other things that might be suggested. They were privileges of use of a particular kind, but they were none of them either the proprietorship or exclusive possession of the land. The proprietorship of the land it certainly was not; the proprietorship of the land for any other purpose except firing guns it was not either. The mere privilege of discharging a fowling-piece for killing hares and rabbits was not a right to a heritable subject on which a party could stand, if he had no other heritable subject apart from that.

LORD ORMIDALE and LORD BENHOLME concurred.

The Sheriff's judgment was accordingly affirmed.

Agent for Appellant—A. Kirk Mackie, S.S.C.

Agents for Respondent—Tods, Murray, & Jameson, W.S.

COURT OF SESSION.

Saturday, October 23.

SECOND DIVISION.

SPECIAL CASE FOR MUIR'S TRUSTEES AND OTHERS.

Trust—Residue—Period of Vesting—Postponement—Survivorship Clause—Pencil Codicils. (1) Circumstances in which *held* that vesting took place *a morte testatoris*, and was not postponed by the terms of a clause of survivorship. (2) *Held* that the writing of codicils in pencil, and not in ink, does not affect their validity, if it clearly appears that they are of a testamentary nature.

The parties agreed upon the following Case for the opinion of the Court:—

"1. By his trust-disposition and settlement dated 20th September 1825, and recorded in the Books of Council and Session 2d January 1840, a copy of which is appended to this case, the late John Muir, manufacturer in Glasgow, conveyed his whole estate, heritable and moveable, to the trustees therein named, in trust, for the purposes therein specified.

"2. By a codicil, dated 23rd October 1839, holograph of the truster, and written in pencil on his original settlement, he says,—'having given my son Robert £650 for his outfit to Australia, and capital to carry on his operations there, that sum shall be deducted from his share of my estate.'

"3. And by another holograph codicil, written also in pencil, and immediately below the above mentioned codicil, though dated 6th January 1837, prior to the other, the truster says,—'and should my children's shares turn out to be not more than £1000 each, I reduce the married daughters' shares to £100 each; and should they turn out to be not more than £1500, I reduce them to £200; and should they turn out to be not more than £2000, I then reduce my married daughters' shares to £500 each.'

"4. Mr Muir, the testator, died on the 23rd day of December 1839, survived by Mrs Elizabeth Sibbald or Mure, his widow, and by the following fourteen children, viz.:—(1) John Muir; (2) Andrew Sibbald Muir; (3) Mary Muir or Downie, who, on 7th October 1829, prior to her father's decease, had been married to the now deceased Mr Kenneth Dowie; (4) James Muir; (5) William Muir; (6) Jessie Muir; (7) Eliza Muir or Houldsworth, who, on or about 7th October 1836, also prior to her father's death, had been married to the late Mr John Houldsworth; (8) Alexander Muir; (9) Robert Muir; (10) Agnes Muir, who was married in June or July 1843, after her father's death, to Sir George Wingate, K.C.B.; (11) Susan Muir; (12) Isabella Muir; (13) Georgina Muir, married on 15th August 1848, after her father's death, to Mr Patrick Playfair; and (14) Archibald Muir. All the above children attained majority.

"5. The trustees named in the deed, all of whom are now deceased, accepted of office, and the present trustees were assumed in the year 1860.

"6. John, Andrew, James and William Muir, the truster's four sons, never took over the capital and heritable property of the deceased sunk and employed in the business, which the trustees were by the settlement directed to make over to them; and there being little or no moveable estate, the heritable property, which was burdened to a considerable extent, was retained by the trustees to meet the annuity, which by his settlement the truster left to his widow. John, Andrew, James, and William Muir, as after mentioned, all died unmarried, and no one in their right makes any claim to the said heritable property.

"7. The amount of the estate left by the deceased was for a time insufficient to meet the annuity of the widow, but afterwards the income was improved and brought up so as to meet the annuity, and pay off arrears. No payment out of capital or income has been made to any of the children, and the whole beneficiaries agree that no division or payment could have been made during the widow's lifetime.

