Appoint the shares of Mrs Vass and of the children of Mrs Campbell to be paid according to the terms of the obligation by the deceased Mr George Murray senior in the respective marriage-contracts of Mrs Campbell and Mrs Vass referred to on the record: Sustain the claims of the before-mentioned parties to this extent and effect accordingly: Refuse all other claims: Find all expenses hitherto incurred by the parties due out of the fund *in medio*, and remit to the Auditor to tax the same and to report, and decern: *Quoad ultra* remit to the Lord Ordinary to proceed with the cause, with power to decern for the expenses now found due."

Counsel for Pursuers and Real Raisers—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Misses Murray—Macdonald, Q.C. —G. Watson. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Gustavus Aird Murray—Kennedy. Agents—Duncan & Black, W.S.

Counsel for other Claimants—Guthrie Smith—Pearson — H. J. Moncreiff — Taylor Innes. Agent—Alexander Matheson, W.S.

Friday, July 15.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

BALLANTINE AND OTHERS *v.* STEVENSON.

Lease — Removing — Possession — Tacit Relocation.

D. S. was sub-tenant of a farm leased by his brother W. S. On the expiry of the lease he received from the landlord's agent a lease for a further term of years, which he signed with his brother as cautioner and returned to the agent for the landlord's signature. The latter retained it unquestioned, and a year after the landlord repudiated it and brought an action of removing against D. S. *Held* that inasmuch as the lease had been duly signed by D. S., who was (*diss.* Lord Young) tenant of the farm by tacit relocation, and had been acted on by both parties, the landlord was not entitled to challenge it at this distance of time.

This action was raised by Andrew Rollo Bowman Ballantine, Esquire, of Ashgrove and Castlehill, in the county of Ayr, with the consent and concurrence of Edward Atkins, Southampton, against David Stevenson, farmer, for the purpose of having the latter ordained to remove from the farm of Outer and Innerwood, and further, in the event of his continuing in possession, to pay damages. The pursuer was heir of entail in possession of the estate of Ashgrove. Although he succeeded to that estate in 1859, on the death of his predecessor Miss Bowman, he did not come into the actual possession of the estate till 1879, in respect that in anticipation of his succession he sold his life interest to Mr Edward Atkins, of Southampton, who remained in possession until a year or two ago, when he re-sold the interest to the pursuer. During his possession Mr Atkins granted leases of the farms and exercised all the rights of owner. The said farm of Outer and Innerwood was let for a term of nineteen years to William Stevenson, the defender's brother, but from about 1867 the latter was subtenant of the farm under his brother by an arrangement to that effect. In 1876 this lease expired, and negotiations took place for a renewal of it. Mr Atkins at no time took any personal part in the management of the estate but left the whole administration in the hands of Mr Bradby, a London solicitor, and the firm of Bradby & Robins, of which he was for some time a partner. These gentlemen employed Mr Hugh James Rollo, W.S., of Edinburgh, as their local agent and factor, and entrusted him to a large extent with the details of the management. It appeared that in 1875, while William Stevenson had a year and a-half of his lease still to run, the roof of the farmhouse had fallen in from natural decay. Mr Rollo obtained a report on the subject from Mr Stewart, factor to the Earl of Eglinton, suggesting that the landlord should renew the roof and raise the walls of the farmhouse and charge the tenant interest on the outlay. This report was sent by Mr Rollo to Messrs Bradby & Robins on 19th June 1875, but no answer having been returned, Mr Rollo, on 4th January 1876, wrote to them as follows:—"I must again refer to the repair of the roof of the barn on the farm-steading occupied by Stevenson. I am rather at a loss what to advise. Mr Atkins' tenure of the estate depends upon the life of Mr Bowman Ballantine. Then there is only one year of the lease to run, so that it is not worth Stevenson's while himself to be at much outlay, even although by not doing so he puts himself to inconvenience. The farm will certainly not let without the houses being repaired, and when a new lease is entered into there is every reason to suppose that there will be a rise of rent. The Stevensons are most respectable men, and I think a good deal of the younger brother who occupies this farm. How would it do to enter into an agreement with the Stevensons that Mr Atkins will repair the barn, the Stevensons paying six or seven per cent. till the present lease runs out, and then, if Mr Atkins is still in possession, that they will retake the farm on a new lease, and let us have the farm revalued to see what the increase of rent would be? It is quite evident that when the lease does run out the steading must be repaired." On 5th February Messrs Bradby & Robins replied—"Please do what is right according to the respective obligations of the landlord and tenant, and not expending more than is absolutely necessary." On 5th June Mr Rollo wrote—"As I sometime since wrote to you, Stevenson's farm of Outerwood runs out this Martinmas, and I now enclose report by Mr Stewart as to what he proposed should be done in the event of a new lease being entered into. The rise of rent is considerable, but then there is the required outlay. Whitehirst also runs out this November, and, as you will observe, Mr Stewart proposes the two farms should be joined. The change of steading, however, will be a very serious matter as to expense. Considering the tenure upon which the estate is held, depending upon Mr Ballantine's life, the repairing of steadings is a matter

