ship that the interlocutor should be recalled in order that we may enlarge the ground of judgment.

LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Lords therefore recalled the interlocutor of the Lord Ordinary, sustained the defences generally, and assoilzied with expenses.

Counsel for Reclaimer — Solicitor - General (Asher, Q.C.) — M'Kechnie. Agents — Robert Emslie, S.S.C.

Counsel for Respondent—Trayner—Jameson. Agents—J. & J. Ross, W.S.

Thursday, February 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

STEWART AND CRAIG *v.* PHILLIPS.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

Proof—Agreement to Share in Lease of Shootings —Writ—Land-Rights—Innominate Contracts.

Contracts connected with land and innominate contracts of an unusual character can only be proved by writ.

The lessees of a shooting for a term of six years raised action against a person for a share of the rent and expenses of the said shooting, on the allegation that he had agreed to become joint-tenant along with them. *Held* that such an agreement being in truth a lease for a term of years could only be proved by writ.

Archibald Stewart and Robert Paterson Craig, residing in Glasgow, presented a petition in the Sheriff Court of Lanarkshire against John Phillips for the purpose of having him ordained to pay them the sum of £75, 13s. 8d., with interest from 30th April 1880 till paid. The grounds of action as stated by the pursuers were these:—In March 1877 they entered into a partnership or joint-adventure with Alexander Strachan, a commission agent in Glasgow, to take for a period of six years the shootings on the lands of Wester Airdrie and others, commonly called the Cumbernauld estate, Dumbarton. The said shootings were accordingly leased for that period from Mr Burns, the proprietor, the lease being in writing and dated 2d May 1877. Shortly after the lease was entered into they assumed Robert Livingstone as a partner with them in the shootings. Soon after 12th August 1877 Strachan injured his foot so badly that it was arranged that he should look out for someone else to take his place in the partnership. Ultimately John Phillips, the defender, agreed to take Strachan's place, and was accepted as a partner in the month of September 1877 for the unexpired period then to run of the lease, upon condition that he should pay a fourth part of the rent and other annual cost of the shootings. The defender only paid his proportion of the expenses for the seasons 1877-78 and 1878-79, but declined to pay his fourth part of the expenses of the year 1879-80, which the pursuers were compelled to advance and pay for him. These expenses constituted the sum sued for.

The pursuers pleaded — "(1) The defender having entered into the said partnership or joint-adventure along with the pursuers and the said Robert Livingstone, is bound to pay one-fourth part of the cost of the said shootings. (2) The pursuers having advanced and paid on behalf of the defender the sum sued for as his share of the cost of said shootings for the year from 30th April 1879 to 30th April 1880, are entitled to decree against him therefor, with expenses as craved."

The defender averred that he had agreed to take Strachan's place in consideration of paying the latter £40, and in consideration of paying one-fourth part of any additional expense to be thereafter incurred during the season. He duly paid these sums for 1877-78, and also paid similar sums at the end of the next season of 1878-79. In the early part of 1879 he definitely told the pursuers that he could not again join in the shootings. He further, however, offered, out of friendship to Stewart, to pay one-fourth of the expenses, but this offer he withdrew when he found that the pursuers were trying to hold him bound as a joint-tenant for the rest of the lease.

He pleaded—"(1) The action is irrelevant and ought to be dismissed. (2) The pursuers' averments are irrelevant. (3) The pursuers' averments can only be proved by the defender's writ or oath. (4) Even assuming that a verbal agreement such as that alleged by the pursuers were proved by competent evidence, the defender was entitled to resile from it and bring it to an end. (5) The pursuers' averments being unfounded in fact and in law, the defender is entitled to be absolved, with expenses."

The Sheriff-Substitute (ERSKINE MURRAY) allowed both parties a proof before answer of their averments. Thereafter he found . . . "(3) That defender John Phillips agreed to come into the transaction in Strachan's shoes, taking his share of the stock, dogs, &c., his right to shoot, and his responsibility, on payment to Strachan of £40, which was paid; (4) that thereafter, during the rest of the seasons 1877-78 and 1878-79, defender continued to shoot with the other three over Cumbernauld, paying his share of the rent and expenses, and receiving his share of the game; and when the landlord proposed a surrender of the lease, defender was the person who proposed that a high bonus should be asked; (5) that at the end of the season 1878-9, he, as well as Livingstone, intimated their intention of not shooting on Cumbernauld next year, and, as in Strachan's case, steps were taken, by advertising and otherwise, to get strangers to fill up the vacancies; (6) that these attempts proving unsuccessful, Stewart, who managed the concern, having applied to defender at the commencement of the shooting season of 1879-80 for his share of the rent and expenses, he wrote back on 20th August saying he was quite willing to pay one-fourth share of the rent for the season, and suggesting that they should find someone to make up the difference, and adding that if Stewart let him know how much it was, he would send a cheque for it; (7) that the cheque, however, never was sent; and after further correspondence, negotiations, and attempts at arbitration, the present action was raised in February 1881 for £75, 13s. 8d., as defender's fourth share of the cost of the shootings

