The Court refused the minute.

Counsel for the Minuter—A. Jameson—Chree. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondents—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Wednesday, December 11.

SECOND DIVISION.

THE ALBANY SHIPPING COMPANY, LIMITED, PETITIONERS.

Company — Process — Companies Act 1877 (40 *and* 41 *Vict. cap.* 26) *sec.* 4 (2)—*Addition of Words "and Reduced" to Name of Company.*

On the presentation of a petition for confirmation of a special resolution for the reduction of the capital of a company under the provisions of the Companies Acts 1867 and 1877, the Company moved the Court, in virtue of the power conferred upon it by sec. 4, sub-sec. 2 of the Act of 1877, to dispense with the addition of the words "and reduced" to the name of the company pending the disposal of the petition.

The Court *granted* the motion.

By section 10 of the Companies Act 1867, it is enacted "The Company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words "and reduced," as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the Company within the meaning of the principal Act."

By section 4 of the Companies Act 1877, it is enacted—"The provisions of the Companies Act 1867, as amended by this Act, shall apply to any company reducing its capital in pursuance of this Act and of the Companies Act 1867, as amended by this Act: Provided that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital—(1) The creditors of the Company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction; and (2) it shall not be necessary before the presentation of the petition for confirming the reduction to add, and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of the words 'and reduced,' as mentioned in the Companies Act 1867.

At an extraordinary meeting of the Albany Shipping Company, Limited, held on 3rd October 1895, and confirmed at a subsequent extraordinary general meeting held on 22nd October 1895, a special resolution was passed that the capital of the Company should be reduced from £250,000, divided into 25,000 shares of £10 each to £125,000 divided into 25,000 of £5 each. The reduction of capital resolved upon by the Company was a reduction of paid-up capital which was lost, or was unrepresented by available assets, and did not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, and did not in any way affect the rights of creditors of the Company.

Thereafter, on 10th December 1895, the Company presented a petition to the Second Division to pronounce an order confirming the proposed reduction of capital.

On moving for intimation and advertisement counsel for petitioners moved the Court for leave to dispense with the addition of the words "and reduced" to the name of the Company from the date of the presentation of the petition till the disposal thereof. He referred to the English cases of *Langdale Chemical Manure Company, Limited*, 1878, 26 W.R. 434, and *River Plate Fresh Meat Company*, 1885, W.N. 14.

The Court (LORD RUTHERFURD CLARK absent) granted the dispensation craved.

Counsel for the Petitioners — Lorimer. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, December 11.

FIRST DIVISION.

[Lord Kincairney Ordinary.

MOWAT *v.* CALEDONIAN BANKING COMPANY.

Contract—Rei interventus—Unilateral Deed —Improbative Offer for Sale of Heritage.

An improbative offer for the sale of heritage does not become binding on the offerer, *rei interventu*, in consequence of the person to whom the offer is made, before he has accepted it, incurring personal trouble and expense in determining whether it is his interest to accept the offer.

This was an action at the instance of Peter Mowat, builder, Edinburgh, against the Caledonian Banking Company, concluding for implement of missives of sale of Gerston Distillery, Caithness, embodied in the two following documents:—

"*Caledonian Banking Co., Limited, Inverness, 28th November* /94.

"Peter Mowat, Esq.

"Dear Sir,—*Gerston Distillery.*—I am favoured with your letter of yesterday, and have to thank you for the reference which you give. I hereby make you definite offer of the above distillery at the figure you name, viz., £11,500 for two months from this date, and hope that you will let us have your acceptance as soon as you conveniently can within that time. Should you think of visiting the distillery, we shall be glad to give you every facility for inspection.—Yours, &c., E. H. MACMILLAN, *Manager.*"

"26*th Jan.* 1895.

"Dear Sir,—I hereby accept of your offer to me of 28th November of Gerston Distillery, Halkirk, Caithness. — Yours, &c., PETER MOWAT."

The letter from the bank manager was not holograph.

On 28th January the bank manager telegraphed to Mr Mowat, "Letter received, but you have not sent deposit agreed upon. Unless received by to-morrow, transaction at an end.

No deposit was sent, and on 30th January the bank manager intimated to Mr Mowat that the transaction was at an end.