attended with difficulty, and requires some consideration." About this time some difficulty was started as to the power of Mr Atkins to grant leases at all. Mr Rollo, however, by the instructions of Messrs Bradby & Robins, consulted Mr Kinnear, advocate (now Dean of the Faculty of Advocates), on the subject, whose decision was in favour of Mr Atkins' power. This opinion was communicated to Bradby & Robins by Mr Rollo in a letter of 7th September, in which he says—"I can see no reason why we should not enter into a treaty with Mr Stevenson for a new lease of the subjects." On the 9th of September Mr Bradby replied—"We beg to acknowledge receipt of your letter of the 7th inst., enclosing a copy of statement laid before counsel and of his opinion thereon, and which seems satisfactory." On 28th August 1878 Mr Rollo had the lease revised by Mr Stewart, and signed by David Stevenson and by William Stevenson, as his brother's cautioner. This alteration was made at the request of both brothers when they saw Mr Rollo in November or December 1876; he then wrote to Messrs Bradby & Robins—"I now enclose for the signature of Mr Atkins the lease to Mr Stevenson of the farm of The Wood." In reply, on October 26, 1877, they wrote—"Our client thinks he ought not to sign any new lease pending the litigation which has been commenced against him." This litigation was an action raised by Mr Bowman Ballantine, the pursuer in this case, to set aside the transaction under which Mr Atkins acquired the estate, and was subsequently settled in London. On 11th December Mr Rollo wrote—"I had a conversation with counsel as to the lease with Stevenson. As you are aware, Mr Kinnear gave it as his opinion that Mr Atkins had the right to grant the lease. It is, of course, impossible to say how long the present litigation may go on, and in Scotland we have no such thing as farm tenants by the year. I do not see, therefore, what other arrangement there can be than to conclude the lease, resting upon Mr Kinnear's opinion, who is now the counsel for our opponents. I will be glad to hear from you." To this they replied on December 31—"With regard to Stevenson's lease we are instructed to say that our client does not think of renewing it. We conclude that you have not agreed to any renewal." On January 9, 1878, they wrote—"Mr Atkins intended to have the farm revalued before granting any new lease, and will not grant a new lease on the old terms." On the 26th February 1878 they wrote—"Our client trusts he is not committed to a renewal of Mr Stevenson's lease." On 9th March 1878 they wrote—"We shall be glad to hear whether the arrangement with Stevenson is obligatory on our client, as he is not desirous of granting a new lease on the present terms. No valuation has taken place for 50 years. It is not therefore simply a question of the right or power of our client to grant the new lease, but he does not wish to do so." On May 16, 1878, they wrote—"Will you be so good as to inform us by return of post what is Mr Stevenson's position. We conclude he is now only a tenant at will, or at most a yearly tenant." Mr Rollo replied on May 17, 1878—"Stevenson having signed the lease and continued in possession, besides making a payment to account of rent, must be considered as the tenant for the duration of the lease." On the 10th June 1878 Mr Bradby wrote—"Mr Stevenson should without delay be made to clearly understand that our client has never agreed to grant him a new lease." Mr Rollo refused to stand to these instructions, and after some further correspondence upon the matter, in which Mr Rollo explained the position clearly, the tenants were informed that there was an objection for the present on the landlord's part to sign the lease.

On 20th of September 1880 the concurring pursuer Mr Atkins, with consent of the other pursuer, raised an action of removing in the Sheriff Court of Ayr against William Stevenson, concluding for his removal from the farm. The latter entered appearance and lodged defences denying that he was occupying the same, or had any right to continue in possession as tenant. The defender David Stevenson claimed to possess the farm under the arrangement made with his brother William, and under the lease which he had signed, but which the pursuers repudiated, and it was to have him removed that the present action was raised.

The pursuers pleaded—"(1) The pursuer, the said Andrew Fitzjames Cunningham Rollo Bowman Ballantine, being proprietor of the lands and farms libelled, is entitled to obtain decree of declarator as concluded for, and to have the defender David Stevenson instantly removed and ejected from the said lands and farms as a vitious or precarious possessor. (2) In the circumstances above set forth, the defender, who has no legal possession, is not only not entitled to retain the title or occupancy or possession of the said lands and farms against the will of the pursuer, but is liable in all loss and damage arising to the pursuer thereby, and the pursuer is entitled to decree against him as concluded for in that respect, with expenses."

In defence the defender averred that in 1876 Mr Rollo had consented to take him as successor to his brother William in the tenancy of the farm under a nineteen years' lease, and that Mr Atkins had consented to this step. Thereafter the lease in these terms was sent signed by him and his brother as his cautioner to Mr Rollo for Mr Atkins' signature. In reliance on the lease he entered into possession of the farm and took over the whole crops and implements from his brother at a valuation at Martinmas 1876. He had regularly paid the rent stipulated in the lease, which had been accounted for by Mr Rollo to Mr Atkins. He further averred that on the lease being returned to Mr Rollo he took it for granted that it had been forthwith signed by Mr Atkins, and he only learned in August 1878 that Mr Atkins' signature had not been adhibited.

He pleaded that—"(1) Being tenant of the lands in question under a nineteen years' lease, to run from Martinmas 1876, he should be assoilzied. (2) *Separatim*, an agreement for a nineteen years' lease in terms of the lease signed by the defender had been constituted, and was now binding under the writings and actings aforesaid."

In the proof which was taken before the Lord Ordinary it appeared that Mr Rollo was aware that the defender had entered into an agreement

with his brother as to being his brother's sub-tenant in the farm. It also appeared that Mr Bradby had not thought it proper at once to cause intimation to be made to the Stevensons that the lease was not to be carried out, but had thought that the best plan was to leave the lease in abeyance, because it might in the end have been arranged that it should be carried out.

The Lord Ordinary (CURRIEHILL) found (1) that the defender David Stevenson was in possession and occupation of the farm as a yearly tenant; and (2) that he was bound to remove from the said farm and premises as follows, viz., from the arable lands at the said term of Martinmas 1881, from the yards at Candlemas 1882, and from the houses, grass, and other pertinents at 1st May 1882. His Lordship appended a note to his interlocutor, the import of which was as follows:—The question between the parties depended mainly upon the extent of Mr Rollo's authority. In the first place, it was certain he had no direct authority from Mr Atkins to enter into leases with tenants, but the correspondence which passed between the parties revealed that he had such authority from Messrs Bradby & Robins, who had full power to bind Mr Atkins in the matter. It appeared, however, that Mr Rollo had failed to communicate to Messrs Bradby & Robins that the new lessee was to be David Stevenson. They imagined that the lease was to be executed in favour of William Stevenson, the former lessee, and the *delectus personæ*, which was the right of a landlord, demanded that this should have been made clear to them if the lease with David Stevenson was to stand. His Lordship then added—"Now, as to the alleged facts upon which the defender founds as amounting to *rei interventus*, viz., possession, payment of the increased rent, and execution of the repairs, the proof negatives all of these allegations. In the first place, the possession of the defender is not to be attributed to the lease now in question; it had begun long before that lease was ever thought of; he had for years previously been his brother's sub-tenant, and he just continued after Martinmas 1876 to occupy and labour the farm as before. In the second place, in point of fact he did not pay the increased rent, at all events until sometime after he had been informed that the new lease had been repudiated by Mr Atkins. Indeed, he seems to have been generally in arrear. And in the third place, he did not until 1880, shortly before this action was raised, and long after he knew that the lease was repudiated, execute any repairs upon the steading. It is thus impossible for the defender to maintain either that the lease was adopted or homologated by Mr Atkins or his solicitors Bradby & Robins, or that anything had been done by him (the defender) on the faith of the lease which he would not have done if the lease had never been even proposed. In short, there has been no *rei interventus*.

