£5000 of 3 per cent. Consolidated Bank Annuities. In doing so he may have to expend more or less than that sum of money, but the obligation is a definite one, namely, to replace the marriage trustees in the same position as they occupied before they transferred the stock—to make them owners or transferees of so much consolidated stock.

The other obligation is to pay interest on £5000 3 per cent. stock. That is an obligation to pay money, and a perfectly definite and ascertained amount. The objections which have been taken may be answered in that way. It was objected that the obligations sought to be secured were indefinite. I think they are both perfectly definite. One is an obligation to perform an act which can be done only in one way. The other is to pay interest on a certain sum. I agree therefore with the view taken by the Lord Ordinary.

LORD MURE—I agree with the opinion expressed by the Lord Ordinary in his note. The question he had to decide was whether an obligation *ad factum præstandum* could or could not be made the subject of a good heritable security. I agree with him that the only question is whether the obligation is sufficiently definite to satisfy the rule of law that no indefinite burden can be created on land. Now, the terms of the bond put it beyond all question that the lands were disponed in security of £5000 consols. No doubt the value of that stock may vary in amount, but the granter is bound to make good the security for that amount. That is a definite obligation, and may be made a burden upon land.

LORD SHAND—If it could be maintained that an *ad factum præstandum* obligation could not be made a real burden upon land, there would have been some ground for the argument we have listened to. There is, however, no doubt, as the Lord Ordinary says, that such obligations may be made real burdens. In this case the obligation to transfer stock is an obligation *ad factum præstandum*, and is of quite a definite nature, and consequently I have no doubt that it can validly be made a real burden upon land.

The second obligation is simply an obligation to pay a sum of money—the interest on a certain amount of three per cent. stock. There is nothing indefinite in that. I am therefore of opinion that the argument on both points fails.

LORD ADAM concurred.

The Court adhered.

Counsel for Defenders and Reclaimers—Sir Charles Pearson—Low. Agents—Mackenzie & Kermack, W.S.

Counsel for Pursuers and Respondents—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Wednesday, October 17.

SECOND DIVISION.

[Sheriff of Caithness.

TOD (SUTHERLAND'S TRUSTEE) *v.* GEDDES (MILLER'S TRUSTEE).

Landlord and Tenant—Lease—Tacit Relocation—Rei interventus—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 28.

Previous to the term of Martinmas 1884 the tenant of certain farms under a lease which expired at Whitsunday following, arranged verbally with his landlord the terms of a new lease at a reduced rent. The landlord handed to the tenant a letter to his factor of 1st December 1884, directing the latter to prepare a formal lease embodying the terms of the new arrangement. The landlord executed a trust-deed for behoof of his creditors, and no formal lease was executed. The tenant continued in possession of the farms, but paid no rent after Whitsunday 1885. *Held* that an action at the instance of the trustee for the rent payable under the old lease as having been continued by tacit relocation fell to be dismissed, in respect that since Whitsunday 1885 the tenant had not possessed by tacit relocation, but under the new arrangement.

Observations on the question whether a tenant abstaining from giving a notice to leave his holding required by the Agricultural Holdings (Scotland) Act 1883, and continuing to possess, could be held to validate *rei interventu* an uncompleted arrangement for a new lease at a different rent.

John Miller, a fishcurer and farmer, occupied certain lands on the estate of Forse, in the county of Caithness, on a lease which expired at Whitsunday 1885. The term of Whitsunday 1885 was the termination of a two years' lease of the subjects between the defender and Mr Sutherland, and accordingly it was necessary, under section 28 of the Agricultural Holdings (Scotland) Act 1883, that the defender, in order to prevent tacit relocation and to secure his right to remove, should have given notice of removal to Mr Sutherland at Martinmas 1884. Upon 8th November 1884, however, Miller had an interview with the proprietor Mr Sutherland of Forse, and the agreement entered into between them was expressed in the following letter, written by the proprietor to his factor and law-agent Mr Nimmo, writer, Wick:—"1*st December* 1884.—Dear Sir,—On the 8th of last month I arranged with John Miller, Boulglass, for a new lease to him from Whitsunday next of the farms and lots he now holds, at a yearly rent of fifty-three pounds (£53) and road-money. Duration of lease fifteen years, with breaks in his favour at the end of five and ten years. All improvements to be made solely at his own expenses, without any compensation to be paid therefor at the termination of the lease—wire fences excepted. As to the valuation he is now entitled to for the wood, flags, &c., on his houses, I have agreed that a sum of three hundred pounds (£300)—minus £2 per annum during the currency of the lease—is to be paid to him at his outgoing in lieu of all expenses and other

