The defender maintained, and the Sheriff has found, that the action was irrelevant, because under the lease the defender—the landlord—was only bound to "have" the mineral railway duly fenced, and the pursuer himself—the tenant—was thereafter "to maintain and uphold (the fences) in the like condition," and because it was not disputed that the ground occupied by the mineral railway was duly fenced at the date of pursuer's entry. Now, I do not read, as the Sheriff does, the provision as to fencing ground excepted from the lease or resumed during it. It would, I think, be an unreasonable interpretation of the lease to hold that if the landlord during the currency of the lease resumed a considerable portion of the ground for feuing or planting, and thereby added a large amount of fencing, the tenant was to maintain that fencing. In the case of a feu the fence erected might be a wall round the feu, or other expensive boundary fence, yet the landlord's construction is that the tenant must maintain that wall.

The clause provides that the landlord is "to have the ground excepted or taken out of the lease always duly fenced, either by himself or his tenants in such ground." That means that he must keep such excepted or resumed ground fenced, maintaining the fences himself or through his tenants in such excepted or resumed ground, and not that the pursuer should maintain these fences.

I propose that we should recal the Sheriff's interlocutor, affirm the Sheriff-Substitute's judgment, and remit to him to allow proof of new.

LORD YOUNG — I am of the same opinion. I think that the defender's plea that the action is irrelevant should be repelled. I think that the note of the Sheriff shows wherein his error lay. He says that the defender's duty was to "have" the excepted or resumed land duly fenced, and not to maintain the fences. Now, I am of opinion that the declaration that the defender's obligation is "to have the ground excepted from or taken out of the lease always duly fenced either by himself or his tenants in such ground," signifies not only that he must have sufficient fences put up but must maintain them.

LORD MONCREIFF — I am of the same opinion. There are in this lease two distinct and separate provisions as to maintaining fences. The first relates to excepted or reserved ground. The proprietor is to be bound to "have" such ground "always duly fenced either by himself or his tenants in such ground," *i.e.*, the mineral tenants. The second relates to the fences of the farm property so-called. With regard to these the proprietor's obligation is "to put the houses and fences upon the said lands into tenantable order" as at Martinmas 1881, the term of entry, and the tenant's obligation, that being done, is "to maintain and uphold the same, and any additional buildings, fences, dykes, and roads which may be made on the lands." The Sheriff has failed to note that those clauses relate to different matters, and also has given no effect to the word "always" in the first clause.

I think that we should recal the Sheriff's interlocutor and affirm that of the Sheriff-Substitute.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the said interlocutor appealed against: Affirm the interlocutor of the Sheriff-Substitute dated 22nd February 1898, and remit the cause to the said Sheriff-Substitute to proceed therein as accords," &c.

Counsel for the Pursuer—H. Johnston, Q.C.—John Wilson. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Defender — Sol.-Gen. Dickson, Q.C.—M'Clure. Agents—Drummond & Reid, W.S.

Wednesday, July 6.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

PURVES' EXECUTOR *v.* PURVES.

Succession—Vesting—Survivorship Clause—Vesting Suspended till Event which Becomes Impossible.

By her last will and testament a testatrix bequeathed £600 to each of four nieces, who were sisters, and bequeathed her silver plate, personal belongings, and all the residue of her estate to A, one of the nieces. She provided that there should be no division of the estate till A attained the age of twenty-one, and also that, should any of the nieces die before A attained the age of twenty-one, then "said share" should "be divided equally between the surviving sisters." A died unmarried before attaining the age of twenty-one. *Held* that no right to any part of the testatrix' estate vested in A, vesting being suspended in respect of the survivorship clause, that the whole interest in that estate destined to her passed to her surviving sisters, that the suspension of vesting ceased on her death, and that the sisters' original legacies, along with their respective shares of what was bequeathed to A, vested in them and became payable at that date.

Miss Jessie Jolly, who resided at the Cottage, Dunnet, in the county of Caithness, died on 5th June 1894, leaving a holograph last will and testament dated 2nd April 1894. After providing for payment of debts and certain legacies the will proceeded as follows:—"I bequeath to my nieces Isabella, Frances, Janet, and Christina, the the sum of £600 each = £2400. To my

