was perfectly true, for nobody derived one sixpence of profit from it since time began. But my argument, which recommended itself to the Sheriff and the jury, was simply that the price of water, like that of any other article, was what it would bring in the market, and on that footing the jury awarded £1000 of damages or compensation for what was never worth anything at all before. I have no doubt that that principle is equally applicable here. That was a case of course of a sale; it was taking the water for ever. But this is not a taking of the water for ever. The one party could not give it and the other party could not get it permanently. Therefore it is not a sale, and it seems to me to be a lease without an ish, and so in point of law void, although the equitable considerations I have mentioned must be observed before it can be terminated. The result is that I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I think this is a very puzzling case, and the disposal of it depends, in the view I take of it, upon the construction of the letter of 26th May 1875, more a good deal than on that of 9th June 1875; for that letter states, in answer to a question by the pursuers about the obligations under which they were to come—"All we would expect is that you give us the water from Newton Pit if it is going, and from Hallside if it is going and Newton not, and in case neither of them is going we do not pay." Now, I quite agree with your Lordships that this cannot be held to be a permanent arrangement to last in all time to come, because the party so dealing is the tenant, and therefore he could not make an arrangement for anything beyond the terms of his own lease; but speaking with hesitation, as my opinion differs from that of your Lordships and the Lord Ordinary, I regard Mr Dunlop as bound to give the water so long as his pits are going, and if the Steel Company could not have found water for themselves, as they appear to have done now, nearer their own works, I am clear that they could have stood on that arrangement of 26th May as binding Mr Dunlop to give the water as long as his pits were going. That being so, he was excluded from going into the market to deal with anybody else with regard to the water. The natural inference is that the counter obligation is that they are to take the water during Mr Dunlop's lease as long as he pumps it. That, I think, is the fair logical construction, and if it had stood there that construction must have been given to it.

On the other hand, it is true that the pumping in one sense is terminable at the will of Mr Dunlop—that is to say, there is nothing in that letter which prevents his firm from stopping the pumping if it suits their working arrangements to do so, and the argument is, that if it was in the power of Mr Dunlop to stop the pumping, it was optional to the defenders to decline to take the water any longer. There is a good deal in that observation, I admit, but I still think that, looking to the whole circumstances, the fair construction is, that under that provision the only event in which the defenders were not to pay was the event of Mr Dunlop not giving them water.

That being so, I am not prepared to concur with the view which your Lordships have taken. In regard to its being a lease without a definite ish—that is to say, with no precise term fixed—it may be said to be good then only for a year. But if it is a sub-lease, and the question is raised for construction upon the terms of the sub-lease, how long it is to endure—when you find that a portion of that sub-lease is to endure up to a certain period, then I think the natural construction is that it is a lease with an ish up to that period as regards both parties. According to that construction the definite ish is the pumping of the water during the period of Mr Dunlop's principal lease, and in that view it is not open to the objections that it is good only for a year.

These are the difficulties that occur to me in the case, and in that view I am not prepared to concur with your Lordships.

Lord Shand declined, being a shareholder in the defenders' company.

The Court adhered.

Counsel for Pursuers (Reclaimers)—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, W.S.

Counsel for Defenders (Respondents)—Mackintosh. Agents—Wilson & Dunlop, W.S.

Friday, November 28.

SECOND DIVISION.

[Lord Adam, Ordinary.

CURROR *v.* LOUDON AND OTHERS.

Relief—Lost Cheque.

Circumstances in which *held* that certain parties to a minute of agreement under which two of their number became holders in trust of shares in a joint-stock banking company, were bound to relieve the two trustees of calls made in the liquidation of the company, though the trust was not entered into for any personal benefit to these parties, but only in order to provide against inconvenience to the true beneficiary in the contingency that a cheque lost by him might afterwards appear in the hands of an onerous holder.

This was an action brought to operate total relief against the principal defender Loudon, and proportional relief against Robert Shand, William Cushnie, Charles Mackenzie, William Carmichael, and Robert Forrest, of payment of calls made by the liquidators of the City of Glasgow Bank on the pursuer Curror and the defender Shand as trustees holding stock in that bank in the following circumstances, set forth in the note to the interlocutor pronounced by the Lord Ordinary (Adam)—"The Scottish Friendly Protection Investment Company was on the 4th of August 1873 declared, in terms of the 31st rule of the company, to be at an end, the objects for which it had been instituted having been accomplished, and the funds were directed to be distributed among the shareholders.

