

Walker & Co., or to any of the partners of that firm, or to any one on their behalf, by Thomas Harrison or Matthew Duncan, their foreman, or other person or persons employed by them in connection with the machinery mentioned on record, relating or referring to said machinery, or to the articles or things supplied by Hannay & Sons to Tannet, Walker & Co., or to any matter mentioned or referred to on record in either action prior to 19th April 1872." "(4) All letters, memoranda, telegrams, or written communications between Mr Benjamin or Walker, of the firm of T. W. & Co., to his other co-partners in the firm or to the firm, or by the firm or any one or more of the co-partners thereof to him, relating to the machinery mentioned on record, or to the furnishing or fitting of the same, prior to April 19, 1872."

The pursuers objected to these two articles.

At advising—

LORD PRESIDENT—The case of *Livingstone v. Dinwoodie* is an important authority, because it was deliberately considered, and after consultation with the other Division; but it is a case which differs from the present, and I am quite satisfied with the distinction drawn by Mr Watson. The letters of workmen which are asked for, if not evidence of themselves, may be made so, and therefore I think the rule laid down in *Livingstone v. Dinwoodie*, does not apply. But if these letters can be made evidence, they may be very important. As regards the fourth article of the specification, however, I do not feel disposed to allow it. I don't think that communications between the partners can be recovered except on very special grounds, and none such have been assigned here. If one of the partners had been sent to another country with certain instructions, it might have been necessary to discover from correspondence what these were, but nothing of that kind is suggested here, and I am for refusing article four.

The other Judges concurred.

Counsel for Tannet, Walker & Co.—Solicitor-General (Clark), and Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Hannay & Sons.—Balfour and Watson. Agents—Webster & Will, W.S.

Saturday, July 19.

## SECOND DIVISION.

[Lord Jerviswoode, Ordinary.

MILLER'S TRUSTEES v. THE LEITH POLICE COMMISSIONERS.

*General Police and Improvement (Scotland) Act 1862—Private Street—Common Access—Right of Appeal.*

Where a piece of ground situated within a Burgh was in an open condition, accessible to foot passengers or carts going to premises, the entrance to which was on either side of the piece of ground, and where the premises were severally occupied, and a lamp had been placed for the convenience of the public resorting to the place.—Held (1) That the piece of ground was a private street, as defined by the General Police Act. (2) That the Commissioners hav-

ing entered upon the piece of ground and executed certain works upon it without objection from the proprietors in the manner pointed out by the Police Act, their procedure was final.

This suit, raised at the instance of the trustees acting under the marriage contract of Christian Miller, merchant, Montrose, and Miss Watson, against the Leith Police Commissioners, concluded that "It ought and should be found and declared, by decree of the Lords of our Council and Session, that all and whole that piece of ground lying within the lines of Pattison Street, Leith, and which had been intended to form a continuation of that street towards Poplar Lane, extending in length from a line drawn at right angles across Pattison Street at the eastern gable of the tenement of houses on the north side of that street onward to Poplar Lane, pertains heritably to the pursuers, but jointly and in common with the successors of John Hutton, merchant in Leith; and the defender ought and should be decreed and ordained to cede possession of a portion of the said piece of ground extending from the foresaid line a distance of eighty-five feet or thereby onward towards Poplar Lane, taken possession of by the said commissioners, and formed or attempted to be formed into a continuation of Pattison Street, and to restore the same to the condition in which it was previous to its having been taken possession of as aforesaid."