claims. A stamped lease to be entered into; also a stamped lease for fourteen years to be given to Widow Miller and the representatives of the late Benjamin Miller, Burrogill, on the same conditions they now hold the farm." The letter was given to Miller's wife on his behalf for delivery to the law-agent. It was handed to Mr Nimmo, but nothing was done in the way of preparing a stamped lease. Miller continued to occupy and work the farms.

Upon 24th February 1885 Mr Sutherland executed a trust-deed for behoof of his creditors, and Mr Henry Tod, W.S., Edinburgh, finally came to be the sole acting trustee under that deed.

Upon 25th April 1885 Mr Nimmo sent a letter to Miller, stating, *inter alia*—"With reference to Mr Sutherland's letter to me of 1st December last, I delayed preparing the leases in the knowledge that they would not be binding unless possession was had under them; and after the execution by him in February last of the trust-deed I brought it under the notice of the agents under the trust-deed, who informed me they had written to Mr Sutherland that it would be better to make no changes upon the rental by granting new leases." Miller paid no rent after Whitsunday 1885.

In 1887 Mr Tod, as trustee, raised an action in the Sheriff Court of Caithness for payment of £97, 13s. 11½d., being the rent payable under the old lease. He averred that the defender had been tenant by tacit relocation since the term of Whitsunday 1885, and that he declined to pay the rent.

The defender pleaded—"(2) Mr Sutherland's holograph document of 1st December 1884 constituted a valid and probative contract of lease in favour of the defender, binding upon the present pursuer. (3) The verbal agreement between the defender and Mr Sutherland of 8th November 1884 being proved *scripto*, and followed by *rei interventus* and homologation, constitutes a valid contract of lease in favour of the defender, binding upon the present pursuer. (4) The pursuer, as trustee for Mr Sutherland's creditors, is subject to all lawful duties and obligations entered into by Mr Sutherland affecting his heritable estate."

On a proof by writ or oath of the alleged lessor of the lease, the Sheriff-Substitute found that the "verbal agreement for a new lease averred by the defender, and the reduction to writing of the terms thereof, also averred by the defender, have been proved by Mr Sutherland's oath," and allowed the defender a proof of his averments of *rei interventus*.

It appeared from the proof that the defender had resorted to Mr Sutherland in November 1884 for the purpose of giving the statutory notice of his intention to quit his farm, but he abstained from doing so in consequence of the arrangement for a new lease at a reduced rate of rent. Mr Nimmo deponed that he did not execute a formal lease as directed by Mr Sutherland's letter of 1st December 1884 owing to the pressure of other engagements, and that after Mr Sutherland granted the trust-deed he ceased to think of making a formal lease. He further deponed that on 4th April 1885 he stated to the defender in conversation that he could not get a lease in terms of the said letter. This statement was, however, unsupported by other evidence.

The Sheriff-Substitute assoilzied the defender from the conclusions of the action.

In the course of the action Miller became bankrupt, and Alexander Geddes was confirmed trustee in his sequestration.

