edly liable in repayment of the advances made whatever might be the amount. Well, then, if the cash-credit account could be debited with advances or sums of money for which the obligants were bound, and the securities were deposited as against the cash-credit account, they were so deposited and could be held by the defenders for the balance due on the cash-credit account whatever that balance might be. I take it to be the case that the advances of cash made by the defenders to Campbell, Rivers, & Company under the cash-credit did not exceed £5000, but it is also the case that the defenders on discount account were creditors of the firm to the extent of over £3000. All the items in the discount account were items which the defenders were "at any time," in terms of the cash-credit bond, entitled "to place to the debit of the said current or cash account." They have not lost that right, and may now put their claims on discount account into the current or cash account. They virtually do so now by their contention in this action. That being done, the defenders hold the securities in question for the balance due them on the cash-credit account, including therein the discount account. Treating the case in that way the defenders are not holding the securities in question as for any general balance or debt other than that against which the securities were deposited with them.

In the view which I have taken of this case it is unnecessary to consider whether the principle recognised in the case of *Hamilton* v. *Western Bank* is applicable to the present case, nor to consider the cases referred to by the Lord Ordinary as settling that securities deposited or pledged in security of a specific debt or obligation cannot be retained in security of another and different debt. Nor, is it necessary to give any opinion as to how far the defenders might be justified in retaining the securities in question upon the principle of settling accounts in bankruptcy. In my opinion, none of these principles require to be appealed to for the decision of this case, which may be decided upon grounds less open to controversy. I think the present case stands thus—the late Mr Alston deposited the securities in question as against any sum which might be due by him or his firm on their current or cash account, and he expressly authorised the defenders to debit that account, not only with the sums of cash advanced, but also with all sums in which the defenders stood as creditors, and the said firm or its partners stood as debtors. The securities were therefore deposited, not as against any specific debt or obligation separable and distinguishable from the other debts or obligations of the firm and its partners, but against the amount of debt which the firm and its partners might be owing or responsible for to the defenders. Taking that view of the case, I think the Lord Ordinary's interlocutor should be recalled, and as it is not suggested that the securities in question will be sufficient to meet the defenders' claims on the estates of Campbell, Rivers, & Company and Mr J. P. Alston, I think they should be assoilzied from the conclusions of the action.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor of the Lord Ordinary and assoilzed the defenders.

Counsel for Pursuer—Guthrie—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for Defenders—H. Johnston—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, June 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GARDEN *v.* EARL OF ABERDEEN.

Proof—Innominate and Unusual Contract—Proof by Writ or Oath—Lease—Constitution of Independent Agreement—Verbal Alteration.

A brought an action against B, owner of the farm of C, for £5000, as the amount of the loss which he had sustained during a nineteen years' lease of that farm. He averred on record that at a meeting with B in March 1881, ten years before the close of the lease, the latter said "that if the pursuer would remain in the farm to the end of the lease and meantime pay the rent, he, the defender, would repay the pursuer all his loss for the nineteen years of the lease, and that he did not care what the sum was." He either used these words or words to that effect, namely, that he would at the end of the lease make up to pursuer the loss which he had already sustained and might sustain by his tenancy of said farm under his then current lease and rent of £390 The pursuer undertook to consider the proposal, and on 26th March 1881 he wrote to the defender in these terms—"I have now considered and cordially accept them" (said proposals) "With the utmost confidence I leave the case in your hands assured that you will see that justice is done to me which is all that I desire."

Held that the pursuer's action was relevant, but as the contract or agreement alleged by him was an innominate contract of an unusual kind it could only be proved by writ or oath.

Robert Garden, Farmer, Mains of Tolquhon, Tarves, Aberdeenshire, raised an action against the Earl of Aberdeen.

In the first six articles of the condescendence the pursuer set forth that he and his forefathers had been tenants on the estate of Haddo for upwards of a century, that his uncle was tenant of North Ythsie on that estate from 1852, and spent between £1200 and £1300 on the improvement of the farm, that on his death in 1864 the pursuer

took up the lease and at its expiry entered on a new lease for nineteen years from Whitsunday 1872, but that against the pursuer's remonstrances the rent, although already too large, was raised from £250 to £390, and that after the said lease was entered into the pursuer made frequent application to the defender and his factor for reduction of rent.

