gravel, marble, fire-clay, or the like—comes within the word 'mineral' when there is a reservation of mines and minerals from a grant of land." That is what he says in an early case upon that. We have also a case of clay in the case of *Hext* v. *Gill* (7 Ch. 699), which was a case of china clay. But that is a special case, from the fact that it was a voluntary sale, and the proprietor of the minerals was not entitled to work them for the reason that, it being a voluntary sale, the granter was bound to do nothing to derogate from his grant. If we had that principle applied to these railway cases it would probably protect the railway, but that has no application to this case.

There is therefore a great deal of authority for saying that clay if of commercial value is a mineral in the sense of the statutes.

Now, as to the mode or manner in which the proprietor of minerals is entitled to work them, it is superfluous to say anything, because that is determined conclusively by the case of *Bennet* to which your Lordship has referred. The principle there established is simply this, that the proprietor is entitled to work his minerals exactly as if he had never sold the land at all, and the only restriction of that power is the one your Lordship pointed out as contained in the 23d section of the Waterworks Clauses Act, which says—[*reads*]. These are the only two statutory limitations of the absolute right to work in the way best adapted for getting the minerals. Now in this case there can be no question raised upon either of these points. It is a matter of admission that in point of fact the clay here has been worked for a considerable time, and is being worked, and it is because it is being worked close up to the margin of the pursuers' purchase that the question has now arisen. The clay is therefore of commercial value, and there is no allegation that it is not being worked in an ordinary and reasonable mode. Therefore I am of opinion with your Lordships that the clay here being of commercial value comes under the reservation in the disposition.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuers—Sol.-Gen. Robertson, Q.C.—Comrie Thomson—G. W. Burnet. Agents—Campbell & Smith, S.S.C.

Counsel for Defender—D.-F. Mackintosh, Q.C.—Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, January 21.

FIRST DIVISION.

MURRAY AND OTHERS (GREGORY'S TRUSTEES) *v.* MRS GREGORY'S TRUSTEES AND OTHERS.

Succession—Vesting—"Nearest of Kin"—Destination-over—Period of Distribution.

By postnuptial contract spouses conveyed to each other in liferent, and to the children of the marriage, if any should be born, in fee, the whole estate of each, the fee of both estates to be divisible by the husband among the children of the marriage, such division to take effect after the death of the surviving spouse, and at majority or marriage of the children. Powers of advancing funds for their maintenance and education or setting them up in business were conferred on certain persons named as trustees to carry the contract into execution. In the event of the decease of all the children during the life of the surviving spouse the funds were (failing a disposition by the spouses severally) to suffer division after the decease of the survivor of the spouses, by the funds of the husband falling to his own nearest of kin, and those of the wife falling to her own nearest of kin. The marriage was dissolved by the husband's death, he never having executed any further deed, and the only child of the marriage predeceased the widow, leaving issue, who also predeceased her. *Held* (1) that there was no vesting under the contract till the death of the surviving spouse; (2) that the persons favoured as to the husband's estate were his nearest of kin as a class, to be ascertained as at the period of distribution, and not as at his own death, and therefore that his nearest of kin as at the death of the widow were entitled to his estate. Lord Shand *dissented* on both points.

Heritable and Moveable—Conversion.

A husband by postnuptial contract conveyed to his wife in liferent and the children of the marriage in fee, and in the event of their predeceasing the surviving spouse then to other persons, the estate belonging to him at the date of the contract, or which should belong to him at his death. During the marriage its form was changed from moveable to heritable. *Held* that it was not converted in a question of succession, but that the succession to it continued to be regulated by the contract.

By postnuptial contract of marriage entered into between Dr William Gregory, sometime Professor of Medicine in the King's College of Aberdeen, afterwards Professor of Chemistry in the University of Edinburgh, and Mrs Lisette Scott or Makdougall Gregory, his wife, "for their love and affection to each other, and for provisions to the children of their marriage, if any there may be," dated 25th March 1840, and registered in the Books of Council and Session 16th October 1877, Dr and Mrs Gregory gave, granted, assigned, and disponed, each of them to the other in case of his or her survivancy, in liferent during all the days of the lifetime of such survivor, and to the children of their marriage in fee, the whole estate and effects, heritable and moveable, then belonging to either of them, or in which they then had any vested rights or interests, or which might pertain and belong or become due or indebted to either of them during the subsistence of their marriage. In particular, and without prejudice to the generality, each disponed to the other in liferent in case of survivance, and to the children of the marriage in fee, certain specified estate, that of Dr Gregory consisting of his share of certain sums of money in the public funds. It was also provided and declared that the funds settled on the children in fee should be divisible among

