in point and at the same time fatal to the pursuers' claim.

In my judgment the Lord Ordinary's interlocutor should be recalled and the defenders should be assoilzied.

LORD CULLEN—I concur in the view taken by the majority of your Lordships.

The sum of £2310 claimed by the pursuers was paid by them under an obligation which became due under the contract while it was still operative, and on its payment there emerged counter obligations on the part of the defenders which continued prestable against them until the emergence of the war made unlawful further performance of the contract. It may be allowed that these counter obligations in so far as they were so prestable were not the equivalent of the £2310, but this seems to me to be the misfortune of the pursuers. The effect of such a termination of contracts as the war brought with it must often be to leave the interests of the contracting parties unequally balanced, so that it enures more to the advantage of one party than of the other. Suppose that when the war emerged the second instalment of 20 per cent. had been paid, and that the engines were under construction, could the pursuers have maintained that the value of the partly constructed engines whereof the property had passed to them being less than the 40 per cent. already paid by them, they were entitled to demand repayment of the difference? I think not. The affirmative was, indeed, maintained by the pursuers. Their view appeared to be that while further performance of the contract was forbidden, all that might have been done under it, *hinc inde*, while it was operative fell on the termination of the war to be opened up and an account taken and a balance struck in order to avoid loss by either party through the premature termination of performance under the contract. This, however, seems to me to be similar in effect to demanding *restitutio in integrum* on the footing of the contract having been voided *ab initio*.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Defenders and Reclaimers—Chree, K.C.—MacRobert, K.C.—Macfarlane. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Pursuers and Respondents—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Tuesday, July 11.

FIRST DIVISION.

[Lord Hunter, Ordinary.

DANISH DAIRY COMPANY, LIMITED, *v.* GILLESPIE.

Landlord and Tenant — Lease—Renewal—Informal Agreement — Homologation — Receipt of Money by Landlord's Agent from Tenant's Agent.

Landlord and Tenant — Lease—Renewal—Informal Agreement—Rei interventus—Tenant Refraining from Seeking other Accommodation.

The terms for renewal of a lease arranged by exchange of improbative documents between the respective agents of the landlord and the tenant, included a condition that all expenses be paid by the tenant. The lease was thereafter extended by the landlord's agent and sent to the tenant's agent, who returned it, signed by his client, together with a cheque in settlement of the expenses, which was duly acknowledged and cashed by the landlord's agent. Relying on the agreement for renewal of the lease the tenant abstained from seeking other premises throughout the remainder of the letting season. *Held* (*rev.* judgment of Lord Hunter, Ordinary) (1) that the landlord not having authorised his agent to complete a formal lease, the latter's actings and acceptance of the expenses did not constitute homologation of the informal agreement, and that the landlord was accordingly entitled to resile therefrom; (2) that the fact that the tenant had (in reliance on the informal agreement) refrained from seeking other premises had not been brought to the landlord's knowledge, and therefore did not amount to *rei interventus*.

The Danish Dairy Company, Limited, Edinburgh, *pursuers*, brought an action against James Gillespie, Motherwell, *defender*, for payment of £250 as damages in respect of the breach of an alleged contract of lease of a shop entered into between the pursuers and the defender. The lease in question was constituted by informal writings passing between the agents of the parties. The pursuers averred that these writings had been rendered valid by the fact that the landlord's agent had, in accordance with one of the stipulated conditions of the lease, accepted a cheque from the pursuers' agent in payment of his account of expenses; and also by the fact that in reliance on the informal agreement the pursuers had, in the defender's knowledge, abstained from taking steps to procure another shop. By amendment made at another stage they added an averment that the defender, on or before 1st December 1919, when the informal negotiations terminated, had authorised his law agent to complete the contract on his behalf in whatever shape, formal or other, he thought expedient, and that the law agent had acted in pursuance of that authority when he cashed the cheque.

