Tuesday, January 26.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

APPEAL—AITON *v.* SELLAR.

Landlord and Tenant—Lease—Rei interventus.

Terms of informal writings between the son and the factor of a landlord, and certain tenants, *held* to be in law the writ of the landlord—sufficient to instruct a concluded agreement for a 57 years' lease, which was held to be followed by sufficient possession to constitute a subsisting lease in an action of removing at the instance of the landlord.

This was a summons of removing at the instance of William Aiton of Boddam, against Alexander Sellar, Alexander Stephen, and James Sellar, all fishermen, residing in Boddam, concluding that the defenders should be decerned to flit and remove from the occupation of their dwelling-houses at the term of Martinmas 1872.

The pursuer stated in his record that none of the defenders held a lease of the subjects and had no right or title to occupy them after the term of Martinmas 1872.

The defenders stated that in 1867 the pursuer proposed to the fishermen alternatively to purchase their houses or to lease them. The conditions of purchase were to be that the rent of £1, 2s. 6d. should be continued; that the conveyance might be in the form of a lease for 999 years, and that the materials of the house should be valued, and while these belonged to the tenant, yet, in respect of the perpetuity of the tenure to be granted, he should pay the half of the value to the proprietor. The conditions of the lease were to be that the rent should be increased to £2, that the duration should be for three nineteen years, that is, fifty-seven years, that the tenant should uphold the house and leave it at the end of the lease without payment.

A list, with appropriate columns, was submitted to the fishermen on behalf of the pursuer, and a number elected to purchase, while more, including the defenders, elected to lease. Those who elected to purchase received leases for 999 years on the terms above mentioned, and as regarded the others the execution of the leases was deferred by the pursuer on the ground that by the following year more might, if the fishing were successful, be disposed to purchase, but in the meantime the arrangement to lease was held as concluded, and the increased rent has since then been paid. The pursuer from time to time promised to execute and deliver formal leases, and no intimation was received by the defenders that they were not to receive their leases until the month of September 1872. The writings, consisting of lists, rolls, and correspondence relating to the agreement set forth in this and the preceding article, are in the possession of the pursuer and his doers. The same arrangement was also verbally made by the fishermen with the pursuer personally, and he from time to time promised that the leases would be forthcoming.

The pleas in law for the pursuer were—"(1) None of the defenders having a lease or leases of the subjects above-mentioned occupied by them respectively, and having no right or title of possession after the term of Martinmas next, decree of removing ought to pass against them in terms of the conclusions of the summons. (2) No agreement for a lease having been made between the pursuer and the defenders, and the latter, being merely tenants from year to year, are bound to remove in terms of the conclusions of the summons. (3) There being no subsisting agreement under which the defenders are entitled to claim from the pursuer the value of the materials of their houses, and such claim being personal to the parties between whom the alleged agreement (if such ever existed) was entered into, cannot be obligatory on the pursuer as successor to the lands and estate of Boddam, and such alleged claim can form no ground of defence to this action. (4) In any view the only competent mode of proof is by writ or oath of the pursuer."

The pleas in law for the defenders were—"(1) The defenders have a good and valid right and title to possess the subjects in question in virtue of their agreement with the pursuer, extending for years beyond the term at which they are sought to be removed. (2) The agreement between the parties has been validated and completed by *rei interventus*, as well as by homologation and acquiescence on the part of the pursuer. (3) In respect of said concluded agreement, the pursuer is bound to grant a lease to the defenders of the subjects in question for fifty-seven years from Martinmas 1867. (4) The pursuer is, in the circumstances, barred by his acts and conduct from maintaining that the said agreement was not entered into. (5) In the event of the pursuer repudiating, and being found entitled to repudiate, his arrangement with the defenders, he is not entitled to remove them without paying for the materials of the houses in question."

After a proof, the Sheriff-Substitute (Dove Wilson) pronounced the following interlocutor and note:—

"*Aberdeen, 23d February* 1874.—Having considered the cause, finds *in fact* (1) that in the year 1867 the pursuer offered to the defenders a lease of their respective premises libelled for 57 years from the term of Martinmas 1867; (2) that the defenders accepted said offer; and (3) that since Martinmas 1867 the defenders have been in possession under said offer and acceptance; finds in law that the pursuer is not now entitled to resile from his offer; and therefore assoilzies the defenders from the conclusions of the libel; finds them entitled to expenses of process, allows an account thereof to be given in, and when lodged, remits to the Auditor of Court to tax and report, and decerns.

"*Note.*—It has for long been well settled in the law of Scotland that a lease for a term of years can be proved only by writ or oath. There is no question in this case at present as to what has been proved by oath. The question is whether a lease has been proved by writ?

"The writings on which the defenders are forced to rely consist of a correspondence which occurred in the years 1867 and 1868 between the pursuer and his son on the one part, and the witness Robert Stephen on the other part. Certain documents referred to in the correspondence form also part of the proof. The writings are unfortunately incomplete, but such as they are they give a great deal of information.

"The first letter which it is necessary to notice is one from the pursuer to his son, dated 26th August 1867, in which he desires him to learn what the fishermen intend doing about their

houses, as final answers were wanted by the 18th September at latest, in time to warn them away if they do not agree. This letter evidently refers to some previous verbal communications between the parties. The nature of the proposals under consideration will sufficiently appear in the course of the correspondence. The next letter of consequence shows what the pursuer's son had done on the instructions given him by his father in the first letter above mentioned. It is a letter (dated 3d September 1867), from Stephen, who then acted as a collector of rents for the pursuer at the fishing village, and is addressed to the pursuer's son. It shows that the pursuer's son had been at Boddam, had seen Stephen on the subject, and had promised to send him a list to be filled up, showing 'those (fishermen) *who was to buy* and *those who was to take a lease* of their houses.' This shows that there were two proposals under consideration, and it also shows what they were. Crossing this letter came one from pursuer's son to Stephen (of the same date), containing the list in question to be filled up. Its terms are too important to be condensed. It says:—

"'57 *St Vincent Crescent, Glasgow*, 3*d September* 1867.

