hered to; but we did not so deal with it. We have gone into the whole points and considered them, and I do not think we can re-open them.

LORD COWAN understood that counsel had argued all the points on which they wished the review of the Court, and if there was any point on which they were wrong, it was open to be stated in the House of Lords.

Interlocutor read.

Expenses reserved.

Agent for the Trustees—Henry Buchan, S.S.C.

Agent for the Beneficiars—L. M. Macara, W.S.

HOUSE OF LORDS.

MINISTER OF BANCHORY-DEVENICK *v.* THE HERITORS.

(*Ante*, vol. vi, p. 620.)

Teinds—Valued Lands—Moss-lands—Decree—Onus *of Proof. Held* (affirming judgment of Second Division) (1) on a proof, that the teinds of certain lands were valued; and (2) that the *onus* of proving that the teinds of lands in the parish were unvalued lay upon the minister.

This case was formerly before the House of Lords upon important questions of teind law, but the only question now before their Lordships was, —whether or not the minister of the parish of Banchory-Devenick had made out, upon a proof, that the teinds of certain parcels of land in the parish were unvalued. Their Lordships unanimously affirmed the judgment of the Second Division, holding that the *onus* which fell upon the minister had not been discharged, and that the teinds must be presumed to be valued, in the absence of satisfactory proof to the contrary.

At advising—

LORD CHANCELLOR—My Lords, in this case the appellant contends, in a proceeding which has been raised before the Court of Teinds in Scotland, that he is entitled, as a minister of the parish of Banchory-Devenick, to the teinds of certain lands within the Barony of Findon, which, as he alleges, have not been valued hitherto, and which ought now to be valued in a process which is pending for augmentation of the stipend and allocation of teinds. The case has been before your Lordships' House upon a former occasion, and the ground has been cleared to a considerable extent with reference to some of the difficulties which have presented themselves.

It appears that the teinds of this district (I will not say the parish, because that prejudges the question) were to a certain extent valued by a decreet of valuation as long ago as the year 1682. For some time after that, up to about the time of the present litigation, there had been a notion, which turned out to be erroneous upon a decision of your Lordships, that the teinds of the whole parish had been valued by the terms of that decreet. That depended upon the construction of the decreet itself; but however, when that decreet came to be analysed, it appeared to your Lordships' House that it was clear upon the face of the decreet that there was a portion, at all events, of the land as to which the teind was left unvalued, and that in respect of that the minister would of course be entitled to a valuation according to the present existing value.

Now the case is somewhat singularly circumstanced as regards the character of the land in the parish, because it appears to have consisted, in the year 1682, of a considerable quantity of moss land, as it is termed, which was unproductive, as well as of certain farms and holdings which had been appropriated to cultivation, and as to which a regular rental was paid in respect of such cultivation. It appeared to your Lordships' House upon the former occasion that, regard being had to the whole terms of the decreet, there were certain portions of land in respect of which nothing but moss land was reserved; in other words, there was no rental payable for them in respect of the cultivation of the land, but the rental was payable only in respect of the privilege of cutting peats for the purpose of burning them, which peats so cut would not be in themselves properly teindable matters. And therefore in the decreet it was carefully stated that with regard to certain lands, therein mentioned by name, the rental of these lands (I think that was the expression) had not been valued; that is to say (as one of your Lordships said), that those lands so specified by name should be taken as not being covered by the valuation of 1682. There was another certain portion of land called Badentoy in respect of which a rental in two characters was payable; there was a certain double rent which was payable; there was a certain silver rent which was payable, which latter rent (the silver rent) the Commissioners, in their decreet of 1682, stated to have been payable for the moss allenarly, and as regards that silver rent they deducted it from the valuation.