The pursuers pleaded, *inter alia*—"2. The defender having refused to implement his part of a contract of lease between him and the pursuers' authors, constituted said contract by improbative writings and *rei interventus*, as condescended on, is liable in damages to the pursuers. 3. The defender is barred from resiling from the contract of lease condescended on (*a*) by *mora* and acquiescence, and (*b*) by homologating the said contract."

The defender pleaded, *inter alia*—"4. The alleged lease founded on by the pursuers not having been granted by the defender, the defender is entitled to be assoilzied. 5. The defender not having validly bound himself to grant the lease in question, he is entitled to be assoilzied. 6. *Separatim.* The contract in question being one for a lease of heritage, and not being holograph or tested, the defender was entitled to resile therefrom, and having timeously resiled, he is entitled to be assoilzied. 7. The defender not having any contract with the pursuers, *et separatim*, not having committed any breach of contract, he is entitled to be assoilzied."

On 17th June 1921, the Lord Ordinary (HUNTER), after a proof, decerned against the defender for payment of £140 as damages in full of the conclusions of the summons. The nature of the correspondence and of the evidence sufficiently appears from the opinion of the Lord Ordinary.

Opinion.—"In this action the Danish Dairy Company, Limited, sue a Mr Gillespie, residing at Oakdene, Motherwell, for damages in respect of his refusal to implement his part of an alleged contract of lease entered into between him and their authors.

"The late Mr George Jamieson, who carried on business under the designation of the Danish Dairy Company, of which he was sole partner, was tenant of the premises No. 27 Craigneuk Street, Wishaw, for ten years prior to Whitsunday 1920, under leases between him and the defender, the last of which was for the five years ending at Whitsunday 1920, and carried on business there as a dairy produce and provision merchant during said period. On 10th March 1919 Mr Jamieson died, and thereafter the business was carried on by his trustees, by whom it was transferred to the pursuers.

"On 13th November 1919 Mr Pole, the agent for Mr Jamieson's trustees, wrote to the defender regarding a renewal of the lease, and while suggesting that he might agree to some reduction of rent intimated that his clients would be prepared to take a lease for say three years on the same conditions as at present. The defender handed this letter over to Mr Marshall, his agent and factor, with authority to deal therewith, giving him specific instructions as to charging an increased rent and providing that all expenses of the lease were to be borne by the tenants. Acting upon these instructions Mr Marshall wrote to Mr Pole, —'My client cannot agree to any reduction of the rent, and indeed is not disposed to continue the lease after Whitsunday next. He would, however, continue it for one year from Whitsunday at a rent of £23. The only terms upon which my client would agree to a lease being entered into are:—For two years at a rental of £23; for the following two years at a rental of £25; and for the year following at a rental of £27—all expenses of the lease to be borne by the tenant.' After consulting his clients Mr Pole on 22nd November wrote asking if the defender would be prepared to grant a lease on the terms proposed except with regard to expenses with a break in their favour at the end of two years. Mr Marshall refused to assent to either of these two proposals. On 25th November 1919 Mr Pole wrote to Mr Marshall that his clients still hoped that the defender would agree to a break at the end of two years in their favour only, but if not 'they have instructed me to agree to your client's terms for a five years' lease as to rent and expenses, the terms of the lease otherwise to be the same as under the existing lease. I shall accordingly be glad to receive at your convenience a draft lease for revisal.' On 1st December Mr Marshall replied—'I note that you have been instructed to agree to my client's terms and I am accordingly preparing the draft lease.'

