they seek to have him interdicted from doing so. The respondent maintains that the strip of ground is his property, and that the complainers in erecting the fence in question have been guilty of an act of trespass. On considering the proof led by the parties in support of their several contentions the Lord Ordinary has decided in favour of the respondent, and I think he is right. The rule of our law is, "No sasine, no land." The complainers have no sasine in the strip of ground in question, nor have they any conveyance or title of any kind upon which sasine could follow. The only evidence on which the complainers rely as supporting their claim to the piece of land in question is a land plan prepared by themselves in or about the year 1857, in conformity with which they say they have had exclusive possession for much longer than the prescriptive period. But the land-plan is no title, and exclusive possession will not prove or establish a right unless it follows upon a habile title. The complainers do not possess—at all events, they neither allege nor produce—any such title. Further, I am of opinion with the Lord Ordinary that the complainers have failed to prove that they have had exclusive possession. On the other hand, the respondent has a title, and is infeft therein, which covers or may cover the piece of ground in question. From the conveyance in favour of the respondent there is excepted "a piece of ground sold to" the complainers' authors. What that piece of ground is, what its situation, or what its extent is not specified, further than that it is "now occupied by said branch line." The branch line does not now and has never "occupied" the piece of ground in question. The complainers, in my view, have entirely failed to identify the piece of ground in question as the piece of ground, or part of that piece of ground, excepted from respondent's conveyance. The result is that the complainers have failed to show that they have any right to erect their fence where they have erected it, and that the respondent cannot be interdicted from removing a fence unwarrantably erected on his property.

The complainers cannot obtain a possessory judgment in their favour. It is they who have recently inverted the possession, and the fence which the complainers seek to have protected has only existed for some months, and not for seven years.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Complainers — Cooper. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent — Dundas, Q.C.—Craigie. Agents — George Inglis & Orr, S.S.C.

Thursday, November 9.

FIRST DIVISION.

DOUGLAS AND OTHERS (MORTON'S TRUSTEES) *v.* THE AGED CHRISTIAN FRIEND SOCIETY OF SCOTLAND.

Contract — Promise of Subscriptions to Charity—Liability of Representatives—Offer and Acceptance — Jus quæsitum tertio.

M wrote to a member of a committee for the formation of a charitable society offering, if a society was formed to answer a description given by him, and on certain conditions as to details, to subscribe £1000, payable in ten annual subscriptions of £100. The society was formed, and M's conditions complied with. After the formation of the society M wrote to the secretary offering to become "personally responsible for the pensions of fifty life pensioners of £6 each," on certain conditions. This offer was accepted and its conditions complied with, and a pension scheme was started, which was subsequently extended by further offers on M's part. M paid £100 annually to the society, and also the funds necessary for the payment of the pensions granted, until his death, when two of the annual subscriptions of £100 remained unpaid. In a special case presented by M's trustees and the society, *held* that the trustees were bound to pay the remaining subscriptions of £100, and such sums annually as were necessary for the payment of pensions to pensioners elected prior to M's death.

Observed that the offer of ten subscriptions of £100 and its acceptance constituted a contract containing an express stipulation in favour of a third party—the society—and an agreement between the parties to the contract that that stipulation should be performed with the third party, who consequently had a right to adopt the contract and sue upon it.

This was a special case presented by the trustees of the late Mr John Thomas Morton, first parties, and the office-bearers of the Aged Christian Friend Society of Scotland, second parties, in the following circumstances: — Mr Morton, who died in September 1897, took a prominent part in the formation of the Aged Christian Friend Society, which was established in 1889. By letters written before the Society was established to the Rev. Mr Lowe, a member of a provisional committee sitting in Edinburgh which promoted the Society, Mr Morton offered, on certain conditions relative to the formation and establishment of the Society, to subscribe to its funds a sum of £1000, payable in ten annual subscriptions of £100 each. This offer was accepted by the committee, and the Society was formed with Mr Mor-

ton's approval, and so as to satisfy the conditions of his offer; and Mr Morton subscribed £100 annually to the Society up to the time of his death in 1897. At that time two of the ten subscriptions of £100 each offered by him remained unpaid.

