Thursday, May 31.

FIRST DIVISION.

[Sheriff-Substitute of Haddington.

BELL *v.* GOODALL AND OTHERS.

Landlord and Tenant—Informal Missive—Holograph Acceptance—Possession—Sub-lease—Rei interventus.

Circumstances in which an informal missive, improbative and unsigned by the granter, was by *rei interventus* reared up into a lease valid for seven years, the grantee having by holograph letter accepted the terms of the lease contained in the unsigned document, entered into possession, and sublet a portion of the premises, and the sub-tenants having been, without any remonstrance, allowed to enter upon the portions let to them.

The deceased Charles Lawrie, blacksmith, East Linton, was heritable proprietor of a piece of ground situated on the south-west side of Westgate, North Berwick, of which the late John Heriot, joiner in North Berwick, was tenant from year to year at a rent of £6 per annum.

Shortly before his death Heriot fell into poor circumstances and obtained advances of money from James Goodall, a fish merchant in North Berwick, to whom he transferred, in security of the sums lent, a wooden building or shop which he had erected on the piece of ground already referred to. On the 22d November 1880, shortly after the death of the said John Heriot, Goodall went to East Linton, where Lawrie resided, for the purpose, if possible, of obtaining a seven years' lease of the said ground at a rent of £7 a-year. A lease was also prepared by Goodall's agent, in the shape of an offer by Lawrie and an acceptance by Goodall, and was in the following terms:—

"Mr James Goodall,

"Fish Merchant, North Berwick.

"Sir,—I, Charles Lawrie, blacksmith, East Linton, hereby agree to let to you, for a period of seven years, from and after the term of Whitsunday next 1881, that piece of ground at the West Gate of North Berwick belonging to me, and now or lately occupied by the deceased John Herriot, joiner, North Berwick, on which the said deceased has put up a wooden erection and building, as well as the piece of garden ground behind, all as let by me to the said John Herriot, for the sum of £7 sterling per annum, payable half-yearly, at Martinmas and Whitsunday yearly, under reservation of all question or claim as to the said wooden erections between the said Mr Herriot or his representatives and you or any other person, I having no claim to the material of said erection further than that should I wish to retain the same I shall pay for it at a valuation, and you, if you have a right to the same, shall have full liberty to remove it without my having any claim in or to it.—In witness whereof I have subscribed these presents, written by James Stobie, solicitor, Haddington, at East Linton, this 22d day of November 1880 years, before these witnesses, John Lawrie, blacksmith, East Linton, my son, and the said James Stobie."

"John Lawrie, *witness.* *p.* CHARLES LAWRIE,
"James Stobie, *witness.* JOHN LAWRIE."

"Mr Charles Lawrie, Blacksmith,
East Linton

"Sir,—I, James Goodall, within named and designed, hereby accept of the within written offer, and, if necessary, stipulate that a formal lease in terms thereof shall be mutually expede between us and at mutual expenses.—In witness whereof I have subscribed these presents, written by James Stobie, solicitor, Haddington, at East Linton, the 22d day of November 1880 years, before these witnesses, John Lawrie, blacksmith, East Linton, and the said James Stobie."

"John Lawrie, *witness.* JAMES GOODALL,
"James Stobie, *witness.* 22/11/80."

The said missive was signed by John Lawrie on behalf of his father Charles Lawrie, who was blind, and John Lawrie also signed as one of the instrumentary witnesses.

On the 6th January 1881 Goodall sublet as a workshop part of the wooden erection already referred to, to Sked & Himsworth, carpenters, for seven years from Whitsunday 1881, at a rent of £12 per annum. The fact of this sub-lease, and the cause for which it was granted by Goodall (namely to recoup himself for the money lent to Heriot and expended upon the wooden erection), became known to Lawrie some time prior to Whitsunday 1881 by letter from Stobie, Goodall's agent. Subsequent to the date of Sked & Himsworth's lease, but before they had entered on the subjects, a letter was written by Messrs Adam & Winchester, S.S.C., Edinburgh, the agents of Charles Lawrie, to Mr James Stobie, solicitor, Haddington, agent for Goodall, calling in question the alleged lease, in respect that it was neither holograph nor tested, and alleging that John Lawrie had no authority to sign for his father. A long correspondence followed this letter, and various proposals were made for a compromise, the principal difficulty being as to the value of the wooden erection, it being suggested that Lawrie should purchase it from Goodall at a valuation. These negotiations were unsuccessful.