The pursuer then averred—"(Cond. 7) Towards the close of the year 1880 a part of the pursuer's farm-steading fell down from sheer decay. The pursuer asked the defender through his factor to replace it, but the latter apparently could not give the necessary permission or orders to have a farm-steading, which had fallen in from decay, rebuilt or repaired. After months of delay the pursuer was requested to wait upon the defender personally. He did so. The interview took place at Haddo House in March 1881, and the defender's wife (Lady Aberdeen) was also present at the interview. The defender admitted to the pursuer at said interview that his farm was undoubtedly over-rented; that Mr Douglass, his factor, had admitted to him that he was partly to blame for the over-renting, and said that he and her Ladyship had been considering how the pursuer could be compensated for his loss. After said interview at Haddo House the defender and Lady Aberdeen drove over to the farm and had a meeting with the pursuer. The defender said that if the pursuer would do the carting and pay interest on the building outlay, the steading would be put right; and that if the pursuer would remain in the farm to the end of the lease, and meantime pay the rent, he, the defender, would repay the pursuer all his loss for the nineteen years of the lease, and that he did not care what the sum was. He either used these words or words to that effect, namely, that he would at the end of the lease make up to pursuer the loss which he had already sustained and might sustain by his tenancy of said farm of Ythsie under his then current lease and rent of £390 . . . . (Cond. 8) The pursuer did not accept the said offer at said meeting. He was anxious to have his loss paid then, and his rent then and there reduced, but he undertook to consider the proposal, and on 26th March 1881 he wrote to the defender in these terms—'I have now considered and cordially accept them' (said proposals). 'With the utmost confidence I leave the case in your Lordship's hands assured that you will see to it that justice is done to me, which is all that I desire.' (Cond. 9) Relying on the defender's said undertaking the pursuer continued in the said farm until the end of the lease at Whitsunday 1891, and paid the rent of £390, to his great loss and damage. In the defender's own words in his letter to pursuer of 6th August 1892—'From the time of that conversation onwards you at once evinced a perfectly contented and cordial disposition, and peace and comfort were restored. And I take this opportunity of expressing my appreciation of the ready manner in which you thus left the matter in my hands and the friendliness you have since displayed.' Further, in terms of said undertaking, the defender repaired the farm-steading, the pursuer doing the cartages; and the pursuer thereafter, until the end of the lease, paid interest at 3 per cent. per annum on the defender's outlay on the repairs. (Cond. 10) In the year 1886 a great agitation arose among the defender's farming tenants for a reduction of rent. Many of them came to the pursuer and asked him to join in the movement. They stated that he should be the leader of it, seeing his case was one of the most flagrant, in respect of the excessive rent paid by him for said farm. The pursuer was not able to explain matters to them, but he waited upon the defender and told him how he was being pressed. His Lordship's answer was that he, the pursuer, would be much better under the arrangement that had been come to between them in March 1881 than under any revaluation that could be made in 1886, and he asked the pursuer to take no part in the agitation, and the pursuer accordingly sought no reduction of rent or revaluation of his farm. The result of the tenants' agitation was that the defender intimated to the tenants that he would either relieve them of their farms or consent to a revaluation. In most cases revaluations were made, and in some cases as much as 33 per cent. reduction was made extending over five preceding years, and also continuing in the future. . . (Cond. 11) When the pursuer's lease ended at Whitsunday 1891 he left the farm . . . (Cond. 12) Since and for some time before the lease expired the pursuer has endeavoured to obtain compensation from the defender in terms of his foresaid undertaking, but the defender has not yet made any payment whatever. He now alleges that what he undertook was only that he would ascertain whether at the time in 1871 when the rent was fixed the said rent was relatively higher than the rent of other farms on said estate valued at the same time; and if so that he would repay pursuer the difference. The pursuer's farm was let at a relatively much higher rent than was being paid at the time for other farms, and even on the footing now stated by the defender but not admitted, but on the contrary, denied by pursuer, the pursuer has suffered great loss and injury. What the defender however agreed to do, and but for which undertaking the pursuer would not have acquiesced and continued in the farm was, as before stated, to compensate the defender for the losses which he has sustained during the currency of his lease. These losses he estimates at not less than £5000 sterling."

The pursuer pleaded, *inter alia*—"(1) The defender having, in March 1881, entered into a valid and binding agreement to the effect that if the pursuer would remain in his farm and pay the rents thereof to the ish of the current lease, the defender would at said ish compensate the pursuer for all loss and damage sustained by him during the currency of the lease; the pursuer, having sustained loss and damage to the

amount concluded for, is entitled to decree, in terms of the conclusions of the summons, with expenses. (2) *Separatim*, the defender is not entitled to repudiate or resile from said agreement in respect that it has been followed by *rei interventus*, known and assented to by the defender, and has been homologated or otherwise adopted by the defender. (3) The pursuer having, in reliance on the defender's undertaking, paid the rent of said farm and refrained in 1886 from claiming a revaluation, and having suffered the said loss, the defender is bound to compensate him for the same."