such children in such shares as Dr Gregory should appoint by writing under his hand, and failing such division equally, declaring that after the death of the surviving spouse it should be in the power of certain persons who were named as trustees to carry the deed into execution to advance for their maintenance and education such proportion of the interest arising from their provisions as might seem expedient, or the whole if necessary, and even to advance for sons before majority the whole or such part of their provisions as should be necessary for establishing them in a profession. It was then declared that "in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor of the said married parties, then and in either of these cases it shall be in the power of the said married parties severally to dispose by testament of the proper share of the funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties, and failing any such disposition, then and in that case the said whole funds and estate settled by these presents shall, after the decease of the longest liver of the said married parties, suffer division in manner after mentioned—that is to say, the whole funds and estate above mentioned belonging or which may belong to the said Dr William Gregory shall fall to and become the property of his own nearest of kin, and the whole funds and estate above mentioned belonging to or which may belong to the said Mrs Lisette Scott or Gregory shall fall to and become the property of her own nearest of kin."

In 1848 Dr Gregory purchased, with the funds belonging to himself, certain heritable subjects in Princes Street, Edinburgh, at the price of £2275. These subjects belonged to Dr Gregory at the time of his death, and were therefore included in the conveyance by him contained in the postnuptial contract of marriage.

Dr Gregory died on 24th April 1858 survived by his wife Mrs Lisette Scott or Makdougall Gregory and by James Liebig Gregory, who was the only child of the marriage. The widow made up a title to the subjects in Princes Street, upon the assumption that she was vested in the fee thereof, by a notarial instrument recorded on 21st January 1859, proceeding upon the instrument of sasine in the subjects in favour of Dr Gregory and the postnuptial contract of marriage.

James Liebig Gregory was married on the 14th of September 1861 to Miss Elizabeth Mary Somerville Fairfax, and died on the 5th day of May 1863 survived by the only child of the marriage, Henry Makdougall John Fairfax Gregory, who was born on the 29th of November 1862.

In 1877 Mrs Lisette Scott or Makdougall Gregory sold the subjects in Princes Street for £7500, and in consequence of a doubt having been expressed by the purchasers as to whether she had anything more than a liferent of the subjects, and as to whether she was in a position to sell them, an agreement was entered into by which the purchasers accepted a conveyance from Mrs Lisette Scott or Makdougall Gregory, with consent of Henry John Makdougall Fairfax Gregory to the purchasers, and they borrowed over the property, and certain neighbouring property purchased by them, the price, £7500, granting a bond for it in favour of certain trustees, the first parties to this case, who by a declaration of trust declared that they held the said sum of £7500 to be applied in terms of the destination and conditions in the postnuptial contract and the notarial instrument by which Mrs Lisette Scott or Makdougall Gregory made up her title, and that the sum was to be a *surrogatum* for the subjects.

Henry Makdougall J. F. Gregory in May 1881 made up a title to the subjects by general service as heir to his father James Liebig Gregory, and notarial instrument in his favour following upon the instrument of sasine in favour of Dr William Gregory, the postnuptial contract, and the general service.

Henry Makdougall J. F. Gregory died on 21st June 1881 leaving a disposition and settlement by which he directed that if he should be found to have any right to the price of the subjects, such right and interest should be made over to his grandmother Mrs Lisette Scott or Makdougall Gregory. The whole of his other moveable and personal estate other than the £7500, the price of the subjects, he left to his mother Mrs Elizabeth Fairfax Gregory, whom he appointed sole executrix.

Mrs Lisette Gregory died on 24th May 1885 leaving a last will under which she disponed to trustees and executors her whole heritable and moveable estate. After her death it became necessary to decide to whom the £7500, the price of the subjects, belonged.

This Special Case was accordingly presented, the parties to which were as follows:—The parties of the first part were the trustees who had been appointed to hold the purchase price of the subjects under the arrangement above stated.

The parties of the second part were the trustees and executors of Mrs Lisette Gregory.

The parties of the third part were the heirs-at-law of Dr Gregory, and of Henry M. J. F. Gregory, as at the death of Mrs Lisette Scott or Makdougall Gregory, and their guardians, they being in minority.