The pursuer appealed, and argued—There was here no settled bargain, and therefore there was no resiling from it by the pursuer, and no completion of it by the *rei interventus* of the tenant. Mr Sutherland certainly agreed to give a new lease, and wrote a letter to his agent to get that done, but before the end of the old lease he had granted a trust-deed to the pursuer, and he, as trustee, had repudiated the bargain for the lease as shown by Nimmo's letter of 25th April. The tenant knew that the bargain had been so cancelled, but he still continued to occupy the farm and to work it as he had been accustomed to do; he must therefore be held to have kept in the farm by tacit relocation, and so was liable for the rent due under the old lease. Even supposing a bargain had been completed between Mr Sutherland and the defender, Mr Sutherland was entitled to resile, and had resiled by his factor's letter of 25th April. The cases referred to in Morrison on Sale of Lands showed that always the document founded on was delivered by one of the parties to the other party, and although no definite answer was returned, that was sufficient to make a bargain. Here the letter founded on was not delivered by one party to the other, but was written by one party to his agent ordering him to do something, but before that something could be done the party had resiled from the agreement. Nor was *rei interventus* constituted even although the tenant on the faith of the new agreement had abstained from giving notice of removal to his landlord at Martinmas 1884. Three necessary elements of *rei interventus* were awanting. There was no definite and explicit act which could be stopped if necessary; the alleged act of *rei interventus* was not known to the party against whom it was pleaded; and it was not unequivocally referable to the agreement—Bell's Prin. 26; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656; *Arbuthnot* v. *Reid*, July 6, 1804, Hume, 815.

The respondent argued—There were two aspects of the case. Either the holograph letter of 1st December constituted a proper lease, or it did not. If it did, then the defender of course was working under the new lease, and no *rei interventus* was needed. It had been held in various cases that sales of property could be constituted by a probative document offering to buy or sell, given by one party to the other, without any formal acceptance of the offer—*Fergusson* v. *Paterson*, November 23, 1748, M. 8440; *Muirhead* v. *Chalmers*, August 10, 1759, M. 8444; *Fulton* v. *Johnston*, February 26, 1761, M. 8446; *Arbuthnot* v. *Campbell*, February 27, 1793, Hume, 785; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656; *Murdoch* v. *Moir*, June 18, 1812, F.C.; *Sutherland* v. *Hay*, December 12, 1845, 8 D. 283 If the letter of 1st December did not constitute a new lease when delivered by one party to the other, as it was addressed to the landlord's agent, then it could be shown there was *rei interventus*, and so the lease was set up. The tenant had had a communing with his landlord, and had received a promise of a new lease, and so he did not give warning to quit his farm

at Whitsunday 1885, which he would have needed to do if he did not wish to stay on at the old terms. Then he received the letter of 1st December, and trusting that the agent would make out a lease in proper form at his leisure he continued to occupy the farm. The letter from Mr Nimmo did not amount to a repudiation by Mr Sutherland of his engagement to give the defender a new lease—*Ballantine* v. *Stevenson*, July 15, 1881, 8 R. 959; *Stuart* v. *Macra, Stuart, & Campbell*, November 12, 1834, 13 S. 4, 7. There was either a completed bargain by handing Mr Sutherland's letter to his agent, or an incomplete lease was set up by *rei interventus*.

At advising—

Lord Young—This action is for the payment of certain rents alleged to be due for some heritable subjects, and is laid upon the footing that the tenant the defender held these subjects by tacit relocation since Whitsunday 1885. If he has held the subjects as tenant on tacit relocation, then the rent, some of which is admittedly due, must be paid to the pursuer, although the question of how far the tenant is entitled to withhold his rent in respect of meliorations made by him on the property is another matter.

The first and most material issue is, whether the defender was tenant of the lands in question by tacit relocation since the term of Whitsunday 1885 or not. The tenant says he was not, and in support of his denial he says that upon the eve of the time when it would have been necessary for him under an Act of Parliament to give notice to his landlord to terminate the existing lease as at Whitsunday 1885 he resorted to his landlord and made arrangement for entering into a new lease. Of course if it is shown that the parties agreed upon a new lease, which was acted upon, there is an end to the case. The results of the bargaining for a new lease are contained in the letter dated 1st December 1884, adressed by the landlord to his man of business expressing the terms of the new lease, and desiring him to carry these terms into effect by a formal deed. This letter he handed to the tenant for delivery to his man of business, communicating to him at the same time its contents, and the letter was delivered accordingly. Upon getting this letter the tenant says he abstained from giving the notice to his landlord of his intention to terminate the old lease which he would otherwise have done. Now, a letter so expressed by the landlord, addressed to his agent, even though given to the tenant to deliver, would not in itself constitute a lease for a period of years. Whether the fact that the tenant had abstained from giving notice to terminate the old lease in reliance upon the new terms, would be sufficient *rei interventus* to make these terms a binding contract, we do not need to decide. The bent of my own opinion is to the effect that it would be sufficient to prevent either of the parties resiling from their bargain. The period had elapsed in which he could have looked for a new farm, and he may have allowed it to pass in reliance on the former agreement for a lease, but, as I have said, we do not need to decide that question.