My Lords, I apprehend the case stands thus, that it is admitted on both sides that if the land were all land in one parcel, including cultivated land and moss land, whatever may be the extent of either the one or the other, and if it were all let at one rental, and that rental were valued, the teinds would be then valued for the whole of that holding. It is not because a part of the holding never produces any teinds that therefore you are to consider it as not to be valued; because, looking at the Act of Charles the First, which appears to have been a very beneficial Act for Scotland, the purpose for which that Act was passed was this, that the teinds being valued in money then and there, the settlement might be a settlement for ever, and in order that all lands, whether productive or not at that time, which was held together with other land which was held as a profitable holding, should be taken as included in the valuation, and if afterwards it should be found suitable for improvements, and improvements could be made thereon, the heritor would have the advantage of that improvement without being subject to any greater amount of teinds. But when it was found that the rental was specifically reserved in respect of any particular subject, which subject was not in itself a teindable subject, then the course of law appears to have been to deduct the rental, where it could be ascertained, from the teindable rental—it being a subject of deduction from the whole value which ought to be put upon that teind. But it did not on that account follow that the subject itself in respect of which such rent might be reserved could not be taken to be valued. An instance of that appears very clearly and plainly in the present case, namely in the case of Badentoy. Badentoy is let partly at a silver rent, and that silver rent is found to be a moss rent allenarly, and that is therefore

not taken into the calculation, but the teindable rent is paid upon the whole, including a particular moss, in respect of which also a special rent was reserved on account of the uses made of it in the shape of cutting it for turfs. The silver rent is made a deduction, but Badentoy is nevertheless valued, and the pursuer, in the first instance, in his condescendence sought to treat that portion of it, in respect of which the silver rent was paid, as being an unvalued portion. But there has been no difference between the Lord Ordinary and the Court of Teinds with reference to that particular subject-matter—it has been treated, in truth, in its totality, notwithstanding that there was a particular silver rent reserved as a moss rent—a particular kind of rent which was not of itself a rent for a matter subject to teind. That has been deducted, and that deduction being made, the rest of the land has been valued.

Now, my Lords, that being so throughout this argument, which has been a very intricate one (and necessarily so from the nature of the case), and has occupied your Lordships one or two days, the inquiry has been what was parcel or not parcel in the year 1682. It is a most unfortunate state of circumstances, moreover, because there appears to be an entire gap of evidence upon the subject from 1682 for nearly a century afterwards. And after this long lapse of time the difficulty is very considerable in ascertaining what was parcel or not parcel; and accordingly, from the very first it appeared to me that the decision in this case must in a great measure turn upon the question upon whom the *onus* of proof was to be cast. But I think we shall find how that stands if we look to the interlocutors which are undisputed, including the interlocutor of your Lordships' House, which affirmed the interlocutor of the Court of Teinds in some parts. I think we shall find from those interlocutors what the exact state of the case is as to the *onus* of proof.

The finding of the Court of Session in the interlocutor of 3d February 1865 is this, that "according to the true construction and effect of the decree of valuation of 1682, the teinds of those portions of the barony of Findon, if any, which are not embraced within the special subjects enumerated in the rental produced by the pursuer, and adopted as the basis and limits of the decree of valuation, are unvalued: Find that the teinds of the lands of Barclayhill, Calsayend, and Meddens, mentioned in the said decree, are not valued by said decree: Find that the terms of the said decree are not such" (this is the important part) "as to exclude a proof or inquiry before answer that the teinds of the parcels of land mentioned in the 11th article of the condescendence, or any of them, are unvalued." It then proceeds to Portlethen.

That being so, it is clear that what is stated in this decreet as to Barclayhill, Meddens, and Calsayend, is that they are unvalued—as to Barclayhill and Meddens there is no dispute now—and as to Calsayend there is a dispute which I shall mention presently.

You further find from that that the terms of the decreet of 1682 did not exclude proof or inquiry as to whether the teinds mentioned in the 11th article of the condescendence are unvalued. But who is to prove that? The person who is the pursuer in the action—who, in the 11th article of the condescendence, specifies the several lands about which your Lordships have now been occupied for some time in hearing a discussion—he asserts that these teinds are unvalued; and you further find that in the decree of 1865, which is affirmed by your Lordships' House, the pursuer is not excluded from proof that those teinds are unvalued. Accordingly, my Lords, in the interlocutor of the Lord Ordinary in this case, which has been pronounced since the matter passed from your Lordships' House, the Lord Ordinary finds to a greater extent in favour of the pursuer than the Court of Teinds afterwards does upon revision. His form of finding was noticed by Sir Roundell Palmer in his argument as singular, but it is in exact conformity with the decree. He finds that in respect to particular parts it is not shown that they were not valued—showing he put the correct interpretation on that decision, namely, that the person who sought to recover the teinds was the person to prove that these particular lands had not been valued.