The parties of the fourth part were the trustees of Colonel Gregory, the heir-at-law of Henry M. J. F. Gregory at the date of his death.

The parties of the fifth part were the next-of-kin of Dr William Gregory as at the date of the death of Mrs Lisette Scott or Makdougall Gregory.

The second parties maintained that they had right to the price of the said subjects in one or other of the following ways, viz.—The fee was in James Liebig Gregory, and on his death descended to his son Henry Makdougall John Fairfax Gregory. Henry Makdougall John Fairfax Gregory by his general disposition and settlement validly conveyed or bequeathed the price of the subjects to his grandmother Mrs Lisette Scott or Makdougall Gregory, and they had now right thereto under the said last will and testament; or the fee was in the next-of-kin of Dr Gregory — said next-of-kin falling to be ascertained as at his death, the fee was in James Liebig Gregory, was then taken up by Henry Makdougall John Fairfax Gregory, and the right to the price passed to them as trustees of his grandmother, to whom he had bequeathed his rights.

The parties of the third, fourth, and fifth parts all maintained that Mrs Lisette Scott or Makdougall Gregory took only a liferent of the subjects with a fiduciary fee for the ultimate

beneficiaries, and that the vesting of the beneficial fee was, upon a sound construction of the postnuptial contract of marriage, suspended until her death.

The parties of the third part maintained separately that they being the heirs-at-law of Dr Gregory as at the death of Mrs Lisette Scott or Makdougall Gregory, were now entitled under the postnuptial contract of marriage to the price of the subjects.

The parties of the fourth part maintained separately that if the fee of the subjects was in Henry Makdougall John Fairfax Gregory, they, as representing Colonel Gregory, the heir-at-law of Henry M. J. Fairfax Gregory, were entitled to the price of the subjects, it having been incompetent for him while in minority to test on the price of the subjects.

The parties of the fifth part maintained separately that they being the next-of-kin of Dr Gregory as at the death of his widow Mrs Lisette Scott or Makdougall Gregory, were now entitled, on a proper construction of the contract of marriage, to the price of the subjects.

The question of law which the Court were asked to determine was—"To which of the parties hereto does the price of the subjects belong?"

Argued for the second parties—The fee was in James Liebig Gregory at the date of his father's death, and was transmitted by him to his son, who in turn transmitted it by general disposition to his grandmother Mrs Lisette Gregory, by whose settlement it was carried to the second parties. The power of disposal reserved to the spouses in the marriage-contract was not exercised by Dr Gregory; it might be held therefore as *pro non scripto*. Vesting took place at the date of Dr Gregory's death, at which time the *personæ prædilectæ* could easily be discovered. There was a presumption in favour of the nearest of kin intended to be favoured being the nearest of kin as at the testator's death, whom he may be presumed to have known and wished to benefit rather than his nearest of kin at some far distant date.

Authorities—*Ferrier* v. *Angus*, January 21, 1876, 3 R. 396; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 296; *Balderston* v. *Fulton*, January 23, 1857, 19 D. 293; *Robertson* v. *Houston*, May 28, 1858, 20 D. 989.

Argued for the third and fourth parties—This was a case of testate succession, and the parties to be benefitted must be sought for at the date of the testator's death. By the purchase of this heritage by Dr Gregory with funds belonging entirely to himself there was operated conversion.

Authorities — *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 Macph. 1144; *Boyd* v. *Denny's Trustees*, December 15, 1881, 9 R. 299.

Argued for the fifth party—Nothing was intended to vest under the provisions of the deed until the death of the surviving spouse. Dr Gregory had selected those who were nearest to him in blood to be conditional institutes if his child or children should die during the lifetime of the survivor of the spouses. This was a regular destination-over, the effect of which was to suspend vesting. The time to look for the persons selected was when the succession opened, namely, at the date of the death of the surviving spouse.

Authorities—*Cockburn's Trustees* v. *Dundas*, June 10, 1864, 2 Macph. 1185; *Maxwell* v. *Maxwell*, December 24, 1864, 3 Macph. 318; *Connell* v. *Grierson*, February 14, 1867, 5 Macph. 379; *Stodart's Trustees*, March 5, 1870, 8 Macph. 867; *Young's Trustees* v. *Janes*, December 10, 1880, 8 R. 242.