"8. Mrs Muir, the widow of the testator, died on 25th October last, 1868, and the whole residue being now realised, amounts to the sum of about £7000.

"9. The children of the testator who survived their mother were seven in number, viz.:—(1) The said Mary Muir (Mrs Dowie); (2) The said Jessie Muir, still unmarried; (3) The said Alexander Muir; (4) The said Agnes Muir (Lady Wingate); (5) The said Susan Muir, still unmarried; (6) The said Georgina Muir (Mrs Playfair); and (7) The said Archibald Muir. Of the seven children who predeceased their mother, the following three died unmarried, and without leaving any valid deed disposing of their shares, viz.:—(1) John Muir, who died on 12th December 1855; (2) Andrew Sibbald Muir, who died on 18th February 1849; (3) Isabella Muir, who died on 14th April 1848. And the two following were married and left children, but no deed disposing of their shares, viz.:—(1) Robert Muir who died in Australia in 1851, leaving one child—John Sibbald Muir, now of age, and resident in Australia; (2) Mrs Eliza Muir or Houldsworth, who died in January 1854, leaving five children, who are alive and all of age, viz.:—(1) The said Henry Houldsworth; (2) The said John Muir Houldsworth; (3) The said William Thomas Houldsworth; (4) The said Mrs Jane Isabella Houldsworth or Shaw; (5) The said Eliza Houldsworth. Of the other two children who so predeceased their mother, James Muir, who died unmarried on 25th October 1847, left a holograph will or testament, wherein he nominated his brother William, now deceased, his executor, and after bequeathing certain legacies which have been paid, he directed the residue to be divided among his brothers, John, Andrew, William, Alexander, Robert, and Archibald Muir, all of

whom, or their representatives, are parties to this case; and William Muir, who died unmarried on 12th May 1851, left a will or settlement, under which the said Alexander Muir and Patrick Playfair are appointed his executors.

"10. The trustees are now ready to divide the residue of the estate, but certain questions have arisen. The parties to this case, other than Mr Muir's trustees, however, are the whole parties who have any beneficial or other interest not only in the estate of the said John Muir, but in the estates of his seven children, who predeceased his widow, and the only questions which have arisen are *inter se*. (1) It is maintained for the executors of William Muir, and for those interested in the estate of James Muir, and for those of the beneficiaries who were the nearest of kin or other representatives of John Muir, Andrew Sibbald Muir, and Isabella Muir, that the shares of these parties had become vested in them on attaining majority, and therefore fell to their executors, or other representatives; while for those of the beneficiaries who are not interested in these estates, or do not represent these deceased parties, it is maintained that there was no vested interest in these deceased parties, so that on the division at the death of the testator's widow the surviving seven children of the deceased, the only child of Robert Muir, and the children of Mrs Houldsworth, were entitled to take the residue. (2) The parties whose shares are affected by the two holograph pencil memoranda or codicils of the truster, written on the settlement, dispute their validity. (3) Supposing these codicils to be valid, it is maintained for John Sibbald Muir, as representing his father, Robert Muir, that the amount to be deducted from his share shall not bear interest from the testator's decease, or from any date, but that the principal sum only shall be deducted from the share which falls to him. (4) On the same supposition, it is maintained for Lady Wingate and Mrs Playfair, that the term 'married daughters' used in the codicil of date 6th January 1837 applies only to the daughters who were married at its date, or at the time of the testator's death, and not to Lady Wingate and Mrs Playfair, who were not married till after their father's death, when they had both attained majority.

