form a heritage on which a claim could be made. It was quite true that feu-duty was a heritable subject, but under the Act every heritable subject did not give right to the franchise. A heritable bond was a heritable subject, but it did not confer a vote. No such thing appeared on the valuation roll, where heritable subjects entitling a party to vote must be entered. In the course of discussion the point had been raised whether there was any heritable subject included in the roll except those enumerated in clause 42 of the Valuation Act. Mr Macdonald suggested tack teinds. Now he (Lord Ormidale) had made inquiry at the Revenue Office, and he had been informed (what was in conformity with his previous understanding) that there was no subject dealt with in the valuation roll except those enumerated in the clause referred to. That clause was intended to be a complete enumeration of all assessable subjects. If that was so, he thought it followed pretty plainly that it never could have been contemplated in clause 5 of the recent Reform Act that feu-duties were to be a qualification for the franchise. He thought they were entitled to read clause 42 of the Valuation Act as part of the recent Reform Act, and, such being the case, he thought it was impossible to arrive at any other conclusion than that it was not contemplated by the Legislature that feu-duties alone, or superiority as contrasted with property, should afford qualification. He therefore held that the present claim could not be maintained.

The judgment of the Sheriff was accordingly affirmed.

Agent for Appellant—John Gillespie, W.S.
Agent for Respondent—W. Archibald, S.S.C.

BROWN *v.* BLACKWOOD.

Tenant and Occupant—Sub-let—Valuation Roll—Proof of Value. A party who stood on the roll of voters had sub-let a part of the subjects on which he stood enrolled. The lessee, after an occupation of two days, renounced the contract, and a compromise was effected. It was proved, by a proof taken before the Sheriff under protest, that the value of the subjects remaining to the lessor after the sub-let was sufficient to afford the qualification. *Held* (1) that uninterrupted personal occupancy had ceased through the occupation of the subjects by another under a sub-let for the period of two days; (2) that it was competent by evidence outwith the valuation roll to prove that value to afford the qualification was retained, notwithstanding the sub-let. *Observed*, per LORD ARDMILLAN, that a voter on the roll is entitled to stand on the defensive.

The Sheriff stated the following special case:—"The said Robert Brown stood upon the register of voters as tenant and occupant of house, bakehouse, stable, and garden, Linton. It was objected by the said William Blackwood that the said Robert Brown was not entitled to be retained upon the register of voters in respect that he had not been in the actual personal occupancy of the said subjects during the whole statutory period of twelve months. It was proved that Brown had entered into an agreement with a Mr Berry, whereby he sublet to Mr Berry for the month of July 1869, for hire, a sitting-room and a bed-room, and the use of a bed in another bedroom; and that under that contract Mr Berry entered into possession about the beginning of July, and remained in the said rooms for only two nights, and then left the premises, and at the same time made a compromise with Brown, whereby the contract was given up, and the claims on either side were disposed of. The value of the remaining portion of the subjects, of which Brown was admitted to have continued in uninterrupted possession, did not separately appear from the valuation roll, but it was proposed by Brown's counsel to lead other evidence to show that such remaining portion of the subjects was upwards of £14 value; that he had therefore uninterruptedly retained sufficient qualification under the Reform Act of 1868.

"This line of examination was objected to as incompetent, in respect that under the Reform Act of 1868, section 6, the value of the premises upon which Brown's right to be retained on the roll depended must appear from the valuation roll. The evidence tendered, however, was in the meantime allowed to be led under protest, when it was sufficiently proved to my satisfaction that the value of the portion of which Brown had retained uninterrupted possession was £16.