"Mr Robert Stephen, Boddam.

"'Dear Sir,—Herewith I send you list of occupiers of houses in the village of Boddam to be filled up according as they may purpose to purchase said houses or lease them. Opposite the name of one who intends purchasing write *will purchase house*, and opposite the names of intending leaseholder, write *will lease house*, in the respective columns, and those who will neither purchase nor lease write such opposite his name. If the full name of each person is not written down, please write it, and if jun. or sen. can be added anywhere put it in, so that the full name may be put upon the roll. When that is done send the list to me, and I will at once make out the roll, inserting the value of each house, and the payment to be made by intending purchasers, also length of lease. Opposite the name of purchasers, and opposite the name of intending lease-holders, I will insert the length of their lease and annual rent—and then send the whole to you to be signed by each tenant personally. They are not to sign the list I now forward to you to be filled up; please return it as soon as possible.—Yours truly,

"'JOHN AITON.

"'*P.S.*—Since writing the foregoing I have bethought me to add to the list in pencil the valuation of each house, and the annual rent put thereon, in case some may have forgot and may ask you for the information. J. A.'"

"Without going beyond the terms of this letter, it becomes plain that the nature of the title to be given both to the purchasers and to the lessees was to be a lease, and therefore that in the former case the lease must have been intended to be perpetual or of so long a duration as to be equivalent to a perpetual one, and in the latter case of a comparatively short duration. From this letter it also appears that the prices at which the houses were to be offered to purchasers, and the rents at which they were to be offered to lessors, were also fixed. And as the pursuer's son was to fill in the respective periods of duration without further communication with the fishermen, it is matter of fair inference from the letter that those periods had been fixed, and were so well understood between the parties that further discussion of them was unnecessary. In reply to this important letter there is one from Stephen of 4th September 1867, in which he undertakes to do what he is asked, and says that he will "call on all the tenants in Boddam and see if they are to purchase or lease their houses." One or two letters pass, mainly giving or asking information as to details, and then, 11th September 1867, Stephen returns to the pursuer's son the list duly filled up. The first paragraph of this letter explains what had been done. It runs:—"Enclosed I send you your schedule, which I hope you will find correct. Those in the schedule without lease or purchase written after their names has not as yet decided whether they will purchase or lease until they see whether they have any privilege round their houses, but they will do either of them." He also states it as his impression that had the fishing been better many more would have purchased in preference to leasing. On 13th September 1867 the pursuer's son writes to Stephen acknowledging receipt of the lists, and *inter alia* saying that if any fisherman change their mind before the roll is sent for signature, and will purchase instead of lease, to advise him. On 14th September Stephen wrote the pursuer's son in reply, promising *inter alia* that if any of the fishermen did change their minds about their houses he should let him know.

"The whole matter was thus apparently on the eve of settlement when the pursuer intervened. The small number of those who had decided to purchase, as compared with those who had decided to lease, had apparently disappointed him; and on 17th September 1867 he wrote to his son that the best way would be to leave the option of lease or purchase open for another year. On receiving this letter, the pursuer's son (on 18th September) wrote to Stephen, desiring him to communicate this new proposal to the fishermen. His letter says:—

"'"'57 *St Vincent Street, Glasgow*,
"'"'18*th Sept.* 1867.

"'"'Mr Robert Stephen, Boddam.

"'"'Sir,—After a careful consideration of the information you have sent me, and due attention being given to the fact that this season's herring fishing is likely to turn out but a poor average for the fishermen of Boddam, the proprietor writes me that, under these circumstances, and a knowledge of their wishes, he will be willing enough to leave the fishermen the option of a lease or purchase of house property in the village of Boddam open for another year, if they should wish it, but upon the distinct understanding that they pay the lease rental, that is, two pounds (£2), rent for the year from Martinmas 1867 to Martinmas following, and that without any garden ground.

"'"'I think that what has been proposed above will meet with a unanimous acquiescence from the fishermen, as it gives them a very fair chance of providing themselves by next season with means for the purchase they all desire to make: but put the proposal to them, and let me know the result. At the same time write the proprietor direct on the subject. Ascertain as far as you can generally if they be satisfied; and if there be any dissenting let me know who they are, and what it is.—Yours truly, JOHN AITON.'"

"On the following day (19th Sept.) the pursuer

himself wrote to Stephen a letter containing the following passage:—'I wrote John to say that if the fishermen wished it I would keep the question of their purchasing their houses open for another year, but on the distinct understanding that they pay the £2 rent for next year. They quite understand that they are to have no gardens after this year. Please to let me know whether they wish the chance of purchase kept open, or wish their leases at once.'

"On 19th September Stephen wrote to the pursuer's son acknowledging receipt of this proposal, and stating that he would communicate it to the fishermen and send the results in a few days; and on the 27th he wrote to the pursuer stating the fishermen's acquiescence in the proposal.

"This concludes the correspondence for 1867; and before going to that of 1868 it is desirable to see exactly how matters were left. In the first place, the writings prove that the pursuer made, through his son and through Stephen, an offer to the fishermen either to purchase or to lease their houses; and, in the second, that the fishermen, as set forth in the list sent by Stephen, had accepted respectively one or other of the alternatives offered; and, lastly, the writings prove that the terms on which the leases were to be executed had been arranged to the mutual satisfaction of the parties, and that nothing remained except to embody them in formal writings. It is plain also that what prevented the leases from being written out was the pursuer's desire, acquiesced in by the fishermen, that the matter should stand over for a year, in order that more might exercise the option of purchasing.

