tions are given, but it may be recalled by contrary instructions. A cheque does not raise up any onerous relation between the holder and the bank, and therefore may be recalled. In this a cheque differs from a bill of exchange, which by law constitutes a onerous relation between the holder and the drawee. Neither is a cheque itself a proof that it is a mandate *in rem suam* of the holder, it may be an assignation in certain circumstances, but that is not the question here.

The Court dismissed the appeal, and adhered to the Sheriff's interlocutor.

Counsel for Pursuer—Solicitor-General (Clark), and Keir. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Defenders—Watson and Mackintosh. Agents—H. & A. Inglis, W.S.

Wednesday, February 11.

SECOND DIVISION.

[Lord Shand, Ordinary.

WELWOOD *v.* HUSBAND.

Lease for 999 *years—Right to kill Game.*

Held that the right of killing game is an incident of landed property, inherent in the landlord in respect of his ownership of land, and is not conveyed to a tenant by an agricultural lease for 999 years.

The pursuer in this case was A. A. M. Welwood of Meadowbank and Garvock, who raised a summons against Robert Husband, tenant of Easter Gellet and others, in the parish of Dunfermline and county of Fife, to have it found and declared that the pursuer, as heritable proprietor of the said lands of Easter Gellet and others, has the sole and exclusive right to the game of every description which is or may be at any time in or upon or flying about the said lands, and that the pursuer has the sole and exclusive right and privilege of coursing, hunting, shooting, and killing the foresaid game; and further, that the defender has no right or title to the said game, and ought to be interdicted, &c., from killing the said game in all time coming. It appeared that there were two leases of different parcels of land, one for 999 years, and the other for 99 years. The pursuer eventually only insisted in the conclusions of his summons in regard to the lands held under the 999 years' lease.

In his condescendence the pursuer set forth that "the defender is agricultural tenant of the lands described in the first place in the summons, under a tack dated 16th June 1808, and recorded in the books of Council and Session on 23d May 1812, entered into between Robert Welwood, Esq., institute under the foresaid entail, as proprietor of said lands, and in exercise of an alleged power to that effect in the entail, on the one part, and Thomas Purves, Esq. of Lochend, as tenant, on the other part, whereby the said Robert Welwood let to the said Thomas Purves, his heirs and subtenants, the farm and lands described in the first place in the summons, and that for the space of 999 years from and after the term of Martinmas 1806; and the said Thomas Purves thereby obliged himself, his heirs, executors, and successors, to make payment to the said Robert Welwood, his heirs, executors, or assignees, of a free yearly rent amounting to 455 bolls 2 firlots 1 peck 2½ lippies of oatmeal, being equivalent to 3 bolls of oatmeal at 8 stones weight per boll for each acre, and proportionally for part of an acre; and the said Thomas Purves also obliged himself and his foresaids skilfully and properly to labour and manure the lands thereby let, and to keep them in good tid and quirod, and not to run out or destroy the same, and to leave the inclosures upon the lands in a tenantable and fencible condition at the expiry of the lease; and it was by the lease further provided and declared that if one whole year's tack-duty should remain unpaid at the end of three months after the same should have become due, the tack should be void and null, provided the proprietor should within three months thereafter signify his intention of resuming possession of the said lands by a writing under his hand, without any declarator or other process of law; and it was declared that it should not be lawful for the said Thomas Purves or his foresaids to purge the irritancy at the bar; and the said Thomas Purves obliged himself and his foresaids to remove from the land at the expiration of the tack, and to leave the same void and redd, to the effect that the proprietor might enter thereto immediately, and that without any previous warning or process of removing, as the said tack in itself more fully bears.

"The defender is tenant of the lands described in the summons in the second place, under a tack entered into between the said Robert Welwood last mentioned and Alexander Young, tailor in Limekilns, dated 9th December 1800, whereby the said Robert Welwood let to the said Alexander Young and his heirs and assignees the said piece of ground described in the summons in the second place, and that for the space of 99 years from the term of Martinmas 1800, subject to payment of the tack-duty and other conditions therein specified.

"The defender, the said Robert Husband, acquired right to the foresaid two tacks by disposition and assignation dated 29th and 30th May 1843, granted in his favour by Alexander Purves, Esq., and others, the trustees of the said Thomas Purves, who had right thereto.

