the shooting of game, was a personal privilege or enjoyment. That question has long ago been settled. There is a whole string of cases, and I think the case in which the subject was perhaps most deliberately and satisfactorily dealt with was the case of *Menzies* v. *Menzies*. So that it cannot be doubted that game let is property let. The privilege of shooting game let to a tenant is part of a right of property; unlet game raises a different question, and unlet game must be estimated as of so much annual value. The case of *Crawfurd* v. *Stewart* was of much the same character. The fact that under the Poor Law the landlord pays one-half does not raise a different principle; for where the landlord pays on the annual value, and the tenant does the same, it may be called one-half, or the other half, which each pays, but it is the annual value still. It is the criterion of the landlord's and of the tenant's liability.

In regard to a deer forest, it is obvious that there is this other consideration, that there is no means of ascertaining, except by pure hypothetical conjecture, the rent of the land apart from the deer shooting. In the case of a grouse shooting there may not be a very great sheep stock upon it, but there is a sheep-stock often put upon it; and it is capable of being let for pasture for cattle and sheep, whether it is so or not. But in the case of a deer forest everything else is excluded. That is the very reason why it is impossible to reach the rent of the land if it is merely a deer forest, otherwise than by taking the rent as the annual value, and the annual value as the rent.

The only difficulty suggested in dealing with the case is an attempt to say that if there is no assessment in regard to grouse why should there be such in regard to deer? But we have not that before us. There have been distinctions drawn on such matters. I agree with your Lordships that the decision of the Commissioners was right.

Lord Mure—I agree with your Lordship in the chair that there is no substantial distinction between the circumstances of this case and the case of *Stirling Crawfurd* v. *Stewart*, which has been referred to, and which was tried under the regulations of the Poor Law Act. The only argument that Mr Mackintosh used was, that, strictly speaking, in the matter of deer there is no profit; and that this Act being made for the purpose of levying a tax upon profits, deer did not fall within its general principle. Then, he said that the appellant did not occupy in the ordinary sense of occupation. I do not think that is a sound distinction, because, in regard to property, the income-tax is laid on the annual value as well as upon occupancy, and it is levied whether the occupant makes a profit or not. He is supposed, taking one year with another, to make a profit out of his occupation, but if he makes no actual profit he still pays, because it is presumed that whatever the rent may be a profit is really made. So, in this case the tenant of a deer forest is presumed to get some benefit out of the forest when he pays a particular rent for it. He makes some profit out of it in the shape of the enjoyment of the privileges of the deer forest. A deer forest appears to me to fall under the very words of section 60 of the Act, because section 60, to which we refer in dealing with section 63, uses not merely the word "occupy," but for whatever purpose "occupied or enjoyed." I am thus of opinion that a man who enjoys the privileges of the tenancy and occupancy of a deer forest falls within the very words of section 60.

Lord Deas—I should explain that in what I said about the application of the decision in the Poor Law case I am quite aware that the division there between the landlord and the tenant is not between individual landlords and individual tenants, but landlords as a class and tenants as a class. But that makes no difference in the principle, or in the result at which I arrived, as the principle I go upon is this—that it is a tax upon the whole of the annual value, and divided between the two in certain proportions. It does not, therefore, matter what the proportions are, whether one-half or some other proportion. So that, although I did not use the words "classes," it comes to precisely the same thing.

The Court affirmed the determination of the Commissioners, and found the assessor entitled to expenses.

Counsel for Sir G. N. Broke-Middleton—Asher—Mackintosh. Agents—Adam & Sang, W. S.

Counsel for The Inland Revenue—Dean of Faculty (Watson)—Rutherford. Agent—David Crole, Solicitor of Inland Revenue.

Thursday, March 16.

SECOND DIVISION.

SPECIAL CASE—BISHOP OF SYDNEY AND OTHERS (HARDEN'S TRUSTEES.)

Succession—Testament—Implied Revocation—Donatio inter virum et uxorem stante matrimonio.