The defender lodged defences, in which he, *inter alia*, averred that at their meetings in 1881 he agreed to inquire into the matter of the rent at the end of the lease, or if he found that the rent paid by the pursuer was more than that paid for similar farms in the district, he would then allow a proportionate deduction; and pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient in law to support the conclusions of the summons. (3) The pursuer's averments can be proved only by the writ or oath of the defender."

On 25th May 1893 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Sustains the first plea-in-law for the defender; repels the whole pleas-in-law for the pursuer; and assoilzies the defender from the conclusions of the summons, and decerns, &c.

"*Opinion.*—The pursuer sets forth that he and his forefathers had been tenants on the estate of Haddo for a long period; that his uncle was tenant of North Ythsie on that estate, and spent a large amount on its improvement; that on his death the pursuer took up the lease, and at its expiry entered on a new lease for nineteen years from Whitsunday 1872, but that, against the pursuer's remonstrances, the rent was then raised from £250 to £390. These particulars are stated in considerable detail in the first six articles of the condescendence. The only important fact, however, is that the pursuer at Whitsunday 1872 became tenant of the farm of North Ythsie under the formal lease for nineteen years at the rent of £390, otherwise these averments have no relevancy.

"In condescendence 7 the pursuer avers that at an interview with the defender, the Earl of Aberdeen, in March 1881, the Earl admitted that the farm was overrented, and said 'that if the pursuer would remain in the farm to the end of the lease, and meantime pay the rent, he, the defender, would repay the pursuer all his loss for the nineteen years of the lease, and that he did not care what the sum was,' or 'that he would at the end of the lease make up to the pursuer the loss which he had already sustained and might sustain by his tenancy of said farm of Ythsie under his then current lease and rent of £390.

"This is the averment on which this action primarily depends. The pursuer represents the words of the defender to be an offer or promise on his part binding on him when accepted, but it is averred in condescendence 8 that no contract was then concluded, but that the contract was completed by a letter written by him to the defender on 26th March 1881, in which he says that he cordially accepts the defender's proposals (which are not further defined), and adds, 'With the utmost confidence I leave the case in your Lordship's hands, assured that you will see to it that justice is done to me, which is all that I desire.'

"The pursuer represents that a contract was thus completed on 26th March 1881, which gave him a right to recover from the defender whatever loss he might incur through his occupation of the farm, and he has produced a statement in which he balances his profits and losses during the whole years of the lease, and brings out a loss of no less than £6927, 7s. 11d. In this statement the losses for the years 1880-82, are stated at £855, 19s. 7d. and £714, 18s. 5d., or £1570 for the two years, which is just about the double of the rent.

"If this was a contract, and if the defender used the words which the pursuer imputes to him, it was a contract on the part of the defender as improvident and absurd as could be imagined, and it is, to say the least, extremely unlikely that the pursuer has accurately understood and reproduced the defender's language. Again, if it was a contract, it was a verbal contract, for it is not said that any document exists in which its terms are expressed; they are not expressed at all in the defender's letter of acceptance of 28th August 1881; and again, if it was a contract, I cannot regard it as anything else than a contract altering the terms and conditions of the written lease, and adding to it a new contract between the defender as landlord, and the pursuer as tenant, wholly inconsistent with the conditions of the lease.

"The defender contends that there is not in these two articles of the condescendence any relevant averment of an enforceable contract at all, because the letter by the pursuer bears, not that the defender shall be bound by his proposals, but that the matter is left entirely in the defender's hands, that is to say, left to the defender's good will and liberality. I am disposed to read the pursuer's letter in that manner, and to hold that there is here no relevant averment of a contract.

"The same result is reached, however, in another way by regarding the pursuer's condescendence as averring a verbal contract altering a formal written contract which, as laid down by the Lord President in *Kirkpatrick* v. *Allanshaw Coal Company*, December 17, 1880, 8 R. 327, 'cannot be done' . . . 'by words only' (p. 332).