for the season 1879-80: Found (8) that the defence taken was *in law* that the agreement libelled is not proveable except by writ or oath; and that if such a verbal agreement were proved, the defender was entitled to resile from it and bring it to an end; and, in fact, that he really made no agreement for more than a year, and that he was entitled to give up his connection with the concern at the end of every year: Found, on the whole case, and in law—(1) that a joint adventure or transaction of the nature libelled can be proved not merely by writ or oath, but otherwise; (2) that defender was proved to have entered into a joint adventure or transaction with pursuers for the purposes of the nature libelled, and that the sum sued for was due by defender to pursuers as his share in the liabilities under the transaction: Therefore decerned as craved."

He added this note—"No one who considers attentively the real and written evidence can doubt for a moment that the defender really entered into the transaction averred, and agreed to become subject to the liabilities for which he is now sued. His conduct throughout was that of one who understood his position; but it is quite possible that in 1877, before commerce had become so bad, he may not have taken much thought as to the possibility of his wishing to retire from the transaction, in the belief that a substitute could easily be found—a consideration which may have had something also to do with the comparatively loose way in which the bargain was made; but that the bargain, as averred, was made cannot be doubted.

"But it is argued that such a transaction cannot be proved except by writ or oath, being practically a lease or sub-lease. This is a mistaken view. The liability arising under the lease is only one of the incidents of the adventure or transaction. As a matter of fact, his share of the rent is only about £42, 10s., out of £75, 13s. 8d. due by him altogether. The facts as proved show that to view the matter simply as a sub-lease by pursuers to defender would be entirely to misconstrue the transaction.

"As to defender's alleged power to put an end to the partnership or joint adventure, he could not do without securing the other parties against the share of the liabilities which he had undertaken."

The defender appealed, and argued—(1) In point of law this was an innominate contract, not having known prestations, and could only be proved by writ. It was not a contract of partnership, for there was no gain involved in it—*Pooley* v. *Driver*, Nov. 28, 1876, L.R., 5 Ch. Div. 472; Lindley on Partnership, vol. i., p. 2; Ersk. Inst., iii., 2, 20; *Edmonston* v. *Bruce or Edmonston*, June 7, 1861. It was just an assignation of a heritable right which required more than parole proof of its existence—*Walker* v. *Flint*, Feb. 20, 1863, 1 Macph. 417; *Fowlie* v. *M'Lean*, Jan. 18, 1868, 6 Macph. 254. But (2) even assuming parole proof to be competent in point of fact on the evidence, no such agreement as libelled had been proved.

The pursuers replied—(1) In point of law a verbal agreement followed by possession and *rei interventus* could be proved by parole evidence—*Gibson* v. *Adams, &c.*, Nov. 20, 1875, 3 R. 144. (2) In point of fact the proof led disclosed exactly the agreement sued on.

The Lords made avizandum with the case.

At advising—

Lord Young—The pursuers are lessees of a shooting by a lease for six years, commencing with shooting season 1877. It was not their intention themselves to bear all the expense and enjoy all the sport of the shooting, but to get two friends to join them and share the expense and the sport with them. They now aver—and it seems to be true—that before taking the lease they arranged (verbally) with a friend (Mr Strachan) to be one of the two, and that another friend (Mr Livingstone) afterwards agreed to be the other. These four accordingly commenced the season 1877-78 together, and, no doubt, on the footing of sharing the expense and the sport equally. In the course of it Mr Strachan desired, owing to the state of his health, to be relieved, and with the approbation of the others agreed (verbally) with the defender to take his place, the fourth share of the expenses being divided between them according to the benefit each had of the season's sport. The first season was thus passed harmoniously, as was also the second (1878-79), the expenses being contributed equally by the pursuers, Livingstone, and the defender. At the end of that season the defender and Livingstone intimated to the pursuers their intention of not shooting the following season, and the pursuers endeavoured by advertisements and otherwise to get others to join in their stead, but unfortunately without success. They now contend—and I do not suggest that it is an afterthought, having no doubt of their good faith—that the defender (for we are not here concerned with Livingstone) is bound to the end of their lease of the shooting, and is not at liberty to withdraw. They accordingly now here sue him for a fourth of the expenses of the shooting for the season 1879-80, although he admittedly adhered to and acted on his intimated resolution to withdraw given at the end of the preceding season.