That is, however, said to be contrary to the universal course of law in the matter of teinds, namely, that in the matter of teinds the pursuer, the minister, stands upon his right to have everything subjected to teind which is not shown to have been valued. Here, he says, I am as minister, and here are lands producing teindable subjects, therefore my case is so far made out, and now it is incumbent upon you, the heritors, to show, upon the contrary, that your teinds have been valued. It is for you to retain the evidence of title in respect of the matter, and to retain evidence of the boundary, and in all other ways to keep in your own power the means of showing that your teinds, which you say were valued, were so valued. The burden of proof is thrown upon you.

My Lords, that appears to have been undoubtedly the ordinary rule with reference to teindable subject matter, but in this decree of 1865, founded upon what were the terms of the decree of 1682, the Court, having the whole matter before them, and having looked at what that decreet of 1682 purported to do, came to the resolution of pronouncing the interlocutor I have spoken of, and which was affirmed by your Lordships' House. I do not think it right, therefore, to go back, as we are invited to do, on the opinions and statements of noble and learned lords in advising the House. I do not think that in substance there will be found to be anything in them contradictory to what I am now stating; but I am now simply stating what is in the interlocutor itself, as showing what the burden of proof is. One noble and learned Lord who took part in that discussion in your Lordships' House, who is now present, and who is very competent to inform the House upon the law in reference to this subject matter, stated that the burden of proof (which I apprehend, if I may venture to say so, concurring with him, is the exact state of the case), according to the evidence produced, might be shifted. A *prima facie* case might have been produced, and that might be submitted. But I do not apprehend that the burden is shifted in this process by the pursuer simply saying here—I am as minister. You have this state of things from 1682 down to the present litigation in this matter. There has been a supposition, which turned out to be erroneous, that the whole teind had been valued. When you come to look at the decreet, you find that portions were brought in, in the first instance, which seemed to relate to the whole district which purported to be valued, but your Lordships find that there are certain teinds,

and certain subjects which were valued, and certain rentals and other things which are stated not to be valued. You take them out, and then you say, you are still at liberty to pursue your proof, and go on to certain other lands which you say are not valued, and which are in the 11th article of the condescendence. That 11th article, it is specifically affirmed, did not stand upon the right of the minister. It did not say, "I say these things are teindable, and you must prove the contrary." But it averred that given lands were subject to teinds, and it was left to him to prove that.