At advising—

LORD PRESIDENT—The question in this Special Case arises upon the construction of the postnuptial marriage-contract of Dr and Mrs Gregory. The deed is in some respects a peculiar one. It is not a trust conveyance, as there is no conveyance to trustees, and yet at the end of the deed certain parties are nominated trustees for the purpose of carrying out the provisions of the marriage-settlement.

The deed commences with a conveyance by the spouses to each other of their whole estate and effects, the liferent of which was to go to the surviving spouse, while the fee was to go to the children of the marriage, and then follows, without prejudice to the generality, a particular conveyance by the husband in favour of his wife in liferent in the event of her survivance, and to the children of the marriage in fee, of certain funds belonging to him; and in like manner Mrs Gregory, without prejudice to her general disposition, conveys to her husband in liferent in the event of his survivance, and to the children in fee, a certain fund belonging to her; and then follows a declaration that the fee of both the husband's and the wife's estate is to be divisible among the children in such proportions as Dr Gregory may direct by any writing under his hand, and failing such division, then share and share alike. It was further provided that after the death of the longest liver of the spouses, and until the children's provisions became payable, the trustees might advance a portion of the annual revenue of their provisions for their maintenance and support. Then comes the clause upon the construction of which the present question arises.

Before considering the language of this part of the deed it is of importance to keep in mind some events which were connected more or less closely with the contract.

First, of course, there was the marriage itself, which was followed in 1858 by the death of the husband. Then James Liebig Gregory, the son, married in 1861, and died in 1863, but left a son, who died in 1881 leaving a settlement in favour of his grandmother Mrs Lisette Gregory. She died in 1885 leaving a settlement, and her executors are the parties to this case of the second part. The other competitors are the heirs-at-law of Dr Gregory and the heir-at-law (or his representatives) of Dr Gregory's grandson. The contention of the two latter sets of claimants, the third and fourth parties, is that by the purchase of this heritable subject by Dr Gregory his succession was converted into heritage, and so passed to them through the son or grandson. Upon that point I think it sufficient to say that the purchase of this heritable estate did not in my opinion operate conversion, and that the succession to Dr Gregory's estate is to be regulated entirely by the terms of the postnuptial contract. There are other grounds, if it were necessary to refer to them, on which the third and fourth parties are excluded, but it is sufficient to say that the succes-

sion here is to be regulated entirely by the terms of the deed. That being so, the only competition lies between the second parties, the trustees of Mrs Gregory, and the fifth parties, who are Dr Gregory's next-of-kin at the date of Mrs Gregory's death.

The claim of Mrs Gregory's trustees is that at Dr Gregory's death his estate passed to his son James Liebig Gregory, and on his death descended to his son Henry Makdougall John Fairfax Gregory, that by his general disposition the latter bequeathed the price of the subjects to Mrs Gregory, and therefore that they (the second parties), as her trustees, are in right thereof. Now, that contention depends upon the assumption that Dr Gregory's estate vested at his death in the child or children of the marriage, and that of course depends upon the terms of the declaration in the marriage-contract which I am now about to read—"Declaring always that in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor of the said married parties, then, and in either of these cases, it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties." Now, pausing there for a moment, I think it is clear from what I have just read that there could be no vesting until the death of the survivor of the spouses, because there is a destination-over in the event (which occurred) of the child or children of the marriage predeceasing the survivor of the spouses. With regard to Mrs Gregory's share of the joint-estate, she had by the terms of the deed a power of disposal of it, and she has exercised that power in favour of the second parties, so that it is not in dispute in the present case. As to Dr Gregory's share, it goes in terms of the words I am about to read. I would only remark before doing so that there is but one point of time mentioned in the deed as in the contemplation of the parties, and that is the longest liver of the spouses. It is then, and then only, that the succession is to open. In this respect the present case closely resembles the case of *Donaldson's Trustees*, for what the parties here go on to declare is, that "failing any such disposition, then, and in that case, the said whole funds and estate settled by these presents shall, after the decease of the longest liver of the said married parties, suffer division in manner after mentioned." Now, this means that up till then the joint-estate which was created by the first clause of the marriage-contract is to continue after the death of the predeceaser of the spouses, and that the survivor is to get the liferent of all. After the death of the surviving spouse a division is to take place as follows:—"That is to say, the whole funds and estate above mentioned belonging to, or which may belong to, the said Dr William Gregory shall fall to and become the property of his own nearest of kin, and the whole funds and estate above mentioned belonging to, or which may belong to, the said Mrs Lisette Scott or Gregory shall fall to and become the property of her own nearest of kin." The true construction is, that the period of distribution is to be the date of the death of the longest liver of the spouses, which date is to be also the period of vesting. Until that period arrives nothing vests in anyone, and so the question which we have now to consider is, who were the parties entitled to take at the time when vesting occurred?