The pursuers' statement of facts was,—“the pursuers are proprietors of and are infeft in certain subjects near Pattison Street, Leith, and *inter alia*, they are proprietors, but jointly and in common with the successors of John Hutton, merchant in Leith, of all and whole that piece of ground lying within the lines of Pattison Street, and which had been intended to form a continuation of that street towards Poplar Lane, extending in length from a line drawn at right angles across Pattison Street at the eastern gable of the tenement of houses on the north side of that street onward to Poplar Lane. It was provided that the said joint-proprietor should have full right and liberty to use the said piece of ground either as a private enclosure or as a private road communicating to their own properties, to which no one else should have right, or to throw it open as a public thoroughfare, communicating between Poplar Lane and Elbe Street, their using it in one way by no means precluding them from afterwards using it in any other way they may choose, and their having thrown it open as a public thoroughfare not even precluding them from resuming close and private possession thereof; but declaring that any one of their number should have at any time right to insist upon the said piece of ground being thrown open as a public thoroughfare and continuation of Pattison Street in the manner originally intended. At a distance of about 9 feet east from the eastern gable before referred to, a wall was built across the intended line of Pattison Street, having a gate for the convenience of those having right of access. This gate was removed some years ago, but the piece of ground was never thrown open to the public. It remains the private property of the joint-proprietors, none of whom have ever consented or wished that it should be thrown open as a public thoroughfare. Sometime about the end of June or beginning of July last, the Police and Improvement Commissioners of

Leith, or others acting by their orders or for whom they are responsible, entered upon the said piece of ground and removed the wall. They have in part lowered the level of the said piece of ground, and have causewayed it for a distance of about 85 feet in the direction of Poplar Lane, and they have attempted to throw that portion of the pursuers' joint property into a public thoroughfare. By lowering the level of the said piece of ground the Commissioners have interfered with the access to the pursuers' properties, and have caused damage thereto."

The defenders in their answers stated that "(1) The 'General Police and Improvement (Scotland) Act, 1862,' was adopted in whole by the Provost, Magistrates, and Council of the burgh of Leith in October 1862, and they are now the Commissioners for executing the provisions of said statute within that burgh. (2) The place or piece of ground forming the continuation of Pattison Street, situated within the burgh of Leith, has for many years formed part of and been known as Pattison Street, and has been known by no other name. (3) Pattison Street extends at least from Elbe Street to the wood-yard at the end thereof, entering from Poplar Lane, as shown on the plan No. 19 of process. For many years it was accessible both from Poplar Lane and Elbe Street, from and to which it formed a common thoroughfare. It is a private street within the meaning of clause 3 of the Act foresaid. It is situated within the burgh of Leith, and does not form part of any harbour, railway or canal station, depot, wharf, towing-path or bank. It has for years been used by carts, and been accessible to the public from a public street, and has formed a common access to lands and premises separately occupied. It had not before the adoption of said Act been well and sufficiently paved and flagged by the owners of premises fronting or abutting on the same, and had not been maintained as a public street; and at the date of the adoption of said Act by the said Commissioners the said street was formed or laid out, but was not, together with the footways thereof, sufficiently levelled, paved, or causewayed, and flagged, to the satisfaction of the said Commissioners. (4) At a meeting of the said Police Commissioners, held on 26th February 1872, they directed Mr Beatson, the surveyor of streets and buildings, to prepare plans for paving Pattison Street, and to submit them to another meeting. Accordingly at another meeting, which was held on 14th March 1872, the plans and estimates of expense prepared by Mr Beatson were submitted; and on or about 8th April 1872, the Commissioners, after consideration of the same, resolved to cause said street to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged, and channelled according to said plans; and the clerk was directed to give notice by advertisement in the *Daily Scotsman*, *Leith Herald*, and *Leith Burghs Pilot* newspapers, circulating in the burgh, of the intention of the Commissioners to proceed with the said works. At the date of the said resolution and notice the said private street was not, together with the footways thereof, sufficiently levelled, paved, or causewayed, and flagged to the satisfaction of the said Commissioners. (5) The following notice was thereafter duly advertised on or about the 13th day of April 1872, in the foresaid newspapers, in terms of the 397th clause of the said Act:—"Burgh of Leith.—Whereas Hope