A conveyed a house to his wife, who was infeft therein, the disposition proceeding upon the narrative that he had through her succeeded to money. His wife predeceased him, and after a second marriage he died, leaving a trust-disposition and settlement conveying to trustees his whole means, heritable and moveable, and directing them to dispose of, *inter alia*, his "house, furniture, plate, &c.," and also generally to realise the residue, "whether heritable or moveable."—*Held*, without deciding the question whether or not the disposition to the wife was revocable, that it had not been revoked.

This was a Special Case, in which the Bishop of Sydney, the Rev. J. Harden Clay, and G. T. Kinnear, W.S., trustees and executors appointed by Mr Harden's will, were the first parties, and Lieut.-Col. Learmonth, M.P., and James Cleghorn Moore, heirs-portioners of the deceased Mrs Cleghorn or Harden (Mr Harden's first wife) were the second parties. Mr Harden died on 9th January 1875, leaving a trust-disposition and settlement dated 5th December 1873. He was twice married, first, in 1829, to Miss Mary Cleghorn, who

died intestate in 1867, and second, in 1869, to Miss Nixon, who survived him. There was no issue of either marriage.

The circumstances under which this case was brought were as follows:—In 1831 Mr Harden bought No. 6 Doune Terrace, and completed a feudal title thereto. He and his first wife resided there till her death, and afterwards he remained there till his death. On 1st November 1849 Mr Harden disponed the house in Doune Terrace to his wife, setting forth in the disposition the following reasons:—"Considering that since the solemnization of my marriage with Mrs Mary Cleghorn, otherwise Harden, my spouse, she became entitled to the sum of £8000, under the will of John Flemming, formerly of the East India Company's service, and late of the city of London, Doctor of Medicine, deceased, which said sum was received by me and applied to my own uses and purposes, and seeing that the said sum, though received by me as aforesaid, truly belonged to my said spouse, and that it is therefore reasonable and proper that the same should be secured to her for her own proper use and behoof exclusive of my *jus mariti*: In consideration whereof, I have resolved to convey to her in manner underwritten the subjects after described in satisfaction *pro tanto* of the said sum—therefore I have alienated and disponed, and do by these presents alienate, dispone, convey, and make over from me, my heirs and successors, to the said Mrs Mary Cleghorn or Harden, and to her heirs and assignees whomsoever, heritably and irredeemably, All and whole that area in Doune Terrace," &c. Mrs Harden was duly infeft. Dr Flemming's will, under which Mrs Harden succeeded to the £8000, contained no exclusion of *jus mariti*, and nothing save the following simple legacy:—"I bequeath to Miss Mary Cleghorn, daughter of my aforesaid cousin, £8000."

The truster by his will disponed to the first parties, *inter alia*, "All and whole the lands and heritable estate and pertinents, of whatsoever kind and wheresoever situated, now belonging to me, or of which I shall die possessed;" and in the latter part of the fourth clause as to the disposal by the trustees of the estate there occurred the following directions—"My house, furniture, plate, books, &c., I would wish sold (with the exception of two silver goblets, given to me by my father, which two goblets I leave to my brother the said John William Harden), and the proceeds to go into the said residue of my estate. *Quinto*, I direct my said trustees or trustee to realise the residue of my estate foresaid, whether heritable or moveable."

On Mr Harden's death, his trustees being ignorant of the disposition of No. 6 Doune Terrace in favour of Mrs Harden, made up a title in their own persons as trustees thereto, and, in terms of the instructions contained in the trust-disposition and settlement, proceeded to realise the estate. With this view they advertised the house for public sale, and on the 10th of February 1875 it was exposed and sold for £3000. In searching the records for the safety of the purchaser it was found that the disposition to Mrs Harden had been granted. Except upon his estate of Crea in Ireland, Mr Harden was possessed of no other house than No. 6 Doune Terrace, either at the date when his settlement was executed or afterwards.