"The defender Ebenezer John Loudon was a shareholder in the company, and was entitled to a payment of £450 from the funds of the company.

"The defenders Robert Shand, William Cushnie, and Charles Mackenzie were, along with the pursuer and the now deceased Alexander Hay, the trustees of the company.

"The defender William Carmichael was the president, and the defender Robert Forrest was the treasurer and secretary of the company.

"By the rules of the company (17) it was directed that all moneys belonging to the company should be lodged in the bank in the name of the trustees, and that all payments which the board might order on behalf of the company should be made by cheques on the company's bankers, signed at least by two of the trustees, and countersigned by the president or vice-president and treasurer and secretary.

"The trustees were not members of the board, and had no concern with the management of the company. Their duty was simply to sign cheques on the company's bank account on being satisfied that the particular payments had been ordered by the board.

"A cheque in favour of Mr Loudon for the sum of £450 to which he was entitled was drawn on the company's bank account. It was signed by two of the trustees, Mr Shand and Mr Mackenzie, and countersigned by Mr Carmichael and Mr Forrest in terms of the rules.

"This cheque was on the 7th August 1873 sent by Mr Forrest to Mr Loudon, and was duly received by him. Mr Forrest had suggested that the money might be temporarily deposited with another property investment company of which he was treasurer, and for that purpose the cheque was indorsed by Mr Loudon, and, as he believes, posted on the same day to the address of Mr Forrest. But it was never received by Mr Forrest, and has since been amissing.

"In the beginning of October 1873 Mr Shand purchased, on behalf of Mr Loudon, £200 stock of the City of Glasgow Bank at £217, 10s. Mr Loudon intended to pay for this stock with the money in question, and accordingly applied to Mr Forrest for it. It was then discovered that the cheque had been lost, and that the money was still in the hands of the company's bankers.

"Mr Loudon applied to the trustees to grant another cheque for the amount. This they agreed to do on the conditions specified in the following extract from a minute of meeting of the trustees held on 24th October 1873:—'In these circumstances Mr Loudon applies for another cheque from the trustees; and he proposes that in order to create a tangible security which would be available for the protection of the trustees in case they should issue such duplicate cheque, the transfer of stock should be completed in the names of two of the trustees, to be held in trust either until some light be thrown on the missing cheque, or till the lapse of such a period as will reasonably satisfy all that it has most probably been destroyed and will never be again heard of—Mr Loudon and his nominee receiving the dividends as declared. The trustees acceded to Mr Loudon's proposal, the transfer of the stock being taken in name of Mr Shand and Mr Curror as trustees for all concerned—the trust continuing till the trustees under it were satisfied there was no risk in transferring the shares to Mr Loudon or necessity for continuing it longer.'

"A duplicate cheque was then issued by the trustees. It was signed by all the trustees, and countersigned by Mr Carmichael and Mr Forrest.

"The transfer of the stock was also completed in the names of Mr Shand and Mr Curror, and the dividends were paid to Mr Loudon.

"So matters remained until the month of February 1878, when Mr Shand suggested that the time had come when the stock should be transferred to Mr Loudon. Mr Curror concurred in this view, but Mr Mackenzie would not consent, and desired that they should wait for another year before transferring the stock. The trustees thereupon declined to transfer the stock. This result was communicated to Mr Loudon and acquiesced in by him.

"This was the position of matters in the month of October 1878 when the City of Glasgow Bank closed its doors.

"Two calls have been made by the liquidators upon Mr Shand and Mr Curror as the registered owners of the said stock. The first of these calls for £1000 has been paid by Mr Shand and Mr Curror equally between them. They are arranging with the liquidators as to payment of the second. It is for relief of these and subsequent calls, if any, that the present action has been brought."

The defender Shand brought a similar action concluding against Curror as a defender for proportional relief. This action was sisted till decision in Curror's action should be given. Mackenzie admitted liability and did not defend either action.

The Lord Ordinary (ADAM) allowed a proof before answer, and on a reclaiming note for the defender Forrest the Second Division adhered.