The child of the marriage was dead, having predeceased the surviving spouse, and before the time of vesting occurred. It is clear therefore that nobody could take in right of him. But the deed provides that Dr Gregory's share is to go, failing children, to his nearest of kin, a class which, as was held in *Young's Trustees* v. *Janes*, Dec. 10, 1880, 8 R. 242, is not to be held as equivalent to heirs *in mobilibus*.

That being so, the class benefitted are selected legatees, and the general rule as to such beneficiaries is, that when the residue of an estate or a special fund is provided for such a class to be enjoyed by them at a time fixed by the deed, then you are to look who the parties are who answer the description in the deed at the time when vesting and distribution arrives.

That being the general rule, it is obvious that the parties who are entitled to succeed here are the nearest of kin of Dr Gregory at the date of Mrs Gregory's death. In the present case, as in the case of *Young's Trustees*, the expression "nearest of kin" covers both the nearest in blood and also those who would be entitled to succeed according to the common law rules of succession, and as it is clear that the fifth parties belong to the class whom the testator intended to favour, I think that they should be preferred to the price of the heritable subjects.

Lord Mure concurred.

Lord Shand—The question raised in this case is, I feel, attended with much difficulty. There are these important distinctions between this case and that of *Young's Trustees*, that in the case of *Young's Trustees* (1) the estate had been conveyed to trustees, and was held by trustees; and (2) the provision in regard to the residue was made expressly in favour of persons who should be alive at the death of the survivor of the two testators. The words of the provision were that one-half should go "to the nearest in kin, equally amongst them, of me, the said Peter Young, and the other half to the nearest in kin, equally amongst them, of me the said Maitland M'Culloch or Young, who shall be alive at the time of the death of the survivor of us two." In the contract of marriage of Dr and Mrs Gregory these important words "who shall be alive at the time of the death of the survivor of us two" do not occur. Now, the difficulty I have in concurring with your Lordships is that the decision which your Lordships are about to pronounce seems to me to read into the deed after the words nearest of kin (referring to the nearest of kin of Dr Gregory), the words "who shall be alive at the death of the longest liver of the spouses," while no such terms are there. I have found myself unable to concur in this view, more especially in construing a deed which contains no conveyance to trustees to hold the fee of the estate till it should come to be distributed, but only a conveyance directly to the parties favoured. It is true that in prescribing the time of division of the residue it is said that the estate is to "suffer division" after the decease of the longest liver "of the said married

parties." The estate of each of the spouses is then to be separated from that of the other, and is to be distributed as directed. But I am not prepared to hold that the period of division having been postponed, as it was, simply to protect the liferent of the surviving spouse, necessarily postponed vesting in the nearest of kin of both of the spouses, the testators, till the death of the survivor.

Dr and Mrs Gregory had a son. Suppose there had been no child of the marriage, or that his son had predeceased him, and that (as was the fact) Dr Gregory left no special settlement affecting his separate estate, it would, I think, have been impossible to maintain successfully that his next-of-kin had no right vested on his death, but that because of his widow's liferent only those of his next-of-kin who survived her would take any right, or, in other words, that his next-of-kin were to be ascertained as at that date, and not as at the testator's death. The case would have been simply one of a liferent and fee without even a trust to suspend vesting, which indeed would not have been suspended even if there had been a trust.