Street, North Leith, and Pattison Street, being private streets, as defined in "The General Police and Improvement (Scotland) Act, 1862," formed or laid out at or before the adoption of the said Act by the Magistrates and Council of the said burgh, are not, together with the footways thereof, sufficiently levelled, paved, or causewayed, and flagged, to the satisfaction of the Commissioners, for the purposes of the said Act, acting in and for the said burgh, Notice is hereby given that it is the intention of the said Commissioners to cause said streets and the footways thereof to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged and channelled, according to plans thereof, to which reference is hereby made, and which may be seen within the Town-Hall, Charlotte Street, Leith." (6) On or about the 13th day of May 1872, the clerk laid before a meeting of the said Commissioners a copy of each of the newspapers in which the foresaid notice had been advertised, and certified that no person had appeared to object or be heard thereanent. The meeting therefore resolved to proceed with the intended works, and ordered the execution thereof. The said works were accordingly forthwith begun, and on or about 5th August 1872 the burgh surveyor reported that the same had been completed. (7) By the 157th clause of the said General Police Act it is provided 'That as regards the paving or causewaying and maintaining streets, public or private, including the footways thereof, it shall be lawful for any person whose property may be affected, and who thinks himself thereby aggrieved, to appeal to the Sheriff in manner after provided.' And it is thereafter provided by clause 396 of said Act:—"Any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the Commissioners relating thereto, may, at any time within seven days next after the making of any such order, give notice in writing to the Commissioners that he intends to appeal against such order to the Sheriff, and along with such notice he shall give a statement in writing of the grounds of the appeal; and if within four days next after giving such notice the party grant bond to the Sheriff, with two sufficient cautioners to the satisfaction of the Sheriff, to abide the order of the Sheriff, and pay such costs as shall be awarded by the Sheriff thereupon, the work so appealed against shall not be begun until after the judgment of the Sheriff upon such appeal; and the Sheriff, upon due proof of such notice, and upon such caution being found, shall hear and determine the matter of the appeal, and shall make such order thereon, either confirming, quashing, or varying the same, and shall award such costs to either of the parties as the Sheriff in his discretion thinks fit; provided always that the appellant shall not be heard in support of such appeal unless such notice and statement have been given and such caution found as aforesaid, nor on the hearing of such appeal shall he go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid.' By the 397th clause of the said Act it is further provided:—"And in respect to appeal as to all other matters and things which the Commissioners are by the police provisions of this Act empowered to do or perform, or to authorise to be done or performed, and the cost attending which falls by this Act to be provided for by way of private improve-

ment assessment, the Commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing, either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting hand bills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office, or delivered personally, or at their dwelling-houses, to the individuals having interest, as the Commissioners shall think proper; and it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the Commissioners in respect of such matters or things in the manner and to the effect herein last before provided and directed; and if such matter or thing shall not be made the subject of appeal to the Sheriff, or being appealed shall be allowed by him, the Commissioners may proceed with the same, and levy the assessments in reference thereto authorised by this Act; provided always that all such appeals provided for in this and the immediately preceding clause, and all other appeals to the Sheriff allowed by this Act not otherwise provided for, shall be disposed of summarily, and the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocacy, or in any manner of way.' (8) The pursuers did not make any objections against the said intended works, nor did they seek to be heard before the said Commissioners upon any objections; and they did not appeal against the foresaid order for the execution of said works, nor did they take any steps competent to them under the said Act or otherwise against the said order, or the execution of the said works; and the proceedings of the said Commissioners have now become final, and are not subject to review in any manner of way."

The pleas in law for the pursuers were—“(1) The pursuers, jointly with the successors of the said John Hutton, are, in terms of their titles, the sole proprietors of the said piece of ground. (2) The Police Commissioners had no right to enter upon the said piece of ground, or to interfere with it in the manner contended on, without the consent of the proprietors. (3) The Commissioners are bound to restore the said piece of ground to the condition it was in previous to their operations. (4) They are liable in reparation for the damage caused by these operations.”

The pleas in law for the defenders were—“(1) The action is incompetent, and should be dismissed; *alternatively*, the action is irrelevant, and should be dismissed. (2) The pursuers have not a completed feudal right to subjects in question, and are not entitled so insist in the present action. (3) *Esto* that the pursuers have a feudal right, they, being *pro indiviso* proprietors, are not entitled to sue in this action without the concurrence of their co-proprietors. (4) The pursuers having failed to object to the execution of the said works in manner provided by the Act, the whole proceedings of the Commissioners are now final, and not subject to review, and the pursuers are barred from complaining of or objecting thereto. (5) The piece of ground claimed by the pursuers being a private street within the meaning of ‘The General Police and Improvement

Scotland Act, 1862,’ the Police Commissioners were entitled to execute the works complained of. (6) The Police Commissioners having given statutory notice of their intended operations, and the pursuers having made no opposition thereto, the Commissioners were entitled to proceed with and to execute the said operations. (7) The defender is entitled to expenses.”