"Notwithstanding that the said Robert Husband, who is simply agricultural tenant of the lands under the foresaid tacks, has no right to the said game, or to hunt, course, shoot, or kill the same, he, in disregard of complaints repeatedly made to him by the pursuer and by others on his behalf, has shot and otherwise killed and destroyed the said game illegally, and to the loss and damage of the pursuer; or at least the defender has threatened to interfere with and molest, and has interfered with and molested, those authorised by the pursuer to exercise the right of killing game."

The defender stated that the persons possessing the lands under the titles mentioned in second, third, and fourth articles of the condescendence, have always exercised the sole and exclusive right of killing the game on the lands described in the summons, and that he claimed the right to kill game on the said lands, and disputed the right of any other person to do so.

He further set forth—The lands occupied by the defender are entered in the valuation roll at a sum considerably above what is paid annually by the defender to the pursuer, and the whole public burdens on the lands are assessed according to the value of the lands as so entered. The defender some years ago claimed from the pursuer repayment

of the landlord's proportion of the burdens on the lands, but this was refused, on the ground that the defender was truly proprietor of the lands *quoad* the excess of their annual value beyond the amount paid to the pursuer. The defender has accordingly since then been, with the concurrence of the pursuer, entered in the county valuation roll as proprietor of the said lands, and is assessed and pays as proprietor the county rates and other burdens imposed thereon.

The pursuer pleaded:—"The pursuer, in virtue of his titles as proprietor, and, *separatim*, in virtue of the said titles and by the prescriptive possession of himself and of his predecessors, having the sole and exclusive right to the game on the lands described in the conclusions of the summons, is entitled to have such right declared, in terms of the conclusions to that effect."

The defender pleaded:—"(1) The defender should be assoilzied, in respect that he is entitled to kill game on the lands mentioned in the summons, by virtue of his rights and titles thereto. (2) The defender having for some years, with the concurrence of the pursuer, been entered in the valuation-roll as proprietor of the said lands in respect of the said titles thereto, and having paid the burdens thereon on that footing, the pursuer is not entitled to decree as concluded for."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh 18th November* 1873—The Lord Ordinary having considered the cause, Finds and declares that the pursuer, as heir of entail in possession of the lands and estate of Garvock, including therein the lands after mentioned, has the sole and exclusive right and privilege, by himself or others whom he may depute and appoint for that purpose, of hunting, coursing, shooting, and killing the game on the farm and lands of Easter Gellet, and pertinents of the same, and lands of Bellhills of Easter Gellet, and other lands described in the conclusions of the summons, and in the lease thereof, dated 16th June 1808, recorded in the books of Council and Session on 23d May 1812, entered into between Robert Welwood, one of the pursuer's predecessors, as proprietor and institute of entail of the said lands, and Thomas Purves, Esq. of Lochend, whereby the said Robert Welwood let to the said Thomas Purves, his heirs and subtenants, the said farm and lands therein described for the space of 999 years from the term of Martinmas 1806, and that the pursuer, by himself or others authorised by him, is entitled to enter upon and traverse the said lands, and to do everything else thereupon which may be necessary for the fair and full exercise of said right and privilege: Farther, finds and declares that the defender, as tenant of the said farm and lands under the said lease, has no right or title to the game upon the said lands, or to hunt, course, shoot, or kill the said game; but without prejudice to any right which the defender may have to kill or destroy rabbits upon the said land: Interdicts, prohibits, and discharges the said defender from hunting, coursing, shooting, or otherwise killing the game upon the said lands; as also from molesting or in any way interfering with the pursuer, or any one acting under his authority, in the exercise of the said right and privilege: Farther, assoilzies the defender from the conclusions of the action so far as relates to the piece of ground of the lands of Pattiemuir, consisting of 40 falls or thereby, described in the conclusions of the summons, and descerns: Finds the defender liable in expenses; allows an account thereof to be given in; and remits the same when lodged to the auditor to tax and to report.

"*Note.*—The question raised in this case is, whether the landlord or tenant, under a long lease of 999 years of an agricultural subject, has the right of shooting over the lands; and the Lord Ordinary is of opinion that, unless the lease confers that right either expressly or by implication to be derived from provisions beyond the stipulation for an unusual endurance of the lease, the exclusive right of shooting belongs to the landlord.