"I held in law—(1) in respect of the decision of the Registration Appeal Court of last year in the case of *Donaldson* v. *Brodie* (Macpherson, vii. 314), that Brown had lost his uninterrupted personal occupancy in so far as regards the portion of the premises sub-let as above to Mr Berry, and only occupied by Mr Berry for the very short period of two days, and that the shortness of the period of interruption did not affect the principle on which that case appears to have been decided. (2) That while the proof led under protest would have been competent in regard to a qualification under the Reform Act of 1832, yet, from the peculiar terms of section 6 of the Reform Act of 1868, under which alone the voter claimed to be retained on the register, the value on which the voter founded his right to be so retained must appear from the valuation roll equally as if he were now only claiming enrolment for the first time, and that therefore the proof led under protest was incompetent. I therefore sustained the objection, and expunged the said Robert Brown from the register."

Mr ORPHOOT, in supporting the appeal, said there was no doubt that from the terms of the Act the tenant, as such, was entitled to claim only on the actual personal occupancy of the premises for the previous twelve months. It was maintained on the other side that, having proved the sub-letting for a month, and the occupation for two nights, the *onus* of proof was thereby discharged by the objector, that it then fell upon the person on the register to show that he had retained sufficient value, as required by the statute, and that he could not make out that except by the valuation roll. The first question, however, was whether the objector, by merely proving that the voter had let two rooms for two nights, had discharged the *onus* upon him. He (Mr ORPHOOT) submitted that he had not, but that he must prove that the subjects retained in uninterrupted possession fell under the required value. As to the evidence of value adduced by the appellant, he contended that the language of the statute referring to the valuation roll had not been adhered to in the strictest sense. The Court had held in a certain case that they were entitled, indeed bound, to go back to the roll of the previous year, and that, he thought, was sufficient to entitle the present voter to get into proof. As to the case of *Donaldson* v. *Brodie*,

on which the Sheriff had founded, he did not think the decision there given was applicable here.

Mr MACDONALD contended that the valuation roll was conclusive proof of the value of subjects for the year to which it applied. Their Lordships indeed had held that for the period prior to the time when the valuation roll for any year came into force the roll was not *probatio probata*, but as regarded its own period, both under the Valuation Act and in the intention of the Reform Act 1868, the value must appear from the roll. The case of *Donaldson* v. *Brodie* he held to have certainly decided that a person who sub-let part of his premises thereby lost his occupation. Therefore it was evident that if Mr Brown was to keep the franchise it must be in respect of successive occupation of a different qualification. The question then came to be whether a party having had occupancy of the whole subjects specified on the roll, then occupancy of a part of those subjects, and then again of the whole, was entitled to go beyond the roll in order to prove that the subjects on which he was to retain the franchise were of sufficient value.

LORD BENHOLME said the objection to Mr Brown standing on the roll was, that he had sub-let to a Mr Berry for the month of July a sitting-room, bed-room, and the use of a bed in another room. Mr Berry did not occupy the premises for more than two nights; but it had been urged that the effect was exactly the same as if his occupancy had endured for a considerable period. He rather thought that argument was sound, because Mr Berry's occupancy, however short, interrupted the continuity of possession which the statute required in the case of a tenant. It was argued that it was a different qualification on which the voter sought to retain his vote from that on which he originally claimed,—that it was not the qualification which appeared on the valuation roll, and that upon no other qualification except the one appearing on the roll in its integrity could he remain upon the roll. This opened up a somewhat nice question, and the objection took its strongest feature from the circumstance that the valuation roll no longer afforded the means of ascertaining the value. Confessedly the value appearing on the roll had been broken in upon by the sub-set of part of the tenancy, and it was maintained very feasibly that they could not take proof of value from any other source except the roll. Whilst the value of the subjects in their integrity as appearing on the roll was quite sufficient, and more than sufficient, to enfranchise the claimant, it was no part of the intention of the valuation roll to ascertain the amount of deduction which was to be made in respect of the claimant's losing some part of his qualification, and the result would be the very hard one that, although he might continue to possess heritable subjects of ten times the necessary value, he could not maintain himself on the roll. Now that argument, however plausible, seemed to be so fraught with injustice that one would be glad to look about for some answer to it. It being clear that it was not the purpose of the valuation roll to give the information desiderated, it seemed that, in order to meet the justice of the case, there must be some other mode of ascertaining the value of the subjects retained. In contemplation of that, the question of *onus* might arise. When an objector urged that part of a qualification had been lost, was it incumbent on him to prove that the value of the part lost was so great as to leave too little to support the claim, or was it not the part of the claimant to prove that he had retained sufficient? On that question of *onus* it was unnecessary to decide here, because the claimant had undertaken proof, and had proved satisfactorily that he had retained enough. He merely adverted to it to state his opinion that the *onus* must lie in such a case upon the claimant. Well, the claimant here had proved that he retained value to the amount of £16. As to the question, whether such secondary evidence could be resorted to in order to supply what the valuation roll never could afford? he was of opinion that the Court would not do justice unless they allowed the claimant to prove the value of what he retained. The Sheriff had taken a different view, and had therefore, he thought, pronounced an unsound decision.