On 3d December 1862, the Lord Ordinary, after a proof, pronounced the following interlocutor:—“The Lord Ordinary, having heard counsel in the Procedure Roll, and making avizandum, and considered the debate and whole process, Sustains the fourth plea in law stated on behalf of the defender, and therefore dismisses the action, and decerns: Finds the pursuers liable to the defender in expenses, of which allows an account to be lodged, and remits to the Auditor to tax the same, and to report.

“*Note*.—The Lord Ordinary has here come to the conclusion, after having the benefit of a full argument on the whole cause, that the plea which he has sustained as above is well founded; and if this be so, it follows that there is no call to go, and indeed no propriety in going, further.”

The pursuers reclaimed.

The Court granted a proof before answer as to the fact of the street being truly private property.

At advising:—

LORD COWAN—There is considerable difficulty in arriving at the true grounds on which the judgment of the Court in this case ought to proceed, not less from the obscure terms in which the provisions of the Police and Improvement Act founded on by the defenders are expressed, than from the peculiar circumstances in which the ground alleged to form part of Pattison Street is placed, having regard to the recent possession of it as appearing from the evidence.

In the month of April 1872 a notice was duly advertised in terms of the 397th clause of the Act, that “Pattison Street,” with two other private streets which were mentioned, was to be made free from obstruction, and to be properly levelled and paved by the Commissioners acting under the Police and Improvement Act 1862. No party appeared, as required by the statute in every case where private property might be affected, and where any one might think himself aggrieved by the proposed operations; and in this situation the Commissioners proceeded with the execution of the works, and these were reported by the surveyor to have been completed on 5th August 1872.

The pursuers do not seem to have been aware of these operations until the beginning of July, when a communication was addressed by their agent to the Town-Clerk of Leith, remonstrating against the ground being operated on as part of Pattison Street, inasmuch as it was alleged to be private property, and, being such, illegally encroached upon by the Commissioners. On this remonstrance a report was required from the burgh surveyor, who reported “that the street was lighted with a public lamp beyond the point where the wall (alleged to be the west boundary of the ground in question) stood, thus showing that it was open and used by the public,” to a line shewn on the plan, up to which the operations of the Commissioners were intended to be carried. And in a letter addressed to the agent of the pursuers on 10th July 1872, it was intimated by the burgh clerk, “that the street, so far as the Commissioners

propose to deal with it, was open to and used by the public before they gave notice of their intention to pave it in terms of the Police Act." This led to the action of declarator now before the Court at the instance of the pursuers. It concluded that "the piece of ground lying within the line of Pattison Street, Leith, and which had been intended to form a continuation of that street towards Poplar Lane," extending as therein described, "pertains heritably to the pursuers, but jointly and in common to the successors of John Hutton, merchant in Leith;" and this conclusion is followed by other relative conclusions, to the effect of having the ground restored to the condition in which it was before the operations complained of. The defences to this action, on its merits, were, *first*, that the pursuers ought to have objected to the proceedings of the Commissioners in the manner pointed out by the Police Act for parties to obtain redress whose property is affected and who are aggrieved by their proceedings; and that, not having been objected to, what was done was final, and could not be made the subject of review in this Court; and *second*, that the piece of ground in question was part of a "private street," within the meaning of the Police Act, with which the Commissioners were entitled to deal under the Act by execution of the works complained of.

The Lord Ordinary found on 3d December 1872 that the first of these pleas was well founded, and dismissed the action, because, as stated in his Lordship's note, the statutory remedy not having been adopted, "it follows that there is no call to go, and indeed, no propriety in going farther."