"At this date I am of opinion that there was complete agreement between the parties as to the subjects of the lease, the rent, the duration, and other conditions of the lease. It is now suggested by the defender that he made an express stipulation in his instructions to Mr Marshall that he should be protected against any claim for internal repairs, and that no lease should be binding until the draft thereof had been submitted to himself for personal approval. I regret that I feel bound to look upon this statement as a mere afterthought. The defender's evidence both in substance and in the manner in which it was given appeared to me unsatisfactory and unconvincing. A letter has been recovered from Mr Marshall to the defender dated 1st December 1919 in these terms—'I have now got Mr T. M. Pole's acceptance on behalf of the lessees of your terms for the renewal of the lease of above premises. The lease is to be for five years at a rental of £23 for the first two years, £25 for the next two years, and £27 for the last year, with a break in favour of either party at the end of two years. The expenses of the lease are to be borne by the lessees.' The defender's reply to this letter, if he made a written one, has not been recovered. He certainly never suggested that he in any way disapproved of what his agent had done.

"On 21st January 1920 Mr Marshall sent to Mr Pole for revisal draft lease between the defender and Mr Jamieson's trustees. The lease was revised and returned on 22nd January with a request for the engrossment for signature within the next week or ten days. Mr Marshall thereafter forwarded the lease to Mr Pole on 29th January asking that he should have it back duly signed at his convenience. Some delay seems to have occurred in getting the signatures of the trustees, but on 25th February the lease was returned by Mr Pole to Mr Marshall duly signed by the trustees, together with a

cheque for £5, 5s. 11d. in payment of Mr Marshall's note of expenses which he had been expressly instructed by the defender to recover from the tenant. On 27th February Mr Marshall returned the note of his expenses duly discharged and said he would send the tenant's copy of the lease in course. On the same date he informed the defender that he had now had the lease of the shop returned, signed on behalf of the Danish Dairy Company, and 'shall be glad if you will arrange to call here at your convenience to sign it also.' He duly cashed the cheque in his favour for expenses.

"Meantime a disturbing factor had entered into the situation. A proposal had been made to Mr Marshall by a firm of law agents on behalf of clients to purchase the property, of which the shop tenanted by Mr Jamieson forms part, but a condition of the sale was that the lease to Mr Jamieson's trustees should not be proceeded with. This proposal was communicated to the defender by a letter from Mr Marshall, also dated 27th February, in which he says he would be glad to have a call from his client to discuss this. A meeting thereafter took place about 1st March, but as I do not trust the defender's evidence I find it difficult to say what exactly occurred at this meeting. The lease was not in fact signed, but if the reason for this had been what is now suggested by the defender, I should have expected some communication to have been made at once to the agents for the tenants, but this was not done. I do not hold it proved that the defender was not made aware of the circumstances that Mr Marshall had received payment of his expenses. I think, however, that Mr Marshall did inform his client that he might resile from the informal lease that had been concluded at any time prior to actually appending his signature thereto.

"Negotiations were now continued as to the purchase of the property, and nothing further was done about the lease. The intending purchasers were induced to better the offer which they had made, and on 8th March Mr Marshall writes his client to call and see him on the 9th. Apparently the defender's son called on the 10th, for on that date Mr Marshall writes to his client referring to this call, and saying that he had according to the defender's instructions accepted the offer. On the same date Mr Marshall wrote Mr Pole that his client had sold the property and was not in a position to grant a lease to his clients, and enclosing his cheque for £5, 5s. 11d. in repayment of the amount forwarded to him on the 25th February. Mr Pole refused to accept the cheque, expressed his astonishment at the contents of the letter, and intimated that his clients would hold the defender to the lease. Correspondence followed. The pursuers arranged to take premises similar in character to those occupied under the defender at an increased rent, and as the defender refused to recognise that he had acted in excess of his legal right the present action was raised.

"On the evidence I am prepared to hold that everything done by Mr Marshall was done within the authority conferred upon him by the defender, that he was authorised to receive the £5, 5s. 11d. which he obtained from Mr Pole, and that that payment falls to be treated as a payment to the defender.