"From what has been said, it follows that, in my opinion, the lease cannot be founded on by the defender as a title to possess the farm as tenant for nineteen years from Martinmas 1876. But while that is my opinion, I think there is enough in the proof to show that *de facto* the defender has been recognised both by Mr Atkins and by the pursuer, for some time before this action was raised, as a yearly tenant of the farm. He was allowed by Mr Atkins to remain in possession and occupation after it was known that he and not William was *de facto* occupying the farm, and a certain amount of rent was accepted from him each year. And by the pursuer's own agents he was entered in the valuation-roll for 1879–80 as tenant of the farm without a lease at the rent of £250. I do not know whether or in what character he was entered in the roll for 1880–81, but in point of fact he was allowed to begin a new year's tenancy at Martinmas 1880 without objection, for this action was not raised against him till 27th December 1880. It is impossible, therefore, for me to pronounce decree of declarator in the terms sought by the pursuer, viz., that the defender has no right or title to occupy or possess the farm. But I propose to find that the defender is in possession as a yearly tenant until Martinmas 1881 as to the arable lands, and until Candlemas 1882 as to the yards, and until 1st May 1882 as to the houses, grass, &c., and that he is bound to remove from the several premises at these respective dates. As to the rent, I think it would be unreasonable to hold the defender bound to pay the increased rent which he was willing to pay only in respect of a nineteen years' lease, and I therefore think the rent of £250 (the old rent) is a fair and reasonable rent to fix, the more so as it is the rent entered by the pursuer himself, or by his instructions, in the valuation-roll. In this view of the case, of course, the pursuer's claim of damages for illegal occupation falls to the ground, the defender, on the other hand, being bound to pay the rent. It was very fairly stated at the debate by the counsel for the pursuer that the pursuer would give the defender credit for any outlay which he would establish as having been made in substantial repairs and meliorations."

The defender having reclaimed, he argued—(1) Rollo had authority to grant the lease, and whether signed or not it was a valid and concluded lease; (2) the pursuers were barred by acquiescence from repudiating the lease; (3) possession and *rei interventus* completed the lease.

Authorities—Story on Agency, 256; *Macpherson* v. *Clark*, May 12, 1875, F.C. 352; *Dowager Countess of Moray* v. *Stewart and Others*, July 23, 1722, M. 4292, and March 24, 1773, 2 Paton's App.; Ersk. Inst. ii. 6, 36; *Graham* v. *Gowans*, June 20, 1872, Hume's Rep. 784; *Forbes* v. *Wilson*, Feb. 22, 1873, 11 Macph. 454.

At advising—

LORD JUSTICE-CLERK—This is an action which has been carefully argued, and which raises some difficult and important questions.

The substance of the decree which the pursuer asks is, that the defenders, the persons of the name of Stevenson, shall be forthwith removed from the farm or farms of Outerwood, which he says are his property; and the ground upon which the demand is made is, that they are not let to Mr William or Mr David Stevenson, and that they have no right of occupation of any kind.

The defence which is made by Mr David Stevenson, who is the principal tenant according to his own statement, is that he is possessing,

and has possessed since 1877, under a lease signed by himself as principal tenant, and by his brother William Stevenson as his cautioner, and that consequently he is entitled to run out his term. The lease has been produced out of the hands of Mr Rollo, who acted as agent for the landlord, and it is signed by both tenants, and is dated in August 1877. But it is not signed by the landlord. The contention between the parties is this—on the one hand the pursuer says that he, the pursuer, has not a lease which authorises possession, because the document is incomplete; on the other hand it is said that that is wholly immaterial when the landlord, who could have signed at any time, has not chosen to do so, because his retention of the lease, and suffering the possession by the defenders to continue under it, implies an acceptance of the terms specified in the lease on the part of the landlord, and is equivalent to his signature.

These are shortly the questions that arise in this case, which has some features, I think, altogether peculiar to itself. I have never seen a case precisely of the same kind, although the category of cases to which it belongs is one of the commonest in the law of landlord and tenant. The condition in which this lease—the uncompleted lease—stands is this, William Stevenson, the brother who appears in the written instrument as cautioner, was the principal tenant both of this farm and of another, and his brother David Stevenson was his sub-tenant in the particular farm in question. That state of matters had continued until 1876 under a written lease for nineteen years. The lease expired at that time, and in 1876, therefore, it was necessary to consider what course the tenant and landlord were to follow. The landlord at that time was Mr Atkins, who is called here for his interest, and is in reality a creditor of the real proprietor, but holding, I fancy, a disposition for his life interest, or his interest whatever it was, and entitled if he chose to let the farm. Messrs Bradby & Robins, solicitors, London, acted both for the money-lender and for the proprietor, and were entitled, as such parties are entitled in matters of that sort, to let the lands. It seems that Mr Hugh Rollo acted as agent in Scotland for these parties.

Now, the farm buildings having gone into disrepair, and there being considerable difficulty and question as to the title of the real and radical proprietor, it became necessary to take some measures to have them repaired, and Mr Rollo's advice was that a new lease for nineteen years was the only way of doing that satisfactorily; and he wrote at the same time to say that he had a very good opinion of David Stevenson, the brother of the former tenant.

The result was, that after some question as to Mr Robins' power Mr Rollo recommended that a lease should be granted, and granted to Stevenson. It was revised by Mr Stewart, the factor to the Earl of Eglinton, in whose opinion in such matters he had confidence, and there was an obligation inserted in the draft lease which Mr Rollo submitted to the tenants about the farm, and the improvement of the farm, and the payment of an increased rent. And after all that had been done, Mr Rollo on the 28th of August 1877 enclosed for the signature of Mr Atkins the lease to Mr Stevenson of the farm of Outerwood. Mr Rollo then concluded that everything was settled, and David Stevenson, the tenant, was in possession of the farm. He had been his brother's sub-tenant in the nineteen years' lease, and by tacit relocation he had possessed from Martinmas 1876, when that lease ran out. Mr Rollo was of opinion then, and expressed himself so in his letters, that that bargain was completed, and the lease executed by David Stevenson as principal tenant and by William Stevenson as cautioner was handed to the landlord in August 1877. The tenants never heard a word, according to the evidence and according to my opinion, of the objection to that lease or repudiation of it until the month of August 1878, being a full year after the execution of the new lease by the tenants. Then Mr Rollo was asked by the landlord or by the agents of the landlord to repudiate the whole transaction.