"In the present case the lands referred to in the first part of the preceding interlocutor, consisting of about 152 acres Scotch, were let, and are now possessed by the defender, as an agricultural subject, and for no other purpose, as appears from the terms of the lease. The lease granted in June 1808, with entry as from the term of Martinmas 1806, was for the space of 999 years; and the tenant thereby bound himself, his heirs, executors, and successors, 'skilfully and properly to labour and manure the lands hereby set, and to keep them in good tid and quirod, and not to run out or destroy the same, and to leave the enclosures upon the lands in a tenantable and fencible condition at the expiry of the lease.' It is obvious from the terms of the lease as a whole that the lands were let solely for the purpose of occupation as a farm. In the case of an agricultural lease of the ordinary duration of nineteen years, it cannot be doubted that unless the landlord expressly gives the right of shooting, that right, which is inherent in his right of property, remains with him. The tenant is occupant of the lands for the limited purpose of cultivation, with that right of residence and enjoyment of the lands which his occupation as an agricultural tenant infers, but which does not include the right to kill the game on the lands. In England, the right to kill game is conferred by a lease giving the occupation of the land, unless that right be reserved; but the rule is otherwise in this country. The right of shooting does not require to be reserved in the lease. It is reserved if not conveyed—the principle being, that the right acquired by the tenant is held to be defined and limited by the terms of the contract and the purpose for which the occupation of the land is given up, viz., the cultivation of the land and the rearing of crops, or pasturing of cattle. The law as now stated has the sanction of practice for time immemorial, and has been fully explained and commented on in the recent case of *Copland* v. *Maxwell*, 7 Macph. 142, affd. 9 Macph. H. of L. p. 1. The general principle given effect to in the construction of agricultural leases in this country is stated in that case by Lord Westbury thus:—'An agricultural lease is so construed there (that is, in Scotland) as not to include, as passing to the tenant, a particular right which is not at all classed among agricultural purposes or a mode of agricultural enjoyment of a farm.'

"The only quality by which the lease in the present case is really distinguished from that of an ordinary agricultural lease is the length of its endurance. It has been maintained by the defender that if due weight be given to this element, he is, as tenant for so long a period as 999 years, to be regarded as having a much more valuable right than the landlord, and is indeed substantially the

proprietor,—the landlord's true interest being reduced to a mere annual payment in money; and that, consequently, though nominally tenant, he must be held to have the right and privilege of killing the game inherent in the proprietor. The Lord Ordinary is, however, of opinion that there is no sound principle on which the tenant's claim can be rested. The tenant, no doubt, in consideration of the rent to be paid, and if the rent be paid regularly, has a right to the occupation of the land for a very long period of time; but the mere length of time for which the lease had been granted, while it might form a very good reason in many cases for inducing the parties to arrange and contract that the right of shooting should be transferred to the tenant, cannot afford ground for holding that this is a necessary result of the contract. If a lease for nineteen years does not give that right, there is no particular period of endurance beyond that of nineteen years at which it can be said that the right must be held to be given by the landlord. If a 999 years' lease is to be held as giving the right, the same thing may be said of a 99 years' lease, or of a lease for 50, 30, or 20 years. The question of the extent of the tenant's right must, in the opinion of the Lord Ordinary, be solved by ascertaining from the lease whether the occupation and enjoyment of the land—whatever may be the period of endurance of the lease in point of time—has been given over for a limited use and purpose only, or for that complete beneficial enjoyment which a proprietor himself has, including at least the right of shooting. By the lease in the present case the land is given and taken for the limited purpose of occupation and use as an agricultural subject. Having got it for this purpose only, it appears to the Lord Ordinary that the tenant is not entitled to extend its effect by the exercise of the right or privilege of shooting, which is not incident to that purpose, and does not necessarily, or according to ordinary usage in such contracts, arise out of it. It was maintained that the tenant under such a lease was in as good a position, if not better, than a liferenter of lands who exercises the right of shooting; but the distinction between the two cases is, that a liferenter obtains possession for the full and unrestricted enjoyment of the estate, subject only to the condition that the substance of the property shall not be consumed, while the tenant's occupation is, by the terms of his contract, for a limited purpose only.