"The 1868 correspondence is incomplete, all the writings that are in process being a few letters from the pursuer. The first to which it is necessary to refer is one from the pursuer to his son, dated 21st August 1868, in which he acknowledges receipt of a draft lease, apparently that to be granted to purchasers; and expresses a hope that as the herring fishing is doing well a good many of the fishermen will be able to purchase their houses at Martinmas. On 10th October 1868 he repeats this hope to Stephen, and asks 'to know what prospect there is of the fishermen buying up their houses this season, so that something definite could be done when I am on the spot.' From two letters, written respectively on 7th November and 3d December 1868, it appears that the pursuer had been in Boddam between those two dates, looking into the matter of the fishermen's houses. In the latter of these two letters there is a passage of some importance, in which he says that those who made the getting of additional land a condition of purchasing should not have the option of leasing, but should either purchase on the terms offered or leave the house in his hand; and the reason he gives for this is because the refusal of the additional land is 'their objection to purchase, and not inability to do so.' He states that 'this rule (is) to apply to all who makes additional land a condition of purchase.' This letter is written in the belief that he still had it in his power to withdraw his offer of a lease. The last letter of all to which it is necessary to refer is the pursuer's of 14th December 1868 to his son, in which he returns some deeds executed (conveyances to purchasers), and says, 'You need be in no hurry with the leases; and in making them out no extra ground will be given in any case.' From this it appears that the pursuer had not exercised the power which he believed himself to possess of withdrawing the offer of lease.

"The correspondence of 1868 is in perfect harmony with that of 1867. There may or may not, from anything that appears from it, have been some fishermen who availed themselves of the additional chance given to them of purchasing, but there is no trace of any one of them having withdrawn his acceptance of the offer to lease. Nor is there any trace of the pursuer having withdrawn his offer to lease except in the limited case of those who asked for more land before purchasing, and it does not appear that even this limited withdrawal was ever intimated by the pursuer's son to the fishermen. The correspondence ends, as did that of the preceding year, by leaving the impression that nothing more was left to be done except to write out the leases, about which the son was told to be in no hurry. The year's grace was given that those who had accepted the offer to lease might, if they chose, change and become purchasers. Those of them who did so change will appear from the purchases which were made, but with regard to the others, who made no change, there is not the slightest reason to believe that either party resiled from the agreement made during the previous year, and there is, on the contrary, good ground for believing that both parties still regarded it as a subsisting and binding agreement.

"So far as this note has gone, everything has been established by writing. There remain various questions, however. Firstly, whether the agreement made in 1867, and not departed from in 1868, is, in a question with the pursuer, sufficiently vouched by the writings; secondly, whether the terms of the agreement can be supplemented by parole evidence, so as to make them distinctly show all the requirements of a lease; and lastly, whether the pursuer is still entitled to withdraw from the agreement, or whether there has been such *rei interventus* as to make it as binding as if the intention to embody it in formal deeds had been carried out at the time.

"The question whether the agreement instructed by the writings binds the pursuer, seems to the Sheriff-Substitute not to admit of doubt. The evidence of a lease must be in writing, but it is not necessary that the writs should be those either of the landlord or of the tenant, or should be those even which constitute the contract. It is enough if they be written by persons whom the principals have authorised, and if they afford sufficient evidence of the agreement which was made. In the present case, although neither the pursuer's son nor Stephen had any general authority of any kind to grant or accept leases, it abundantly appears under the pursuer's own hand that they had ample authority for each step which they took. It is proved that the pursuer instructed his son and Stephen to convey his offers to the fishermen, and to return their answers to him. Had the fishermen been repudiating Stephen's authority to act, it might have been difficult for the pursuer to have proved that Stephen had authority to bind them, but the pursuer, after specially authorising Stephen, cannot dispute his actings. To the effect of carrying the pursuer's message and the fishermen's reply, Stephen was the pursuer's specially constituted factor, and the pursuer can no more repudiate the written reply sent by Stephen, and say that it is not good evidence, than he could have repudiated a lease which he had specially authorised Stephen

to grant. It is as much evidence against him as if he had himself entered the fishermen as leaseholders in his rental book, since the writing which a man authorises to be written binds him as much as that which he writes himself; no doubt the agreement remains in such a position that it is questionable whether, had a fisherman chosen to draw back, the pursuer could have found means to bind him, but that would have been a difficulty not occasioned by any doubt whether the contract would be in law or in morality binding on them, but only on a doubt whether the evidence against them would be sufficient, and it is a matter of everyday experience that one of the parties to a bargain has evidence of it, while the other has not.

The writings, however, do not show within themselves the whole essentials of the lease. None of the writings show the duration which the lease was to have. It is, however, quite plain that the duration was fixed between the parties before the correspondence commenced, for in the whole correspondence there is no allusion to the possibility of further discussion on that point. It seems also plain that it was to be a uniform length of lease for all who chose that alternative. In the letter in which the pursuer's son sent the list to be filled up, he says that he has added in pencil the prices and the rents in case any have forgotten, but he does not think it necessary to mention the term of years, which, had it been a varying one for the different tenements, would have been as likely an element to be forgotten as any other. When the schedule was returned he was to fill up the respective lengths of lease for purchasers and tenants without further discussion, and as the former was a uniform period, the probability is that the latter was also uniform. Putting all these things together, the Sheriff-Substitute therefore holds that the written evidence establishes two things with reference to the duration,—firstly, that it was fixed, and, secondly, that it was to be the same period for all. Is it competent then to enquire by parole testimony what this period was? The Sheriff-Substitute thinks that it is, provided always that the evidence be very clear and distinct. The case of *M'Leod* v. *Urquhart*, 25th May 1808, Hume, p. 840, is a direct authority for admitting parole evidence to explain the writings to this extent. This was a case with some points of resemblance to the present. The landlord offered by announcement at public meetings crofts for a certain length of time to all who would enlist in a regiment which he was to raise, but the informal missives granted to the tenant did not mention what this time was, and it was held competent to prove it by parole. The only important difference between that case and the present was, that the lease there was for nineteen years, whereas the period claimed here is 57 years, but that is not a reason for altering the principle, although it is undoubtedly a strong reason for being all the more particular that the parole evidence is free from doubt. In some respects it was a weaker case than the present, because it was not inconsistent with the missives that the period there should still be to fix. In the present case the admission of parole seems really more for the purpose of explaining what the parties meant by the terms they used than for that of either adding to or deducting from them. If parole evidence be looked at, the evidence that 57 years was the period is overwhelming. Stephen, who represented the pursuer, says it was the period—all the fishermen, both those who were, and those who were not interested, have the same story; and since the witnesses, during the year and a-half which the negotiations lasted, came repeatedly in personal contact with the pursuer and his son in discussions on the very business, they could not have all been under a uniform delusion. The only evidence to the contrary effect is that of the pursuer and his son, and their evidence is inconsistent with the writings, because they do not pretend that it was some different period that was in contemplation, but alleged that no period at all had been fixed.