Under the reclaiming note presented against this interlocutor, the Court, on hearing parties, considered that the question of jurisdiction, and the finality of the proceedings by the defenders, depended upon the result of an enquiry into the fact of the ground, when interfered with by the Commissioners, being truly "private street," or private property belonging exclusively to the pursuers. For, on the one hand, if the ground was possessed by the pursuers as their private exclusive property, and not street at all in any proper sense, it was manifest that the Commissioners by interfering with it might justly be held to have exceeded their statutory power, and in that case to have no defence to this action, on the principle of construction recognised by this Division of the Court in the case of the *Perth Commissioners, v. The Lord Advocate*, 7th December 1869, 8 M'Pherson, 244. And, on the other hand, it was considered that if the ground, having regard to the condition in which it was at the date of the operations, came within the description of "private street," the defence in that view of it must be sustained, and this action dismissed, as found by the interlocutor under review. A proof "before answer," was accordingly allowed, and the recent argument had regard to the import of the evidence, in its bearing upon the two views of the case now stated.

To understand fully the effect of the evidence on the questions at issue, it is proper to have in view the definition of "private street," contained in the interpretation clause of the statute.

There is first given a definition of the word "street," as used in the statute, which is declared to mean a public street, and to extend to and include "any road," &c., and so forth; "thorough-

fare and public passage, or other place within the burgh used either by carts or foot passengers, not being a 'private street.'" Then there is given the definition of "private street" in these terms: "The expression 'private street,' shall mean any road, street, or place within the burgh (not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank), used by carts, and either accessible to the public from a public street, or forming a common access to lands and premises separately occupied."

There is no doubt that the ground in question is a place within a burgh, and that it does not form part of any of the subjects described in the parenthetical portion of the clause, so that the inquiry resolves into the applicability of the other descriptive terms—*i.e.*, whether the ground is "used by carts," and whether it is accessible to the public from a public street, or forms a common access to lands and premises separately occupied." There is no mention in this definition of the place being "thoroughfare and public passage," as in the description of a public street. All that is required is, that the ground is used by carts, and *alternatively* either accessible to the public or forming a common access. Then, having reference to this definition, the 150th section "for the convenience of the inhabitants and for the public advantage," empowers the commissioners to take such measures as were here resolved on, "where any private street or part of a street is at the adoption of this Act *formed or laid out*, or shall at any time hereafter be formed or laid out," and has not been "levelled, paved, or causewayed and flagged to their satisfaction." The question is, whether the evidence that has been led brings the ground within the definition of private street thus given.

Now (1) one thing is clear from the terms of the titles of the pursuers, that Pattison Street was intended to be continued through the ground in question eastward to Poplar Lane, and that any one of the proprietors might and may at any time insist on its being opened as a thoroughfare or public passage from Elbe Street on the west to Poplar Lane on the east, and that from an early date there were walls built on the north and south sides of the ground all through, marking it out as the intended continuation of Pattison Street. Unfortunately the original feuing plan has fallen aside, and the precise date when this took place has not been ascertained. The side walls, however, north and south, in continuation of what is certainly Pattison Street, have existed from the earliest times. To this extent, although there was no proper formation of the street, the ground may be considered to have been laid out as part of Pattison Street, and to be so appropriated and used whenever any of the proprietors should choose to insist on its being opened up as a thoroughfare, and it will be observed that the words "formed or laid out" are not conjunctive but alternative.

Again (2) as to the state of the ground—There is no doubt that it was at one time enclosed by means of a wall running from the east end of Mrs Munnoch's house, on the north across the roadway or line of street to the south, as described by the witnesses, and delineated on the plan between the letters S. T. on street. This is proved beyond question, and at that time access was obtained to the ground thus enclosed by a gate-

way in the wall, the gate being always kept locked, and the key obtained at Mrs Munnoch's by all parties entitled to have entrance. But while this was the state of matters at an earlier period, it is no less certain on the proof that from and after 1858, or at all events for ten or twelve years prior to 1872, this wall, except at the north side of it, was broken down and the gateway removed, so as to form no obstruction to access into the previously enclosed ground, whether by foot passengers or by carts having occasion to go to the premises, the entrance to which was on the one side or other of this piece of ground. Such lands and "premises" are "severally occupied." There are at least five or six such subjects—an "asphalter's yard," a "coal yard," a "wood yard," a "stable," besides other yards, &c., within what was once enclosed ground. A public lamp has been in recent times placed for the convenience of the public resorting to this place or street. Then it is clear beyond controversy that this ground in its now open condition forms a common access to those separately occupied premises. I hold these facts to be established by the proof, and it is for determination whether they are not sufficient to bring the ground within the statutory description of private street.