nephew Peter Purves the sum of £300. To my nephews James, Thomas, and William, the sum of £250 each = £1050. My silver plate, personal belongings, and all the residue of my estate to my niece Christina Purves. But there shall be no division of my estate till my niece Christina Purves attains the age of twenty-one, the interest being employed as much as possible to pay off all debts and charges left by me; but when these are discharged, each year the interest accruing shall be paid to each of the different legatees according to the amount of capital belonging to each; and should any one of my said nieces die unmarried before my niece Christina Purves attains the age of twenty-one, then said share shall be divided equally between the surviving sisters; and in like manner should anyone of my nephews die, then his share shall be divided among his surviving brothers. Now, it is to be understood that such provisions are purely alimentary, and that it is illegal to mortgage or pledge in any way the provisions made for my several nieces and nephews in this will; but should any of them, in defiance of this proviso, insist on becoming security for any one, or in any way mortgaging the provision left for them by me, then the nephew or niece who acts in that way shall forfeit all right to his or her share, and the said share shall be paid by my trustees to the managers of the Royal Infirmary of Edinburgh for the time being, for the purposes of that institution. . . ." Then followed a request to certain parties named to act as her trustees, and then this clause—"I should also like my executors to continue my present investments as far as they seem safe, and absolving from any responsibility in the matter. When my niece Christina Purves reaches the age of twenty-one, each one share will become his or her absolute property, and can be disposed of by will or otherwise as the legatees desire."

Christina Purves, the residuary legatee under Miss Jolly's will, died in minority, unmarried, and intestate, on 29th April 1896. If she had lived she would have attained the age of twenty-one on 9th July 1900.

In consequence of the death of Christina Purves in minority questions arose as to the distribution of the estate of the testatrix, and the present action of multiplepoinding and exoneration was raised by Miss Jolly's sole accepting and acting executrix.

Claims were lodged for (1) Mrs Isabella Jolly or Purves, the sole surviving sister of the testatrix, with consent of her husband, and Alexander M'Donald as her marriage-contract trustee, who claimed the legacy of £600 bequeathed to Christina Purves, the silver plate and personal belongings bequeathed to her, and the residue of Miss Jessie Jolly's estate, on the ground that these bequests had fallen into intestacy, and that Mrs Isabella Jolly or Purves was Miss Jessie Jolly's sole next-of-kin and representative *in mobilibus ab intestata;* (2) for Isabella, Frances, and Janet Purves, who claimed £600 each, with interest from the date of Christina's death, an equashare each of the £600 beqeathed to Christina Purves, with interest from the date of Christina's death, and an equal share of the residue of the estate of Miss Jessie Jolly, including her silver plate and personal belongings, or alternatively a share of the provisions in favour of Christina as three of her next-of-kin; (3) for Christina Purves' executor-dative, who claimed the provisions in her favour under Miss Jessie Jolly's will on the ground that they vested in her *a morte testatoris*, or alternatively the residue in respect that it so vested; (4) for Peter, James, Thomas, and William Purves, who claimed £1050, to be paid to the survivors of them on 9th July 1900, with interest, or otherwise £1050 unconditionally with the proportion of interest applicable thereto; and (5) for Isabella Swanson and Mrs Elizabeth Robertson or Gunn, with consent of her husband, and her husband for his own right and interest, who claimed £100 and £20 respectively, being the amounts of legacies bequeathed to them by the testatrix.

The claim No. 1 was not ultimately persisted in, and the claim No. 5 was not disputed.

On 28th March 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that the bequests in the last will and testament of the late Miss Jessie Jolly in favour of her nieces and nephews did not vest *a morte testatoris;* (2) that no right to a share of her estate vested in the now deceased Christina Purves; (3) that the whole interest in said estate destined to her passed to her sisters Isabella, Frances, and Janet under the destination in their favour; (4) that the provisions in favour of the nieces and nephews of the testatrix vested in them on the death of the said Christina Purves; and (5) are now payable to them: Therefore (I.) sustains the claims of the said Isabella, Frances, and Janet Purves, (1) to £600 each, (2) to £600 equally between them, and (3) to the residue of the estate of the testatrix, including her silver plate and personal belongings: (II.) Sustains the latter or alternative claim for Peter, James, Thomas, and William Purves: (III.) Sustains the claim for Isabella Swanson and Mrs Elizabeth Robertson or Gunn and Alexander Gunn for present payment of £100 and £20: Repels all the other claims, and ranks and prefers the claimants accordingly: Finds that the expenses of all the claimants are payable out of the estate," &c.