Now, that is the feature which I mentioned as being wholly peculiar to this case. I have never seen a case where the landlord, after getting a regularly executed instrument to which his tenants were conclusively bound, and which he could have made effectual at any time, sought at the distance of twelve months to repudiate such an instrument.

I am of opinion in this case that he cannot be allowed to do so.

The law upon this matter is not in the slightest degree either doubtful or matter of rare occurrence or decision. It is perfectly well settled in numberless cases. I refer the parties to an analogous instance, stronger in some respects for the tenants, and weaker in others, and of so recent occurrence as the year 1872—the case of *Forbes* v. *Wilson* (Feb. 22, 1873, 11 Macph. 454) in this Division. That case was substantially a case of this description. There was an application by Mr Wilson, a factor, to be allowed to lease a piece of ground that was the subject of an excambion — a current excambion between Mr Forbes of Callander and his neighbour. Mr Wilson wrote a letter to the landlord, Mr Forbes, offering to lease the ground at 15s. per annum Mr Forbes sent no answer whatever to that, but Mr Wilson assuming that this implied an acceptance on the part of the landlord, proceeded to execute the work which he intended to do on this piece of ground. Then after the lapse of some time Mr Forbes said—"Oh, there is no lease here. I never consented to the lease. I never heard of it. You may have arranged it with my agent, but I knew nothing about it." But the Court would not have that from him. Lord Cowan, after recounting the facts of the case, says this—"Mr Wilson entered into possession even before the late Mr Forbes' death, which occurred soon after the date of the offer referred to, and laid out a large sum of money in forming an avenue to his house of Bantaskine through the strip of ground, the formation of which was the very object of the excambion, the excambed ground being used for that purpose. There was thus fixed on the late Mr Forbes an obligation to give effect to this lease. Nothing is better established than that such a conjunction of circumstances is quite sufficient to constitute a valid and binding contract of lease." Then in the same case Lord Neaves observes—"It may be that Mr Forbes is quite correct in stating that he had no personal knowledge of what had been

arranged, and of what operations were going on in respect to the strip of ground in dispute; but I must hold that every proprietor, whether he mismanages his estate or not, is presumed to know all about what goes on in connection with it, and especially what passes with the full knowledge of his own servants."

Now, here we have the fact that the landlord has held for a whole year an obligation on his tenants which he could have enforced at any time during that period, and the question is, whether he is entitled at the end of that period to repudiate that obligation?

Now, undoubtedly I should not have been inclined to think that an acceptance on the part of the landlord was to be presumed from the construction of the document itself if the parties had refrained from acting on it—that is to say, if this had been the lease of a subject which they did not occupy, or which David Stevenson did not occupy, and the term of entrance to the land had arrived, and nothing had been done. That might undoubtedly have altered the circumcumstances. That might have shown that the tenants were not in any better position than the landlord. But I think there are two grounds on which the tenants here are entitled to continue their possession under the lease. The first is an implied acceptance by the landlord of the terms which had been signed by the tenants, although he himself did not sign the instrument that was in his own hands, which implied acceptance necessarily arises in a year to year tenancy. And I state that separately, because I am by no means prepared to say that any specific kind of *rei interventus* would be required to validate that implied acceptance. It is a question of contract, and if there is ground to infer from the legal actings of one of the parties that he has assented to the contract—the written contract of the other—I am far from being prepared to say that that would by itself go a long way; but it is unnecessary that I should found any part of my judgment here upon that, because I am quite clear that this contract was acted upon as far as circumstances would permit, and that in the knowledge of the landlord. It is perfectly true that David Stevenson was in possession before the commencement of this new lease, and therefore there could be no change of possession when he went on under the new arrangement. That is quite true; but there is one question there which is not so much of fact as a question of legal right. Was David Stevenson entitled to attribute his possession from the date when he sent this instrument to the landlord to the lease itself? I am of opinion that he clearly was, and for this plain reason, that he could not help himself in regard to the obligations undertaken. As far as his brother was concerned, he could no longer remain as his sub-tenant; clearly he could not. And with regard to the landlord he was not entitled to say—"My creditor is my brother, and not you." That would never do. The landlord could have compelled David Stevenson to pay the rent for which he had stipulated; and I have no idea that a landlord can hold a lease over the head of a tenant on these terms with an intention—for I rather think it comes to that—of saying at some time that he may select whether it is more profitable for himself to hold it a concluded bargain or not. But that, however narrowly we scan it, is the position of this case. Mr Bradby, the solicitor in London, admittedly has the power to accept or reject, and he tells us in the plainest terms in his evidence that he retained the lease, which he was bound to have returned at once if it was not to be acted upon, in order to see what would turn up against a profitable view for his client. He says, for instance—"I did not think it proper to cause intimation to be made to the Stevensons that the lease was not to be carried out; it was better to leave it in abeyance, because it might in the end have been arranged that the lease should be carried out." And therefore there never was from the first a decided resolution not to accept the lease until August 1878. I think that is quite conclusive of the case, for if the landlord did not reject the lease he accepted it. There were not two ways of it, and he did not reject. My own opinion is he never intended to reject. I think Mr Bradby acted upon his own opinion that the lease was a good and profitable lease. That he had trouble with his two clients who were at law together is perfectly true; but if we go through the correspondence I think there are obvious indications that Bradby was not prepared, at least during that year, to take the responsibility of throwing over the two respectable tenants he had got.

I shall close the observations I have to make with a few remarks on the correspondence as bearing on the question of *rei interventus*. On the 4th of January 1876 Mr Rollo writes that the best way would be to see if the Stevensons (both of them) will retake the farm on a new lease, having it re-valued. Bradby writes on the 5th February 1876—"Please do what is right according to the respective obligations of the landlord and tenant, and not expending more than is absolutely necessary. Mr Rollo accordingly submits the matter to Mr Stewart for a re-valuation, which he obtains, and he writes that he has got it on the 5th June 1876. He writes again on the 7th September as to Mr Atkins (the creditor's) power. There he quotes Mr Kinnear's opinion, and says—"I can see no reason why we should not enter into a treaty with Mr Stevenson for a new lease of the subjects." Did Mr Bradby see any reason why they should not enter into a new lease? Not the least. He writes on the 9th September—"We beg to acknowledge the receipt of your letter of the 7th instant, enclosing copy of statement laid before counsel, and of his opinion thereon, and which seems satisfactory."