It is not doubtful and not disputed that a lessee of a shooting or a proprietor (there being, I think, no distinction) may lawfully intend to uphold a shooting, providing and maintaining the necessary establishment of dogs and keepers, and furnish the benefit (exclusive or partial) to the person with whom he contracts for six years, or a longer or shorter period, on such terms as are mutually agreeable, and that such contract duly made will be enforceable *hinc inde*. The contract which the pursuers allege is of this character; for their averment is that they and the defender contracted for six years, their obligation, on the one hand, being to continue as lessees of the shooting and maintain dogs and keepers during that period, permitting the defender to have the benefit to the extent of a fourth; the defender's obligation, on the other, being to pay to them yearly one fourth of the expenses. The defender, admitting that such a contract is lawful, denies that he made it, and contends that writing is necessary to the constitution or at least proof of it. I am of opinion that a right of shooting and sporting on ground for a term of years cannot be constituted without writing, and that it is immaterial to this question whether the pursuer, from whom the right is alleged to proceed, is the proprietor of the ground or the lessee of the shootings. I am further of opinion that a con-

tract to continue lessee of land or of a shooting for a term of years for behoof of another cannot be constituted without writing, and at least cannot be proved otherwise than by writ. What I have said refers to the one side of the contract, but the two sides must go together. Lastly, I am of opinion that even were parole evidence competent, there is no satisfactory evidence of a contract by the defender, binding him to the pursuers for a term of years, and none at all of a contract by the pursuers binding themselves to the defender for a term of years. An action by him to compel them to continue the lease and to keep dogs and keepers for six years would have been, in my opinion, clearly unmaintainable.

I am therefore of opinion that the interlocutor of the Sheriff ought to be reversed, and the defender assoilzied with expenses.

LORD CRAIGHILL—The sum sued for in the action which has been brought up by appeal is £75, 13s. 8d., alleged to be due by the appellant to the respondents as money advanced and paid by them on his behalf. The way and the warrant in which the payments which give birth to the claim are said to have been made appears to be this:—The respondents are tenants of the shooting on the Cumbernauld estate, a lease in writing for six years from 1877 having been granted to them by Mr Burns, the proprietor. This lease, it is said, was taken by them, not for themselves only, but for them and a Mr Strachan, who had arranged that he should share the advantages as well as the liabilities of this contract. Mr Strachan, however, in August 1877, was allowed to withdraw on condition of finding another who would take his place, and the appellant, the defender in the Court below, is said to have assumed that position. He exercised the privilege and fulfilled the obligations in the seasons 1877-78 and 1878-79, but he refused to continue the connection any longer, and this action has been brought to recover from him what would have been the amount of his liability for 1879-80 if the obligations of the two previous years had been continued. Proof was allowed, but as there were doubts as to the competency of proof *pro ut de jure*, this proof was allowed before answer. Proof was led for both parties, and the result was that the Sheriff-Substitute, upon a consideration of the evidence, decided in favour of the pursuers. Hence the present appeal.

Though the Sheriff-Substitute originally had doubts as to the competency of parole proof, yet when he came to consider the judgment which ought upon the proof to be pronounced, he came to be of opinion that parole proof was admissible, and being of opinion that this proof supported their grounds of action, he decided in favour of the pursuers. We are now called upon to consider two questions—the first being the competency of parole proof, and the second, if such proof be competent, what is the import of the evidence which has been adduced.

With reference to the first of these questions, had the result depended on the terms of a contract of copartnery or of joint adventure, I would not have differed from the opinion of the Sheriff-Substitute as to the competency of parole proof, but he, I think, has misapprehended the question for determination. That question is not whether there was an arrangement between the pursuers and defender as to shooting over the estate of Cumbernauld, but whether such a right to shoot for a term of years could be established by a parole testimony. Supposing even that a partnership existed, such a right as that alleged to have been communicated, and that for a longer period than a year, could not be constituted otherwise than by writing, because that right is of a heritable character, and a lease of heritage for more than a year must by the law of Scotland be so established. Here there is no writing. Mr Burns, the landlord, could not have communicated to the defender a right for a term of years without writing. The pursuers, his tenants, cannot do that which he could not have done, and consequently the engagement between the pursuers and the defender standing upon nothing but a verbal agreement, was not effectual for the six years which, as the pursuers allege, are covered by the contract.

Entertaining this opinion, and not being called on to enter upon the second question submitted to us, I think that the interlocutor of the Sheriff-Substitute ought to be altered and the defender assoilzied.

LORD RUTHERFURD CLARK—In form this is an action to recover from the defender a share of the rent of the Western Airdrie shootings for season 1879-80, together with certain attendant expenses. In substance the case is, that the defender was co-tenant with the pursuers of these shootings for a period of years, and it is on this ground, that the pursuers seek to make the defender liable for the sum sued for.