Now, here the controversy has been mainly upon two things—*first*, upon the extent of Calsayend, which was unvalued, and which was found by your Lordships to be unvalued; and here great difficulties are encountered. There appears to have existed a very extensive moss indeed, which consisted, according to this map, of a very considerable acreage; which moss extended not only in length, but even in some degree laterally, according to the view of the pursuer, under this one name of Calsayend, reaching nearly to the ocean on one side, and spreading largely both right and left, but principally to the north of Calsayend itself. Calsayend seems to have been so named from being at the end of a large causeway or road —the great northern and southern road—which appears to have terminated in that district, and which had the name of Causeyend in 1682. Now, there is a considerable discrepancy between the parties as to whether anything more than some limited space, not very exactly defined, around the end of the causeway, according to this map, was that which was called Causewayend. We seem to find somewhere about 1689 some moss spoken of as Causewayend Moss, but that does not of itself show what is contended for; and there was a holding held at, I think, about £80 Scots, at the time of the decreet in 1682, for this moss mail, and for no other purpose than the cutting of the moss—not for pasturage (in which case it would have been teindable), but for the limited purpose of cutting moss peats. Now, one would not naturally anticipate that this moss would be of very great extent. I do not at all rely upon that which was relied upon in the argument, that there was some other farm, which was about half the size, and paid about half the rent. That is a circumstance to be considered among other circumstances; but, of course, it might be easily overbalanced, if there had been any evidence to show that somebody had taken in hand the whole of this large moss, and had consented to pay rent for it, for the purpose of cutting peats, because he could not have taken it for any other purpose. Now, that being so, I think the presumption is somewhat in favour of the smaller quantity. But, independently of that, that which weighs most upon my mind is, that the burden of proof seems to rest upon the pursuer of showing that it was anything more than that which has been assigned to him by the direction of the Court below. I think that in part of Lord Mure's judgment he gave a certain urther extent to Causayend. Then it came before the Court of Teinds, and the Lord Justice-Clerk entered into a most elaborate detail, which is set out in our printed papers, of which a great part was read at the Bar. He went into a very elaborate detail, and made remarks upon the subject which appear to me extremely just. And I confess, upon a subject of such remote antiquity, in which the difficulty must be great of ascertaining what the exact limits and dimensions were—I think the finding which has been come to is very consistent with the object for which the moss mail was paid at that remote period, and with the extent of that moss mail, regard being had to the probable quantity which its purchaser would be likely to deal with; and it appears to me that it is impossible to say, after that investigation, that the decision is wrong. The person upon whom the burden of proof falls has failed to satisfy my mind that he has established his case.

Now, the only other controversy which I think it necessary to notice is that about Hairmoss, with respect to which Lord Mure and Lord Cowan found in favour of the pursuer, whilst the other learned judges found in favour of the respondents, the defenders. Now, as regards Hairmoss, the matter stands thus:—The point pressed upon us most strongly was this, It was said that the only way in which the Court of Teinds got at these other parcels which are not enumerated by name in the decreet of 1682 is by treating them as a pertinent, because the contest on the part of the appellant is, If I am obliged to enter into proof as regards these lands, then I say that whatever is not stated by name in the decreet must be taken to have been unvalued, on the same principle (that was the argument) as those which are enumerated as Causeyend and the other moss, upon which rent was to be paid for moss mail allenarly, were taken to be unvalued, so these other mosses, which were productive of nothing but moss, would be in the same condition as the unvalued portion in respect of which moss mail was to be paid, and accordingly it must be taken as being unvalued. That, I think, is a fallacy. Where the judges who pronounced the decreet found a rental actually paid for moss land and for moss mail allenarly, they say, finding that we left those parts out because they were moss and nothing else, and they were let at a moss mail and nothing else. But where the rental is fixed to include a vast extent of moss land, then that rental is valued as including all that there is in the holding to which that rental attaches. That being so, the pursuer says, Unless you can show distinctly that these other moss lands—this great Hairmoss—is not named anywhere in the decreet, it must be taken to have been one of the unvalued parts. The Court of Teinds says, on the contrary, Regard being had to what is undoubtedly a circumstance which is far from conclusive in the case—namely, the fact that from the year 1682 downwards, for a period of nearly 170 or 180 years, no teind has been claimed in respect of these lands, and that they have been treated as valued during all that time—we think we are entitled to say that, looking to the whole form of the valuation, and the absence of a teindable quality being attributed to these lands during this long period of years, if we find that we can rightly assign a reason for that, we assign the reason that they could have been rightly held, and were not improbably held, as pendicles or pertinents of the farms which are mentioned by name in that decreet. Further than that, there was evidence to justify the fact of its not being an improbable thing that they should be so held. At the present time parts of these mosses are so held. Those mosses, though not producing any great value, and probably adding very little to the rent, still are an accommodation to the tenants; and tenants have *de facto* for a considerable time (as appears from the evidence) taken those mosses in

with their farms, and turned out their cattle to graze upon the mosses around them. An observation was made by one of the learned counsel which appears to be not wholly unworthy of notice, that in the original decreet of 1682 the vicar was present as well as the minister, and that all the teind was gone into as including any teinds that might arise from the pasturage of cattle or otherwise upon those mosses.