The following questions were submitted for the opinion and judgment of the Court:—(1) Whether the disposition of the house No. 6 Doune Terrace, executed by the said deceased Robert Allan Harden on the 1st of November 1849, in favour of the said deceased Mrs Mary Cleghorn or Harden, and her heirs and assignees whomsoever, and the infeftment following thereon in her favour, conferred on her an absolute and irrevocable right and title to said house; or whether the said disposition has been effectually revoked by the said trust-disposition and settlement of 5th December 1873; and whether the said house has been effectually conveyed by the said trust-disposition and settlement to the parties hereto of the first part? (2) In the event of its being found that the said disposition has not been effectually revoked, whether the parties of the second part are entitled to the said house, or to the price thereof, as heirs of the said deceased Mrs Mary Cleghorn or Harden? (3) Whether the parties of the second part are entitled to payment of a sum corresponding to the amount of the annual rent or value of the said house for the years which have elapsed since the death of the said Mrs Harden, with annual interest? (4) Whether the said second parties, in the event of their being found entitled to the said house or price thereof, are liable to repay to the first parties the sum of £2000 mentioned in article 4th of the foregoing statement? (5) Whether the said James Cleghorn Moore is further entitled to the legacy bequeathed to him by Mr Harden."

Argued for the first parties—There were here two questions—(1) Whether the donation of the house to Mrs Harden was or was not revocable; (2) Whether, supposing it to have been revocable, it was or was not revoked?

There was here, on a just construction of Mr Harden's will, evidence of intention to dispose of his whole estate, including this house. He had lived in it six years after his first wife's death, when he made his will, and no claim had been during that time made to it by the first wife's heirs. This was a case merely of donation *inter virum et uxorem*. If he intended to revoke the deed, supposing it revocable, he took a habile mode of doing so. The question thus regarded as one of intention was answered in the deed by (1) the mention of the house, "house, furniture" &c., in clause 4; and (2) the general disposition of heritable property. There was not here in the legal sense a remuneratory donation, which must have in it an onerous obligation, or at least a moral obligation.

Authorities—*Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909, 12 Scot. Law Rep. 597; *Stevenson* v. *Hamilton*, Dec. 7, 1838, 1 D. 181; *Handyside*, Feb. 7, 1699, M. 11,349; Erskine, i. 6, 31.

Argued for the second parties—If a deed made under the circumstances of this deed was a natural and rational one, it was not revocable. The presumption was against the revocation of a special deed by a general settlement. The case was a still stronger one when the testator was divested by his own *inter vivos* deed. The authority of *Handyside* had settled the question that a general deed will not revoke a specific donation.

Authorities—*Halyburton*, Dec. 10, 1713, M. 11,387; *Handyside*, M. 11,347.

At advising—

Lord Justice-Clerk—My Lords, two questions present themselves in the case now before the Court. These questions are—*firstly*, Whether the conveyance by Mr Harden to his first wife was revocable? and *secondly*, Whether, if it were so, it has been revoked?

Now, upon the second question I am clearly of opinion that the presumption against revocation might have been excluded had there been a clear reference to the house, and there can be no doubt that there would have been enough to imply a revocation had there been a special conveyance of the subject. But I am disposed to think that there is nothing in Mr Harden's will on which we could safely rely as proving an intention to revoke this conveyance of the house. There is really nothing at all save in the words "house furniture," and those words are not to be found in the conveyance; they are only a direction to the trustees as to how they are to dispose of what has been conveyed to them. Now, I am not prepared upon the punctuation alone (although in the original deed there certainly is a comma after "house") to hold that there was here a conveyance of No. 6 Doune Terrace. In the first place, there are no words of revocation; next, there is no implication on the facts of a conveyance of a house on the titles of which it was clear that it did not belong to the testator; and lastly, it is not enough to go on the specific portion of the clause; the surroundings also must be considered, and they all point to the meaning as being furniture "of the house," as distinguished from other furniture.