If this view be sound, and I confess I see no reason to doubt it, the only consideration left which can be founded on leading to an opposite result is, the fact of the survival of Dr Gregory's son till 1863, and of his grandson till 1881. The conveyance is to "his own nearest of kin" in the event of his dying without leaving children, or of the death of all such children during the lifetime of the survivor of the married parties. In my opinion the nearest of kin thus called to the succession are the persons having that character at his death, at which date vesting took place subject to defeasance if Dr Gregory's son or grandson survived Mrs Gregory, the liferentrix, and thereby acquired an indefeasible right. The destination of the fee by Dr Gregory, put shortly, is in favour of his children, whom failing by their predeceasing himself or predeceasing his widow, should she survive him, to his next-of-kin. The case is not one of suspension of vesting, because either (1) of a clause of destination to survivors of a class as in the leading case of *Young* v. *Robertson*, 4 Macq. 314, or (2) of a destination-over, and the fee is given by conveyance to the next-of-kin directly without the intervention of a trust. These considerations are in my view sufficient to show that the next-of-kin called are those at the testator's death, and not those who may happen to survive the liferentrix. Suppose that Dr Gregory's son had died without issue the year after his father died, can it be doubted that the next-of-kin then alive would have acquired right to the estate? The existence of the liferent was no good reason against vesting, and no other reason could be suggested to suspend vesting. It seems to me that the existence for a time of a son, and afterwards of a grandson, neither of whom took an indefeasible right, did not suspend vesting either in the next-of-kin of the testator at his death or postpone vesting till the death of the liferentrix.

In a question of this kind I do not think any sound distinction can be drawn between persons called as the testator's "nearest heirs" or as the "nearest in kin." In the one case he refers to those nearest in the line of legal succession, in the other to those nearest in blood, but in both cases he means to call persons nearest to himself at the time of his death. The presumption is strong to this effect, and those who maintain a contrary intention—the intention to call next-of-kin as at the time of distribution of estate on the death of a liferenter—must be able to show expressions or clear indications to this effect. There are, I think, no such expressions or indications in this deed. The case of *Wannop* (*Haldane's Trustees*) has been strongly founded on as showing that even if the destination here were to the testator's nearest heirs these must be ascertained not at the testator's death, but at the termination of the liferent. Unfortunately, as I think, that case was not appealed, for it has left the law in an unsettled and unsatisfactory condition. I remain of opinion, as I think your Lordships who took part in the decision, I believe, also do, that the case was badly decided, and it is not easy to reconcile Lord Deas' opinion with his judgment in the case of *Balderston* v. *Fulton*. In the absence of any trust or of any clause of survivorship or destination-over, I think the destination in this case, even if it had been in favour of a class such as the testator's nephews, would still have operated vesting *a morte testatoris*, subject to defeasance if the child or grandchild of the testator survived the liferentrix, and that the estate would not have gone to nephews only who so survived. But even if this were not so, it seems to me that "next-of-kin" in a question of this kind are no more to be regarded as a "class" than nearest heirs would be. In both cases the testator has in view persons nearest to himself, and to both cases I think the same rule should apply. That being so, I refer to the opinions of your Lordship, Lord Mure, and myself in the case of *Wannop* for the principle and the authorities which should, I think, determine the question in this case. The authorities there referred to (particularly the case of *Balderston* v. *Fulton*), and cited also in my judgment in the case of *Snell's Trustees*, 4 R. 709, make it further clear that if the next-of-kin called are those at the death of the testator, it is no good reason against holding the testator's son to be his next-of-kin that he was called to the succession as the testator's child in the first instance with a title defeasible by death during the liferenter's life. The property in question here is heritage, and whether next-of-kin refers to nearest in blood entitled to moveables or heritage is of no moment, for the only son was nearest in both senses. On the whole, I think the next-of-kin called were the testator's next-of-kin at his death, and that the property in question descended from Dr Gregory's son to his grandson, and was carried by his settlement to Mrs Scott or Gregory, and by her settlement to her trustees. In any view, I can see no reason for holding that vesting could be suspended after the death of Dr Gregory's grandson in June 1881.

Lord Adam—The event which has occurred was contemplated and provided for by the spouses in the passages in the marriage-contract to which your Lordship has referred. Dr Gregory has died without leaving children and without a testament, the longest liver of the spouses is now dead, and the period of division has arrived. I think, looking to the words of the deed, that there is here a proper destination-over in favour

of a selected class, who are to be sought for when the period of distribution arrives, and that until that time no vesting takes place. The question therefore comes to be, who are the next-of-kin of Dr Gregory at the period of distribution? and upon that matter I think the decision of the majority in the case of *Wannop's Trustees* is directly applicable. Upon these grounds I concur.

The Court found the parties of the fifth part entitled to the whole funds held by the parties of the first part.

Counsel for First and Second Parties—Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third and Fourth Parties—Guthrie. Agents—J. S. & J. W. Fraser Tytler, W.S.