Then it is said, now we will show you that Hairmoss is not included, and then there is produced a document which is of some interest, dated in 1682, the very year of the decreet. It occurs in making up the titles of Bannerman that there is a title of that very date, being a disposition of that very land itself to Bannerman, which contained this description, "*glebarium vocatum* Hair Moss." Now all the learned judges agree that *glebarium* means a moss and nothing else. Therefore Hairmoss no doubt was described there as a separate parcel, and not a pendicle of anything. At the same time there is Cookstown; by this same title Cookstown was a very large holding in 1682, it was the principal holding in the barony of Findon, and it is described in the same disposition. But what we have got to consider in looking at the valuation of the teind in 1682 is what was the state of things under Bannerman. Bannerman was the heritor who was principally interested—the valuation is made out in his name —it was for a conveyance to Bannerman. The question is, what did his tenant hold, and what was he to take? Now in this very same decreet where this *glebarium* is mentioned there is also mentioned the burnt land;—it is described as "*super eodem*," upon the same moss, that is to say, upon Hairmoss. Now this burning of land seems upon all sides to be conceded to be a process taken in hand for the purpose of improvement, as one of the first steps towards reclaiming land. And, therefore, when you find in this very document a description of the moss, and a portion of burnt land thereupon, and when you find other descriptions of the moss in subsequent documents at a long distance of time—when you next come across the property and the description of it in those subsequent sales upon which so much has been said, and of which maps have been produced, and when you find a place in Hairmoss called Bishopton, a holding with land held adjacent to it, which no doubt must have been originally a portion of Hairmoss, the question is, whether this Hairmoss might not well have become a pertinent to this property of Bishopton, which was let to the tenant at the time of this decreet. But further than that, you will find in the subsequent decrees that Hairmoss is described as appurtenant to Cookstown, Badentoy, and Meddens. Now with regard to Badentoy and Meddens, it appears that Badentoy was held to be valued, but Meddens was held not to be valued under the decreet; but Badentoy and Meddens were found to be themselves appurtenant to Cookstown; and it is said that according to the Scotch law a pertinent cannot be a pertinent of a pertinent. Now if you find an expression that is somewhat inaccurate, you must look to see what this expression refers to. If you find that Badentoy and Meddens are appurtenant to Cookstown, and then if you find that this Hairmoss is described as appurtenant to Cookstown, Badentoy and Meddens, the just inference would be, I think, that it was then appurtenant to Cookstown, which was the larger denomination of the whole locality. Cookstown was a well-known place at the time of the decreet, and it seems to have been of considerable size at the time of the decreet. I do not find it by any means improbable, therefore, that in the valuation of these specified lands, including Cookstown, Hairmoss might well have been included as a subject of rental payable at the time of that decreet.

Now I quite agree that it is very far from satisfactory to attempt to arrive at a conclusion as to what were the exact parcels; but the real question is, Is the burden shifted? Has the pursuer shown that these matters which are mentioned in article 11 of his condescendence were uncovered by the valuation in the decreet? Has he shown that they have not been valued? The remarks he has made upon the larger moss of the two, Hairmoss, having largely increased my dissatisfaction with his case. I do not go into details. I have followed as carefully as one could for hours and hours these maps which have been brought before us, and the observations which have been made upon them by the learned judges in the Court below—by Lord Mure and Lord Cowan on the one hand, and by the other three learned judges in the Court of Teinds upon the other—and I cannot say that at any period of time such a *prima facie* case was made out by the pursuer as would justify me in saying that the *onus* had been shifted and thrown back upon the heritors, or in saying that that which they have been enjoying for a long period of time was erroneous, or that in consequence of that decreet having been opened up to the extent to which it has been by your Lordships' judgment upon the former appeal, therefore it may be still further opened up by reason of anything which the pursuer has demonstrated to us. I am not prepared to say that the opinion of the Court of Teinds has been wrong. I am of opinion that the decree ought to be affirmed, and that the appeal, as it fails in point of law, ought to be dismissed, with costs.