The pursuers became tenants of the shootings for six years or seasons commencing in August 1877. The lease was taken in their names, but the lease was taken for their behoof and that of Alexander Strachan, and shortly after Robert Livingstone was associated with them. Therefore, while the lease was in the name of the pursuers, it was held by them for themselves and the two other persons whom I have mentioned.

In August 1877 Alexander Strachan injured himself, and resigned his interest in the lease. The pursuers say that the defender took his place, or, in other words, agreed to become a co-tenant for the whole period for which the lease had to run. As the defender denies this allegation, the first question is, whether the agreement libelled can be proved otherwise than by the writ or oath of the defender?

It is worthy of notice that, according to the case of the pursuers, they hold the lease in trust for themselves and the defender and Livingstone. It is certain that if they denied that the defender had an interest in it he could only prove the trust by their writ or oath—*M'Vean* v. *M'Vean*, June 4, 1864, 2 Macph. 1150; *Seth* v. *Hain and Others*, July 14, 1855, 17 D. 1117. No doubt this limitation is imposed by the Act of 1696; but it is somewhat anomalous to hold that while the defender would be thus restricted, the pursuers can establish the defender's liability by a parole proof.

I am of opinion that they also are limited in their mode of proof, and that they can only prove the agreement libelled by the writ or oath of the defender. Their case is that the defender became their co-tenant for a period of years. If this had been a question between the landlord and the defender, it could not be doubted that the

proof would be limited to the defender's writ, because a lease for a term of years can only be proved in that way. In my opinion there is no difference in a question between the pursuers and defender; further, I think that the defender may appeal to the rule under which contracts connected with land, or innominate contracts of an unusual character, are provable by writ only—*Edmonston* v. *Bruce or Edmonston*, June 7, 1861, 23 D., 995. It seems to me that this case falls under both or one of these categories, and that as the pursuers have not produced any writ of the defender their action fails.

It was contended that the pursuers expended money on the faith of the defender's agreement, and that they are entitled to recover the money so expended. If their allegation were true, I think that their argument would be well founded. But I agree with the Sheriff in thinking that at the end of season 1878-79 the defender intimated that he would have no further connection with the shootings. Therefore, in this alternative view, the pursuers' case fails on the fact.

I have only to add that if I had thought it competent to proceed on the parole evidence, I do not think the pursuers would have succeeded in proving their averments.

The LORD JUSTICE-CLERK was absent.

The Lords therefore recalled the interlocutor of the Sheriff-Substitute and assoilzied the defender.

Counsel for Appellant — Solicitor - General (Asher, Q.C.)—V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Respondents — G. Smith — M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Thursday, February 2.

FIRST DIVISION.

PETITION—THARSIS SULPHUR AND COPPER COMPANY.

Public Company—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *secs.* 11 *and* 13—*Special Resolution for Reduction of Capital—Confirmation Order—Process—Title to Appear.*

In an application to the Court by a limited company for an order in confirmation of a special resolution passed under the provisions of the Companies Act 1867, and providing for the reduction of capital and other objects, a shareholder who avers that the resolution is illegal is entitled to appear. Procedure in such a petition *sisted* until the compearer should bring an action for reduction of the resolution and relative declarator.

The Tharsis Sulphur and Copper Company (Limited) was registered as a company in 1866, with an original capital of £300,000, which was in 1868 increased to £1,000,000, and in 1878 to £1,236,660.

The Companies Act 1867 (30 and 31 Vict. c. 131), enacts, section 9, that "Any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital; but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint-Stock Companies as is hereinafter mentioned."

By section 10 of the said Act it is provided that "The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words 'and reduced' as the last words in its name, and those words shall until such date be deemed to be part of the name of the company within the meaning of the principal Act."

By section 11 of the said Act it is provided that "A company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged, or has determined or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit."

By section 13 of the said Act it is enacted "That where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object;" and that "the Court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors, and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction."

On the 24th November 1881, at an Extraordinary General Meeting of the company, certain special resolutions were passed, which were subsequently confirmed on 9th and registered on 14th December, with the view, *inter alia*, of reducing their capital, and of subsequently increasing it by the creation of certain new shares.

With a view to have the said resolution to reduce their capital confirmed by the Court the company presented a petition under the Companies Acts 1862 and 1867 praying the Court "to fix the date at which every person who is then entitled to any debt or claim against the company within the meaning of section 13 of the Companies Act 1867, shall be entitled to object to the proposed reduction of capital, to settle a list of the creditors of the said company who shall at the date to be fixed by your Lordships be entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the