Opinion.—"This will bequeaths £600 to each of four nieces, £300 to a nephew, and £250 to each of three other nephews, and the residue to Christina, one of the four nieces, but payment is postponed until Christina attains the age of twenty-one. Thus far there is nothing to prevent vesting *a morte testatoris*, but then there follows the clause on which the present question depends—'Should any one of my said nieces die unmarried before my niece Christina Purves attains the age of twenty-one, then said share shall be divided equally be-

tween the surviving sisters.' This is a proper survivorship clause, and I think there is no doubt that it prevented vesting *a morte testatoris* of the 'share,' whatever that may mean. It was argued that the 'share' referred only to interest, but in my opinion that is not so. I think it refers to capital sums, not interest, and I do not think that is doubtful. I think that as none of the nieces have been married that clause operated suspension of vesting until Christina's death. I consider that it applied to Christina as well as to the other nieces. She cannot be excluded from its operation without doing violence to its express language. Hence the share destined to Christina had not vested in her when she died, and the destination-over in favour of her sisters Isabella, Frances, and Janet took effect. I am further of opinion that Christina's share referred to in this clause, and falling under the ulterior destination, included all that was bequeathed to her. The term 'share' is not used in the deed before. It was a share of the testatrix's estate, and I perceive no legitimate reason for restricting the meaning of the word. There are no doubt plausible grounds for the suggestion that it was not intended to include in the ulterior destination the testatrix's residue, and so in the event of Christina's death intestate, preferring her sisters to her brothers, or the testatrix's belongings and silver plate, especially as no provision is made for the division of these, but such suggestions are conjectural. There are no words in the will to justify them, and it would be making another will, and not construing this will, to give effect to them.

"The next question is, whether the suspension of vesting has ceased by the death of Christina, and I am of opinion that it has. The testatrix's words refer not to a date but an event. They do not postpone division until the date when Christina shall attain twenty-one, but until she attains twenty-one that event cannot happen. The words express a suspensive condition which has become impossible, and I am of opinion that they must, in accordance with an elementary rule in the construction of wills, be held *pro non scripto*, and therefore as deleted from the deed at the date of her death.

"The same conclusion is reached on what I consider a legitimate construction of the clause, for I hold it to mean that the division of the estate should not take place until Christina attained twenty-one 'if she survived.' That qualification must have been in the mind of the testatrix, for she cannot be supposed to have overlooked the possibility of Christina's death. The result must be that the event to which the survivorship clause and destination-over applies has happened, and that the provisions in favour of the surviving nieces have therefore vested. The provisions in favour of the nephews have plainly been affected in the same way, and they also have vested.

"No decisions very closely applicable were quoted. The case of *Mackie* v. *Gladstone*, March 14, 1876, 13 S.L.R. 368, is the most in point. There it was held that the residue of an estate directed to be paid to two sons when the younger attained twenty-five, with a survivorship clause, was payable to the other on the death of the younger before attaining twenty-five. That case, although somewhat different in its circumstances, seems to support my view of the present case — *Cattanach* v. *Flinn's Executors*, July 2, 1858, 20 D. 1026; and *Maitland's Trustees* v. *M'Diarmid*, March 15, 1861, 5 Macph. 732, were also quoted as touching on this question. There appears, however, to be nothing in them opposed to that view. In *Finlay's Trustee* v. *Finlay*, July 6, 1886, 13 R. 1056, payment of a provision was authorised before the date fixed in the deed, the reason for postponing payment having come to an end. That decision seems to have proceeded on a similar principle.

"From the grounds of this judgment it follows that the bequests in the testament may now be paid. There is no one who can have any interest to object to such payment. I have no need to consider the question which would have arisen between Christina's next-of-kin and her executor, had I held that any part of the estate had vested in her."

Christina Purves' executor-dative reclaimed, and argued—The provisions in favour of Christina Purves vested *a morte testatoris*. The so-called survivorship clause was not, properly speaking, a survivorship clause at all. The gift here was an absolute gift, and vesting was not postponed. In any view, the survivorship clause did not apply to the residue or the plate and personal belongings. The word "share" only applied to the legacy of £600. It could not be maintained that the plate and personal belongings were not intended to vest at once.

Argued for the claimants and respondents Isabella Purves and others — The Lord Ordinary's judgment was right. Vesting was postponed in respect of the survivorship clause. The word "share" applied to the whole interest of each beneficiary.

Counsel for the claimants and respondents Peter Jolly Purves and others were in attendance but did not address the Court.

LORD JUSTICE-CLERK — This will was drawn by the testatrix herself. Generally speaking it is very clearly expressed. Everything that she had is disposed of by bequeathing certain sums to various persons, including Christina, and the residue, with her silver plate and personal effects, to Christina. After making these bequests she proceeds as follows—"but there shall be no division of my estate till my niece Christina Purves attains the age of twenty-one, the interest being employed as much as possible to pay off all debts and charges left by me, but when these are discharged each year the interest accruing shall be paid to each of the different legatees according to the amount of capital belonging to each." It is plain from this that she meant her estate to be dealt with as a trust.