Thereafter after proof an interlocutor was pronounced finding Loudon bound to relieve the pursuer of the liabilities incurred by him through his acceptance of the transfer, and of all calls made and to be made by the liquidators, and ordaining him to pay the half of the amount of each call to the pursuer, and further finding each of the defenders Shand, Cushnie, and Mackenzie bound to relieve the pursuer of all liabilities incurred by him through his acceptance of the transfer, but only to the extent that there should be equal liability resting on the pursuer and these defenders; and assoilzieing Carmichael and Forrest from the conclusions of the action. He added this note:—

"*Note.*—[*After stating the facts*]—As regards the defender Mr Loudon, the Lord Ordinary does not think that there is any doubt that he is bound to relieve the pursuer of the calls in question. He was the owner of the stock, which was held by the pursuer and Mr Shand for him and solely for his convenience. It was maintained by Mr Loudon that in respect the pursuer and Mr Shand had in February 1878 unreasonably refused to transfer the stock to him at his request, they thereafter held it for their own advantage and at their own risk, and that he was free from further liability. Mr Loudon, however, had agreed that the trustees should hold the stock until they were satisfied that it was no longer necessary to hold it, and he acquiesced in their resolution to hold it for another year.

"As regards the liability of the trustees of the company, Mr Shand, although nominally a defender, has of course the same interest as the pursuer to fix liability on Mr Loudon and their two co-trustees, and he is insisting in an action against them with that object.

"Mr Mackenzie does not defend this action, and admits his liability, so that the question only arises with the fourth trustee, Mr Cushnie.

"The Lord Ordinary thinks that if Mr Loudon is unable to meet all the calls, and if any loss arises in consequence, the loss must be borne equally by all the trustees. They were all parties to the arrangement by which it was agreed that the transfer of the stock should be taken in name of the pursuer and Mr Shand. It was so taken for their protection in case any loss should arise in consequence of their having issued the duplicate cheque. The pursuer and Mr Shand, therefore, held the stock in trust for them to that effect, and must therefore relieve them of a proportional share of the loss, if any.

"The case as regards Mr Carmichael and Mr Forrest appears to the Lord Ordinary to be different. It was to the trustees to whom Mr Loudon applied to issue a duplicate cheque. The stock was to be taken in the pursuer's and Mr Shand's name 'in order to create a tangible security which would be available for the protection of the trustees.'· It was the trustees who acceded to Mr Loudon's proposal. The trust was to continue until the trustees under it were satisfied that there was no risk in transferring the stock, and accordingly when the proposal was made in February 1878 to transfer it, it does not appear to have occurred to any person that it was necessary to consult either Mr Carmichael or Mr Forrest on the subject. They no doubt countersigned the duplicate cheque, but they did so merely for the purpose of marking it as a cheque on the company's funds. Whether they ran any risk in so doing it is not necessary to inquire, because the Lord Ordinary is satisfied that neither of them desired to be protected from any such possible risk, or that they were parties to the arrangement by which it was agreed that the stock should be held in trust. The Lord Ordinary thinks that Mr Carmichael's evidence as to the signing by him of the minute of 24th October 1873 may be quite relied on."

Cushnie and Loudon reclaimed, and argued—1. There could be no recourse against anyone whose name was not on the first cheque. The sole object of the minute was to provide against the contingency of the cheque at any time turning up in the possession of an onerous holder. The words in the minute, "trustees for all concerned," must refer to those "concerned" by having their names on the first cheque, viz., Messrs Shand, Mackenzie, Carmichael and Forrest. *Waterston* v. *City of Glasgow Bank*, Feb. 6, 1874, 1 R. 470, showed that a cheque differed from a bill in laying no *nexus* on the drawer's funds till presented at the bank. The first cheque therefore might have been stopped by notice to the bank, and the bank might have paid the money on the second cheque, leaving a personal remedy against Shand, Mackenzie, Carmichael, and Forrest to any *bona fide* onerous holder. They therefore alone were interested in the arrangement made by the minute. 2. The trust was kept up an unreasonable time. The shares should have been transferred to Loudon in February 1878, when he asked a transfer. Those therefore who unnecessarily kept up the trust must bear the loss.

Counsel for the respondents were not called upon.