"The trustees are unwilling to exercise the power conferred on them by the settlement, of determining its meaning in case of doubt or difficulty (if indeed this would be competent); and they and the other parties to this case therefore, for their guidance, submit the following questions of law for the opinion and judgment of the Court:—(1) Did the shares of the funds retained by the trustees of Mr Muir to meet his widow's annuity become vested in his children at their father's death, or not until the death of their mother, or at what other period? And have the children of Robert Muir and Mrs Eliza Muir or Houldsworth any rights as representing the said deceased parties respectively? (2) Are the two pencil holograph codicils written on the settlement, both or either of them, valid and effectual? (3) In the event of the codicil applicable to the advance by the truster to the said Robert Muir being found to be valid and effectual, are the trustees entitled to deduct from the share of the estate falling to the said John Sibbald Muir, not only the principal sum of £650, but the interest thereon from any date, and, if so, from what date and at what rate; or is the said John Sibbald Muir entitled to receive the full amount of his share subject only to the deduction from the share payable to him of the said principal, without interest? (4) In the event of the codicil relating to the shares of the truster's married daughters being found effectual, is its application limited to the shares of the said Mrs Mary Muir or Dowie, and Mrs Eliza Muir or Houldsworth, who were married at the date of the codicil, and at the date of the testator's decease, or does it extend to the shares of the said Lady Agnes Muir or Wingate, and Mrs Georgina Muir or Playfair, who were married after the decease of their father, and after they had attained majority? An extract of the trust-disposition and settlement of Mr Muir is produced herewith, and the present case is submitted for the opinion and judgment of the Court on the above questions of law, in terms of the Act 31 and 32 Victoria, cap. 100, sec. 63."

SOLICITOR-GENERAL and A. MONCRIEFF, FRASER and LANCASTER, for the parties.

At advising—

LORD COWAN—The deed of settlement which has given rise to this special case is dated in Sept. 1825; certain codicils thereto are dated in Jan. 1837 and Oct. 1839; the testator died in Dec. 1839; and his widow died in 1868.

1. The first question to be determined under the special case regards the period when the residue of the estate vested in the several children, to whom it is destined by the father's settlement; in particular, whether the funds retained by the trustees, which, as explained in the case, embraced the whole estate, vested in the children at the death of their father, or not until their mother's death. This question must be determined upon a consideration of the whole provisions of the settlement, and the intention of the testator to be thence inferred.

By the second purpose of the trust an annuity is provided to the truster's widow of £300, restrictable to £150 in the event of her second marriage. No other permanent burden on the trust funds is imposed by the deed. By the fourth purpose provision is made for the free capital belonging to the truster employed in the business carried on by him, at his death, being correctly ascertained; and for this free capital being made over to his four sons with a view to their carrying on the business on their own account,—under condition of the said free capital being "paid to the trustees for the behoof of my whole children who may be alive at the time of my death" by equal yearly instalments in the course of eight years. There follows the direction as to the equal division of the said capital, and of the *whole other estate*, heritable and moveable, belonging to the truster, set forth at the bottom of page 11 and on page 12 of the printed deed. This direction is "to divide equally among my whole children that may be alive at the time of my death," including his four sons,—share and share alike; "which provision," it is added, "shall be payable on their respectively attaining the age of majority." From the estate and funds which are to be thus divided and paid to the children there are exceptions—(1) such a sum to be retained from the ascertained capital and interest employed in the business, and to be paid by the sons to the trustees for behoof of the children, as may be necessary for covering the annuity provided to the widow; and (2) the household furniture liferented by her. Supposing the direction in the deed to have stopped here, I do not think that the direction to retain out of the business capital a portion of the funds to secure the widow's annuity, could

be held to affect the vesting of the estate, as at the death of the testator. That capital (including the portion of it retained) was to be paid by the sons to the trustees for behoof of the whole children alive at the truster's death. All these children therefore became vested with their several shares, although these might be partially retained to secure the widow's annuity,—whatever may be said as to the household furniture. These provisions thus vesting in the children are to be payable to each of them on attaining the age of majority.