LORD ARDMILLAN said there were three steps by which he had reached the conclusion that the Sheriff was wrong. The first was, that Mr Brown was not a claimant but a voter on the roll, and therefore entitled to stand on the defensive. The second was, that the objector alleged that the value retained was insufficient, and, at the same time, that there could not be any proof of the value except the valuation roll. If the latter proposition was true, he thought the objector's case was gone; because, as the valuation roll could not show the retained value, it could not afford the means of proving the objection. He admitted, however, that when the objector had proved that a portion of the subject was sub-let, he threw upon the voter the burden of supporting his claim, by proving that the retained value was sufficient. But, as the just result of holding that, they must allow the voter to do what was required by some competent means beyond the valuation roll. It would be the greatest possible iniquity to allow the objector to prove the sub-letting of a small part, and to refuse to the voter proof that he retained enough to qualify him. He had no doubt at all that, if the objector was to be allowed to turn the burden of proof upon the voter, the voter must be entitled to obtain proof in any competent way. The valuation roll could not show the value of a subject the tenure of which had been broken in upon. Such value must therefore be found in some other place. The great object was to get at the truth of the matter, and he had no doubt that, in the case of a divided subject, the truth must be ascertained by permitting the voter to whom objection was made on the ground of sub-letting to instruct the value of what he retained.

LORD ORMIDALE pointed out that it was the mere question of occupancy, and not the question of tenancy, that was involved in the case. The objection taken was not that the tenant had divested himself of his right to any extent, but that he had not been in the actual personal occupancy during the necessary period. But, as he understood the matter, occupancy did not require to be shown on the valuation roll, and could not well be. They could establish it *aliunde*. In regard to the tenancy itself, it stood unaffected, and the only question came to be—If the voter gave up a portion of his premises for a time, did he not retain enough to continue him on the roll? Now, the question of *onus* undoubtedly arose here. He did not think that the principle involved in the question of *onus* was in the least degree affected by the consideration that the voter had undertaken to show that he retained enough. It appeared to him that where it was merely a matter

of being out of the occupancy for the requisite period of the requisite value of subjects, the *onus* lay upon the objector, and it would not do for him merely to prove that for a week a room, amounting, they might suppose, to a mere fraction of the whole value, had not been occupied by the voter, and then to throw the *onus* on the latter of establishing his value. He thought the *onus* was upon the objector, and that he was bound to go on with his proof to the extent of showing that what remained in the voter's occupancy was not enough. It was only then that he truly made out his objection. It was quite clear that in this case the objector had not done this, or attempted to do it. But the voter himself had made it quite clear that he had enough value left—that he had been in the occupancy during the necessary period of something more than the necessary amount. Therefore it appeared to him that the Sheriff had gone wrong, and ought to have repelled the objection.

The judgment of the Sheriff was accordingly reversed, and the voter's name restored to the roll.

Agent for Appellant—William Archibald, S.S.C.
Agent for Respondent—John Gillespie, W.S.

WEIR *v.* BLACKWOOD.