At advising—

Lord Justice-Clerk—I cannot doubt that the Lord Ordinary has come to a right conclusion in finding Loudon primarily liable, and the trustees of the company who were parties to the minute of 24th October 1873 subsidiarily liable *inter se*. Divested of extraneous circumstances the question arises in this simple way—The funds of the Scottish Friendly Property Investment Company were being distributed among the members in consequence of the winding-up of the company, and Mr Loudon as a partner of the company was entitled to the value of his share. He gets that value in the shape of a cheque for £450, and that cheque he loses. I do not doubt that he might have had redress from the bank in some way, but probably only by agreeing to find judicial security that the missing cheque would never be presented. Instead of that he approaches the company and induces the trustees to give him a second cheque under an arrangement by which those granting it were protected against any consequences that might arise from an act which was clearly not within their commission. Accordingly it was agreed that the shares in the City of Glasgow Bank, which virtually represented the proceeds of the cheque, should be purchased and transferred to the names of Mr Shand and Mr Curror for behoof of Loudon. That this transaction was for the benefit of Loudon in the first instance no one can doubt, and I do not think it necessary to say more on this branch of the case. The losing of the cheque was his own fault, and the arrangement was entirely for his benefit, and therefore he is the party who must be held primarily liable.

Next, as to the question who are subsidiarily liable, I am of opinion that the parties whose names are on the register and who are directly liable to the bank are entitled to relief, so as to have the loss shared equally among themselves and their co-trustees who united in the minute of 24th October 1873. It is clear that while the arrangement was previously for Loudon's benefit, Shand and Curror were only named to represent all parties who agreed to the arrangement, and therefore all those parties are equally responsible for any resulting loss.

The only other question is, whether there was any undue delay on the part of Mr Shand and Mr Curror to denude of the trust created by the minute? I do not think that it is in the mouth of of any of these parties to maintain that plea. They were just as much entitled and bound to look after their own interests as Mr Shand and Mr Curror. I do not think that according to the terms of the minute the time contemplated in the minute for putting an end to the trust had come, because Mr Mackenzie, one of the parties concerned, was not satisfied that the missing cheque would never again be heard of. But be this as it may, it was competent for any of the parties concerned to ask the question if they thought the time had arrived. They did not do so, and therefore they cannot now maintain that there was undue delay.

I think therefore that the Lord Ordinary is right on both points—*first*, in holding that Mr Loudon is primarily responsible as the true owner of the shares and the beneficiary under the trust; and *secondly*, as he is apparently not able to meet the demand of the liquidators in full, Mr Shand and Mr Curror are entitled to relief from their co-trustees who signed the minute to the effect I have stated.

Lord Ormidale and Lord Gifford concurred.

The Court adhered.

Counsel for Cushnie (Reclaimer)—Trayner—Wallace. Agents—Bruce & Kerr, W.S.
Counsel for Loudon (Reclaimer)—A. J. Young. Agents—Adam & Winchester, S.S.C.
Counsel for Pursuer (Respondent)—M'Laren—Black. Agents—Curror & Cowper, S.S.C.

REGISTRATION APPEAL COURT.

November 1879.

No. 1.[*] [County of Stirling.

PATERSON *v.* JOHNSTON.

Election Law—County Franchise—Tenancy of Shootings—Heritage.

Held that a tenancy and occupancy of shootings affords a good qualification for the county franchise.

Robert Johnston objected to a claim preferred by George Paterson to be entered on the roll as tenant and occupant of shootings at Woodend, in the county of Stirling, on the ground that such tenancy did not afford a qualification. The facts found by the Sheriff (Gloag) were as follows:—"The claimant has for the requisite period been tenant and occupant of the shootings, which are of sufficient annual value. There is no house included in the lease. The lands are let to other tenants for agricultural purposes, under reservation of the game and right of shooting."

The objection was sustained by the Sheriff.

Mr Paterson appealed.

The question of law for decision of the Appeal Court was—"Whether a qualification to vote is afforded by a tenancy and occupancy of shootings?"