So far, then, this provision of the deed seems to me clear enough; but there follows a declaration "that if any of my said children die before the share to which they may be entitled shall be *payable*, the provisions of the children so dying shall be divided equally among the survivors," excepting as to those leaving families, who are to take the place of their deceased parents. The obvious meaning of this clause of survivorship is to provide for the death of children prior to majority, when alone their shares were to be payable; and also to provide,—what no doubt the law would have regulated, —viz., for the case of children predeceasing their father, but leaving families of their own. This survivorship clause provides for either of these cases, but in sound construction cannot be carried farther. Every clause of this kind is to be construed with due regard to its special terms, having regard to the other provisions of the deed. Where no other part of the deed fixes the vesting, and that requires to be determined by the direction given as to payment and division, a survivorship clause is all important. The case of *Donaldson's Trustees*, to which reference was made in the argument, is of that description. The only direction as to payment and division was "on the death of the longest liver of the spouses." The clause in this deed is quite differently expressed, and occurs in the midst of a series of provisions that fix the period of vesting as at the testator's death. And hence it is that the provision of this deed, which directs that the funds laid aside to meet the widow's annuity shall upon her death be divided "equally among my said children share and share alike in the manner before specified," is so expressed as necessarily to embrace the whole children alive at the father's death, or the families of such as may have predeceased that event. The division is not to be among children alive at the widow's death, but "my said children,"—that is, the same individuals in whom, by the previous provisions of the deed, the whole estate vested, and to whom the whole would have been paid at the death of the testator or at majority but for the security provided by retention of the funds for behoof of the widow. This view is in accordance with the whole other provisions of the deed. In particular, it is consistent with the provisions made in the fifth purpose, that the whole heritable property belonging to the truster at the time of his death, and not merely that portion of it which was connected with the business, should be employed in securing the provisions concerned in favour of the truster's wife and children. The whole heritable property therefore behoved to be held by the trustees to secure the widow's annuity. They held not merely the business capital they were directed to retain so far as necessary, but the whole heritable estate of the deceased for that purpose. As matters have turned out the free trust-estate of every description amounted to no more than £7000, and this has been retained by the trustees, as directed by the deed, until the widow's death. The amount consists not less of the proceeds of heritable property which formed no part of the business capital, than of the surplus of that capital itself. The question of vesting therefore truly relates not solely to shares of the business capital retained, but to the shares of the estate generally, which the truster specially destined to children alive at the time of his death.

On the whole, as to this question of vesting, it appears to me that but one period is contemplated by the deed, and that the testator's intention was that a vested interest should be taken in his estate by all his children alive at his death, subject to the condition of survivorship to the limited extent and effect which I have explained.

2. On the second question, no explanation has been given by the parties, of the circumstances in which the two holograph writings were added to the deed of settlement by the testator. I understand the fact not to be disputed that the deed, having been all along in his own possession, was found in his repositories, in the condition in which it has been presented to and been inspected by the Court. And thus the only point submitted for judgment is, whether, because of the writings being in pencil and not in ink, they are to be held invalid and ineffectual? That the writing is in pencil is an important element in the inquiry whether a holograph addition to a settlement ought to receive effect as testamentary, or whether it is to be viewed as deliberative only. But if it be truly testamentary in its nature and terms, so as to entitle it to effect had it been written in ink, I cannot hold that its being written in pencil destroys its validity. Now the writings in this case are in their terms testamentary; they are both of them subscribed by the testator and dated by him, and, being holograph, they are probative writs by the law of Scotland. And hence, there being no circumstances in the case to show that they must have been written merely as deliberative, effect cannot be denied to them, on the mere ground of their having been written in pencil. This view is, I think, consistent not less with the principles of our own law, than with the decisions which have been pronounced in the English courts referred to in the debate. The import of these cases will be found accurately summarised by Mr Williams in the 1st volume of his work on Executors.

3. No document of debt having been taken by the deceased for the advances to his son Robert, I am of opinion that, according to the true import of the codicil, it is only the principal sum, without interest, which falls to be deducted from his share of the trust-estate.

4. The codicil relating to the shares of married daughters, in the view I take of the testator's deed of settlement, and of the terms of the codicil itself, is applicable only to those of his daughters who were married at the time of his death.

The other Judges concurred.

Agents for the Parties—Jardine, Stodart, & Frasers, W.S.