Register of Voters—Objection—Failure to obey citation. A party who stood on the Register of Voters was objected to on the ground that he was not proprietor of the subjects in which he stood enrolled. He was twice cited to appear as a witness and haver in support of this objection, but failed to appear, and warrant of citation and executions were produced. The Sheriff held that in these circumstances the party must be held to be confessed. Appeal against this judgment (*dub.* LORD ORMIDALE) dismissed.

"The Sheriff stated the following special case:—The said John Weir stood on the Register of Voters as proprietor, houses and garden, Linton. It was objected by the said William Blackwood that the said John Weir was not proprietor of the subjects in which he stood enrolled. The said John Weir had been, on 14th September 1869, personally cited to appear as a witness and haver in support of the above objection, to 'exhibit and produce' the titles of the said subjects in the Registration Court held at Peebles on 15th September 1869, at one o'clock afternoon, and failed to appear in terms of the citation. He was again personally cited on 17th September 1869, to appear in the Registration Court on 18th September 1869 at ten o'clock forenoon, to bear evidence as a witness and haver at objector's instance, to 'exhibit and produce' the titles of said subjects, and again failed to appear, after being three times duly called at the public door of the Court by the proper officer; and the said John Weir's case was at the time the only case remaining to be disposed of by me before concluding my Registration Courts. In respect of which failure, it was moved by the said William Blackwood that the said John Weir's name be expunged from the Register of Voters for the county of Peebles. It was answered on behalf of the said John Weir that this failure to obey the citation is not sufficient reason for expunging his name from the Register of Voters, but no explanation was given or offered of his failure to obey the citation. The warrant for citation and executions were produced. In a previous case of another party (William Thomson), who stood upon the assessor's list, but failed to appear upon due citation as a witness and haver, and whose case came before the Court on the 16th September current, and was defended by the same counsel and agent who appeared for the said John Weir, I held the said William Thomson to be confessed, in respect of his failure to appear, and intimated my intention to follow the precedent in any similar case. I held, in law, that the said John Weir must, in the circumstances above set forth, be held as confessed; and I therefore sustained the objection and expunged the name of the said John Weir from the Register of Voters."

Mr ORPHOOT, in supporting the appeal, said that before the Sheriff the appellant's claim to the franchise was objected to on the ground that he was not proprietor of the subjects on which he was enrolled. It was proved that he had been cited as a witness and haver to attend at the Court. He failed to appear, and being a second time cited, he still failed to appear. He was represented by counsel and agent, but did not appear as a witness and haver; and it was in respect of his failure to appear in that character that the Sheriff held him confessed, and struck him off the roll. He submitted that that judgment was ill-founded, urging that if under such circumstances a voter was liable to be struck off the roll, great hardship might be inflicted by citing absent parties for the purpose of causing them annoyance.

After some discussion, in which Mr MACDONALD supported the Sheriff's procedure.

LORD ARDMILLAN said the voter had been doubly cited as a witness and haver, but did not choose to come. He was represented by counsel, who offered no explanation of his absence. It had been suggested, in the course of argument, that the remedy was to have fined him £5; but he concurred with Mr Macdonald in thinking that if there was a prospect of a contested election, many a candidate or friend of a candidate would be glad to pay such a penalty for the voter. He could not consider a £5 penalty as any remedy to the objector at all—it was a mere punishment of the party for what was in the nature of contempt of Court. The only intelligible remedy to the objector was that, if there was due notice, with certification express or implied, then the voter not appearing should be subjected to the loss of his vote.

LORD ORMIDALE said that what he should have desiderated in such a case was that some certioration should have been given to the party that, failing his appearance, the objection taken against his vote would be sustained. That not having been done, he was not prepared to hold that the course taken by the Sheriff was a strictly proper and correct one.

LORD BENHOLME thought it must be supposed that the voter was perfectly well-advised as to what would be the result of his non-appearance. He considered that the Sheriff had done perfectly right under the circumstances in striking the name off the roll.

The judgment of the Sheriff was accordingly affirmed.

Agent for Appellant—William Archibald, S.S.C.
Agent for Respondent—John Gillespie, W.S.