Lord Chelmsford—My Lords, I agree with my noble and learned friend, upon this short ground, that the *onus* of proving that there were unvalued teinds in the parish lay upon the appellant, the minister, and that he has failed to give sufficient proof upon this subject.

Now, that the burden of affirmative proof properly lay upon him appears to me to be clear from the nature of the proceeding, and also from the interlocutors which have been pronounced. The proceeding is a process of augmentation and modification; and the Court of Teinds, by an interlocutor of the 1st of July 1863, augmented and modified the stipend; but they at the same time declared "that this modification, and the settlement of any locality thereof, shall depend upon its being shown to the Lord Ordinary that there exists a fund for the purpose." Now it is quite clear that the minister could not have the benefit of this augmentation unless he proved affirmatively that there was a fund out of which it could be obtained. In the 10th and 11th condescendence of his revised objections (I will leave the 14th out of the question) he states that there were certain lands (naming them) which were unvalued. This is denied by the heritors; and they at the same time contend that he is stopped from averring that there were any unvalued lands in consequence of the decree of valuation of 1682.

The Court of Teinds by the interlocutor of 1865,

"find that the teinds of the lands of Barclayhill, Causayend and Meddens, mentioned in the decree, are not valued by the decree; find that the terms of the said decree are not such as to exclude a proof or inquiry before answer, that the teinds of the parcels of lands mentioned in the 11th article of the condescendence, or any of them, are unvalued." And they remit to the Lord Ordinary to direct such inquiry as may be rendered necessary by this interlocutor.

Now this interlocutor of the Court of Teinds was affirmed by this House; and when the case was remitted to the Lord Ordinary to direct such inquiry as might be rendered necessary by it, the question was, What was to be made? It was whether or not it was the fact that the teinds of the parcels of land mentioned in the 11th condescendence are unvalued. Upon whom lay the affirmative of that?—Upon the person who avers it. It was not for the heritors to prove that these lands had been valued, but it was for the minister to prove distinctly under this interlocutor that the lands were unvalued; and that appears to be the construction put upon this interlocutor both by the Lord Ordinary and by the Court of Teinds afterwards upon the interlocutor which is appealed from, because they find distinctly "that the objector has failed to prove that any part of the lands of Cookstown or of the barony of Portlethen other than the lands of Meddens, Barclayhill and Calsayend remain unvalued." Both the Lord Ordinary and the Court of Teinds have put the same construction upon the interlocutor which I have put, namely, that the burden of proof lay upon the minister, and that he has failed to give such proof. I entirely agree with my noble and learned friend that the proof has failed; and that being so, I think it unnecessary to travel again over the same ground. My Lords, I agree with him entirely in thinking that this interlocutor ought to be affirmed.

Lord Colonsay—My Lords, this is one of the cases in which we are occasionally led into a very abstruse inquiry in regard to the condition of matters a very long time ago, when parole evidence can help us very little, when the records are not very perfect, and when the production of documents and titles may mislead, even by different names being given to the same subjects, or portions of the same subjects, at different times. The point for inquiry here is, whether under the decreet of valuation in 1682 certain portions of land were or were not valued for teinds? The heritors found upon that decreet of valuation, as showing that the whole lands held by them within a certain area were valued.

The Court below and this House held that three parcels were not valued. The minister had averred that certain other parcels were not valued; and the parcels which he so averred had not been valued are the parcels mentioned in the 11th article of his condescendence. Now, the parcels mentioned in the 11th article of his condescendence are Redmire, Bishopstown, and lots 2 and 3 of reserved moss called Duff's Moss, and certain lands which are called Hillside, with certain exceptions—the synods lands, the lands of Seaton of Findon, the cultivated land on what was formerly the Moss of Findon, commonly called Groundlessmyres, and the cultivated land on the Hairmoss. All these he said were unvalued; and the deliverance of the Court on that subject in the interlocutor of 1865, which was affirmed in this House, was —"That the terms of the said decree are not such as to exclude a proof or inquiry before answer that the teinds of the parcels of lands mentioned in the 11th article of the condescendence, or any of them, are unvalued." Well, that clearly puts upon the party alleging that they were unvalued the *onus* in the first instance. It might be shifted by subsequent evidence, but the *onus* was clearly upon him in the first instance of proving that the lands were unvalued. Accordingly, the case went back, and proof was allowed to the minister to establish the proposition which he had set forth in the 11th article of his condescendence. The Lord Ordinary found that, in regard to Bishopstown and Redmire, they are to be held as valued—that the minister has not established that they were unvalued; but that he has proved that Hairmoss is unvalued. The grounds on which it was held that Bishopstown and Redmire were to be taken as valued—that is, that the minister had failed to prove they were unvalued—are, I think, quite satisfactorily stated in the views of the late Lord Justice-Clerk, which were adopted by the majority of the Court.