"Both parties have averments on record of the possession and exercise of an exclusive right of shooting, but they concurred in asking for a decision on the legal question; and as the Lord Ordinary is of opinion that the question is really one of law, to be determined by the terms of the contract, he has decided it accordingly. It occurred to him that the action might be maintained by the pursuer on the separate ground that the estate being entailed, a previous heir of entail had no power to grant an effectual lease of shootings for so long a period of endurance; but the counsel for the pursuer stated that the pursuer desired to rest his case entirely on the terms of the contract, and not on any peculiarity arising out of the fact that the estate is held under an entail.

"Both parties treated the subjects referred to in the second part of the conclusions of the action as being in no different position from the lands above specially referred to. But on referring to the lease of 1800, which has now been produced, it appears that the extent of land conveyed or let is about a quarter of an acre, and that it contains an obligation to build a house on the ground. In short, it is a building-lease. In reference to such a subject, the Lord Ordinary is of opinion that, by necessary implication, the right of shooting is given up by the landlord. The reservation of such a right is inconsistent with the nature of the subject and the purpose for which it is conveyed. The Lord Ordinary has therefore assoilzied the defender from the conclusions of the action relating to this small property."

The defender reclaimed.

At advising—

Lord Benholme—It is in vain to deny that a lease beyond ordinary endurance, as for instance one for 99 years, has, with regard to sub-setting and certain other matters, some advantage over agricultural leases of ordinary length. But the rule of law, by which the right of killing game is an incident of the right of landed property, is a privilege *sui generis*, and has nothing to do with the ordinary use of the land. Its only connection with the land consists in its being concerned with the game that is found upon it.

I look upon the argument founded upon the differences between long and short leases as one which, in regard to this peculiar privilege, does not advance the case one step. The right to kill game is inherent in the landlord in respect of his ownership of the land, and it cannot be inferred that this right is conveyed to the tenant by an agricultural lease of whatever length. The Solicitor-General, I think, admitted that he had no authorities to cite in support of his argument on this point. This is enough for me; I cannot resist the great weight of authority that was brought forward on the other side.

The second lease for 99 years has been given up by the pursuer. It might have been argued that as the Lord Ordinary has found for the pursuer under the one lease, why not under the other? I should have been prepared to give the same judgment with regard to both, but the concession of the pursuer has rendered this unnecessary.

Lord Neaves—I concur, and very much on the same grounds. If we were at liberty to go to the law of nature, we might perhaps not see our way to draw a distinction between those birds and animals, *ferœ naturœ*, that are game and those that are not.

But the law of Scotland has always, or at least for a very long time, recognised such a distinction, and has held the right to kill game (possibly on account of its edible value), to be a privilege attached to the possession of land. This is, however, not a right of property; no man has a right of property in the game any more than he has in the bees or butterflies that hover over his estate. But the right to pursue that game is a valuable privilege, recognised by law. It is not necessary to speculate as to the reasons that may have led to this privilege being attached to the possession of land. Persons with landed property have sometimes nothing to do but to enjoy themselves, and it may have been the intention of the Legislature to attach such persons to the country by giving them this exclusive privilege. But, however that may be, there is no doubt that this privilege has existed for a long time as an incident of the ownership of land. It has never been found that the length of

any agricultural lease inferred an alienation of this right in favour of the tenant, whilst a joint right is not to be presumed—much the reverse. The law is, that the right to enjoy this privilege is not carried by a lease along with the right to the land for agricultural purposes. Leases are simply personal contracts and in this present case there is nothing to show that any thing more is included than the usual right to the agricultural fruits.

On the second point of the case I give no opinion. I desire to be taken as neither approving nor condemning that part of the Lord Ordinary's interlocutor.

Lord Justice-Clerk—I concur. The questions argued were two. The first as to the landlord's privilege of killing game; and second whether a lease of this length is to be held as implying a transfer of this right to the tenants. As to the policy of the game laws themselves, I express no opinion, any more than as to that of the old forest laws. What we have to do is to interpret these laws. There can be no doubt that the law recognises a distinction between game and other wild animals, first, by reserving to landholders the privilege of killing game; second, by the laws passed for preserving valuable wild animals; and third, by the revenue laws, which make a licence to kill them necessary.