Meanwhile Whitsunday 1881, which was Sked & Himsworth's term of entry, had arrived, and they took possession of the wooden building as sub-tenants. On the 3d June 1881 Charles Lawrie died leaving his property to trustees, who shortly thereafter sold the subjects in question to John Bell, coach proprietor, North Berwick. Bell thereupon warned Goodall to remove, and subsequently presented the present petition of ejection in the Sheriff Court of Haddington against Goodall, and against Sked & Himsworth, averring that at the time when the missives of lease were entered into Charles Lawrie was in such a state of health as to be incapable of entering into any contract, and that he did not authorise his son John to write and sign his name to the missive, and was not aware that that had been done. He also pleaded, *inter alia*, that the missive of lease was not binding on or good against singular successors of the said Charles Lawrie in the said subjects.

The defender Goodall maintained, on the other hand, that the agreement was made with Charles Lawrie, who especially desired his son John to sign it for him; and pleaded that the missive of lease was in the circumstances valid, and must bear faith in judgment until set aside by a competent Court. He further pleaded *rei interventus.*

By interlocutor of 17th July 1882 the Sheriff-

Substitute (SHERIFF) allowed the defender Goodall a proof of his averments regarding the missive of lease, and to the pursuer a counter proof.

The pursuer appealed to the Sheriff, who however adhered to the Sheriff-Substitute's interlocutor.

Proof was accordingly led on the 16th October 1882, the result of which sufficiently appears from the Sheriff-Substitute's interlocutor and note—"Finds it proved that the missive No. 12 of process was subscribed by John Lawrie, with the authority of the deceased Charles Lawrie, the proprietor of the subjects in question, on 22d November 1880 years: Finds that it is averred by the defenders, and not denied by the pursuer, that, as is instructed by the agreement No. 14/15 of process, the defender James Goodall, on 6th January 1881 years, sublet part of the premises to the defenders Messieurs Sked & Himsworth for seven years from the term of Whitsunday 1881: Finds it admitted that the defender James Goodall, by himself or his sub-tenants, the defenders Sked & Himsworth and others, entered to possession of said subjects at such term of Whitsunday 1881; that at Martinmas 1881 the defender James Goodall was called upon by Charles Lawrie's representatives to pay to them the half-year's rent of the subjects due at that term: Finds in point of law that the missive No. 12 of process is in the circumstances proved equivalent to the writ of the said Charles Lawrie, and sufficient proof *scripto* of an agreement to grant a lease of the subjects in question for seven years from the term of Whitsunday 1881; that by the acts following on said agreement parties are barred from resiling from said agreement: Therefore sustains the defences, assoilzies the defenders from the whole conclusions of the prayer of the petition, and decerns: Finds the defenders entitled to the expenses incurred by them in this process: Allows accounts thereof to be given in," &c.

"*Note.*— . . . The Sheriff-Substitute is humbly of opinion that if the defenders' averments, to the effect that the missive offer No. 12 of process was signed on behalf of Charles Lawrie, with his approval, by his son John, be proved, that there is such proof *scripto* of an agreement for a lease as followed by *rei interventus* constitutes a good lease for seven years of the subjects from which the defender is sought to be removed.—Bell's Prin. sec. 1189; 1 Hunter, Law for Landlord and Tenant, p. 359; *Walker* v. *Flint*, February 20, 1863, Ses. Reps. 3d series, i. 417; *Elmslie* v. *Duff*, June 2, 1865, Ses. Reps. 3d series, iii. 854.

"A proof has been led of the averments of parties regarding the missive, and on that proof the case is now to be disposed of. . . . . .