Argued for the appellant—Under the Reform Act 1868, sec. 6, Paterson was an "occupant of heritage," as he appeared upon the valuation roll. That Act was to be read as one with the Valuation Acts—sec. 58. "Heritages" were defined by 17 and 18 Vict. c. 91, sec. 42 (Interpretation Clause). The whole difficulty was whether a man could be "tenant and occupant" of shootings alone—*Dawson—Richardson—Girvan—Stirling-Crawfurd—Leith—Farquharson*—Poor Law Act, sec. 34—*Macpherson—Sinclair—Menzies*. The case of *Menzies* especially applied to the transition period when the privilege of shooting was not of the value it now possessed.

Authorities—Act 31 and 32 Vict. c. 48, sec. 56, sec. 58 (Reform Act); Act 17 and 18 Vict. c. 91, sec. 42; Act 8 and 9 Vict. c. 83 (Poor Law Act), sec. 34; *Dawson* v. *Watson*, Oct. 20, 1869, 8 Macph. 10; *Richardson* v. *Stewart*, Nov. 8, 1878, 6 R. 17; *Girvan* v. *Campbell*, Nov. 1, 1875, 3 R. 1; *Stirling-Crawfurd* v. *Stewart*, June 6, 1861, 23 D. 965; *Leith* v. *Leith*, June 10, 1862, 24 D. 1059; *Macpherson* v *Macpherson*, Aug. 13, 1846, 5 Bell's App. 280, *Sinclair* v. *Duffus*, Nov. 24, 1842, 5 D. 174; *Menzies* v. *Menzies*, March 10, 1852, 14 D. 651, and again July 29, 1861, 23 D. (H. L.) 16; *Farquharson* v. *Farquharson*, Nov 3, 1870, 9 Macph. 66.

Argued for the respondent—This was not an occupancy of lands and heritages—*Dawson*. It was not a tenancy of heritage. If there could be a right of tenancy of shootings, there should also be a right of ownership of shootings, but none existed. There was no *separatum tenementum*—*Aboyne*. [Lord Craighill—That case is worth referring to on the point of whether shooting is a personal privilege only or something more]—*Pollock*. The case of *Pollock* showed that the right of tenancy in shootings was not protected against "singular successors." The right of shooting when attached to a subject undoubtedly heritable would do, but that made all the difference. There was here a "*tenementum*" which owing to the valuable right attached was of sufficient value to confer the franchise. The tenancy of shooting was defeasible at the will of a person other than the tenant—*Birkbeck*. All the cases cited satisfied the requirement contended for as essential to the franchise, viz., the existence of a heritable subject apart from the shooting, of greater or less value—*Patrick*.

Authorities—*Earl of Aboyne*, June 22, 1813, F.C.; Kay, pp. 195, 196; *Pollock, Gilmour, & Co.* v. *Harvey*, June 5, 1828, 6 S. 913; *Birkbeck* v. *Ross*, Dec. 22, 1865, 4 Macph. 272; Hunter, vol. i. (1876, ed.) 454; *Patrick* v. *Napier*, March 28, 1867, 5 Macph. 683, and 689 there.

At advising—

Lord Ormidale—As stated in the Special Case, the appellant has claimed to be entered in the register of county voters for Stirlingshire "as tenant and occupant of shootings at Woodend in said county, which claim was objected to by Robert Johnston, clerk, Cambusbarron, a voter on the roll, on the ground that the tenancy of shootings does not afford a qualification." And it is also stated in the Special Case "that the claimant has for the requisite period been tenant and occupant of the said shootings, which are of sufficient annual value. There is no house included in the lease. The lands are let to other tenants for agricultural purposes under reservation of the game and right of shooting."

It thus appears that no land or house or other proper heritable subject has been let to the appellant. Except the privilege of shooting, and of course the right of going over the ground for the purpose of exercising that privilege, the claimant neither has, nor alleges he has, any qualification. The claimant is not entitled to enter upon or interfere with the land at all, which indeed is let to other tenants for agricultural purposes. The question, therefore, whether a qualification to vote is afforded by the tenancy and occupancy of shootings alone, arises in the case very purely. This is a question of interest and importance, and all the more as several other cases depend upon it besides the present.

Now, by the enfranchising acts a party must in order to be admitted to the register of voters be the owner or tenant and occupant of lands or

[*] For convenience of publication and reference the cases in the Registration Appeal Court have been numbered separately and consecutively.