of their parents. It does not matter what the number of children may be, or how much that number may come to be reduced; one-half is still to go to the survivors and the issue of those who have predeceased. It is clear that if one of these children die without issue, the income which was enjoyed by that child will just go to increase the income of the survivors. A right of survivorship is clearly implied, except that the issue of predeceasing children are not to be cut out.

Then follow provisions regulating the discretion of the trustees in using this income for the benefit of the children—"declaring that my said trustees shall only be bound to apply such parts of each share or portion so to be set apart in educating, advancing, or fitting out in life each child as they may in their discretion and under the circumstances that may arise think fit, the unapplied balance, if any, of each share or portion so set apart

being to be invested separately or in an account by itself in a bank or good security for behoof of each child or descendants of a child, and the same, with all interest that may arise thereon, is at the close of this trust to be paid over to the child or lawful issue of a child for whom it was at first set apart, along with the other funds hereby provided to such child or descendant of a child." There is nothing in this provision the least inconsistent with the previous clause regulating the disposal of the income. The unapplied balances are part of the income already accrued, which the trustee would, had it not been for this provision, have been bound to divide among the other children and the issue of those who had predeceased. The trustees are entitled in their discretion to withhold payment of any more than is necessary for the education, advancing, or fitting out in life of any child, but, as regards the unapplied balances, they necessarily become trustees specially for that child and his or her issue, and, accordingly, it is to be paid over at the close of the trust to such child or the issue of such child. We have no question here as to any unapplied balance, because Mrs Scott received full payment of her share of the income. But it is necessary to understand this clause as affecting the general construction of the deed. There is still another declaration in regard to this subject—"declaring that in the event of any of the said children dying intestate and without leaving lawful issue, the unapplied share or portion of such child so deceasing is to be divided equally, share and share alike, among the survivors and descendants of such as may have died, *per stirpes*, the lawful children of a deceased child being always entitled, equally among them, to the share or portion which would have fallen to their parent if in life. "Here the object of the testator plainly is—in the event of a child to whom an unapplied balance belongs dying leaving issue, the unapplied balance is to be paid to the issue, but in the event of such a child dying intestate and without issue, the unapplied balance, although apparently the absolute property of that child, is not to go to that child's next of kin, but to the surviving children and descendants of such as may have died. But then the child must die not only without issue but intestate, which plainly implies that the child is entitled to test upon this unapplied balance.

These provisions in regard to unapplied balances are very special and exceptional, and are quite different from the clauses which precede and follow them, and which regulate the disposal of income and capital.

The fourth purpose regards the division of the capital of the estate. Here again the period of division is very distinctly specified—"On the death of the said Jane Newall or Morin and John Morin, my son, and on the youngest of his surviving children arriving at the age of twenty-one years complete, I direct and appoint my said trustees to close this trust, and with, under, and subject to the exception hereinafter made and declared, to divide the whole free residue of my estates, both heritable and moveable, real and personal, conveyed to them by these presents, among the lawful children of my said son and their issue, and that equally share and share alike, the issue of a deceased child being always entitled, equally among them, to the share their parent would have drawn if in life."

The question arises on the construction of this clause, Whether a child of John Morin junior, who died without issue, is entitled through her representative to claim a share of the free residue? On the construction of this clause, it is plain that it was the intention of the testator that the division should take place at the close of the trust among the children then alive, and the children of the predeceasers. The very circumstance that the children of the predeceasers are brought in, shows that, according to the view of the testator, they would not otherwise have taken. The insertion of this clause shows that it is only surviving children, along with the issue of the predeceasers, who are to take under this division.

It is important to keep in mind that there is not in any previous part of the deed any gift of capital to any person. Therefore if a child who has predeceased the term of division is nevertheless entitled to a share of the residue, we must find that right in this clause and no where else. I think that the words of the clause exclude such a claim. It is said that if this be the intention of the testator he could have made it much more clear, and it is pointed out that in a former part of the deed, that relating to unapplied balances, where he intended to give a right of survivorship, he has used very distinct words. But if he had used the same words here he would have caused a different result from what he intended. By the former clause it was intended that predeceasing children should be entitled to test upon the unapplied balances. In regard to their share of the residue, this is what he wished to exclude. So that the language of the former part of the deed operates rather as an argument against the party advancing it.

If anything more is wanted to make the testator's intention clear, it is to be found in the words which follow—"Declaring always, as it is hereby expressly provided and declared, that at the final division of my personal property and others now directed and provided for, the party acquiring right to a conveyance of the heritable property of Allanton and others, under and in virtue of the destination contained and set forth in the foresaid codicil of even date with these presents subjoined to said trust-disposition and deed of settlement, in reference to the disposal of my heritable property of Allanton and others in favour of my said trustees, is to have no share or interest whatever, it being my will and intention that, in addition to such portions of the income of my estate as may be applied and set apart for his or her behoof in virtue of the provisions herein contained, he or she is only to have right to the said lands of Allanton and others, and that under the aforesaid destination." It could not possibly be ascertained under the settlement of the heritable property who was to acquire right to a conveyance of Allanton until the period of final division of the personal property. As it remained uncertain whether a share should go to one child or another, that indicates very strongly that no right could vest in any of them, for it might be that at the period of division any one might be found to have succeeded to the estate of Allanton. This is a circumstance of great importance, and its importance is not diminished by the case of *Wellwood's Trustees*, or even the earlier case of *Douglas* v. *Douglas*. Although in these cases there were indications of opinion that the fact of a person succeeding to a heritable estate, and whose succession could only be definitely ascertained at the period of division of the moveable estate, would not prevent the vesting of the move-

able estate, still that opinion was not necessary for the decision in either of these cases, and I cannot hold it as a doctrine applicable to all cases. Here, where every circumstance concurs in showing that it was the testator's intention that vesting should be postponed to the period of final division, that opinion is not very material.