"The Sheriff-Substitute is of opinion that it is proved that John Lawrie signed the missive on the request of his father, as deponed by the defender and his agent. The acts following on the missive are not disputed. In January 1881 Goodall sublet part of the property for seven years to the defenders Sked & Himsworth, who then occupied it. They continued to possess it after Whitsunday 1881, and there is no averment that they derived any title to do so from old Lawrie. Old Lawrie died about June 1881, and although a correspondence was carried on between February and the time of Mrs Lawrie's death between Messrs Adam & Winchester, on his behalf, and Goodall's agents, with the view of arranging for Goodall giving up the lease, no steps were taken to prevent him or his sub-tenants from occupying the property. He was called on to pay the half-year's rent due at Martinmas 1881 by Charles Lawrie's representatives or their agent.

"In these circumstances it appears that such acts were done on the faith of the agreement for a lease as barred both parties from resiling, and along with the informal missive sufficiently constitute a lease of the subjects. The defenders are therefore entitled to absolvitor in this process."

The pursuer appealed to the Court of Session, and argued—The missive being neither holograph nor tested, was valueless as a lease for seven years. The signer John Lawrie was also instrumentary witness to his own signature; besides there was no written procuratory, which was indispensable if the deed was to be validly signed *per procuration*. The mere existence of the sub-lease could not instruct *rei interventus*—Hunter, Landlord and Tenant, i. 188. Authority to another by a landlord to let his land must be in writing—Bell's Conveyancing, 449; *Elmslie* v. *Duff*, June 2, 1865, 3 Macph. 854; *Sinclair* v. *Caithness Quarry Company*, July 9, 1880, 7 R. 1117; *Walker* v. *Flint*, February 20, 1863, 1 Macph. 417. As to the proof allowed by the Sheriff-Substitute, either (1) the evidence could not competently be looked at all, or (2) it was of so suspicious a character as to carry no weight. *On question of rei interventus*—The sole act alleged to constitute *rei interventus* was the allowing the tenant to obtain possession. The granting of a lease had not necessarily for its sequence the granting of a sub-lease.—Erskine, iii. 2, 3; Bell's Com. i. 346; Hunter, i. 352; Bell's Leases, i. 358. The essence of *rei interventus* was the performance of some act by which *res non sunt integræ*.

Argued for respondent—There was here such a writ as followed by *rei interventus* was binding on the successor in the title. An entry in a landlord's rental book has been held good as a lease—See case of *Bathie* v. *Lord Wharncliffe*, March 6, 1873, 11 Macph. 490, where the tenant possessed on a draft lease. The old strictness was to a large extent relaxed now, and the proof of *rei interventus* was reasonably sufficient. This was shown by (1) the granting of the lease; (2) by the tenants obtaining possession without objection.—*Johnston* v. *Grant*, February 28, 1844, 6 D. 875; *Wink* v. *Church of England Insurance Company*, 19 D. 1079; *Burns* v. *Stewart*, February 1, 1877, 4 R. 427.

At advising—

LORD PRESIDENT—This case is certainly in a most unsatisfactory state for pronouncing judgment, but for all that it is not a case which in itself ought to be attended with much difficulty. There is here a writing which I think can hardly be disputed to be sufficient evidence of an obligation or agreement to grant a lease for seven years. Now it is a well settled rule of law that in order to constitute a lease binding for a term of years there must be writing. But the writ in question is plainly insufficient in itself to constitute a lease, for not only is it improbative, but it must also be taken to be unsigned; but even an

unsigned document, provided it contains all the essentials of a lease, if it be followed by possession or *rei interventus* so as to show that the agreement had been acted on, will be binding upon both parties. Now the single question which was raised in the Sheriff Court was, whether or not there was *rei interventus?* but unfortunately a different question was sent to proof, namely, one relating to the defender's averments regarding the missive of lease; yet when the case came back the Sheriff found that there was sufficient evidence of *rei interventus* to bar both parties from resiling. Now, my great difficulty all along has been to be able to support this finding of the Sheriff-Substitute, but after very careful consideration of the whole evidence I have come to the conclusion that there is enough in the actings of the parties to constitute *rei interventus.*