"To meet this difficulty the pursuer has endeavoured to set forth a case of acquiescence and *rei interventus* and he maintains, on the authority of the case of *Wark* v. *Bargaddie Coal Company*, March 15, 1859, 3 Macq. 467, that proof of the acts of *rei interventus* will enable him to prove by parole the alleged alteration of the conditions of the lease. But in this

endeavour it appears to me that he has failed, and that there is no relevant averment of such acts of *rei interventus*.

"The pursuer avers that besides agreeing to make up the pursuer's losses, whatever they might prove to be, the defender at the same time undertook 'to put the farm-steading right' if the pursuer would do the necessary carting and pay interest on the defender's outlay, and the pursuer says that this part of the agreement has been fulfilled by both parties; and he represents the fulfilment of the agreement about the steading as homologation, not of that agreement only but of the agreement to make up the pursuer's losses also. But it appears to me that the alleged agreement about the steading is quite distinct from the alleged agreement to alter the terms of the lease, and that there is no good ground for holding that the fulfilment of the one bargain can affect the other.

"The other alleged acts of *rei interventus* are these:—(*Firstly*) that the pursuer continued in the occupation of the farm; and (*Secondly*) that he abstained from taking part in a movement of the tenants on the defender's estates for a general abatement of rents. These, however, were not acts in any way inconsistent with the lease, or necessarily referable to any agreement to alter it, and I am therefore of opinion, on the principles on which the case of *Kirkpatrick* was decided, that they are not such acts of *rei interventus* as will, if proved, let in parole evidence of the alleged bargain in derogation of the written lease.

"It was further argued that in this case the defender does not stand on the lease, but admits that a modification of its conditions was agreed to in March 1881, and the pursuer argued that the question is what that modification was, and he founded on the principle that when it is admitted by both parties to a written contract that the writing does not give a true account of the agreement, proof of the true contract is not limited to writ or oath—*Hotson* v. *Paul*, June 7, 1831, 9 Sh. 685; *Miller* v. *Oliphant*, March 7, 1843, 5 D. 856; *Grant's Trustees* v. *Morison*, January 26, 1875, 2 R. 377.

"I think, however, that that principle is inapplicable in this case, because when the defender's averments are carefully examined, it appears that he does not assert or admit any change of the contract of lease at the date averred, but only an avowed intention on his part to afford the pursuers some relief or compensation, if on examination it should turn out that there was reason for granting it. He says that he told the pursuer that he would make inquiry at the end of the lease, and if he was then satisfied that the rent which had been fixed for the farm of North Ythsie in 1871 was higher, relatively than that of other farms in the district which were valued at the same period, he would then allow the pursuer a proportionate deduction from the rent, and that he would leave instructions to that effect to his executors, which testamentary instructions he accordingly left, and they are quoted in the record. I understand that the defender is still willing to carry out that intention.

"I am of opinion, therefore, that there is nothing in the averments or admissions of the defender which can prevent the application of the case of *Kirkpatrick*, and that the defender is entitled to prevail so far as the pursuer's case is founded on an averment of an agreement completed in March 1881. The pursuer's first, second, and third pleas are founded on that alleged agreement, and for the reasons stated, I am of opinion that they fall to be repelled."

The pursuer reclaimed, and argued—He alleged a contract between the parties which was not of an unusual nature, although it might be, as circumstances turned out, unusual in its result. Even if it was unusual, that did not make the action irrelevant—*Downie* v. *Black*, December 5, 1885, 13 R. 271. The contract was not an alteration of the existing lease. It was a collateral agreement to come into operation after the lease was ended, and it postulated that there should be no alteration in the lease during its currency. This distinguished the case altogether from that of *Kirkpatrick*, quoted by the Lord Ordinary. If the case was relevant, the contract could be proved *prout de jure*. In this case the defender admitted there was a bargain between himself and pursuer but disputed its terms. The dispute therefore came to be a question of recollection. *Rei interventus* had also followed on the agreement. On account of the agreement the pursuer did not join in the agitation to reduce rents in 1886, and he thus did not get the large reduction in rents which the other tenants got at that time.

Argued for defender—There was no relevant averment of a contract made by the pursuer. To make such a case relevant the pursuer must make (1) a plain specific statement of what the contract was, and (2) a clear specific statement of the constitution of the contract. But here no contract was set forth, and there was not an unqualified acceptance of any offer stated by the pursuer in his letter of 26th March 1881, but simply an acknowledgment that he would leave matters in Lord Aberdeen's hands. The contract averred was not collateral, it was an agreement to reduce rent and an alteration of the old contract. A written contract could only be altered by writing. If there was a contract, it was innominate, anomalous, and unusual, and could only be proved by writ or oath. No *rei interventus* was averred sufficient to set up an informal contract.