Mr Rollo then proceeded to have the draft prepared. I quite grant that he might have no authority, as agent of the parties, to conclude and make leases of the land, but it is a different matter when it comes to Bradby saying—"Do what you think right and proper;" and Rollo says—"I think it right and proper that there should be a new lease of the subjects;" and Bradby writes in answer—"Your letter is satisfactory." I think a very little adoption by the landlord, or sanction by the landlord in thus acting for him—sanction of things done under an authority of that kind,—would be sufficient to validate the transaction and to bind the landlord. And accordingly on the 28th of August Mr Rollo writes—"I now enclose for the signature of Mr Atkins the lease to Mr Stevenson of the

farm of The Wood." And there it rests. As I have already said, that, as far as the tenants are concerned, is the lease.

Now, it is quite true that two months thereafter and more Mr Bradby, who had made no sign whatever up to that time, writes—"Our client thinks he ought not to sign any new lease pending the litigation which has been commenced against him." It is plain, I think, that Mr Bradby's judgment went the other way; but his client had been troublesome. He does not send the leases back to his tenants, however, but writes to his own agent. And accordingly Mr Rollo says—"I have had a conversation with counsel as to the lease;" and he adds that he will be glad to hear from him. Mr Bradby says on the 31st December—"We conclude that you have not agreed to any renewal." How he could conclude that when he had the lease in his hands it is impossible to comprehend. It is perfectly certain that Bradby had Rollo's letter. To allow him to say he did not read it is to allow him to say what no Court of law can take off his hands. We must hold that he read Mr Rollo's letter, and what that letter told him was that the new lease was sent up for signature. It was in vain for him to write four months after—"We conclude you have not agreed to any renewal." If Mr Rollo had power to conclude or to agree to it, he certainly had done so, and Mr Bradby knew that perfectly well. Then he writes on 9th January—"Mr Atkins intended to have the farm, &c., valued before granting any new lease, and will not grant a lease on the old terms." On the 26th February 1878 he says again—"Our client trusts that he is not committed to a renewal of Mr Stevenson's lease." Thus, in his opinion at all events, Mr Rollo might have committed his client, but he hopes he is not committed. Then he writes again on the 9th March 1878—"We shall be glad to hear whether the arrangement is obligatory on our client, as he is not desirous of granting a new lease on the present terms;" and in the next letter, dated May 16th, he says—"Will you be so good as to inform us by return of post what is Mr Stevenson's position. We conclude he is now only a tenant at will, or at most a yearly tenant." Then we have Mr Rollo's letter of 17th May, in which he says—"Stevenson having signed the lease and continued in possession, besides making a payment to account of rent, must be considered as the tenant for the duration of the lease."

Now, I have read these things as pointing their effect on the question of *rei interventus*. Whether the tenants were entitled to attribute possession to the instrument they had signed or not is one thing, but that they did attribute their possession to that instrument—and Mr Bradby for the landlord knew that all the time—was perfectly certain, because these letters of Bradby saying, "I hope there is no bargain with the Stevensons," followed by a letter from Mr Rollo saying, "There is certainly a bargain, and they will hold by it," certiorated Bradby that at all events the tenants were doing what they were entitled to do, and that they were attributing possession to the written instrument. The only other thing I think it necessary to make any remark upon is, that on the 10th of June Bradby says—"With respect to the proposed new lease to Mr Stevenson, our client will not grant it on the old terms. Should he be disposed to grant it at all, Mr Stevenson should, without delay, be made to clearly understand that our client has never agreed to grant him a new lease." Mr Rollo will not stand that, and he says in effect that Mr Bradby was cognisant of all the circumstances, and that long before he let him know the whole facts. After further correspondence upon that matter, in which Mr Rollo explained the position very clearly, the tenants are informed, or Mr Stevenson is informed, that there is an objection for the present to sign the lease.

In the last place, there was a payment of rent under the new lease accepted by Mr Rollo, and therefore accepted by the landlord, for Mr Rollo had acted for him. It went into the coffers of the landlord. Bradby at first thought it was not a payment to account of the rent, but there can be no doubt it was.

Now, I am of opinion that as the tenant who signed this lease was himself in possession, he substantially did all that he could—all that a tenant in these circumstances could do—to validate the lease, by acting on the lease, the instrument which he had himself signed. I think the landlord throughout retained in his own hands the power of enforcing the lease, which he could only do upon the condition of being a party to it, and merely by refraining from at once throwing it up and returning an obligatory document he is not entitled to say he is not bound.

In the second place, I think that the condition of possession necessarily was that the tenants were possessing under the instrument which had been signed as tenants, and that unless they could have got free if sued by the landlord on the pretext that they were not—they not knowing whether he had signed it or not—they must be held to have possessed under the lease. The Lord Ordinary thought, and I think rightly thought, that if Stevenson was the tenant the case would be much more easily disposed of, because it is easier to renew a current lease, and the proof of the renewal is not nearly so stringent as required by law as where it is an original lease. That is quite true; but I think the Lord Ordinary has given far too little effect to the fact of the retention by the landlord—the deliberate and intentional delay on the part of the landlord in making up his mind as to the clear and unquestioned view of the tenants, corroborated by Mr Rollo's own statement that the lease was perfectly binding, and that therefore they were possessing under it. I am of opinion that both law and justice require that we should alter this judgment, and that we should give effect to this instrument in question and assoilzie the tenant from the conclusions of the summons.

Lord Young—I concur in your Lordship's judgment.

Lord Craighill—I also concur in the result at which your Lordship has arrived. As has been stated, the case is one of great importance in the law of landlord and tenant, and while I concur in your Lordship's observation that the case is so far peculiar, inasmuch as the lease that was signed by the tenant was kept by the landlord without any intimation to the tenant that he was not to consent to that lease for the

period of a year, yet I should not be prepared to hold that this is in truth the principle upon which the present case has to be decided.