In the first place, there is evidence to show that whether Lawrie senior was perfectly cognisant of what was done at the time when the missive was signed or not, at any rate he found out very shortly after; and further, he must have been aware at the time of his wife's funeral in February 1881, if not sooner, that Goodall, his tenant, had sublet part of the subjects. Now, that brought to Lawrie's knowledge the fact that the document in question had been acted upon, and when in May 1881 Goodall not only acted as a tenant himself, but his sub-tenants entered upon the subjects of their sub-lease, and were permitted to continue their possession for a year until Whitsunday 1882, I think that these two circumstances, taken in connection with Lawrie's knowledge of what had taken place, constituted sufficient *rei interventus.*

I cannot say that I have much confidence in the decision which I now suggest to your Lordships, but I do not see what otherwise in the circumstances to do. I am therefore for affirming the decision of the Sheriff.

Lord Deas—There can be no doubt that the difficulty in this case consists in determining whether or not there is sufficient proof of *rei interventus.* I am disposed to think that upon the whole the evidence on this matter is sufficient, and in coming to this conclusion I am a good deal moved by the observations of the Sheriff-Substitute, who took the proof. I see no good grounds in law to recal his interlocutor, and am inclined to think that the truth and justice of the case lie in this direction

Lord Mure—I have come to the same conclusion. No doubt the evidence is in many respects most unsatisfactory and vague; but upon the whole it seems to me perfectly clear, that prior to Whitsunday 1881 old Lawrie became aware that a sub-lease had been granted by Goodall to other tenants. He took no exception to what had been done, but allowed things to go on as if with his approval. In these circumstances I can see no sufficient grounds for differing from the opinion arrived at by the Sheriff-Substitute.

Lord Shand—I am of the same opinion. The case is no doubt a narrow one upon the facts, but there is not sufficient evidence I think to warrant us in recalling the Sheriff-Substitute's interlocutor. I think it is apparent that what Goodall intended was not to occupy these premises himself but to sublet them. His lease was therefore naturally followed by a sub-lease, and unless this sub-lease is sustained he is liable to suffer in a claim of damages. The granting of the sub-lease was to my mind as much *rei interventus* as the laying out of money upon the subject would have been. But the case does not rest upon that fact alone, for the sub-lease was made known to Lawrie in a letter from Stobie, and following upon that information the proprietor might have said "the lease is at an end;" yet he never gave up that position; and further without any remonstrance he allowed the sub-tenants of Goodall to get possession and to remain in possession unchallenged for a year. I think therefore that these two circumstances, taken together, the granting of the lease, and the allowing possession to be taken by sub-tenants are sufficient *rei interventus* to set up this informal missive.

The Court pronounced the following interlocutor:—

> "Find it proved that although the missive No. 12 of process was not subscribed by the deceased Charles Lawrie, the proprietor of the subjects in question, it contains all the essential conditions of a lease for seven years by the said Charles Lawrie in favour of the defender Goodall: Find that by holograph letter dated 22d November 1880 the said defender accepted the terms of the lease contained in said unsigned document: Find that the defender James Goodall, by missive dated 6th January 1881, sublet part of the premises to the defenders Sked & Himsworth for seven years from the term of Whitsunday 1881: Find that the defender James Goodall, by himself and his sub-tenants, the defenders Sked & Himsworth and others, entered into possession of said subjects at the term of Whitsunday 1881, and continued in possession under the writings above mentioned until Whitsunday 1882: Therefore refuse the appeal and decree: Find the appellant liable to the respondents in the expenses of resisting the appeal as joint respondents maintaining the same pleas, allow an account, and remit," &c.

Counsel for Appellant—J. P. B. Robertson—M'Kechnie. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for Respondent (Goodall)—Strachan. Agent—William Officer, S.S.C.

Counsel for Respondents (Sked & Himsworth)—Thorburn. William Paterson, Solicitor.