After the Society was established, Mr Morton wrote to the secretary offering to become "personally responsible for the pensions of 50 life-pensioners of £6 each" per annum, subject to certain conditions. This offer also was accepted by the Society, and Mr Morton's conditions were complied with; and Mr Morton paid at the commencement of each year, up to and including the year 1897, the funds necessary for the payment of these pensions to the survivors of the pensioners.

There were further offers by Mr Morton whereby the pension scheme was extended, which were duly accepted by the Society, the particulars of which it is not necessary to enter into for the purposes of this report.

The first question submitted for the judgment of the Court was—"Are the first parties, as representatives of the said deceased John Thomas Morton, bound to implement in all respects the said several offers of the said John Thomas Morton?" The second question detailed the payments undertaken by Mr Morton.

Argued for the first parties—The offer of £1000 was a mere expression of charitable intention. If the maker of a charitable offer changed his mind, or became unable to implement his offer, no obligation remained, charitable promises being always subject to the conditions of continuance of life and wealth. There was here no *rei interventus* unequivocally referable to the alleged contract, and no *rei interventus* short of that was sufficient in the circumstances to set up any obligation—*Maddison* v. *Alderson*, June 4, 1883, L.R., 8 App. Cas. 467. Mr Morton did not bind himself in a continuing contract to pay the pensions, and his letters with regard to them read as a whole showed that the possible cessation of subscriptions was contemplated by him, particularly the letter of 5th February 1892, in which Mr Morton proposed "That both pensioners and subscribers be informed that the continuance of the pensions would depend upon the continuance of the subscriptions."

Argued for the second parties—With regard to the remaining payments of £100 necessary to complete the £1000 which Mr Morton undertook to pay in ten instalments, his offer of these payments was conditional, his conditions had been implemented by the Society, and the offer had been acted upon; though that offer was not tested or holograph, it was binding, as there was sufficiently substantial *rei interventus* in the existence of the Society to supply the place of these formalities. The offer and acceptance constituted a contract whereby Mr Morton undertook to pay certain sums, and the committee undertook to form a society, and the eight payments which had been made by Mr Morton showed that he regarded the Society's side of the contract as implemented, and the two remaining payments were a debt due from his estate. With regard to the various pension schemes, Mr Morton had expressed his intention to become "personally responsible." The lives of the pensioners might have been entirely altered, they might have lost other benefits owing to their being in receipt of these pensions, and the first parties were bound to continue the payments necessary for them in fulfilment of the obligation expressly undertaken by Mr Morton.

At advising—

LORD KINNEAR — The questions in this case are of some novelty, but they depend upon principles which are perfectly simple in themselves and are well established. The late Mr Morton of Rosemount, who appears to have been a generous and benevolent person, undertook to pay certain sums of money to a charitable Society called the Aged Christian Friend Society of Scotland, and duly performed his promises so long as he lived. But he died before they had been completely performed, and the question is, whether his representatives are now under obligation to do what he would certainly have done himself if he had been still in life. That appears to me to be a mere question of construction of the documents in which the promises of the deceased are embodied. If a promise is intended, as Mr Bell puts it, as a final engagement, it is binding, but it is not binding if it is a mere expression of a probable intention which the promisor might or might not fulfil. It is a familiar doctrine in the law of Scotland, differing in that respect from the law of England, that an obligation is binding although it may not proceed on a valuable consideration, or may not be expressed in a solemn form, such as a deed under seal. What is necessary is that the promisor should intend to bind himself by an enforceable obligation, and should express that intention in clear words. Now, in applying this doctrine to the documents before us, I do not see that there can be much doubt as to the meaning and legal effect of the letters which we are required to consider.

In the first of these letters, that of the 27th November 1888, Mr Morton explains the nature of a benevolent scheme which he is desirous to see established, and says to the person to whom he is writing:—"If you saw your way to constitute" such a society as is described "for Scotland, you would do a good work, and I would have much pleasure in assisting the finding of funds to start the society." So far, I think, there is no obligation at all; but then he goes on to describe in some specific detail the nature of the charitable society which he desires to see founded, and then, after inviting his correspondent to form a committee for the purpose of establishing the society, he says—"I will be happy to subscribe £100 towards commencing the work when you get another £100 subscribed and a committee formed." This letter is addressed to the Rev. Mr Lowe, who was a member of the provisional committee by whom the Society was afterwards estab-