"The question of law involved in the case remains to be considered. It was contemplated by parties that a formal lease would be drawn up, though this was necessarily a mere formality, as it was agreed in December 1920 that the new lease was to be similar in terms to the existing one. Until actual signature by him of the lease the defender was entitled to resile, unless this right was excluded by his having homologated the imperfect contract or by *rei interventus*, *i.e.*, a change of circumstances prejudicial to the tenant of which the defender had, or may be presumed to have had, knowledge. The pursuers maintain that they have succeeded in establishing both these grounds of bar. It has been decided that receipt by a seller of part payment of the purchase price of lands prevents a seller from founding upon the informality of a bargain concerning heritage. The defender made payment to him by the tenant of the whole expenses of his law agent a condition of his granting the lease. I think, therefore, that payment to his law agent of his expenses was in law an acceptance by him of part of the consideration which he had stipulated for, and amounts to such an approval of the lease as prevents his resiling.

"As regards *rei interventus* it is proved that the pursuers had given one of their employees instructions to look out for suitable premises about six months before the termination of their lease with the defender. After their negotiations with Mr Marshall had resulted as they thought in the conclusion of a bargain for a new lease, they stopped their inquiries, and for about three or four months made no effort to secure other premises, in the belief as they thought that a concluded bargain had been effected. During this time rents were rising, and premises that were on the market were secured by others. No doubt the pursuers finally succeeded in getting suitable premises, but the rent they had to pay was substantially higher than they would have had to give at an earlier period. The defender says that he did not know that the pursuers were in any way prejudiced by not securing the lease, but I do not think that it can be taken that one interested as the defender was in property was ignorant of the prejudice being suffered by the pursuers in being out of the market at the critical period when rents were rising and accommodation was becoming scarcer. In my opinion the defender was not justified either in equity or in law in selling his property without regard to the rights acquired by the pursuers and is therefore liable to them in damages."

[*His Lordship then proceeded to deal with the question of damages.*]

The defender reclaimed—The argument turned largely on the nature of the evidence and sufficiently appears from the opinions of the Judges. The following authorities were cited:—For the defender

and reclaimer—*Dallas* v. *Fraser*, 1849, 11 D. 1058; *Mitchell* v. *Scott's Trustees*, 1874, 2 R. 162, *per* Lord Ormidale at p. 167, 12 S.L.R. 108; *Caithness Flagstone Quarrying Company* v. *Sinclair*, 1880, 7 R. 1117, 1881, 8 R. (H.L.) 78, *per* Lord Watson at p. 90, 18 S.L.R. 466; *Ballantine* v. *Stevenson*, 1881, 8 R. 959, *per* Lord Justice-Clerk Moncreiff at p. 971, and Lord Craighill at pp. 975, 976, 18 S.L.R. 696; Bell's Prins., secs. 25, 26 and 27.

For the pursuers and respondents—*Earl of Kinghorn* v. *Hay*, 1674, M. 8414: *Lawrie* v. *Maxwell*, 1697, M. 8425; *Campbell* v. *M'Pherson*, 1793, Hume 786; *Sutherland* v. *Hay*, 1845, 8 D. 283, *per* Lords Medwyn and Moncreiff at p. 286 and 287; *Church of England Life and Fire Assurance Company* v. *Wink*, 1857, 19 D. 1079; *Forbes* v. *Wilson*, 1873, 11 Macph. 454, *per* Lord Neaves at p. 467; *Bathie* v. *Lord Wharncliffe*, 1873, 11 Macph. 490, 10 S.L.R. 398; *Ballantine* v. *Stevenson*, 1881, 8 R. 959, *per* Lord Justice-Clerk Moncreiff at p. 974, 18 S.L.R. 696; *Sutherland's Trustee* v. *Miller's Trustee*, 1888, 16 R. 10, *per* Lord Young at p. 13, 26 S.L.R. 6; *Buchanan* v. *Harris & Sheldon*, 1900, 2 F. 935, *per* Lord President Kinross at p. 938, and Lord M'Laren pp. 939 and 940, 37 S.L.R. 729; *Station Hotel, Nairn, Limited* v. *Macpherson*, 1905, 13 S.L.R. 456; Bell's Prins., secs. 26 and 27.

