proposal of the 1st February on the other, are identical, I can have no doubt that when the first were delivered to Wm. Robertson, and the last was delivered to Mrs Maclaren, the agreement was concluded, and neither party could resile. But it seems to be substantially admitted that the two propositions are identical; and if so, the agreement must stand. The proposal of the 1st February was, although holograph, not subscribed. It is true that, as a general rule, a holograph writing unsubscribed is only to be considered as inchoate or incomplete. But if a holograph writing, especially if the granter's name is contained in the body of the writing, even though unsubscribed, be delivered for the purpose of being acted on, there can be no question that it is binding. But the transaction did not stop there, for Mrs Maclaren took the proposal to Mr Fyfe, who prepared a draft, and this was sent to the sisters, who returned it with a docquet holograph of Margaret approving of the written proposal and draft, and signed by them all. This was transmitted to William's agent, as an indication of their acceptance of William's proposal. I think after this it was too late to resile, and that the agreement was complete. The alterations on the draft by the defender's agent were entirely immaterial.

The other Judges concurred.

Agents for Pursuers—Fyfe, Miller, & Fyfe, S.S.C.
Agent for Defender—James Barton, S.S.C.

Saturday, February 3.

FIRST DIVISION.

RUSSELL *v.* MOLLESON.

Judicial Factor—Executor—Holograph—Interlineation—Insanity.

In the repositories of a deceased was found a document purporting to be a holograph testament. The name of the executor, who was also appointed universal "legator," was interlined over a deletion, of which there was no notice in the testing clause. On the petition of two of the next of kin, the Court appointed a judicial factor on the estate of the deceased, till the right of the person who claimed to be executor-nominate (which was the subject of judicial proceedings) should be finally determined, his title to the office being opposed on the alleged grounds (1), that the interlineation containing his nomination was not holograph of the testator; (2) that the alteration in question was made when the testator was not of sound mind.

This was a petition for the appointment of a judicial factor on the estate of the late William Russell, C.A., by Eliza Russell and Isabella Russell or Miller, two of the next of kin of the deceased.

The petition was opposed by James Alexander Molleson, C.A., who claimed to be executor-nominate under Mr Russell's last will and testament.

Mr Russell died at Edinburgh on 13th November 1871. On his repositories being opened after his funeral there was found a document purporting to be a holograph testament of the deceased. It contained numerous deletions, and, in particular, the deletion of the names of the two persons who were originally nominated in succession as sole executors, and the insertion by interlineation of the name of Mr Molleson, whom failing, of Mr Steel, Register House, Edinburgh. These deletions and interlineations are not noticed in the testing clause. The executor was also appointed universal legator (*sic*) under burden of the testator's debts and legacies.

Competing petitions for the office of executor were lodged in the Commissary Court of Edinburgh by Mr Molleson and the present petitioners. The latter denied that the interlineation of Mr Molleson's name was holograph of the deceased, and they also averred that the deletions and interlineations affecting the office of executor were made after 10th August 1871, from which date down to his death they averred Mr Russell was not of a sound disposing mind. The Commissary on 11th January 1872, without allowing proof, but after an inspection of the document, granted warrant to issue confirmation in favour of Mr Molleson. An appeal to the Court of Session was taken, which is still depending.

The Lord Ordinary (MACKENZIE), on 16th January 1872, appointed Mr G. A. Jamieson, C.A., to be judicial factor on Mr Russell's estates. His Lordship added the following note:—"The writs founded on by the respondent as constituting and appointing him to be the sole executor of the deceased Mr Russell contain numerous deletions, and, among others, the deletion of the names of the two persons who were originally nominated in succession as sole executor, and the insertion, by interlineation, of the name of the respondent, whom failing, of Mr Steele. These deletions and interlineations are not noticed in either of the testing-clauses, bearing to be dated 10th January 1865 and 6th February 1867. These testing-clauses afford, therefore, in the opinion of the Lord Ordinary, no presumption that the deletion of the names of the persons originally appointed as executors, and the insertion or interlineation of the names of the respondent and of Mr Steele, are holograph of Mr Russell.—*Robertson* v. *Ogilvie's Trs.*, Dec. 20, 1844, 7 D. 236.

"When the respondent applied to the Commissary of Edinburgh for confirmation, the commissary-clerk, very properly, in respect of the deletions and interlineations in the nomination of executors, refused to issue confirmation without the special authority of the Commissary. The respondent accordingly presented a petition for such authority, in which he averred that these deletions were made by Mr Russell; and that his nomination as executor was, as well as the remainder of the writ, holograph of Mr Russell. The present petitioners, who claim to be two of Mr Russell's next of kin, lodged answers to the respondent's petition, in which they denied that the interlineation containing the petitioner's name is holograph of Mr Russell, and averred that the deletions and interlineations affecting the nomination of an executor were not made before 10th August 1871, at which date, and from which date down to 13th November 1871, when he died, Mr Russell was not of sound disposing mind, so that the writ founded on by the respondent, as altered by deletions and interlineations, was not the last will of a free and capable testator. The petitioners also presented an application to the Commissary of Edinburgh to be decerned executors *qua* next of kin to Mr Russell. Without allowing any proof, the Commissary-Depute, on 11th January 1872, pronounced an interlocutor granting warrant to the commissary-clerk to issue confirmation in favour of the respondent; against

which interlocutor the petitioners, on the same day, lodged an appeal, which has not yet been disposed of.