Counsel for Fifth Parties—D.-F. Mackintosh, Q.C.—Low. Agents—J. S. & J. W. Fraser Tytler, W.S.

Tuesday, January 25.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

NICOLL'S EXECUTORS *v.* HILL AND OTHERS.

Succession—Husband and Wife—Mutual Settlement—Jus quæsitum—*Protected Succession.*

A husband and wife executed a mutual testament by which each conveyed to the survivor the whole moveable estate which should be his or hers at death, and appointed the survivor to be executor and universal legatory of the predeceaser. Moreover, in order to settle the succession to their means at the death of the survivor, they bequeathed to certain relatives of the husband the whole goods and gear which should belong to the survivor at his or her death (subject to certain exceptions), and reserved power of revocation to them jointly, and to the husband if he should be the survivor. The wife, who had no estate of her own, was the survivor, and no revocation ever took place. *Held* (1) that so far as conferring a gift on the husband's relatives as at the death of the survivor, the deed was purely testamentary, there being no onerosity as far as they were concerned, and therefore (2) that the husband's relatives had no right conferred on them by the deed which entitled them on the widow's death to claim savings made by her out of the estate of her husband, but which she had given away by *mortis causa* donations in order to defeat their claims, such savings, assuming them to have been made out of her husband's estate, being her own property, which she was not under any obligation to leave to be carried by the mutual will.

Opinions that she was entitled to revoke her will as expressed in the mutual testament, and that with respect to her whole moveable estate without distinction.

In 1863 David Nicoll, residing in Dundee, and Isabella Key or Nicoll, his wife, executed "from our affection to each other and for other good causes" a "mutual testament" whereby the husband bequeathed to the wife, in case she survived him, all his goods, gear, and debts which should pertain to him at the time of his death, and in like manner the wife bequeathed to the husband all the goods, gear, debts, and sums of money which should pertain to her at her death, and they constituted the survivor to be sole executor and universal legatory of the predeceaser.

The deed then proceeded thus—"Moreover, we the said David Nicoll and Isabella Key or Nicoll being desirous to settle the succession to our moveable and personal estate in the event of the death of the longest liver of us, Therefore we do hereby, jointly and severally and each of us, whichever of us may be the survivor, leave, legate, assign, and bequeath in that event to and in favour of James Nicoll, basket and toy merchant in Dundee, Charles Nicoll, engineer, Victoria Docks, London, Robert Nicoll, seaman in Dundee, William Marshall Nicoll, mill overseer there, and Helen Nicoll or Cooper widow of the deceased William Cooper, seaman in Dundee, and the survivors or survivor of them, equally among them, share and share alike, declaring that the lawful issue of any predeceaser or predeceasers leaving lawful issue shall nevertheless be entitled to such share as their deceased parent or parents would have been entitled to if alive, all and sundry the whole goods, gear, debts, sums of money, household furniture and plenishing, books, bed and table linen, paraphernalia, and all other moveables whatsoever, including heirship moveables, that may pertain and belong or be resting-owing to the longest liver of us at the time of his or her decease, with the whole vouchers and instructions thereof, and all that has followed or may be competent to follow thereon: And further, we do hereby severally nominate, constitute, and appoint the said William Marshall Nicoll, whom failing, the said James Nicoll, and whom failing William Nicoll, son of the said James Nicoll, to be the executor of the longest liver of us respectively, with all the powers of the office. But these presents are granted always with and under the burden of all the just and lawful debts, sickbed and funeral charges, of the longest liver of us, and the legacy hereinafter appointed to be paid and delivered: And we ordain our said executor to pay and deliver the following legacy to the person after named and designed, viz., to Ann Nicoll Callender, presently residing with us, the sum of thirty pounds sterling," and also certain household furniture and plenishings.

They revoked all former wills executed by either. "And we do hereby further reserve to us at any time during our joint lives, and to me the said David Nicoll if I shall be the survivor, to alter, innovate, and revoke these presents in whole or in part as may be thought proper; but declaring always that these presents in so far as not altered, innovated, or revoked as aforesaid shall be effectual though undelivered, wherever found, the delivery thereof being hereby dispensed with."

James Nicoll and others, named in this portion of the will as beneficiaries, were relatives of the husband.

David Nicoll, the husband, died in September 1863 survived by his wife. He never exercised