At advising—

LORD PRESIDENT.—In November 1919 the pursuers were tenants of a shop under a five years' lease by the defender which was due to expire at Whitsunday 1920. Their case is that in the course of a correspondence between law agents acting for them and the defender respectively regarding a proposed continuation of the tenancy beyond Whitsunday, the defender's solicitor on 1st December 1919 accepted an offer for a new five years' lease of the shop. Entry was to be at Whitsunday 1920, and the consideration was to consist of an increased rent and of payment by the pursuers of the defender's expenses in connection with the lease. The conditions of the new lease—apart from rent and expenses—were to be the same as those contained in the then existing lease. The letters containing the offer and acceptance were never made probative by their adoption as holograph or otherwise, and the resultant agreement, assuming the offer and acceptance to be as alleged by the pursuers, was therefore informal and incomplete and left both pursuers and defender free to avail themselves of their *locus pœnitentiæ* and so to resile. In point of fact the defender did intimate that he resiled on 10th March 1920. The pursuers, however, meet this in two ways—(first) by a plea of homologation on the part of the defender, which is founded on the acceptance by the defender's law agent on 27th February 1920 of a payment made by their law agent to him of the amount of the expenses then incurred and to be incurred by the defender in connection with the lease, and (second) by a plea of *rei interventus*, which is founded on the allegation that in reliance on the agreement they took no steps to obtain other premises between 1st December and 10th March and so lost the best part of the letting season. As the case came into Court the pursuers founded entirely both as regards the agreement which is the basis of both pleas, and as regards the alleged homologation, on the communications between the parties' law agents, without any averment regarding the scope of the authority committed to them and to the defender's law agent in particular. In point of fact the defender himself never saw the correspondence between the law agents and knew nothing of the alleged act of homologation. But in the course of a hearing with regard to the relevancy of their pleadings which took place on reclaiming note before this Division they amended them by averring that the defender's law agent had authority from the defender to complete the agreement on his behalf. Under that authority, if it was conferred, the defender's law agent became entitled to adopt the letters which passed between him and the pursuers' law agent as holograph, thus converting an informal and incomplete agreement into a probative and binding one, and, apart from the adoption of that course by the law agent, any act of homologation committed by the latter would be binding on the defender, however ignorant of its performance he might be, for it would be covered by the authority given to the law agent to make a complete agreement on the defender's behalf.

The pursuer's case thus depends on the possibility of returning an affirmative answer to the first and one or other of the second and third questions following—(1) Is it proved that all the terms and conditions necessary to the making of a complete agreement to let were agreed to by the defender's law agent when he accepted the offer of 1st December 1919? (2) Is it proved that the defender at any time before the alleged act of homologation by his law agent authorised the latter to complete an agreement on his behalf according to those terms and conditions? If it is, then on the ordinary principles of agency the law agent's act of homologation may be enough to complete the agreement on the defender's behalf and make it impossible for him, standing as he does on its incomplete and informal character, to refuse to be bound by it. "The law of homologation proceeds on the principle of presumed consent by the party who does the acts to pass from grounds of challenge known by him to exist, and *sciens et prudens* to adopt the challengeable deed as his own."—*Gardner* v. *Gardner*, (1830) 9 S. 138 (see Lord Moncreiff's interlocutor on p. 140). (3) Is it proved that the defender, having made through his law agent an incomplete and informal agreement with the pursuers for a lease of the shop, knew that the pursuers on the faith of that agreement were allowing the best part of the letting season to go by? If it is—the correspondence between the agents being proof in writing of the terms assented to with reference to the constitution of the letting transaction—