It is not necessary to go into the principle upon which the law depends; a long course of decisions has determined that the landlord possesses the privilege of killing game in respect of ownership of the land, and that he is not to be presumed to part with it in leases for agricultural purposes.

The only further question is as to whether a lease of unusual length raises any presumption of a contrary intention. I do not say that the case is altogether free from difficulty. If it could be considered that the right of occupancy under a long lease was equivalent to a right of property, there might be a good deal to be said in favour of that view in the present case, but the *Traquair* case settled the opposite principle. Here, the kind of tenure in this contract was occupancy for agricultural purposes only, and there is therefore no reason for holding that the landlord conveyed, or intended to convey, to the tenant the right of killing game. If the other view were taken, we must hold that the landlord by this lease is excluded from exercising the enjoyment of this privilege of killing game over his own property.

I cannot take a view that would lead to such a conclusion.

Their Lordships adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer—Balfour and H. J. Moncrieff. Agents—Maconochie & Hare, W. S.

Counsel for Defender—Solicitor-General (Clark) and Keir. Agents—Adamson & Gulland, W. S.

Friday, February 6.

FIRST DIVISION.

[Lord Shand, Ordinary.

HUTTON RIDDELL, PETITIONER.

Entail Amendment Act 1848, § 3—*Date of Deed of Entail*—Mortis causa *settlement.*

By certain *mortis causa* deeds, executed prior to 1st August 1848, a party imposed the restrictions of an entail upon his heirs, and died in 1849. His successor applied to the Court for authority to record an instrument of disentail, on the footing that the entail under which he held was one dated prior to 1st August 1848—holding the date of the *mortis causa* deed to be, with reference to the question of entail, the date of the execution of the deed and not the date when the deed came into operation.

The question was reported by the Lord Ordinary to the First Division of the Court.

Held (*dis.* Lord Deas) that the contention of the pursuer was sound, and that he was entitled to disentail under the provisions of 11 and 12 Vict. c. 36, § 3.

This was a petition presented to the Court for the purpose of obtaining authority to record an instrument of disentail of the estate of Muselie and others, under the 3d section of the Entail Amendment Act, 1848, which enables any heir of entail, of full age and in possession of an entailed estate in Scotland "holden by virtue of any tailzie dated prior to the 1st day of August 1848," to acquire such estate in fee simple, with the consents of the three nearest heirs at the time entitled to succeed after the heir in possession, provided that the nearest heir entitled to succeed after the heir in possession shall be twenty-five years of age.

The entail of Muselie was constituted by two deeds granted by Charles Riddell, Esq. of Muselie, the first being a disposition and deed of tailzie executed on 25th February 1836, and the second a deed of destination and alteration executed on 1st July 1848. By the first of these deeds Mr Riddell, the entailer, disponed the estates to himself and the heirs of his own body, whom failing to John Riddell, his only brother, and the heirs-male of his body, whom failing to a series of other heirs, under the fetters of a strict entail; but reserving absolute power at any time of his life, and even on deathbed, not only to alter the destination, but to recal the disposition in whole or in part, and to deal otherwise with the estate as he might think fit; and by the later deed, on the narrative that his brother and certain of the other heirs had in the meantime died, he altered the destination by disponing the estate of new to Mrs Mary Riddell or Hutton, his niece, in liferent, for her liferent use allenarly, and to the petitioner, George William Hutton, her eldest son, and the heirs-male of his body, whom failing to the other heirs of tailzie therein mentioned, but under the whole conditions, provisions, restrictions, and others contained in the original deed, excepting in so far as the same were thereby revoked and altered. This deed of destination and alteration contains certain relaxations on the provisions and conditions of the original entail, and declares "that the whole conditions, restrictions, reservations, and clauses prohibitory, irritant, and resolutive, contained in the said disposition and deed of tailzie, so far as not herein altered, and the whole conditions, provisions, and restrictions herein written, shall apply to and affect and limit the said George William Hutton, notwithstanding that in form he may now succeed as institute under the said entail, it not being my wish and intention that his powers and rights should be in anyways extended in consequence of the present deed of alteration, but that the whole fetters and condi-