"With regard to the rent there is no dispute. It appears from the parole evidence that it was to be £2 for nearly all the cottages except for a few of the smaller, and these exceptions are so few that the pursuer's son in his letter of 18th September 1867 (announcing the year's grace), speaks of £2 as the lease rental. The receipts since 1867 conclude the evidence on this point, and show that £2 was the rent in the present case.

"In coming to the conclusion to admit parole evidence to some extent in this case to aid in fixing the duration of the lease, and also, though to a much less extent, in fixing the rent, it is not immaterial to have in view that all the written evidence which once existed is not in this process. The original of the schedule which the pursuer's son sent to Stephen has not been produced, and it contained for certain (marked on it in pencil) the rent which was to be paid. Whether its terms would have thrown light on the duration cannot be known. The importance of this schedule is great, because it must have been the document which Stephen had with him when asking the fishermen their decision. Who is responsible for its disappearance does not appear distinctly, but this much is plain, that it was not the fishermen. The matter lies between the pursuer's son and Stephen. The former says that he thinks Stephen substituted a list of his own—that now produced—retaining the one sent. If Stephen did this, his object would be to correct some errors that were in the original. From the correspondence, however, it would rather appear that Stephen returned both the original and the corrected copy. He would hardly have retained the original without remark, and the pursuer's son's reply acknowledging receipt uses the word 'lists' in the plural.

"If the rent and duration be thus held as fixed, there is no room for question as to the subjects, and thus the three things essential to an agreement for a lease are established.

"The agreement, however, which the defenders have proved is one of an informal character, and it is proved that this was intended to embody it in formal leases. There was, therefore, until it was so embodied, room for either party to draw back so long as possession under the agreement had not followed. The possession since 1867 must, however, be attributed to the agreement. The former rents, when the tenants are admitted to have sat either by tacit relocation under old leases, or as tenant at will, were 22s. 6d. a year, and it was part and parcel of the agreement between the parties that the rent was to be raised on the one hand, and a securer holding given on the other. If the tenants had been asked simply for an increase of rent without any inducement to give it being offered, it is quite possible that they might have removed, and as they have now been performing for some years their part of the agreement which was made, it seems

only reasonable that the pursuer should not now draw back from his. The pursuer deliberately offered the lease; the defenders as deliberately accepted it, and as the pursuer has for several years drawn the 'lease rental' it seems to the Sheriff-Substitute that he is now irrevocaby bound by his agreement."

On appeal the Sheriff pronounced the following interlocutor and note—

"*Edinburgh, 10th April* 1874—The Sheriff having considered the reclaiming petition for the pursuer against the interlocutor of 23d February last, with the answers thereto for the defenders, and also considered the record, proof, productions, and whole process, recals the said interlocutor, finds that the defenders have failed to instruct by competent evidence an agreement for a lease of the subjects in question for a term of years as alleged. Therefore repels the defences, decerns removing in terms of the conclusions of the summons, but only at the term of Martinmas next (1874) eighteen hundred and seventy-four, reserving the defenders' claims for the materials of the houses so far as competent; finds no expenses due, and decerns.

"*Note*—The Sheriff, with much regret, has come to the conclusion that the writings founded on will not bear the construction which they have received from the Sheriff-Substitute.

"In 1867, the proprietor of Boddam being desirous to settle permanently his relations with the fishermen of the village (the most of whom had built or acquired their houses without any proper title), caused enquiry to be made as to the number who were willing to purchase on certain terms, and the number who would prefer to take leases. The duty of making this inquiry was entrusted to Mr Robert Stephen, who went round the village and explained to the fishermen that purchasers were to have 999 years' leases at a rent of £1, 2s. 6d., the tenant paying half the valuation of the house, or if these terms were not accepted, they might have leases for 57 years at £2 of rent. A paper is produced embodying the result of Mr Stephen's inquiries, which was sent to Mr John Aiton, the pursuer's son, on the 11th of September 1867. It contains 117 names with the words 'lease' or 'purchase' written against them, where the parties had made up their minds to do either, and the letter accompanying the document explains that where these words were wanting the people had not yet decided what they would do.

"Upon this paper two questions arise—1st, whether it is a sufficient memorandum of the alleged contract to satisfy the rule of law that the terms of a verbal bargain relating to heritage even when validated *rei interventus* can only be proved by writing; 2d, whether Mr Stephen can, in any proper sense, be said to have been the duly authorised agent of the parties to draw it up.

"The Sheriff is inclined to think that the case of the defenders fails on the first point, because it neither specifies the subject, nor the rent, nor the period of endurance—the three essentials of a contract of lease. It is perhaps not necessary that the note or writing should be signed by both parties to be binding. It is conceivable that a proposal in writing made by one of them may be verbally accepted by the person to whom it is addressed; and a verbal offer accepted in writing might be sufficient, but in either case the written offer or the written acceptance should be complete in itself, to the extent, at least, of showing what the parties were contracting about, the more particularly when the person addressed is not an individual, but a community, and the medium of communication is, say, the bellman making public proclamation of the landlord's wishes, or, as in this case, a person going through the village with note-book in hand, from house to house.