the actings of the pursuers may both obviate the objection of improbativeness and (regarded as *unum quid* with the incomplete and informal agreement) may make the latter good evidence of a complete agreement by the defender — *Church of England Life Assurance Company* v. *Wink*, (1857) 19 D. 414 (see Lord Cowan at p. 426; *Walker* v. *Flint*, (1863) 1 Macph. 417 (see Lord Justice-Clerk Inglis at p. 421); see also Rankine on Leases, 3rd ed., 120. But as it is the conduct of the defender on which the pursuers seek to charge him with the agreement it is essential to show that he knew of the pursuers' acting or abstention from acting, for it is his permission or encouragement of such acting or abstention which is the kernel of the evidence of his presumed consent—in other words, the root of the personal bar pled against him—*Gardner* v. *Lucas*, (1878) 5 R. 638 (see especially Lord Shand at p. 656). The importance of this point where actings of a purely negative character are concerned will appear in the sequel.

As regards the first of these questions I have felt considerable doubt, but on the whole I think it ought to be answered in the affirmative. [*His Lordship then stated his reasons for holding that all the terms necessary for a complete lease had in fact been arranged.*]

The next question is as to Mr Marshall's authority from the defender to convert what was an informal and incomplete agreement into a complete and binding one. It may be that Mr Marshall's first letter of 18th November 1919 implied that his instructions covered authority to arrange for the tenants sitting on for one more year under the existing lease at £23. But I cannot read it as being consistent with the view that his instructions covered authority to complete any agreement for a fresh lease for five years. Authority to make a complete and binding agreement on behalf of a client is not to be lightly inferred in the case of a law agent. "Although law agents are very frequently employed to conduct negotiations with a view to contracts, especially in conveyancing business, no one is entitled to assume that a law agent professing to act for a client has general powers to conclude a contract on his behalf"—Begg on Law Agents, ch. 8, sec. 14. Mr Marshall says he had received no such authority, the defender says he had given him none, and the letter of 18th November 1919 certainly does not represent that any had been given. Neither does any of his subsequent letters. Mr Marshall acted as factor on the defender's behalf for certain properties belonging to him, collecting the rents and paying the taxes. But as it happened the rents of this particular property were paid by the tenants to the defender direct. Mr Marshall had nothing to do with the properties otherwise—as regards repairs for example—and his factory, such as it was, did not include power to let. On the day of the alleged offer and acceptance (1st December 1919) Mr Marshall reported to the defender that he had got the agreement of the tenants' law-agent to "your terms for the renewal of the lease," and recapitulated the "only terms" as laid down by the defender at the outset, namely, the progressively increasing rent and payment of the expenses. The inclusion among those terms of a break at two years on either side was a mistake. That was neither one of the defender's terms nor a matter which had been agreed to by the law agents in correspondence. I do not regard the mistake as material. The defender never saw the correspondence which had passed between the law agents, and did not answer Mr Marshall's letter, but, not unnaturally, awaited the submission to him of a draft of the proposed lease. It is proved that in the case of former leases this was the course followed, and the defender says that he had been advised by Mr Marshall of the *locus pœnitentiæ* which the law of Scotland allows the parties to an incomplete agreement concerning heritage.

In these circumstances I am unable to hold it proved that any antecedent authority was given to Mr Marshall by the defender to make a complete and binding agreement on his behalf. Nor do I see how the defender's knowledge that Mr Marshall had assented to all the terms and conditions necessary for the making of a complete agreement could imply conferment of any subsequent authority on the latter to make one, for the defender's *locus pœnitentiæ* none the less remained to him. It is not without significance that although the Whitsunday term was about five months' distant, and notwithstanding the risk to which the parties were exposed from the possible exercise of their respective rights to resile before the agreement was completed, it did not occur to the law agents or either of them to adopt the course—not uncommon when a complete agreement is really intended—of completing the agreement at once by adopting their letters of offer and acceptance as holograph.

As regards the act of alleged homologation, there is no evidence to show that the defender knew anything about his agent's premature acceptance of payment from the pursuers of the expenses of the lease. It came about in this way—[*His Lordship narrated the circumstances*].