No thoroughfare or public passage from Elbe Street to Poplar Lane is proved to exist; but that is not required in the case of a private street as defined by the statute. The ground is used by carts, in so far as the occupiers of the several subjects require for the purposes of their possession to have carts to and from their premises. The ground as a continuation of the west end of Pattison Street is accessible from a public street, and it is a common access of the description set forth in the definition. The object contemplated by the statute appears to have been that such common accesses should be brought into such a state of repair as to allow them to be used by those of the public having occasion to resort to them with safety and convenience. And it cannot be doubted that this object will be fully served by the operations resolved on by the commissioners in reference to this ground.

It was strongly pressed on us that by these titles this ground could not be opened up as a street without the express consent of one or more of the co-proprietors. But consent to the effect stated may be inferred from their acts and deeds, or from their allowing the ground to fall into that condition and to be used in such a manner as, having regard to its proximity to the west portion of the private street, to bring the ground in its present state within the statutory definition.

On the whole, therefore, although the question is not unattended with difficulty, I hold that the definition of private street does apply to this common access to the several premises entering from the ground in question. And I do not think that the pursuers have any good ground to complain of the general terms of the notice given by the commissioners. It is in evidence that the several premises belonging to them entering from the ground in question have all along been described as situated in Pattison Street. Both in their own receipts to their tenants and in their rental books, as also in the public assessment receipts for the rates paid by them for these premises, they are so described. Notice of operations being intended to be done on the private street

called Pattison Street, therefore, was due statutory notice, on the assumption always that the ground is to be regarded as part of a private street, and that the reasoning I have stated is sound. The result is, that in the state of the facts established by the proof, the Lord Ordinary's interlocutor is well founded.

The other Judges concurred. The Court affirmed the judgment of the Lord Ordinary.

Counsel for Pursuers—Adam and Marshall.  
Agents—Adam Kirk, & Robertson, W.S.

Counsel for Defender—Harper and Solicitor-General. Agent—J. C. Irons, S.S.C.

Wednesday, July 16.

## SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

### BREADALBANE TRUSTEES v. BREADALBANE AND OTHERS.

*Trust Settlement — Construction — Application of Rents.*

Circumstances in which *Held* (1) that trustees were bound to retain the rents of certain unentailed lands as a *surrogatum* for sums taken from the capital of the trust-estate and given as legitim to a beneficiary in lieu of the provisions in the trust-deed; (2) that certain annuities fell to be debited to the revenue of the trust-estate.

John, first Marquess of Breadalbane, died on 29th March 1834. He was survived by his widow, the Marchioness of Breadalbane, who died on 25th March 1845, and by three children, viz., John Viscount of Glenorchy, who became second Marquess of Breadalbane, and died 8th November 1862; Mary, Marchioness of Chandos, afterwards Duchess of Buckingham, who died 28th June 1862; and Lady Elizabeth Pringle, wife of Sir John Pringle of Newhall. On the 29th January 1823 the first Marquess of Breadalbane executed a trust-disposition and settlement of his lands and property, heritable and moveable, of every description, in favour of certain trustees. An addition of 24th October 1828 substituted other trustees for some of those nominated in the deed; and upon 11th November 1828 he executed another deed in the same terms as the former, giving effect to the changes made by the addition of 24th October in the nomination of trustees. The second disposition contained a clause declaring that it should be held as a duplicate copy of the first and of the addition, with full power to his trustees to make use of either deed as they should think fit. A codicil, dated 26th August 1829, is added to the trust-deed of 1828. His Lordship also left a holograph deed of legacies, dated 24th January 1829, with codicil, dated 30th June 1829. By a codicil of 26th August 1829 it is provided that the trustees, "instead of investing the free rents of my unentailed lands and estates in manner before-mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, Lady Elizabeth Campbell, now Pringle, and Mary Marchioness of Chandos, equally between them while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them are