I think it appears from the titles that we have here that Bishopstown was a part and parcel of Cookstown, and that the moss land there was a part also of Cookstown. Now Cookstown was valued, and I think that comprehended (indeed it is not disputed that it comprehended) that portion which was called Clochendichter, which lay apparently between them. The same argument that leads to the holding of Bishopstown to have been within the valuation I think also goes far to establish that Hairmoss was within the valuation. I agree with the reasoning of the Lord Justice-Clerk on the subject.

But the difficult questions which remain are in reference to lots 1 and 2 of the reserved moss, and as to which is to be comprehended under the name of Calseyend. Now, the contention of the minister has been that a very large portion of the lands herein—all that is coloured yellow upon the plan produced by him—was originally held not to be valued, and it was contended that those portions 1 and 2 of the reserved moss, and the other great range of moss, formed part of Calseyend; and the plan 204 was referred to as indicating that. And it does appear, certainly, that if that portion which was represented to us at the time as being part of Calseyend was really so, Calseyend was a very extensive tract of country. But the leading names of the heritors' lands were Cookstown and Findon, and it appears from this decreet itself that Calseyend was only a pertinent or pendicle of Cookstown. That is mentioned specially in the decreet, because it was objected at the time of the decreet that the heritor had not produced a sasine in the lands, and he was called upon or allowed to do so. And it appears from the decree that at a later period he did produce a sasine; and the decreet bears that he produced another sasine "bearing him to have been on the 31st day of May 1680 duly and lawfully infeft and seized in all and whole the aforesaid lands of Cookstown, whereof the lands of Calseyend, Meddens, and Badentoy are proper parts and pendicles.

Now, it does seem rather curious—if all that part was Calseyend—that that pertinent of Cookstown was greater than the lands of which it was a pertinent. That would be rather a singular conclusion. But Cookstown being the leading property, and these other lands being pertinent to Cooks-

town, the question is raised, whether these portions round about are to be regarded as parts of Calseyend or as parts of Cookstown proper, and to be comprehended within the valuation? Now Calseyend had a name at the date of the valuation as a separate possession, but it was a possession, as far as we can find from the decreet, merely for moss mail and nothing more, and the question arises whether that possession, being for moss mail only, is to be interpreted as being possession of all that went under that name. Now the expression undoubtedly is "his possession of Calseyend," and the tenant's name is given, "Alexander Duthie, in Causeyend, pays yearly for his occupation of the lands of Causeyend £44 Scots." Now, does the term "his occupation" necessarily imply that he occupied the whole of what may be called Causeyend? I think not. It is "his occupation of Causeyend;" and accordingly we find expressions of this kind in the decreet, "James Mowat, in Cookstown, pays yearly for his occupation of Cookstown." Does that mean the whole of Cookstown? Certainly not, because the very next entry is "Magnus Mowat pays yearly for his occupation of the lands of Cookstown" so much; and there are other instances to the same effect here, "Richard Bannerman, in Findon, pays" so much; Robert Hunter, in Findon, pays so much "for his occupation;" Robert Anderson, at the mill of Findon, pays for his occupation of the mill pleugh so much for "his occupation," so that it merely means that he pays for that which he occupies in that place so much.