"There is thus no one, and until confirmation is expede there can be no one, in a position to take charge of, recover, and administer the moveable estate left by Mr Russell, which amounts, including the value of his household furniture and the debts due to him, to about £4000. According to the view which the Lord Ordinary takes of the writs founded on by the respondent, the respondent must prove, before he can obtain confirmation, that his substitution as executor in room of the party originally nominated is holograph of Mr Russell, and that the writs as altered are the last will of a free and capable testator.—*Anderson* v. *Gill*, H. L., 3 Macq. 180. See also appeal case for opinions of Judges in Court of Session. If this view be correct, some time may elapse before a final decision is pronounced on the petitions now depending in the Commissary Court, as was the case in *Anderson* v. *Gill*, which originated in somewhat similar circumstances. The appointment, therefore, of a judicial factor to take charge of the moveable estate until confirmation is obtained appears to the Lord Ordinary to be right and proper."

Mr Molleson reclaimed.

M'Laren, for him, maintained that there was no room for the appointment of a judicial factor, Mr Molleson being executor-nominate under the will of the deceased.

Campbell Smith for the petitioners.

At advising—

Lord President—I have no doubt of the propriety of the course taken by the Lord Ordinary. There is a serious dispute as to whether Mr Molleson is the executor-nominate of the deceased. If he be executor-nominate, it must be because the document produced is the last will of the testator. And if it is, then he is also universal legatee. What is at issue is his right not only to administer, but to the beneficial enjoyment of the estate. All that I say is that this seems *prima facie* a serious question, and it is in accordance with our practice to appoint a judicial factor.

The other Judges concurred.

The Court adhered.

Agent for Petitioners—J. B. W. Lee, S.S.C.
Agents for Respondent—Henry & Shiress, S.S.C.

Saturday, February 3.

LOGAN *v.* WEIR.

Reparation—Breach of Contract—Lease—Sub-Lease.

An agricultural lease for nineteen years reserved power to either party to terminate the lease at the end of ten years. The tenant sub-let a portion of the farm by missive of lease "to the end of my own lease." The landlord having taken advantage of the break in the principal lease, and evicted the sub-tenant, the latter brought an action of damages against the principal tenant for breach of contract—*Held*, on a sound construction of the missive of lease, apart from any separate undertaking by the principal tenant, that he merely undertook to give the sub-tenant the same tenure which he enjoyed himself.

This was an action of damages at the instance of James Logan, lately wood merchant, Wester Mugdock, near Milngavie, against John Weir, lately farmer at Wester Mugdock. The pursuer concluded for £1000 damages (in all) on two distinct grounds —1st, judicial slander; 2d, breach of contract. The circumstances out of which the action arose were as follows:—

By lease, dated 3d March 1859, William Brown let to the defender's father, the late James Weir, the farm of Wester Mugdock for nineteen years, from Martinmas 1859. The lease contained a clause reserving power to either party to terminate the same at the end of ten years from the commencement thereof, by giving notice in writing to the other party at least three months prior to Martinmas 1867. Assignees and sub-tenants were excluded, without the landlord's consent in writing.

At Whitsunday 1861 James Weir let to the pursuer a house and piece of ground forming part of the farm of Wester Mugdock. The pursuer continued to occupy the subjects from year to year till August 1867, when the defender, who had succeeded to the lease of the farm of Wester Mugdock on the death of his father in 1865, granted to the pursuer the following holograph missive of lease:—

"*Mugdock, 9th August* 1867.

"I, John Weir, do hereby let to James Logan a house and stables, and byre, garden, £7, 10s., for a lease of, to the end of my lease. "I, John Weir."

According to the averment of the pursuer, the defender stated to him that the missive would ensure possession of the subjects for eleven years to come, and on the faith of the missive the pursuer executed certain improvements on the premises.

On 25th March 1869 the defender raised an action of removing against the pursuer in the Sheriff-court of Stirlingshire, to have him decerned to remove at Whitsunday 1869. In answer the pursuer founded upon the missive of lease. The Sheriff-Substitute decerned against the pursuer (Logan), and the Sheriff adhered.

The decree of removing was brought under review of the Court of Session by a note of suspension, which was passed upon juratory caution. The result of the litigation was that it was found by the Lord Ordinary (Mure) that the missive constituted an effectual lease, and his Lordship accordingly suspended the threatened charge of removing. This interlocutor became final.

In the condescendence in the Sheriff-court, and also in the answers to the note of suspension in the Court of Session, Weir denied that the missive in question was in his handwriting, but in the course of the proceedings in the Court of Session he put in a minute consenting that the case should be disposed of on the footing that the missive was genuine, and holograph of and signed by him.

In July 1869 Mr Brown, the proprietor of Wester Mugdock, intimated to Weir his intention of taking advantage of the break in the lease, and gave him notice to remove himself and his sub-tenants. Weir afterwards took a lease of the farm for a year, from Martinmas 1869.

The pursuer averred that this was part of a collusive and fraudulent scheme between the landlord and the defender to render nugatory the missive of lease granted by the latter to the pursuer.

On 30th June 1871 Mr Brown presented a petition to the Sheriff for the ejection of the pursuer from the subjects. The pursuer intimated to the defender that he looked to him to protect him in possession of the subjects, and would hold him liable in damages in the event of his being ejected. Decree of ejection was pronounced on 7th July