But unless the contract so made was departed from by either party, it remained, and was in existence as the lease of the lands instead of the old lease. The tenant remained on in possession of the lands, and I think his possession subsequent to Whitsunday 1885 must, on principles which have received effect in many cases, be attributed to the bargain set forth in that letter, and not to tacit relocation under the old lease. I think that the terms of that letter are inconsistent with any idea of tacit relocation. But that reduces the question to this, did the landlord validly withdraw his consent to the bargain contained in that letter before the old lease had come to an end so that the defender's possession cannot be attributed to carrying out the expressions of the new bargain? It is said that he did withdraw his consent by the letter from the landlord's man of business to the defender of 25th April 1885. I do not think that the letter expresses withdrawal from the bargain at all. The strongest expression in the letter is, "I delayed preparing the leases in the knowledge that they would not be binding unless possession was had under them." I do not think that that is accurate; I think the writer of that letter gives a more accurate account of what was really the state of affairs in his evidence when he says that he was too busy to prepare the leases, and it would be sufficient to prepare them before Whitsunday. The letter of 25th April 1885 goes on to state that after the execution of Mr Sutherland's trust-deed in February Mr Nimmo brought the landlord's letter of 1st December 1884 under the notice of the agents under the trust-deed, who informed him that they had written to Mr Sutherland that it would be better to make no changes upon the rental by granting new leases. That is not an intimation that the landlord is not going on with the lease. It is not a withdrawal from the bargain, but it is merely a statement of fact of what the Edinburgh agents had told the proprietor. The letter did not make Mr Sutherland signify that he departed from the arrangement under which he knew that his tenant had refrained from giving notice to terminate his lease. There is nothing in the letter to signify that he had taken up the position of being off with his bargain. Well, if the terms expressed in the letter of 1st December are not withdrawn or departed from, the possession, as the tenant says, is not under the old lease, but under the new arrangement, and the action which is founded on tacit relocation under the old lease cannot stand. Therefore I propose that we should negative the whole ground of the action, viz., that the defender had been tenant of these lands by tacit relocation since Whitsunday 1885, and dismiss the present action, reserving to the parties their rights *inter se* as to rent for same rent due and as to meliorations.

Lord Rutherfurd Clark—I am of the same opinion. I do not think that this letter of 1st December constitutes of itself a valid and binding lease between the pursuer and defender. It was not addressed to the defender, but to the proprietor's man of business, and it required him in terms to make out a stamped and formal lease between the parties. There is no question that this document would be sufficient to set up a lease if *rei interventus* had followed upon it, and if the defender had entered upon the possession of the farm without anything being said about resiling there is no doubt a good lease would have boen so constituted. But it is said that the pursuer resiled, and that that was either

by verbal intimation from Mr Nimmo to the defender in a conversation which took place on 4th April 1885, or by his letter of 25th April 1885. Now, let us take the last of these first. It is clear that this letter does not amount to resiling. It expresses no such intention, and therefore I do not look upon it as interrupting the right of the defender to validate his right by possession of the subjects. But it is said that sufficient intimation of withdrawal was given to the defender by his conversation with Mr Nimmo. I do not think that there is sufficient evidence to establish that. In the first place, it is not said that Mr Nimmo had instructions from his employer to make any intimation of withdrawal; and secondly, his evidence is quite different from his letter. I think it would be most unjust to the defender to hold that the pursuer resiled from his bargain. In my opinion the pursuer has not established the contention that the defender held his farm under tacit relocation.