Now that being the condition of matters, let us see what the subsequent titles and proceedings indicate. It appears that in 1736 (I think that is about the next title that we have after the date of the decreet) that the lands of Bishopstown and part of the moss and croft of land there, which is part of what they call here Hairmoss, are "part and pertinent" of the lands of Cookstown. Then we come to the division of the lands, the first lot or the division of Cookstown is called Calsie-end, and is said to contain that part of Calsie-end which lies to the east of the great south road, leading from Aberdeen to Stonehaven. Now "that part of causeyend which lies to the east," I cannot interpret otherwise than as being all that part of it which lies to the east. "Such part of it as lies to the east," would therefore, if read widely, according to that construction, comprehend the whole of the moss. But then it goes on, "and the Cottoun and some folds and detached parts of Cookstown, with a piece of moss, all comprehended within the line following," and so on. Therefore that piece of moss was something in addition to that portion of Causeyend which lay to the east of the great south road. The piece of moss so given is part of what had acquired the name of the Moss of Causeyend, and had naturally enough acquired that name because it was near the causeway end, and near the lands which had got the specific name of Causeyend.

Then we have a distribution of the moss, which comes at a later period. And what is it? The articles of roup speak of the moss of Findon and Cookstown in the parish of Banchory, lying to the east of the King's Highway. The first lot is that which is called Groundlessmyres; it had a specific name at that time, as much as any of the others. The next lot is called Benholme's Stables. Now, I think that this militates strongly against the theory of the minister, that all these lands were part and parcel of Causeyend, which was held at the time of the decree by the tenant for moss-mail allenarly, at a rent of £80 Scots. Different names were then acquired, and the only thing that I can see that makes in favour of the appellant is this—that it is described sometimes as the "moss of Causeyend,"—but that is a natural enough name to give to it, as much as to give to the portion which was occupied by a tenant under the name of Causeyend. I cannot therefore see in this anything substantially in favour of the claim of the minister. The heritor brought in all his lands to be valued. The decreet professes to value the whole, comprehending grass pastures as well as corn lands. It does not require any evidence that the arable lands in that part of the country were not very extensive at that time. There were always large ranges of pastures on lease, and we see some proof of that in the evidence before us—it is the ordinary course of things. But there seems to have been a notion entertained by the minister, and which I think in some degree countenanced by the Lord Ordinary, that wherever he could put his finger upon a piece of land of the same description, that is to say moss land, not expressly named or valued, it is to be held unvalued. No doubt all the moors in that country were more or less interspersed with moss lands, and it would be a very dangerous thing therefore to hold such a proposition.

I think, therefore, that the minister has not discharged the *onus* of proof that was laid down upon him, and that we must affirm the decree of the Court of Session.

Friday, June 23.

RUSSEL & SON *v.* GILLESPIE.

(*Ante*, vol. v, p. 597.)

Agreement—Mineral Lease—Underground Working—Clause. Construction put upon a clause in a mineral lease, which declared that the underground workings should not be carried nearer to the mansion-house, office, garden and steadings, than so many yards. Interlocutor of the Court of Session varied.

This was an appeal by Mr Gillespie of Torbanehill against a judgment of the First Division, pronounced on the 12th June 1868, with a cross appeal by Messrs Russel. The action was raised by Messrs Russel, the lessees of the Torbanehill minerals, against Mrs Gillespie, the proprietrix, and her husband, to have the meaning of certain clauses in the lease determined. The nature of the questions at issue sufficiently appear from the opinion of the Lord Chancellor.

Sir R. Palmer, Q.C., Mr Cotton, Q.C., Mr Asher and Mr J. M'Laren, for appellants.

The Lord Advocate, the Solicitor-General, the Dean of Faculty and Mr W. E. Gloag, for respondents.

At advising—

The Lord Chancellor said that this was an action to declare the meaning of a contract, which, in some respects, was of a singular nature, owing to the circumstances which had since occurred giving rise to meanings which could not have been in the contemplation of the parties, and yet the meaning of the instrument came out very plain. At the time this lease was entered into it was not known what was the precise value of the coal and minerals included in it, but this having been now