Then she provides as follows—"and should any one of my said nieces die unmarried before my niece Christina Purves attains the age of twenty-one, then said share shall be divided equally between the surviving sisters." What she means is, that if any niece shall die before a particular event happens, what would have come to that niece if she had survived the event is to be divided equally among those nieces who survive the event. That that is a survivorship clause I think there can be no doubt. It is so expressed. What happened was that Christina died unmarried without attaining the age of twenty-one. It therefore became impossible for the event which the testator mentioned (any niece dying unmarried before Christina attained 21) ever to happen. That having become impossible, I think that what Christina would have taken had she survived fell to be divided among the other nieces. I am, therefore, of opinion that the Lord Ordinary was right in the conclusion at which he arrived.

It was urged that Christina was specially favoured by the testatrix, and that it was not to be readily presumed that the special benefit which she got should pass to her sisters rather than be shared in by the whole family. I do not think this is necessarily so. The testatrix might quite well have thought that the nieces would require more of her means than the nephews, who were presumably able to make their own way in the world, and while she favoured Christina specially, if she lived to mature years, that is quite consistent with her specially favouring her other nieces if Christina did not live to enjoy her bequest.

I think the interlocutor of the Lord Ordinary should be affirmed.

LORD YOUNG—I am of the same opinion. The testatrix intended that if any of her nieces died unmarried before Christina attained twenty-one, everything which she bequeathed to that niece should be divided among the other nieces. The residue which was given to Christina must therefore be divided among the surviving nieces.

LORD MONCREIFF — I am of the same opinion. It is probable that the testatrix did not contemplate that her youngest niece Christina Purves would not attain majority, and that she framed her will on that assumption. But the clause of survivorship applies in terms to Christina's case as well as that of the other nieces. At one time I thought it might be possible to distinguish between the legacy of £600 to Christina and the gift of residue. But I am satisfied that that cannot be done. Christina's "share" in the sense of the will was the legacy of £600, plus the silver plate, plus the residue, and must all be dealt with as *unum quid*. She died unmarried before reaching majority, and therefore under the survivorship clause her "share" goes to her surviving sisters.

I concur with the Lord Ordinary in thinking that suspension of vesting ceased on the death of Christina.

LORD TRAYNER was absent.

The Court adhered, with additional expenses to the whole parties to the cause.

Counsel for the Claimant Christina Purves' Executor — Salvesen — A. S. D. Thomson. Agent—Henry H. Meik, W.S.

Counsel for the Claimants Isabella Purves and Others—Guthrie, Q.C.—Cullen. Agents—Kinmont & Maxwell, W.S.

Counsel for the Claimants Peter Jolly Purves and Others — Sym — Constable. Agents—Purves & Barbour, S.S.C.

Wednesday, July 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LESLIE'S TRUSTEES *v.* MAGISTRATES OF ABERDEEN.

Superior and Vassal—Redemption of Casualties—Separate Holdings—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

By feu-charter dated 1730 a superior feued out to a vassal two subjects, consisting of the lands of Calsayseat, and a piece of muir ground, described as adjoining the said lands.

The two subjects were separately described in the feu-charter, but the muir ground was declared in the *tenendas* and other clauses of the charter, as well as in the precept of sasine, to be part and pertinent of the said lands of Calsayseat. In the *reddendo* clause the vassal was taken bound to pay to the superiors "for the said lands of Calsayseat and pertinents thereof, and the said piece of muir ground now annexed thereto as part and pertinent thereof, the sum of £14 Scots money (viz., £6 for the said lands of Calsayseat and £8 for the said piece of muir annexed thereto) . . . doubling the said feu-duty at the entry of every heir to the said lands with the pertinents."

In an action raised for redemption of casualties effeiring to the muir ground alone, by the successor to the original vassal in both subjects, under sec. 15 of the Conveyancing Act 1874, *held* (1) that the two subjects did not form separate holdings, and (2) that the vassal was not entitled to redeem the casualties incident to one part of his feu only.

This was an action at the instance of the trustees of the late Miss Helen Leslie and Miss Jane Leslie of Powis House, Aberdeen, against the Magistrates of Aberdeen, concluding for declarator that on payment to the defenders of the sum of £113, the pursuers, as proprietors of "All and haill that piece of muir ground adjacent to the lands of Calsayseat, feued off by Alexander Frazer . . ." were "entitled to be discharged of all liability for casualties exig-