lished, and who was ultimately a director of the Society. In the second letter Mr Morton observes upon the character of a society which it would appear had been described to him by his correspondent Mr Lowe, and says that the society so described "would be a valuable addition to the Scotch societies, but it is not the kind of Society which I am desirous of helping the formation of," and therefore it is quite clear he had a specific and definite idea in his mind of the kind of society which he wished his correspondent to form; and after explaining the character of the society he himself approves of, he goes on to say—"It is a society which, if properly established and conducted, would stand at the very head and top of all Scotch benevolent societies, and I am willing to increase my offer of help to the establishment of such a society to a subscription of £1000 (one thousand pounds) to be payable in ten annual subscriptions of £100 each, provided a properly constituted committee can be found and a fair amount subscribed in proportion to the above subscription offered by myself." In the last letter of the three, the letter of 16th May 1889, he expresses a quite sufficiently specific opinion as to what would be necessary in order to satisfy his condition that a fair amount should be subscribed in proportion to the amount subscribed by himself.

Now these two first letters appear to me to contain a clear offer which invites acceptance because the offer is made on certain conditions. The writer says—If you will do certain things involving the expenditure of time and trouble as well as money, then I on my part promise to give you a definite sum of money within a definite time. That offer was accepted. It is one of the facts on which the parties are agreed, and which we are bound to take as facts established in this case, that the offer was duly accepted by the provisional committee of this Society, which was formed and established under the countenance and advice, and to the satisfaction of Mr Morton, the offerer. Accordingly Mr Morton, during his life, paid regularly to the said Society eight annual subscriptions of £100 each, the last being made on 5th January 1897, and the case states that two annual subscriptions of £100 each due on 1st January 1898 and 1st January 1899 are still unpaid, and are required to make up the £1000 promised.

The result of these facts, taken in connection with the letters, is that we have in the letters a definite offer determined by acceptance. I do not know that anything more is required in order to make a contract according to the law of Scotland. The question therefore, whether the two remaining sums of £100 each would be enforceable against Mr Morton himself if he were still alive and declining to pay is, I think, not a question of difficulty. There is a clear obligation undertaken by him. The only question theretore is, whether, he having died without performing an obligation which we must assume from the terms of the special case he certainly would have performed had he lived, it may now be enforced against his representatives. It is a general rule that a personal obligation transmits against the personal representatives of the obligator, and although it is perfectly easy to prevent the liability from transmitting by stipulating that the performance shall depend on the survivance of the promisor, there is nothing in Mr Morton's letters to suggest any such limitation of his offer. It is not made on condition of his survivance but is absolute and binding in all events.

The only other point that requires consideration in this part of the case is whether the promise to Mr Lowe can be enforced at the instance of the society which was afterwards formed, and which was not a party to the agreement at the time it was made; and I think Mr Balfour was justified in saying that this was a clear instance of our doctrine of *jus quæsitum tertio*, as that is explained by Lord Wensleydale in the case of *Finnie* v. *The Glasgow and South-Western Railway Company*, August 13, 1857, 20 D. (H.L.) 2. The offer is—If you produce a society answering the description I give you, which may be the creditor in my obligation, then I will pay to that society £1000 in the course of ten years. That is an express stipulation in favour of a third party—that is, the society—definitely described, and it is in effect an agreement between the two parties to the contract that a stipulation shall be performed with that third party; and the rule in such a case is, that though the person in whose favour the stipulation is made is not a party to the agreement, or at the time assenting to it, he may afterwards adopt the agreement in his favour and sue upon it.

The question arising upon the remaining letters appears to me to involve the same considerations, although the letters themselves are not expressed in exactly the same terms. All of these letters were addressed to the Society—that is, to the office-bearers of the Society when constituted—and they contain promises, which it is admitted the Society accepted, to make payments of certain sums for the purpose of providing pensions to be bestowed according to certain defined schemes provided such schemes should be established; and the parties are agreed that the whole of the pension schemes were intended to be, and were in fact, established by the Society. The only question therefore is, whether Mr Morton's promises are mere indications of a benevolent intention or whether they are expressed in the language of obligation; and I think the language of the first of this series of letters—that of 2nd May 1890—is perfectly conclusive of that question, for what Mr Morton there says is—"Will you kindly place before the directors of the Aged Christian Friend Society of Scotland the following offer of mine. I shall be happy to be personally responsible for the pensions of fifty life pensioners of £6 (six pounds) each, such pensioners to be elected in accordance with the rules of the Society by the directors at an early date, subject to the following conditions,"—and then he