At advising—

LORD TRAYNER—The Lord Ordinary has dismissed this action as irrelevant on the ground (1) that what the pursuer avers and founds on was not (according to a fair reading of the pursuer's averments) a contract or agreement between the parties importing any obligation on the defender, but merely an arrangement to the effect that the matter in dispute between them should be left entirely "to the defender's goodwill

and liberality;" and (2) that if a contract is averred, it is a verbal contract altering a formal written contract, which, according to the authority cited by the Lord Ordinary, "cannot be done." I differ from the Lord Ordinary on both points.

The pursuer's averments (Cond. 7) appear to me to set forth quite distinctly an undertaking on the part of the defender, which, if established, the pursuer is now entitled to enforce. The terms of the pursuer's letter quoted in Cond. 8, on which the Lord Ordinary appears to have proceeded as showing that there was no undertaking, beyond what the defender pleased to do or to give, are not, as I read them, at all inconsistent with the pursuer's averment. In that letter the pursuer merely expresses his belief that the defender will do him justice, but the context shows that the justice he so expected at the hands of the defender was not merely from the defender's goodwill and liberality, but from the defender carrying out fairly the agreement which the parties had made.

Then the view that the agreement or contract averred by the pursuer is a verbal contract altering a formal written contract, is, in my opinion, also unsound. The formal written contract here was the pursuer's case. He does not aver any alteration thereon by the verbal contract he now seeks to enforce. On the contrary, the verbal contract could have no effect, according to the pursuer's averments, until the formal written contract had been fulfilled, and such fulfilment is averred, as showing that the condition on which the verbal contract depended has been purified. The defender says, and the Lord Ordinary has adopted that view, that the verbal contract was in reality a contract for the reduction of the rent payable under the written contract, namely, the lease. I think that is a mistake. There was no contract or stipulation for a reduction of rent, or for any other change whatsoever on the terms of the lease. The lease was to be fulfilled in all its conditions, and the rent stipulated for, to be paid, throughout the whole currency of the lease. But that having been done, the pursuer's averment is, that the defender undertook to repay, when the lease had come to an end, any loss the pursuer had sustained as tenant during his tenancy. We are therefore here dealing with a case which is the converse of that to which the observations of the Lord President were directed in the case of *Kirkpatrick*. This is not "an alteration of a written contract by a parole agreement," but it is "the constitution of an original and independent agreement by parole."

While I am of opinion that the pursuer's case is relevant, I am also of opinion that the contract or agreement alleged by him, being an innominate contract of an unusual kind can only be proved by the defender's writ or oath, and I would therefore sustain the third plea-in-law for the defender.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Repel the first plea-in-law for the defender: Sustain the third plea-in-law for him: Remit to the Lord Ordinary to proceed."

Counsel for Pursuer—Rankine—Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for Defender—W. Campbell—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 24.

FIRST DIVISION.

THE EDINBURGH YOUNG WOMEN'S CHRISTIAN INSTITUTE AND OTHERS, PETITIONERS.

Charity—Voluntary Association for Charitable Objects Supported by Public Subscription—Amalgamation with Kindred Association—Nobile Officium.

A number of persons combined to form an association for the carrying out of certain benevolent purposes. The funds necessary to start the association were raised by means of a bazaar and direct contributions from the public, and the annual expenses were met by public subscriptions.

Held that the Court had no power to authorise the association to amalgamate with another association having kindred objects in view.

In 1874 a number of persons in Edinburgh, who were interested in the spiritual and temporal welfare of young women, combined to form an association (subsequently called "The Edinburgh Young Women's Christian Institute"). The necessary funds were raised by bazaars and direct contributions from the public, and two houses were purchased for the purposes of the association, the titles being taken in the names of trustees, who granted a declaration of trust declaring that they held them for behoof of the association. The annual expenses were met, partly by payments from the inmates, and partly by subscriptions from the public. The association was carried on without a formal constitution until 1884, but in January of that year a constitution was approved at the annual meeting which was called by a newspaper advertisement. The constitution declared that the association should be entitled to unite with other associations having similar objects in view.

When the association was founded there was no other society of the kind in Edinburgh, but in 1877 a branch of "The Young Women's Christian Association"—a kindred society previously formed in London—was started in Edinburgh.

In 1892 it was resolved, as the result of negotiations between the two societies, that they should be amalgamated, and with