"Granting, however, that the writing when supplemented by the other evidence is sufficient, then the defenders have to show that, on drawing it up Mr Stephen was acting for both parties, duly authorised in that behalf. It is here that, in the opinion of the Sheriff, the case for the defenders entirely fails. The defenders themselves were certainly not bound, nor understood to be bound, by what passed between them and Mr Stephen when he was going his rounds, because on the receipt of the information the pursuer, not thinking that any of them were absolutely committed one way or another, proposed in his letters to his son, and also to Mr Stephen, that the option to lease or purchase should remain open another year, in the hope that with a good fishing they would be better able to take the latter course, which was the one which he would prefer. On the other hand, Mr Stephen cannot be regarded as Mr Aiton's agent to the effect of binding him to give every man a lease who expressed a wish to have one. Mr Stephen did not so understand his powers himself, and such an idea plainly never entered Mr Aiton's mind. The object was enquiry. He wished the fishermen to buy their houses, and he wanted to see how many of them were in a position to do so, or how many would prefer to sit as tenants. But this dealing with the village as a community was to be preliminary to dealing with each fisherman as an individual. The great majority of the 117 in Mr Stephen's list were no doubt hardy, sober, and industrious men; but a few of them possibly were of a different character, whom any landlord would hesitate to accept as tenants on any terms, and it is not conceivable that Mr Aiton, in making his proposition public, ever intended to abandon the *delectus personæ* which is of the very essence of the relation of landlord and tenant, and that he was absolutely committed to take every man that offered.

"Accordingly, in the letter of 3d September 1867 sending Mr Stephen his instructions, very distinct directions are given for the express purpose of preventing any such construction of his powers. The fishermen were not to sign the list forwarded, but when it was returned filled up, a new roll was to be prepared containing the value of each house, the payment to be made by purchasers, the length of the leases, and the annual rent. Mr Aiton adds, 'I will then send the whole to you to be signed by each tenant personally.' This was to constitute the contract between the parties, which would then be intelligible.

"At Martinmas 1867 the rents were raised from £1, 2s. 6d. to £2, and the fact that this sum has since been paid forms, it is said, sufficient *rei interventus*. It may be so if distinctly referable to the agreement for a 57 years' lease, which is alleged; but this can hardly be maintained in the face of Mr Aiton's letter to his son, of date 17th September 1867. He there says,—'After looking carefully over all the information you have been kind enough to send me regarding the fishermen's houses at Boddam, I think that the best way would be to leave them the option of lease or purchase open for another year, but upon the distinct understanding

that they pay £2 rent for the next year, that is, from Martinmas 1867 to Martinmas 1868." This was communicated to Mr Stephen, who, after an interview with the fishermen on the subject, reported (under date September 27, 1867), "In general they are quite willing to pay £2 rent until they see at the end of the herring fishing season 1868 if they are able to purchase, and if they are not able to purchase at the above-mentioned time they will then take a lease, and pay the yearly rent of £2." The meaning of this is clear, nothing having yet been definitely settled as to the leases. Mr Aiton says the rents must be at once raised if they are to continue in possession, and they will sit from year to year in the meantime at this higher rate till the matter of the leases is finally adjusted. The fishermen reply,—We are quite agreeable. Indeed, we would rather the matter should lie over till the end of season 1868; but that you, the proprietor, may have no cause to complain of the delay which has been conceded as a favour to us, we will start at once with the new rent. So that this matter of the payment of the increased rent rather shows, not only that there was no *rei interventus*, but that there never was any completed agreement between the parties. In short, the whole thing comes to this,—the pursuer expressed to the villagers, as a community, a readiness to deal with them on certain terms as individuals, but the agreements contemplated have never been carried out, and therefore the defenders are merely tenants from year to year.

"As the cases are representative cases no expenses have been given."

The pursuer appealed.

Authorities cited—Hunter on Leases, i. 263; Bell on Leases, 305; *M'Leod*, Hume, 840; Hunter, i. 263; *M'Rorie*, F.C., Dec. 18, 1810; *Russell*, 13 S. 752; *Maxwell*, Hume, 849.

At advising—

Lord Shand—The decision of this case is attended with difficulty, and I am not surprised that it should have given rise to a difference of opinion between the Sheriff and Sheriff-Substitute. I concur, however, in thinking that the judgment of the Sheriff-Substitute is right,—finding that the defenders have instructed their alleged right to leases for 57 years of the houses occupied by them respectively.

The parties are agreed that at Martinmas 1867 a change occurred in the terms of the tenure on which the defenders continued to possess their houses. The question in dispute is as to the nature of the change. Was it merely an arrangement for an increase of rent and for one year's possession in order to give time for deliberation, and a permanent arrangement being made for a lease of 999 years, on certain conditions, or for a lease of 57 years, or was it an arrangement concluded for a lease of 57 years at the increased rent, with power tothe defenders during the first year of that lease to make their right substantially a right of property by taking a 999 years' lease subject to the condition of making payment of one-half of the estimated value of the houses? I agree with the Sheriff-Substitute in thinking the latter was the agreement between the parties.