Mr Mowat thereafter raised the present action.

The pursuer averred that the defenders had adopted and recognised their offer as existing by the terms of the holograph telegram quoted above, and by a letter of 27th December, "which is believed to be, at least in part, holograph of defenders' said manager."

He further averred that, following upon the defenders' offer, he "incurred considerable expense and trouble in making investigations regarding said distillery and its capabilities and prospects. He travelled to London and also to the North of Scotland . . . and in connection therewith he expended considerable time, money, and trouble. This he did on the faith of the offer quoted above, and with the knowledge and encouragement of the defenders and their said manager. . . ."

He contended accordingly that the defenders were barred from founding on any informality in their offer, (1) *personali exceptione*, and (2) *rei interventu*.

The defenders averred that between the time of their offer and the pursuer's acceptance they had arranged that the pursuer should with his acceptance deposit 5 per cent. of the purchase price, and that they had broken off negotiations in consequence of his failure to do so. They denied that they had adopted or recognised their improbative offer by any subsequent holograph writing.

The Lord Ordinary (KINCAIRNEY) on 10th August pronounced the following interlocutor:—"Finds that the defenders' offer is not holograph or authenticated, and that it has not been adopted by any document holograph of the manager of the bank or otherwise probative: Finds that there are no relevant averments of *rei interventus*." He accordingly assoilzied the defenders.

Note.—. . . . . "I am further of opinion that there is no relevant averment of acts of *rei interventus*. There could not have been any such acts done in reliance on a completed agreement, for there was no completed agreement until the date of the pursuer's acceptance, and the defenders' repudiation followed immediately. I do not dispute that an offer expressed as open for a certain time may become binding *rei interventu*, although improbative. The pursuer referred to several cases in which informal unilateral deeds had been made binding *rei interventu*. Such were the cases of *The Dunmore Colliery Company*, February 1, 1811, F.C.; *United Mutual Mining Company* v. *Murray*, June 13, 1860, 22 D. 1185; and the *Church of England Insurance Company* v. *Wink*, July 17, 1857, 19 D. 1079. But I think the pursuer avers no acts which are of the character of acts of *rei interventus*. He does not say that he relinquished any engagement, or renounced any advantage, or entered into any contract on the faith of the contract. All that he did was to make inquiries about the distillery and endeavour unsuccessfully to raise money by means of a syndicate. Such acts are not within the category of acts of *rei interventus*.—Bell's Prin., sec. 26; Bell's Com., i. 346; *Gardner* v. *Lucas*, February 8, 1878, 5 R. 638, *per* Lord Shand.

"It has been remarked that the pursuer in this action seeks to enforce a purchase, but does not make any offer of the price. The openly expressed suggestion of the defenders is that he has not, and never had, the necessary funds. I do not know how that may be. Perhaps the defenders have the best of reasons for standing on a technical defence against the fulfilment of a bargain. I do not find such reasons on the record or in the correspondence. But I am of opinion that the defenders are within their legal rights, and that their defence must be sustained."

The pursuer reclaimed, and argued—The mere fact that the acts by which *rei interventus* was constituted took place before the pursuer's acceptance of the offer, and that consequently the obligation to be confirmed was only unilateral, did not prevent the application of the doctrine of *rei interventus*. It was in consequence of the offer that the expense had been incurred—*Baird's Trustees* v. *Murray*, November 21, 1883, 11 R. 153 at 166; *Church of England Insurance Company* v. *Wink*, July 17, 1857, 19 D. 1079. The case of *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, suggested that the averments would support a claim for damages, even if not for implement.

Counsel for respondents were not called upon.