sets out certain conditions, and concludes his letter by saying—"I shall learn with pleasure that the directors have seen their way to accept my offer, and will be happy to forward a cheque for the first year's pensions after I learn that the fifty pensioners have been elected." Now, that is a distinct offer of personal responsibility, and an offer that invites acceptance or rejection as an offer on conditions, and again the parties are agreed that it was duly accepted and that the conditions were properly carried out.

The remaining letters are not all in terms that in themselves would seem to be as strong as those of the letter which I have just read, but without going through them in detail, my opinion is that the fair construction of all of them is that they likewise are letters expressing and intended to express obligations, and in reading subsequent letters which are intended in most cases to add something to the offer originally made, it is, I think, quite legitimate to refer to the first letter, which contains the original offer, as giving the key for the construction of the whole series. There is certainly nothing whatever in the later letters to suggest that the offers there made were made otherwise than on the same terms of obligation as those which had been so clearly set out in the first letter. On the whole matter, therefore, I am of opinion that, on a fair construction of this series of letters also, the deceased gentleman meant to bind himself, and did in fact bind himself and his personal representatives, to pay the pensions specifically described in the various letters, provided the scheme was established according to his design, which is clearly expressed, and provided that the offer was accepted by the managers of the scheme—that is, the directors of the Society. It appears to me that the directors of this Society were thus constituted Mr Morton's agents, and were instructed and authorised to give to certain pensioners his promise that the amounts definitely fixed as the pensions proposed by him, should be paid to them during their lives under the conditions contained in his letters. It is not suggested that the directors exceeded the mandate given to them; on the contrary, it is the admitted fact that they duly carried out what they were authorised to do; and I am therefore of opinion that they became bound, and bound the mandant, to the persons to whom they have given pensions to continue paying them according to the conditions stated in the offer. I do not at all suppose that by making these offers Mr Morton bound himself and his representatives to continue pensions to all persons who might in future be elected, for an indefinite number of years, and I do not think that is contended by the Society, but what I do think established is that he intended to bind himself, and has effectually bound himself, to continue the pensions to pensioners already elected in terms of his offer, and therefore that these pensions must be continued by his representatives. I have the less difficulty I must say in coming to these conclusions that I think we must infer from the terms of the special case put before us that the representatives of this charitable person are perfectly ready and willing to continue payment of these benevolent subscriptions provided it is clear that they are bound in law to do so, although they have most properly declined to do so until they are satisfied that it is in accordance with their legal obligation and therefore their legal right, because otherwise it is quite clear they would not be entitled to apply the trust funds in their hands for benevolent purposes of their own. I am therefore of opinion, if your Lordships agree with me, that we should answer the question put first in the affirmative, but the only doubt that I have is whether the specific questions put in regard to the pensions have made it quite clear that the pensions which it is maintained are still payable are those in favour of pensioners already elected. If there be any doubt as to the meaning of the question it could be amended, no doubt, but I did not understand from the argument that anything more was maintained on behalf of the second parties than what I think they are really entitled to.

LORD ADAM and LORD M'LAREN concurred.

The LORD PRESIDENT was absent at the advising.

Counsel for the second parties stated that all the pensioners on whose behalf payments were claimed were elected prior to Mr Morton's death.

The Court answered the questions in the affirmative.

Counsel for the First Parties—Sym—Mitchell. Agent—Douglas Wilson, Solicitor.

Counsel for the Second Parties—Balfour, Q.C.—Clyde. Agents—Rusk & Miller, W.S.

Thursday, November 16.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HAWKS *v.* DONALDSON.

Process—Reclaiming-Note—Signature by Counsel.

A reclaiming-note at the instance of a party who was conducting his own cause was duly printed and boxed, but was signed by the party himself and not by counsel. The Court *held* that it was necessary for the reclaiming-note to be signed by counsel, and gave the party an opportunity of having it thus signed.

Agent for the Reclaimer—Party.