The pursuer brings his action against the defender Stevenson on the ground that the defender has no right or title to remain for a single day in possession of the lands in question. I think it is obvious that there might have been two defences to this action—one that whether or not the defender was entitled to remain for nineteen years from Martinmas 1876, it was plain that at least for the year that was current when the action was raised—namely, December 1880—he could not be removed, because his brother had been tenant upon a nineteen years' lease down to Martinmas 1876. David Stevenson had been his brother's sub-tenant from 1867, and he continued in possession after the expiry of the lease for nineteen years at Martinmas 1876. It would be in vain therefore for the pursuer to say that David Stevenson, who had paid rent to the landlord as his brother's sub-tenant not only prior to Martinmas 1876, but subsequent to that time, in respect of possession down to Martinmas 1876, could be dealt with by the landlord as one who was in possession without any right or title granted by the landlord.

The great defence, however—and the only one in principle with reference to which there has been any contention between the parties—is this, that not only at the time of the action was the defender entitled, by virtue of a right which was granted to him, to continue in possession, at any rate till the close of the year then current, but that he was entitled, in virtue of that which he said was a lease affecting the landlord, and from the obligations of which the landlord could not escape, to remain in possession as tenant for a period of nineteen years.

Now, it was incumbent on the defender maintaining that defence to show that he had a written title, for consent given in any other way than writing would not be a consent sufficient to establish the liability of the defender's antagonist. The defender accordingly produces as his title a written lease, which he says was granted to him, and which Stevenson signed as tenant, and which his brother signed as his cautioner. He also says that after the lease had been so signed it was transmitted to the landlord and retained by him for a year without any objection being offered to its terms, and more than that, that in the interval between the time when the lease was transmitted to the landlord and the time when the landlord intimated an intended repudiation the lease had been acted upon by both parties, and for that reason had become as obligatory against the landlord as it was obligatory against the tenant, in respect the landlord had taken benefit from the lease, and in respect further that the tenant had fulfilled his obligation under the lease.

Now, it is upon the construction of the evidence affecting this question that I have come to the conclusion that the defender is entitled to be assoilzied.

That those who represented the landlord here were in default in the way in which they dealt with the lease after it had been transmitted in August 1877, is, I think, a view in which all will agree. The conduct of the London solicitors who acted as agents for Mr Atkins was not only inconsistent with the ordinary principles and practice of men of business, but, I think, was in the last degree discourteous to those with whom the transaction was to be concluded, and was a course which might have wrought difficulties by which serious results might have been incurred. But I am not prepared to hold that though this lease had been signed for a long time, if nothing had been done by the landlord which could be described as homologation, and if nothing had been done by the tenant which could be described as *rei interventus*, the landlord would have been bound. No doubt it was a strange thing—all the stranger because his conduct might give rise to misapprehension—that he should keep the lease, and should remain as it were uncommitted for this long period. If the tenant was anxious on the subject, as he ought to have been I think, then the course for him to have followed was to have categorically inquired whether the lease had been signed or not, or whether it was to be signed or not, and if he did not receive satisfactory intimation to the effect that the lease was to be accepted, then he could have declared that by his signature to the proposed lease he would not be any longer bound. But the tenant acquiesced in the situation of affairs—did not put it to the landlord that he should declare his purpose; and so it came to pass that in August 1878, one full year after the lease had been delivered signed by the tenant to the agent of the landlord, there was given to the tenant an intimation that the landlord would not sign the lease which had so long before been transmitted for his signature. If anything had occurred in the interval, it might have been, no doubt, matter of great hardship to the tenant, but the tenant would have been in default as to his own duty for his own protection. If he sent in the lease to be signed by the landlord, it was his duty in a reasonable time to inquire whether that had or had not been done by which the obligation of the landlord would unquestionably be established. But according to my reading of the authorities this is the true view of the law. It is not mere lapse of time that will suffice to make up an equivalent for the necessity of signing so as to complete the contract. It is the acceptance of the one party, or of both parties, or the performance by them of what is equivalent to acceptance. What is equivalent is this—where one of the parties takes benefit from the proposed contract, and where another party has fulfilled some obligation which was incumbent upon him only if the contract were a completed contract; and if this last is done with the knowledge, and presumably with the consent, of the other party to the contract, then both are bound. When once it is reduced to this, that both parties act as if the contract were completed, then both are bound by that as a completed contract.

Now, with regard to the question whether or not there was that done here which was equivalent, as regards the obligation of the parties, to the signature of both parties to the contract, my own opinion is that the Lord Ordinary has misapprehended the import of the evidence. I agree with him in thinking that in regard to any possession following upon this, it could not be said there was possession given to David Stevenson upon his contract. See how the matter stood in August 1877, when the contract was signed by Stevenson or his brother, and then sent to the agent in London. At that time the

contract had not been concluded; both parties had not concluded it. It was signed by the tenant, who previously to that signature was under no obligation to continue. Then what passed at the term of Martinmas 1877? It was sent to the landlord for his signature, and if he had intimated he was not to sign he would not have been precluded from giving warning to the tenant to remove at the ensuing term of Martinmas. But at this time Stevenson was in possession under that tacit relocation which had for some time existed. Things were allowed to remain as they were after the expiry of the former lease for nineteen years. The tacit relocation was William's title—his principal title—and it was also David's principal title as sub-tenant. This was the state of matters down to Martinmas 1876—down to the signing of the lease by the tenant—and also, I think, from that time onwards until the time when the landlord became bound consequently up till that time. I think that the possession which was enjoyed by the tenant was not possession under the lease so much as possession attributable to the previous title, namely, the title originally granted, the lease for nineteen years, continued as it was by tacit relocation. Perfectly true, if the parties became bound by the lease, the lease became the title of possession—aye, and more than that, retrospectively as between the parties the tenants were to be held as having possessed from the term of entry specified in the lease, namely, Martinmas 1876. But it is only after the new lease becomes operative against one of the parties that we find there is a change upon the title of possession deducible from the contract, which has become obligatory by that time.