It lies of course with the defenders to instruct the existence of the right they allege as being one for a period of years; and it must, I think, be conceded that the *rei interventus* founded on, which consists entirely in the payment of increased rents, is not of a kind which aids the defenders materially in their contention. A new and informal arrangement for a lease is often followed by expensive operations on the tenant's part, executed with the knowledge of the landlord in erecting buildings or making drains and fences, or the like, and sometimes by the payment of a grassum. In such cases the acts of *rei interventus* are useful and properly founded on, not merely to show that the agreement of the parties was acted on, but as throwing light reflectively on the agreement itself. In such cases the nature and the amount of the expenditure afford a very strong presumption that the arrangement was one for a term of years. In the present case I think any such element is wanting. The increased rent paid for about four years before the present dispute is equally consistent with an agreement for tenancy for a single year continued by tacit relocation as with an agreement for a 57 years' lease. The increased rent is not necessarily to be accounted for by an arrangement for a tenancy of years. The *rei interventus* is thus of use only in the way of showing that the new agreement, whatever it was, was acted on, and indeed acted on by both parties, but not as showing what the agreement was.

The agreement must thus be found entirely in the writ of the landlord, by which the defenders say its existence has been proved. There were no writings which passed between the parties such as informal missives, or even a draft lease revised or adjusted, which, when followed by *rei interventus*, might have been held to constitute a lease. The only document directly communicated to the defenders was the schedule made up by Stephen, the factor, for the pursuer, on which the verbal answer of each defender to the question of lease or purchase was recorded. This document was not signed, and was not intended to be the writing constituting a lease in favour of the parties whose answers were there recorded. But although there be no writing which, though informal, can be referred to as constituting a lease, when followed by *rei interventus*, I think the agreement as alleged by the defenders has been proved by writ, *i.e.* by the writ of the pursuer.

The parole evidence can be competently resorted to in order to prove the relation of agency between the pursuer and his son and factor, both of whom acted for him in the transaction between the parties, and recorded in writing at the time for the pursuer the result of their communications, and may also be legitimately referred to, to prove the surrounding circumstances necessary to make the writings intelligible and to enable the Court to construe the terms there used. To this limited extent only I have proceeded on the evidence of the witnesses. In the writings of the landlord I am of opinion that evidence is to be found that before Martinmas 1867 he and the defenders had agreed that on the one hand the defenders should each pay an increased rent, the difference being £2, in place of the former rent £1, 2s. 6d., and that on the other hand they should be tenants on leases for 57 years, with an option or privilege, however, open to them during the first year, of taking leases for 999 years on payment of one half the value of their houses, and reverting in that case to their old rent of £1, 2s. 6d. for the longer period.

The documents which I think prove the agreement are, in the first place, the pursuer's own letters of 26th August and 14th December to his

son, and of 19th September to Robert Stephen, with the entries in Mr John Aiton's note book of the fishermen's answers as to their houses, the letter by Stephen of 11th September to Mr John Aiton, and the list or schedule it contained, and the letter by Stephen of 27th September to the pursuer. Such of these writings as are in the handwriting of Mr John Aiton and Robert Stephen respectively are to be taken in the present question as the writ of the pursuer, in the same way as the record by a factor in the rental book of his employer of the terms of a lease is held to be the writ of the landlord. Mr John Aiton and Stephen were employed by the pursuer to act as his factors or agents in communications made for him to the defenders, and the books or writings in which they recorded on the landlord's behalf the terms on which the parties had negotiated, and the result of the negotiation, are to be regarded as his writ.

From these writings I think it is proved—(1) that prior to 26th August the pursuer and the defenders and others, fishermen in the occupancy of houses, had been negotiating as to their purchasing their houses by taking leases for 999 years, or otherwise taking leases for the shorter period of 57 years; (2) that by the pursuer's desire, communicated through his son to Stephen, the final answers of the defenders and the other fishermen to the pursuer's proposal to allow either purchases or leases were called for and given, and were recorded in writing; and (3) that while all who answered the proposal by agreeing to lease were thereby held bound to do so, yet the pursuer, being anxious that as many as possible should yet purchase their houses, agreed to keep the right or chance of purchase open for another year, and that put them in the position of tenants on long leases with a power of purchasing the houses which were the subject of lease. I think this arrangement is distinctly recorded in the pursuer's letter of 19th September to Stephen, when he says (*reads, ut supra*), and I cannot adopt his explanation that the leases there mentioned as to be sent at once if wished were leases not for 57 but for 999 years; (4) It appears to me to be farther proved that the leases mentioned in the writings to which I have referred, as distinguished from the purchases, were leases for a period of 57 years. The note in John Aiton's book referring to the defender Alexander James Stephen, expressly states this to be the term of endurance of his lease. The whole other writings show that one and the same term of endurance of lease at the increased rent only was in the mind of the parties negotiating, so that when the term of 57 years is proved in reference to one, it is truly proved as to all.

On the whole, I am of opinion that the *rei interventus* which unquestionably took place followed on a verbal agreement with the defenders, proved by the writ of the pursuer to have been not an arrangement for what has been called a year's grace only with no obligation beyond that time, but an agreement concluded for leases of 57 years, with a power or privilege to the defenders to purchase the subjects of their respective leases if they desired to do so, and this being so, I think the defenders should be assoilzied from the conclusions of the action of removing at the pursuer's instance.

Lord Gifford—I have found this case to be one of very great delicacy and difficulty, both in point of fact and in point of law. For although the question raised is mainly one of fact—whether the leases alleged by the respondents the fishermen of Boddam are sufficiently instructed—the question involves most important legal considerations as to the legal competency and sufficiency of the evidence adduced, and as to the nature of the *rei interventus* which is necessary to validate the tenant's right.

The case also is one of considerable importance to the parties. For although the heritable subjects are individually not of great value, a lease of 57 years involves important rights both to landlord and to tenant. It is a claim of heritable right—the right of the respondents to their dwelling houses, and while we can only deal with the three individual cases which are raised in the present action, it is quite right to keep in view that the cases of many others of the fishermen may be practically decided by this one.