At advising—

LORD PRESIDENT—The only part of the case on which we have heard argument is that based upon *rei interventus* as affecting the defenders' improbative offer. I say this because the averment that the defenders by the letter of the 27th December adopted the offer as subsisting is not, as it stands, a relevant averment, all that is said being that the letter "is believed to be, at least in part, holograph of defenders' said manager." Mr Christie explained to us the reasons why the averments on this point are not more specific, viz., that the original letter has been destroyed, and that nobody is prepared to prove what parts were holograph. Accordingly, all that we have left is the plea of *rei interventus*, and to that plea there is, I think, a complete answer, viz., that every act which the pursuer avers as constituting *rei interventus* was done by him between the receipt of the improbative offer and his acceptance thereof, and all the averments amount to

is that the pursuer, after receiving the offer, like a sensible man set about making inquiries as to whether or not it was worth his while to accept it. Accordingly, the proposition in law which of necessity was put forward by Mr Christie is to the effect that when an offer, neither holograph nor tested, has been made, if the person to whom it is addressed does anything to inform himself whether it will be to his interest to accept, such actings will be enough to turn the offer into a completed contract. Such a proposition is contrary both to law and to common sense, and accordingly I think the Lord Ordinary's decision is right. The bank are entitled like everyone else to stand upon their legal rights, and all that they have done has been to point out and found upon the fact that there was no legal agreement. We are not called upon to inquire into or make any observations on their conduct in the matter.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Craigie — Christie. Agents — Anderson & Green, S.S.C.

Counsel for the Defenders—W. Campbell —Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, December 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ALSTON *v.* ROSS.

Process — Sist — Right-of-Way—Poverty of Defender—Local Government (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 58), *sec.* 42.

A heritable proprietor raised an action of declarator and interdict to restrain a member of the public from using a path which he had been admittedly in the habit of using for sixteen years, and over which he claimed that a public right-of-way existed. The defender, before the proof was taken, lodged a minute, in which he averred that his poverty prevented him from proceeding with the defence, and that the County Council had under consideration whether, in virtue of the powers conferred upon them by the Local Government Act of 1894, they should vindicate the right-of-way claimed by him. He craved the Court to sist process pending the decision of the County Council.

The Court *granted* the sist upon an undertaking by the defender not to use the path during the sist.

Mr Robert Lockhart Alston, of Rosehall, Sutherland, raised an action of declarator and interdict against Alexander Ross and others, craving the Court to interdict the defenders from walking along a certain path passing through his property, over which the defenders claimed that a right-of-way existed.

It was admitted that for sixteen years previous to the property coming into the hands of the pursuer, the path had been used by the public without check, but on the pursuer acquiring the estate in 1894 he challenged the right of the public, and raised the present action. The Lord Ordinary, after some delay had been granted on motions by the defenders, fixed the diet of proof in the action for 6th November 1895.

On 30th October the defender Ross lodged a minute, in which he stated that his funds were exhausted, and that he was unable at present to prepare for the proof; that the averments of parties had been brought before the County Councils of Ross and Sutherland, and were being considered by them with a view to deciding whether or not they should use the powers conferred upon them by section 42 of the Local Government Act of 1894 for vindicating rights-of-way; and that, even in the event of their declining to take action, he would obtain sufficient subscriptions from the public to enable him to defend the action. The defender accordingly craved the Court "to sist the cause *hoc statu*, or otherwise to adjourn the diet of proof for three months;" and undertook, if this were granted, to refrain from using the path during the period of the sist.

The Lord Ordinary (KYLLACHY) refused the motion to sist, and on 6th November, the proof having been called and no appearance having been made for the defender, pronounced decree against him.

The defender reclaimed, and argued that the sist should be granted till the County Council had decided whether to vindicate the right-of-way. The poverty of a party had been considered a sufficient ground for granting such a motion in the cases of *Sassen* v. *Campbell*, March 10, 1830, 8 S. 707, and *Clark* v. *Newmarch & Grant*, Nov. 17, 1825, 4 S. 182.

The pursuer argued that the decree pronounced against this defender in absence would not constitute *res judicata* against the County Council should they decide to vindicate the right of way; that he had already caused much unnecessary delay, and had given no indication until the last moment that he was not prepared to go on.

At advising—

LORD PRESIDENT—If the person asserting a right-of-way had been the pursuer, and he had failed to attend a diet of proof, we should have been slow to alter the Lord Ordinary's interlocutor. But the pursuer in this case is seeking to negative a right-of-way claimed by the defender, and to interdict him from using a path which admittedly he has been in the habit of using for a considerable number of years. Accordingly we find that the user of the path is the party attacked, and it is his possession of it which would be altered by an interdict.

Now, the defender points to the statute under which a duty is imposed by Parlia-