Lord Lee—I agree, but I wish to say, as, I understand is also my Lord Young's view, that I think that at the time the landlord is said to have resiled from his bargain, it was too late for him to do so. It was said that mere abstention from giving formal notice was not enough to make *rei interventus* so as to validate the lease, but we cannot take mere abstention by itself. After the tenant had refrained from giving notice, and as the last day of giving notice had expired, the tenant must be held to have been in possession, not under the old lease, but on new terms. There was more than abstention, as he went on to possess the ground in the belief that he had made arrangements for a new lease which was to begin at Whitsunday.

The Court pronounced the following interlocutor:—

". . . Find (1) that the defender possessed the lands and others libelled from Whitsunday 1883 till Whitsunday 1885 under a lease between him and George Sutherland of Forse, the proprietor of the subjects, and that the said lease terminated at Whitsunday 1885; (2) that he has since possessed the said subjects, not by tacit relocation under the said lease, but under an arrangement entered into between him and Mr Sutherland, set forth in the letter of 1st December 1886, addressed by Mr Sutherland to his agent Mr Nimmo, and delivered by Mr Sutherland to the defender's wife on behalf of the defender: Therefore dismiss the action, reserving the pursuer's claim for rent and the defender's claim for meliorations, and all answers to said claims: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer (Appellant)—Guthrie—MacWatt. Agent—Alfred Sutherland, W.S.

Counsel for the Defender (Respondent)—Strachan—M'Lennan. Agent—Thomas Liddle, S.S.C.

Wednesday, October 17.

FIRST DIVISION.

[Lord Trayner, Ordinary.

COWAN'S TRUSTEES *v.* COWAN.

(*Ante*, vol. xxiv. p. 469.)

Process—Multiplepoinding—Claims—Expenses.

In a multiplepoinding raised by trustees to determine the right to a certain portion of a truster's estate the question in the competition was argued between the heir-at-law of the truster and one of four next-of-kin. As a result the latter secured a judgment that the fund was in great part moveable, but was found liable in certain expenses to the heir-at-law in respect of failure in certain contentions. The respective rights of the heir-at-law and the next-of-kin having been thus determined, the three other next-of-kin lodged claims. *Held* that they could only be allowed to participate in the fund on condition of bearing equally with the next-of-kin who had litigated the question all the expenses incurred by him, including those in which he had been found liable to the heir-at-law, as the contentions in which he had failed were not of a reckless character.

Daniel Cowan, merchant, Broughty Ferry, died childless on 19th December 1881. In order to settle the rights of the heir-at-law and the next-of-kin to certain heritable property left by the deceased his trustees raised an action of multiplepoinding and exoneration. The question as to the right to the fund *in medio* was argued between James Cowan, the heir-at-law, and Henry Cowan, one of four next-of-kin. As a result of this competition Henry Cowan secured for the next-of-kin a large portion of the fund *in medio*, but was found liable in certain expenses to the claimant James Cowan.

After the respective rights of the heir-at-law and the next-of-kin had been determined claims were lodged by the other three next-of-kin, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans.

The Lord Ordinary (Trayner) on 27th January 1888 pronounced the following interlocutor:—"Having heard counsel for the claimants, Ranks and prefers the claimant James Cowan to the sum of £45, 17s. 1d., with interest corresponding thereto since the date of consignation, being his share of the fund *in medio* in terms of the interlocutor pronounced by the First Division on the 19th March 1887: Finds the claimant Henry Cowan entitled to payment out of the fund *in medio* of the sum of £46, 12s., being three-fourths of the expenses in which he was found liable by the interlocutor of 20th May 1887, and three-fourths of the estimated expense incurred by him under the reclaiming-note: Further, ranks and prefers the claimants Henry Cowan, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans, each to the extent of one-fourth of the balance of the fund *in medio*: Grants warrant to, authorises, and ordains the Union Bank of Scotland, Limited, Edinburgh, to make payment to the claimants of the sums to which they have been severally found entitled out of the sum consigned in their hands, conform