The question is, Whether the three respondents, defenders in the action of removing, have sufficiently, and by competent evidence, established valid and subsisting leases between them and the appellant and pursuer, Mr Aiton of Boddam, for 57 years from Martinmas 1867, of the cottages or houses respectively possessed by the respondents, and that at the annual rent of £2 each? While fully admitting the difficulties and the force of the legal objections pleaded by the landlord, and very ably urged at the bar, I have come to be of opinion, on the whole, that the respondents have succeeded in establishing by sufficient legal evidence the subsistence of the leases claimed by them.

The rule of law is that leases for more than one year, being heritable rights, can only be instructed by writing, and the writing ought to be either holograph of the respective parties or duly tested according to law. But it very often happens, especially with the humbler classes of tenants, that possession of the subject is given and enjoyed, and important *rei interventus* takes place on the faith of the lease, without any formal or legally tested written lease, and in these cases the subsistence of the lease is allowed to be proved by writing, although the writing be destitute of or defective in the usual legal solemnities. For example, there may be merely a written offer signed by the landlord, but not holograph of him, and there may be no written acceptance by the tenant, but if on the faith of the improbative offer possession has followed and the lease has been acted upon, both parties will be bound for the whole period of duration expressed in the imperfect writing. And so in many other cases where what is called a defective lease is validated and rendered binding on both parties *rei interventu*, or where the terms of a lease never formally reduced to writing are instructed by informal writings acted on by both parties, and followed by possession and enjoyment of the subject, and by actings on the faith of the lease.

This rule of law has been established in almost every variety of circumstances by a very long and a very numerous series of cases, which will be found collected in Mr Hunter's work on Leases, vol i. page 412 and subsequent pages, and by other institutional writers. It is not necessary that I should refer to these cases, because their authority and the rule of law which they establish were admitted by both parties. The dispute being not as

to the general rule of law, but as to its application to the circumstances of the present case, I do not understand that it was contested that a defective lease may be validated *rei interventu* or by possession having followed on it, or that the terms of a lease clothed with possession may be instructed by informal writings. The contest in this case really is, whether the writings founded on by the tenants are in law the writings of the landlord, whether they are sufficient to instruct a concluded lease, and whether the possession of and acts done by the tenants are referable to the contract of lease alleged by him, and are sufficient to validate it, even supposing its terms to be made out from the imperfect writs founded on.

Now, on all these points I have come, though not without hesitation, to form an opinion favourable to the tenants, although certainly the case is one of the narrowest which has yet occurred.

In the circumstances of the present case, I think that the writings of Mr John Aiton, engineer, the son of the appellant, and of Mr Robert Stephen, the factor of the appellant, must be held as equivalent to the writing of the appellant himself, at least whenever the son or the factor were acting on the instructions of the appellant. It has never been doubted that rental books or rental rolls made up by a factor duly authorised are held as made up by the landlord himself. In this sense the maxim is applicable *Qui facit per alium facit per se.* In the present case, however, there is a great deal of evidence directly under the landlord's own hand.

Now, without going over the evidence in detail —it is long and complicated, and to specify and distinguish the items of evidence would serve no good purpose,—I think the following facts are sufficiently instructed by writings which are either directly or constructively the writs of the landlord.

(1) It is proved that the appellant Mr Aiton offered and proposed to give the fishermen in the village of Boddam one of two things, either, 1st, a long lease of their houses or cottages for 999 years, at the existing rent, £1, 2s. 6., they paying one-half of the estimated value of the house or its materials; or, 2d, to give them a shorter lease of their cottages for 57 years at the advanced rent of £2 per annum. Throughout the whole correspondence and communing the first proposal was called a purchase by the fishermen, the second alternative was called a lease to them. No other proposal was made—there was no third alternative.

Originally this offer was made by the landlord verbally at meetings and otherwise, but its terms are all got from the writings of either Mr Aiton himself or of his son or factor acting under his instructions.

(2) It is proved that Mr Aiton instructed his son, an engineer in Glasgow, to put himself into communication with the fishermen, and "learn what they intend doing about their houses, as I must have their final answers by the 15th of September at latest, so as to have time to warn them away at Martinmas if we cannot agree.

This is proved by the appellant's own letter of 26th August 1867, which clearly shows that he wanted an answer from the fishermen—an answer that is to his alternative proposals, and an answer which would constitute an agreement, for if "we cannot agree" the fishermen not agreeing were to be warned away.

(3) It is proved that the appellant's son, following out his father's instructions, put himself into communication with the fishermen through the factor with the view to get their final answers to the appellant's proposal. Mr John Aiton had already been in personal communication with many of the fishermen, and we have his note book, in which he had noted in June 1867 the answers of many of them to the appellant's offers. But he now sent down final lists to the factor, and instructed the factor to write opposite each fisherman's name whether he will purchase or lease his house, or whether he will do neither. Obviously this was intended to be the "final answer" which the appellant instructed his son to get.

I may notice in passing that Mr John Aiton's note-book, which being written in carrying out his father's instructions I think is really the father's writ, proves the length of the proposed lease—999 years called the "purchase," and 57 years called the "lease"—as well as the rent to be paid in each case. The different cottages are indicated by numbers.

(4) It is proved that the appellant's factor, acting upon the appellant's instructions or communicated through his son, went through the fishermen, and upon a list prepared for the purpose noted their final answer in writing. This written list the factor transmitted to Mr John Aiton for the appellant with full explanations. In his letter the factor states that all the fishermen will either purchase or lease, and it appears from other letters that their ability to purchase depended on the success of the year's fishing.

In the list so transmitted by the factor all the present respondents are marked as "lease," which means that they will take a lease for 57 years of their cottages at a rent of £2 per annum. The cottages had all been built by the tenants themselves.

This written list, made up by the factor under the appellant's orders and instructions, seems to me to be very like a rent roll made up by and for the landlord, and a rent roll where possession has followed has often been held a good and sufficient evidence of a long lease. See the recent case of the *Tobermory* fishermen, where the only evidence of the leases was the rent rolls made up by the factor of the Fishery Company. It is not necessary that the tenant shall hold any writing whatever.