That alone would be sufficient to decide the matter, but I am led inductively to conclude that without the clearest words it is impossible to believe Mr Harden could have intended to undo what he had done. The conveyance to Mrs Harden is not, and does not bear to be, a pure donation, and without giving any express opinion, I am inclined to think that between husband and wife the arrangement was just and equitable. It might be a nice point, if the case turned upon that, to decide whether such a donation would be good against creditors or not, as it is a wholly remuneratory gift, but I may observe that things may stand as *inter maritos* which might not be good were creditors in the field, where the consideration is a reasonable one.

Whether or not this deed could have been sustained, it is clear enough that Mr Harden in granting the deed did an act which would require for its cancellation a distinct revocation.

Accordingly, on the whole, I think that there are not sufficient words in the testamentary deed to justify the theory of a revocation, and that in the circumstances a revocation should not be presumed unless it were very clear.

Lord Ormidale—There are two questions here—(1) Whether the particular disposition of this house was of the nature of a donation or of a remuneratory character? and (2) Whether, if it were in the nature of a donation, it was revoked by the testator in his testamentary deed? As to the first question, I confess I have great doubts as to the remuneratory character of the conveyance; indeed, I rather think it was of the nature of a gift. Mr Harden married in 1829, and it is not until 1849 that he executed this disposition; while there was no material change of circumstances in the interval, but some money had come to him through the marriage, and he makes a *quid pro quo* in this conveyance. I can only regard it as a donation *inter verum et uxorem*, and as such revocable. Then, as to the second point, I do not regard it as free from doubt, though I am disposed to concur with your Lordship in the chair.

It has been often decided that in order to operate a revocation there does not require to be any overt act or deed, but merely something which is directly opposed to the donation, as, for instance, if in the clause in question Mr Harden had distinctly named the house; and this leads me to what has occasioned the doubt in my mind, namely, whether the language used was intended to apply to the house. I do not think, on the whole, that Mr Harden had the house at all, and moreover, had this been so, the conveyancer would not have mentioned it in so casual a manner. Therefore, disregarding the comma (and there are plenty of cases in point for that), I am led to think that a term has been used not after all so unusual, for "furniture" is applied to many things. Looking to the collocation of the words, and to the rule that *in dubio* the presumption is against revocation, I think there was no revocation intended here, and in favour of this view I am unable to resist the narrative of the conveyance itself.

As to the 5th clause, I look upon it as attended with even greater doubt; it is so general in its character.

Lord Gifford—I concur. As to the two questions mentioned by your Lordships, I am not clear as to the first, and give no opinion, although I think if Mr Harden had during his lifetime revoked the conveyance, it is very doubtful whether it could have stood. But that very doubt bears on the second question. The first deed is *inter vivos* to take instant effect; "truly belongs to my spouse" is the expression of the feeling of Mr Harden's own mind, and he wishes the means obtained through his wife "secured to her for her own proper use and behoof, exclusive of my *jus mariti*." Then he proceeds to effect his purpose by a conveyance of the house to Mrs Harden, "her heirs and assignees." All this points to intention. I do not stop to consider his power. What is now sought is his intention. Avoiding then any questions which might have arisen had Mr Harden become bankrupt, there must clearly be a distinct revocation of this conveyance, taking it as a donation. Did he so revoke it? The testamentary deed conveys "all my estate," but I do not think that at the date of his death the house was his. No doubt a donation *inter virum et uxorem* may be revoked by implication, that is to say, by doing anything which is inconsistent with the donation, but that is not so here. As to clause 4, I agree with Lord Ormidale, and would disregard the comma. I cannot read "house furniture," even with an interposed comma, as equivalent to "house and furniture.' I think, on the whole, that there was no *eniza voluntas revocandi*, and that, whether in law revocable or not, the conveyance of the house was not revoked.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find that

the disposition of the house No. 6 Doune Terrace, executed by the deceased Robert Allan Harden on the 1st of November 1849, in favour of deceased Mrs Mary Cleghorn or Harden, and her heirs and assignees whomsoever, and the infeftment thereon in her favour, has not been effectually revoked by his trust-disposition and settlement of 5th December 1873, and that the said house has not been effectually conveyed by the said trust-disposition and settlement to the parties of the first part to this case: (2) That the parties of the second part are entitled to the said house or to the price thereof, as heirs of the said deceased Mrs Mary Cleghorn or Harden: (3) That the parties of the second part are not entitled to payment of any sum corresponding to the amount of the annual rent or value of said house for the years that have elapsed since the death of the said Mrs Harden, and during Mr Harden's possession: (4) That the said second parties are not liable to repay to the said first parties the sum of £2000 mentioned in article 4th of the Special Case: (5) That James Cleghorn Moore of Burton Hall, Carlow, is entitled to the legacy bequeathed to him by Mr Harden."

