DAWSON *v.* WATSON.

Tenant and Occupant—Shootings—Lands and Heritages—31 *and* 32 *Vict., c.* 48. *Held* that shootings, unaccompanied by a lease of lands or houses, are not lands and heritages within the meaning of the Act 31 and 32 Vict., c. 48, and therefore do not afford a qualification for the franchise.

The Sheriff stated the following special case:—"At a Registration Court for the county of Haddington, held by me at Haddington, on the 28th day of September 1869, under and in virtue of the Act of Parliament 31 and 32 Vict., c. 48, intituled 'The Representation of the People (Scotland) Act, 1868,' and the other statutes therein recited, Ebenezer Dawson, currier, Dalkeith, claimed to be enrolled on the register of voters for the said county, as tenant and occupant of the shootings over the estate of Gilston, in the parish of Fala and Soutra. It was proved that the claimant had been since August 1867, and now is, the sole tenant of the shootings over the said estate, but that he is not the tenant or occupant of any house on the said estate, or of any part of the said estate itself other than said shootings: That the said shootings are entered in the valuation roll of the county for the year ending Whitsunday 1870 at a rental of £20 per annum: That the agricultural tenant of the said estate is Charles Cossar, farmer there, and that he is enrolled as a voter on the rolls of the said county as tenant and occupant of the farm and lands of Gilston. William Watson, writer in Haddington, a voter on the rolls, objected to the said claim, on the ground that shootings are not lands and heritages within the meaning of the Act 31 and 32 Vict., c. 48.

"I rejected the claim; whereupon the said claimant required from me a special case for the Court of Appeal; and in compliance therewith I have granted this case. The question of law for the decision of the Court of Appeal is, Whether shootings, when unaccompanied with a lease of land or houses, afford a qualification under the said Act?"

Mr R. V. CAMPBELL, who appeared in support of the appeal, contended that shootings were embraced under the terms 'lands and heritages' in the Registration Act. In the Valuation Act it was distinctly laid down that shootings should be understood to be included in the expression lands and heritages, and the Valuation Act must be read as one with the Reform Act of 1868. But, even supposing he had not the Valuation Act to found upon, he submitted that, according to a reasonable construction of the words, lands and heritages should include shootings, and that it was as legitimate for a proprietor to lease his land as shootings as it was for him to grant a lease giving any party the privilege to take out minerals. There was this peculiarity, that shootings were not protected against singular successors; but that was only a statutory privilege given to other leases. The lease of shootings was as truly a lease giving the tenant the occupation of the land as was any other lease, and very often the return from shooting grounds was more valuable than the return from grazing lands. In support of this view, he quoted the case of *Crawford* v. *Stewart*, in which the Second Division decided that shootings were to be understood as lands and heritages in the sense of the Poor Law Act.

LORD ARDMILLAN—The question there came to this, that the tenant of a lodge was to be assessed on the added value of the shootings.

Mr CAMPBELL said that decision showed that assessment was to be paid on the shootings *pari passu* with the other subjects; and if their Lordships decided that shootings did not give a qualification except where there was a lodge, a great many people would be disfranchised.

LORD ARDMILLAN—Can you give us a case in which possession of shootings, without any building, has been held as giving a qualification.

Mr CAMPBELL—The Poor Law case decides that shootings are to be assessed as lands and heritages.

LORD ARDMILLAN—There was a lodge in connection with those shootings. It may be of no consequence, but you are refusing to answer the question.

Mr MUIRHEAD was afterwards heard in support of the decision. He said it had been repeatedly decided under the Act of 1832 that shootings could not be understood to be lands and heritages, and could not qualify for the franchise. In one of the cases which came before the Court the claim was admitted, in consideration that it was a house on which he was claiming. The heritage on which he claimed had value attached to it in the right of killing game, which was not itself lands and heritages. In another case it was held that the right of killing game was not a heritable subject; that it was merely a pertinent to the property; that it was only a privilege or right competent to the owner of the land; and that it could be exercised by no other person than the owner except as an incorporal right delegated by him. He denied that the Valuation Act was imported into the new Reform Act, and contended that the qualifying clause, though its terms were not identical, must be read as synonymous with the qualifying clause of the Act of 1832.

Mr CAMPBELL having been heard in reply,

LORD ARDMILLAN said this was a case of some nicety. According to his view of the law, the judgment of the Sheriff was right. The qualification, which must be accompanied by actual personal occupancy, was "tenancy of lands and heritages," and he did not think that the word shootings in the Valuation Act was of itself sufficient to import into the Reform Act of 1868 shootings, apart from lands or houses or other heritages, as a separate ground of qualification. It was quite settled that the rental of an estate was to be taken as inclusive, and not exclusive, of the shootings, and that whether the shootings were let or held by the proprietor. But a lease of game was not protected against singular successors. But in this case the qualification must rest upon this foundation, that the party was tenant and occupant of the lands and heritages, and he did not think that he was tenant and occupant if he had nothing but the privilege of shooting. If he had a lodge, of however small dimensions, with the privilege of shooting attached, it would be quite competent for him to augment the value of his tenancy by the rent which he paid for his shooting; but if he possessed merely the right of shooting, he did not think that that, taken alone, would support a qualification. The privilege of shooting,—apart altogether from its being exercised by the proprietor,—the communicated privilege of shooting was like the privilege of walking in a garden, of drinking at a fountain, of bathing in a stream, of using a boat upon a lake, of gathering mushrooms, of trout-fishing, of golf-playing, and many

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