Now, the Lord Ordinary finds, in the first place, that there was no change of possession. I agree with the Lord Ordinary in that. But he finds, in the second place, "in point of fact he did not pay the increased rent, at all events until sometime after he had been informed that the new lease had been repudiated by Mr Atkins." Now, I think, in the first place, he is wrong when he categorically finds there was no payment of increased rent. I think he is also wrong in saying that if increased rent had been paid at any time, it was not paid until after intimation was given to the tenants that the landlord was not to be held bound by the lease. According to the evidence, which I shall endeavour to look at as briefly as I can, I think there was payment of increased rent—that is, rent the payment of which was obligatory only if the lease was operative; and I further think that rent was paid by the tenant, and the payment was accepted by the representative of the landlord, Mr Rollo, and by those who represented the landlord in London, namely, Bradby & Robins, before any intimation had been given to the tenants that the landlord was not to be found.

Your Lordship has gone over the earlier portion of the proof on this matter, and I do think it is necessary to go over the field which has been traversed by your Lordship. As regards the parole testimony, there is a conflict between Mr Rollo and Mr Bradby, but I think the testimony of the two is to be reconciled in this way, that Bradby is not speaking for or of all those who may be members of his firm. He is speaking for that only which falls within his own individual knowledge. If his testimony is to be taken as meaning this, that there was nothing paid in the way of increased rent up till August 1878, then I think he was committing himself to an opinion entirely inconsistent with that which is established in the correspondence which passed betwixt himself and Rollo.

The term when this payment of rent was made as payment of increased rent is reached only inferentially; but I think we have evidence in that letter of 17th of May that the payment must have been made earlier than that, because on that date Mr Rollo says to Bradby & Robins—"Stevenson having signed the lease, and continued in possession, besides making a payment to account of rent, must be considered as the tenant for the duration of the lease." Two things are there set forth, first the signing of the lease, and in the next place the payment of the rent. He does not there say "increased rent," but it is plain it must have been increased rent that was referred to, because unless the payment was connected with the lease which had been signed, then the value of the payment as doing that which was required, in the absence of the landlord's signature, to complete the contract would have been very small indeed, and would not have been referred to by Mr Rollo as one of the things which established the tenant's position.

That was on the 17th of May, and what we find resulting from that is this, that on the 1st of August Messrs Bradby & Robins write to Mr Rollo—"We have submitted to our client the correspondence which has passed between you and us relative to the granting of a new lease to Mr Stevenson, and our client instructs us that he declines to grant such lease without having considered and approved of terms. We shall be glad to receive a statement of account and remittance, as our client has again called our attention to the lapse of time since he has had an account or remittance." That is on the 1st of August, and on the 5th of the same month Mr Rollo replies—"I have your note of the 1st, and can only refer to the correspondence as to the terms of the lease with Stevenson. I now enclose my account to 31st December last, and also one for bringing it down for the half-year to 30th June, in which I have given effect to the increased rents, the balance on hand being £471, 9s. 8d., subject of course to the account of expenses in the litigation." Here is a distinct intimation given by Mr Rollo, who represented the landlord, that increased rent had been paid by the tenant, and paid by the tenant to him, and further than that, that credit was given to the landlord in the account which was then transmitted for those increased rents. And what do Bradby & Robins say on the 6th of the same month of August—"With respect to Mr Stevenson's rent, it appears that the increased rent proposed to be paid by him has not really been paid at all. We are glad to find that our client has not therefore been compromised by the acceptance of increased rent as upon a supposed agreement for a new lease. Mr Stevenson should be informed of our client's decision at once." He thought it was high time then. He was alarmed a little that Mr Rollo had made the communication to the effect that an increased rent had been paid, and that the sum for which Mr Rollo rendered the account was a sum for increased rent from the Stevensons, but he seems

to have satisfied himself somehow that upon a re-adjustment of the account nothing had been paid on account of increased rent, and so he writes to Mr Rollo in the terms I have mentioned, and very much to his own relief seemingly, for he makes Mr Rollo aware of what would have been the consequence of payment of increased rent—the compromising of the landlord—compromising him in this way, that while he was proposing to repudiate the lease the one day, his agent was taking rent at the same time, to which he would only be entitled if he was to be bound by the lease which the tenants had signed, and under which they were paying.

Mr Rollo answered on the following day, August 7—"I am favoured with your letter of yesterday's date. You are under a misapprehension in supposing that the increased rent by David Stevenson has not been paid, for although there is an arrear of £12, 4s. 1d. as at 30th June, he has paid for the whole year £258, whereas the old rent as paid by his brother would only have been £250, irrespective of the fact that he is in possession and signed the lease which was sent to you on the 28th of August 1877." And the question is not whether it was much or little. That is not the question at all. The question is, whether there was an amount of rent due and paid, and paid only if the lease was to be looked upon as obligatory both upon landlord and tenant? Mr Rollo accordingly told him that there had been this payment. Then upon the 13th of August Bradby & Robins write to Mr Rollo to this effect,—and I refer to this because it seems to me to be conclusive in the first place of the fact that there had been at that date increased rent paid, and in the next place that this had been a fact which prior to any repudiation came to the knowledge of Bradby & Robins. I say what they write on the 13th August is this—"We are in receipt of your letter of the 7th inst. We appear to have looked at the wrong account in reference to the payment of the increased rent. However, it appears on carefully looking at the accounts that no part of the increased rent was received until long after our client had intimated his intention not to grant a new lease, and we had communicated this to you." It is not pretended that the demand has been made before that any communication should be made to the tenant; Mr Bradby could hardly have written to that effect, because the last sentence of his letter of 6th August is—"Mr Stevenson should be informed of our client's decision at once." So it was, however, that this payment of increased rent had been made months before. But in this letter of 13th August Mr Bradby does not contemplate that the payment of increased rent, which he now admits had been made, was a payment that was made by the tenant and received by the landlord before there was any intimation to the tenant of an intention to repudiate. No doubt the letters to which your Lordship referred passed between Bradby & Robins and Rollo, but that amounted to no more than this, the landlord communicating with himself or his own agents. He might say anything he chose in that way as regards his intentions; but if these intentions were concealed from the tenant, and if the tenant was left to suppose that he was under an obligation to pay, and paid rent under a sense of this obligation, and if the amount which was paid was received by the landlord just as if it had been due under a lease to which he the landlord put his name, the landlord could not turn round on the tenant and say, "I am not bound by this because I have not signed;" such conduct at once shows that he looked on the contract as concluded; and the landlord in receiving what was offered received that which was the same as he would have received had the landlord in the interval put his name to the same paper which the tenant signed.