(5) It is proved that the appellant, on considering "all the information" sent home by his son and factor, agreed, in orderto encourage the fishermen rather to purchase than to lease, that is, rather to take the long lease for 999 years than the short lease for 57 years—agreed to delay issuing or making out the leases for 57 years for a year, provided the lessees should pay in the meantime the advanced rent of £2, that is, at the rent agreed on for the 57 years' lease. At the same time, the appellant offered, if any of the fishermen wished it, to give them their leases, that is, their written leases for 57 years, at once. This is proved, *inter alia*, by the appellant's holograph letters of 17th and 19th September 1867. It was simply the proposal of the appellant which delayed or postponed the making out and the granting of formal written leases of 57 years.

(6) It is proved that the respondents, who had all agreed to take leases of 57 years, and to whom formal leases would have been granted if they had asked them—possessed on the faith of the

lease, and paid the advanced rent of £2 for 4 or 5 years. There was a change of tenure indicated by the change of rent, and it seems impossible to ascribe the possession subsequent to Martinmas 1867 to anything else than the agreement for leases of 57 years.

I am therefore of opinion that there is here sufficient writing—held in law to be the writing of the landlord—to instruct an agreement to grant a lease of 57 years at the rent of £2, and that this agreement has been followed by sufficient possession *rei interventus*. There is therefore in law a subsisting lease, and the tenants must be assoilzied from the conclusion of removing. I concur generally with the judgment and opinion expressed by the Sheriff-Substitute.

LORD NEAVES concurred.

LORD ORMIDALE absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal; Find it proved in point of fact that the respondents (defenders in the Inferior Court) are tenants of the houses possessed by them respectively under valid and ubsisting leases to them by the appellant (pursuer) for fifty-seven years from March 1867, and that they have possessed under such leases since Martinmas 1867; Find, in point of law, that the appellant is not entitled to remove the respondents from their respective possessions; Therefore, and with reference to the judgment of this date in the relative action of suspension at the instance of the respondents, recal the judgment of the Sheriff appealed against, and assoilzie the respondents from the conclusions of the action of removing, and decern; Find the respondents entitled to expenses both in this Court and in the Inferior Court, and remit to the Auditor to tax the same and to report."

Counsel for Appellant—Solicitor-General (Watson), Q.C., Asher, and Pearson. Agent—J. Auld, W.S.

Counsel for Respondent—Dean of Faculty (Clark), Q.C., and W. A. Brown. Agent—A. Morrison, S.S.C.

Saturday, January 30.

SECOND DIVISION.

[Lord Craighill, Ordinary.

OLIVER AND HUSBAND *v.* M'KNIGHT.

Bill—Assignation—Relief.

The pursuer, a married woman, being desirous of aiding her husband who had put his name to certain accommodation bills, joined with him in granting a disposition in security of the amount due on the bills to certain subjects of which they were *pro indiviso* proprietors. Thereafter the husband was sequestrated, and the heritable property sold, the price being consigned in bank; and in a multiplepoinding then raised it was held that the assignees were entitled to full payment from the fund *in medio*. The pursuer having obtained from them an assignation to the bills, excluding *jus mariti* raised this action against the drawer for payment of the amount contained in the bills, as having paid their contents out of her separate estate, and acquired a right as an onerous indorsee. *Held* that she was not entitled to recover more than to the extent of relieving her from the consequences of the disposition granted by her in security for her husband's debts.

Observed (per Lord Neaves) that the position of the pursuer here was not that of a cautioner, and could not have been so.

In this case Mrs Macfarlane or Oliver, wife of Andrew Oliver, Kelvingrove Street, Glasgow, with consent of her husband, sued John M'Knight, sometime warehouseman in Glasgow, now coalmaster at Plan, near Kilmarnock, for payment of £238, 1s. 8d. being principal and interest contained in certain bills drawn by the defender upon and accepted by the pursuer's husband, and endorsed to O'Kell, Selkirk, & Co., warehousemen, Glasgow. The pursuer alleged that her husband put his name to the bills in question to accommodate the defender, who was in pecuniary difficulties at the time. The pursuer and her husband were proprietors *pro indiviso* of certain subjects in Glasgow, and concurred in conveying said subjects to O'Kell & Co. in security of the sums due on the bills, although the conveyance granted was *ex facie* absolute. The pursuer's husband having got into difficulties, his estates were sequestrated, and she lodged a claim in the sequestration founding on the bills in question, but the trustee rejected her claim. O'Kell & Co. subsequently sold the heritable subjects, and consigned the proceeds in bank. An action of multiplepoinding was thereafter brought in the Sheriff Court of Glasgow, the fund *in medio* in which was the free proceeds of said heritable subjects, and in said action it was found that O'Kell & Co. were entitled to be paid in full out of said fund *in medio*. The pursuer thereupon obtained from them an assignation to the bills in question, excluding her husband's *jus mariti*, and raised the present action, maintaining that she, having paid out of her own separate estate the contents of the bills, and having acquired right to the same as onerous assignee, she was entitled to decree as concluded for.

The pursuer pleaded—"The pursuer having paid out of her own separate estate the contents of said bills and promissory-note, with the charges thereon, and having under the title before narrated acquired right to the same as onerous assignee, is entitled to decree in terms of the conclusions of the summons."

The defender put upon record no less than six pleas in law in answer to the pursuer's claim, but subsequently abandoned them all except the fifth, which was as follows—"In no view can the pursuer recover more than will, along with the sums received by her in the multiplepoinding, constitute full payment of her half of the proceeds of the property condescended on."

Lord CRAIGHILL (Ordinary) pronounced the following interlocutor:—

"*Edinburgh*, 31*st October* 1874.—The Lord Ordinary having heard parties' procurators, &c.: Finds that all the pleas stated for the defender, except the fifth, were given up in the course of the proof; and