Finally, there is a destination over in favour of the widow, and failing her, to the testator's brother-in-law.

Now taking this deed as a whole, the intention of the testator is very clear, that no right in the capital or fee of his personal property should vest until the arrival of the period of final division. It is very important in a question of this sort to observe the different periods in the mind of the testator. Except this period of final division, I can find no other period spoken of except the first term of Whitsunday or Martinmas after the testator's death, and that period is mentioned for one purpose only, viz., to fix the period from which the rents of the heritable estate are to be thrown into the moveable estate, and at which the division of the income of the entire estate into four parts is to begin. The period of his wife's death is immaterial, except in connection with the son's death and the attainment of majority by the youngest grandchild. Keeping in view that the close of the trust is the important period, and that there for the first time a gift of the capital is made, the conclusion is irresistible, that the vesting was postponed to that period. The result is that Mrs Scott and her executors have no right to any part of the income of the estate that accrued after her death. She received full payment of her share of income which accrued during her life. That is all she is entitled to.

And in regard to the second question, I am of opinion that Mrs Scott's representative is not entitled to any share of the free residue.

Both questions therefore fall to be answered in the negative.

Lord Deas—The testator died in August 1854 leaving one child, John Morin junior, and five grandchildren. He left various deeds, the object of which was to provide for his widow, son, and grandchildren. His youngest grandchild Mrs Scott attained majority on 3d June 1866, and a year afterwards married Mr Scott, the second party in this case. The testator's widow died in April 1870, Mrs Scott in April 1871, and John Morin junior in December 1871.

The whole estates were destined for the benefit of the testator's widow, son, and grandchildren, the destination over to the widow and her brother not being likely to operate, looking to the number of the grandchildren.

The question really is, When did the right to the several shares of income and capital vest in the grandchildren?

John Morin junior repudiated his father's settlement and claimed his legal rights, but that of course does not affect the construction of the deed which we have to construe.

The income, so far as it was to go to the widow, was at her death to accumulate and form part of the capital, and, as regards the share of income apportioned to the grandchildren, if the whole of each grandchild's share was not expended from year to year in necessary expenses, such unapplied balance was also to accumulate, but for the benefit of the particular grandchild of whose share it formed a part.

The question as to the date at which these sums vested is of course one of intention, and though other cases may be referred to, they are of little value to the present case compared with the terms of the deed itself.

One thing is quite clear, viz., that there was to be no division of capital until the attainment of majority by the youngest grandchild, but till the death of the widow and of John Morin junior. So far as vesting depends on the period of division, it is clear, but this is not quite conclusive though it is a strong element in determining it. It would not, however, be enough if it were the only thing. I agree with Lord Colonsay that the presumption of law is always in favour of vesting, and there must be something in the deed itself to show that vesting was not intended. If then we had only the clauses on page 39, regarding the two-fourth parts destined to the grandchildren, I should not be certain that vesting had not taken place, but when we come to the clause about the division of capital, the testator does not repeat the clause of survivorship which he had just before inserted. It may be implied, but that mere implication might not amount to proof of the testator's intention; in short, I should doubt if these two clauses alone would override the general presumption of law as to vesting, not even taken in conjunction with the destination over to the testator's widow and her brother Adam Newall.

But I agree with your Lordship that there are unmistakeable indications as to the testator's intention in regard to vesting. Clearly the accumulated income did not vest till the period of division, and this by itself raises a presumption that it was not meant that one part of the capital should vest at one time and one at another.

Then there is the other circumstance, that the heritable estate was to be made the subject of some species of entail, and this was only to come into operation at the period of division, which was indeed the earliest time at which it could do so, the one who was to get Allanton being excluded from the division of the moveable estate. I have no hesitation in agreeing with your Lordship.

Lord Ardmillan—I agree with your Lordships. We are dealing with a trust, and there is no doubt that in trusts there is a certain amount of presumption in favour of vesting, but then we must gather the intention of the trustees from the whole deed and not from isolated clauses. I think I can see through the whole of this deed that there is always one period kept in view by the truster as the period of final division of vesting, of the close of the trust, or whatever may be the terms under which it may be referred to. I think there can be no other conclusion than this, that while the truster takes various *termini a quo*, they all finish at one final period; and, taking this along with the clauses already referred to on p. 39, I agree with your Lordship.

No expenses found due to either party.

Counsel for Rev. John Hope and others.—Marshall and Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Robert Scott—M'Laren. Agents—M'Ewen & Carment, W.S.