Upon these grounds I entirely concur with your Lordships, and am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

Lord Young—I should, if your Lordships will allow me, like to say a word or two on one or two questions that have been referred to in the course of your Lordships' observations, and specially in regard to the position of William Stevenson in this matter, which I think has been somewhat misapprehended by the Lord Ordinary. This action is not directed against William Stevenson at all. He is no party to it, and the lease of 1877—I mean the deed which he signs as a cautioner for his brother David—is ignored and repudiated by the pursuer altogether. And so he is not called as a party extending any deed, nor is he called as a party possessing the farm by that relocation. In short, he is not here. It has been assumed that he possessed by tacit relocation after Martinmas 1876; but William is not here.

Mr Jameson—There was an action raised against him in the Sheriff Court, in which he put in defences to the effect that he had no title to the farm. The action was directed against him in the Sheriff Court on the footing that he was still in possession of the farm.

Lord Justice-Clerk—Is that referred to on the record?

Lord Young—It has not been noticed here.

Lord Justice-Clerk—You say he continued to possess?

Mr Jameson—Yes.

Lord Young—What is the date of the Sheriff Court action?

Mr Jameson—20th September 1880.

Lord Craighill—That is three months before this action?

Mr Jameson—Yes.

Lord Young—Then the landlord maintained at that time tacit relocation with William Stevenson, and put an end to it, or brought an action in the Sheriff Court of Ayr to put an end to it in 1880. Now, it appears to me that there is no room whatever, and never was any room, for tacit relocation with William Stevenson. I quite assume with your Lordship that Mr Rollo's agency did not include a power to let on leases. But he was the landlord's agent, and the landlord's agent in this country for the management of his property and to look after his tenants, and his knowledge of the true state of matters at any part was the landlord's knowledge. The landlord was abroad. Perhaps I am speaking with undue strictness; but what I mean is, he was not in Scotland, and like other sensible landlords he appointed an agent upon the spot, and

although that agent had no power to let leases, he had power to know, and it was his duty to know, the state of matters at each of the farms, and his knowledge was, I do not say for all purposes, but for most purposes, the knowledge of the landlord.

Now, what was the state of matters at this farm? The lease that expired at Martinmas 1876 was indeed to William Stevenson. Ten years before its expiry William sub-let the farm to his brother David, and he himself removed from it. Even if there had been no arrangement with Mr Rollo, the landlord's representative, on the subject, I should assume that he was aware of that fact which he had acted upon for ten years. But he was aware of it. For William before sub-letting the farm to David went to Mr Rollo and arranged that it should be permitted, and it was accordingly done. William went away and put David in his place with Mr Rollo's knowledge and consent. Now, his knowledge was the landlord's knowledge—it must be imputed to the landlord for knowledge in such a matter. And even if he had not the landlord's authority to consent to a sub-let—if there was no notice taken of it for ten years—the landlord would be too late to object that his agent had done an unauthorised thing.

Therefore the position of matters as regards the years prior to Martinmas 1876 was that the landlord knew that William was away from the farm. He might have been out of the country, but there was no doubt about his being away from the farm. And there was thus no room whatever for a tacit relocation with him in point of fact. Tacit relocation is an agreement which the law on reasonably good grounds imputes to the parties as a real agreement between them. Mr Hunter in his well-known work says:—"Tacit relocation is a presumed renovation of the lease for an ensuing year upon the same terms as those of the preceding year, operating under a lease either verbal or written, and arising from the implied consent of the parties, when neither the lessor warns the lessee to remove nor the lessee renounces in due time." Now, there is no room for such an implied assent with respect to William, and if, say in 1877 or 1878, the landlord—allowing David to remain, and knowing that William was away—had brought an action against William for the rent on the ground of an implied lease with him—William being then in England or anywhere else—I should say his answer would have been conclusive—"There was no room for tacit relocation with me; you knew I had sub-let to my brother, and I was away from the farm, and you could never have imagined for a moment—there was no room to imply it—that there was in respect of my silence a renewed lease by me."

But the importance of that is, that putting (as it does put) William out of the case altogether, it brings the question with the landlord to David, who alone is sued here. Now, what was his title to possess after William's lease terminated? William's lease certainly terminated, and was certainly not renewed by tacit relocation, if what I have said be right. Then what was David's title of possession? All parties were alive to the necessity of giving him a title, and accordingly he applied to have a lease granted to him. Mr Rollo, although he had no power to grant such a lease, had the knowledge of his (David's) possession—knew that he was actually in possession of the farm cultivating it, and that William was out of possession, and Mr Rollo having that knowledge had the power to communicate these facts to his constituents or to call their attention to them. His knowledge of the state of the facts would be their knowledge. He does direct their attention to the matter, and says—"It will be proper to negotiate a lease with David. He is a very respectable man, and his brother William, who is out of possession, will be cautioner for the rent." Well, the negotiations with David are before the expiry of William's lease; Mr Rollo concludes the negotiations with him subject to the landlord's approval, has the farm valued, gets David to agree to the increased rent according to the valuation, and gets him also to request William to agree to give his obligation as a cautioner. The footing of possession is thus arranged. David possesses upon that footing, or he has no title of possession at all. No doubt Mr Rollo having no power to let, the landlord, when what Mr Rollo had provisionally arranged was brought under his notice, might have said—"No. I don't agree to that, and David must go."

But the landlord was bound to take his course. He was bound to do something if he did mean to repudiate. The thing had been arranged and negotiated provisionally as to the title of a man who had no other title of possession at all, and a landlord is not entitled just to fold his hands and say—"Well, I am just keeping my hand upon the lease and letting things slide to see what comes of it." That is not a position which anybody is entitled to take.

But the importance of any remarks that I have to make, if they be well founded otherwise, is that from the first this lease was David's title of possession—that it is to mistake the case altogether to say that there was a current lease as by tacit relocation with William, for he was a tenant no longer. I think there was no tacit relocation, and that the negotiations between Rollo, as representing the landlord, and David, were upon that footing.

I make these observations in addition to what your Lordship has said, and what Lord Craighill concurs in, as to the grounds of judgment otherwise, which I think are sufficient *per se*.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

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