Counsel for First Parties—Kinnear—Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Second Parties—Fraser—Gloag. Agents—MacRitchie, Bayley, & Henderson, W.S.

Thursday, March 16.

FIRST DIVISION.

[Lord Curriehill.

THE TRUSTEES OF THE FREE TRON CHURCH EDINBURGH *v.* MORRISON.

Process—Reclaiming Note—Reponing—Default.

A summons concluded for declarator that the defender was bound to implement a contract of sale of heritable subjects, and further, *inter alia*, for payment of the price, amounting to £5250. There was no real defence upon the merits, and when the case was in the Procedure Roll, upon 25th January 1876, counsel appeared and stated that both he and the agents had ceased to act. Intimation was then ordered to be made to the defender by registered letter, that a motion for decree would be made on 1st February, and on that day decree was pronounced in terms of the first declaratory conclusion of the summons, and *quoad ultra*, the Lord Ordinary being unwilling to pronounce an extractable decree, the case was continued for a fortnight. On 15th February another counsel, instructed by another agent, appeared and asked for delay, which was granted. When the case was called on the 18th no appearance was made for the defender, and decree was given in terms of the petitory conclusion of the summons. The defender prayed to be reponed, but in these circumstances, and on an expression of opinion that an omission to append the interlocutors to the reclaiming note was due to purposes of concealment, and that the object throughout seemed to be to get delay, the Court refused to repone him, and found him liable in additional expenses.

Counsel for Pursuers (Respondents)—Jameson. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defender (Reclaimer)—Burnet. Agent—R. A. Veitch, S.S.C.

Friday, March 17.

FIRST DIVISION.

[Lord Rutherfurd Clark.

DUDGEON *v.* THOMSON & CO.

Process—Suspension and Interdict—Breach of Interdict—Partnership.

A obtained interdict against B in a process of suspension and interdict for infringement of patent. Thereafter B assumed a partner under the firm of B & Co., and A brought a second process of suspension and interdict against the firm for infringement of the same patent. *Held* that as A's averments upon which his case rested were that B had personally, and apart from any question which might arise in regard to his partner, committed a breach of the interdict previously granted, the proper course was to bring a petition and complaint for breach of interdict, and not to ask the Court for a repetition of the previous interdict; and process *sisted*, to allow the petition and complaint to be brought.

Richard Dudgeon, London, on 31st January 1873 obtained interdict against William Thomson, engineer, Glasgow, in a process of suspension and interdict for infringement of a patent held by him for improvements in apparatus used in "expanding boiler-tubes." In that process the validity of the patent was brought in question by the pleas of the respondent, but his objections were not given effect to. Dudgeon now brought another suspension and interdict for infringement of the same patent against the firm of William Thomson & Co., in which he alleged, *inter alia*, that "infringements of the complainer's said patent have been, and are being, carried on by the said William Thomson, or at least he has been and is actively participating in the said infringements." The firm of Thomson & Co. consisted of, as appeared from their contract of copartnery, Thomson the respondent in the first process, and another partner, who had been taken into the concern after the date when the interdict was granted. The respondents, besides denying that they were infringing the patent, pleaded its invalidity on four different grounds, none of which were alleged in the previous process. The complainer answered that these pleas were excluded *exceptione res judicata*, in respect that they were either proponed and repelled, or competent and omitted, in the first action. The Lord Ordinary repelled the plea of *res judicata*, and a reclaiming note was presented.