I arrive accordingly at the conclusion that there is no evidence to suppport an affirmative answer to the second question, and I answer it in the negative.

As regards the third question, I do not doubt that abstention from an act which but for the informal contract a party would have performed, and the non-performance of which results to his prejudice, may form the material of *rei interventus* as well as a positive act. But, as has already been pointed out, the abstention or the positive act must be known to and permitted by the other party if he is to be precluded from taking advantage of an imperfection in the constitution of the contract or obligation. In the passage of his opinion in *Gardner* v. *Lucas*, 5 R. 638, at p. 656, already referred to, Lord Shand expresses the rule of law thus—"The rule is that such acts can only receive effect as *rei interventus* as are im-

portant in their character, and are either known to the other party or must necessarily be held to have been in the contemplation of that party when he entered into the agreement—actings which are in the proper pursuance of the agreement, and which the other party to the agreement would naturally expect should take place in pursuance of it." The peculiarity of the position was that the pursuers were no more bound to the defender than the defender to them. There was a delay of seven or eight weeks on Mr Marshall's part in preparing the draft lease, and a delay of nearly four weeks on the part of the pursuers in signing it. No attempt was made meanwhile to clinch the bargain, and no actual knowledge that the pursuers were not pursuing inquiries with regard to other premises is brought home to the defender. In some cases it has been held that knowledge may be presumed. In the case of guarantees for instance, which (so to speak) invite actings in the way of getting advances on the faith of them, knowledge by a party to an informal and incomplete guarantee may reasonably be presumed—*Johnston* v. *Grant*, (1844) 6 D. 875; *National Bank of Scotland* v. *Campbell*, (1892) 19 R. 885. But slackness on the part of either party in looking after their interests can hardly be accounted as an abstention from acting which will constitute *rei interventus*, and if the pursuers were to rely on their informal and incomplete agreement—without either getting the law agent's letters adopted as holograph, or hastening the execution of the formal lease—they should have made the defender acquainted with the line of conduct they were adopting. In *Sutherland* v. *Hay*, 8 D. 283, the converse case of a landlord taking down a "to let" ticket after making an informal contract of lease is discussed, but the contract was one for immediate entry, and Lord Medwyn expressly couples the taking down of the ticket with knowledge on the part of the tenant that that was being done. Although the quarry which was the subject of dispute in that case had been immediately taken out of the market on the informal agreement being arrived at, that circumstance was treated as only one out of a number (such as warning out the quarry employees from their houses) which were in combination held enough to constitute *rei interventus*. Again, in *Westren* v. *Millar*, (1879) 7 R. 173, Lord Adam (at p. 176) expressly founds on knowledge brought home to the purchaser that a "to sell" ticket had been taken down by the seller after an informal agreement of sale had been arrived at. As I have said, the pursuers do not suggest in their evidence that any knowledge of their abstention was brought home to the defender, and not a single question was put to the defender or to Mr Marshall on this subject in cross-examination. In these circumstances my opinion is that the evidence of *rei interventus* fails, and that the third question must be answered in the negative.

I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing the defender.

LORD SKERRINGTON—A law agent, even though he may be employed to collect the rents and to attend to the repairs of a property, has no general authority to grant leases on behalf of his employer. The existence of such an authority must be proved by the person who requires to found upon it. Accordingly after the debate on the first reclaiming note the pursuers moved for and obtained leave to amend article 3 of their condescendence by averring specifically that on or before 1st December 1919 the defender authorised his law agent Mr Marshall to complete a contract on his behalf for the lease of the premises in question, and to amend article 4 by averring that Mr Marshall acted "in pursuance of his authority" when on 26th February 1920 he cashed a cheque for £5, 5s. 11d. which he had received from Mr Pole, the law agent of the intending tenants, in payment of his charges as the landlord's solicitor, and when on the following day he wrote to Mr Pole stating that he would send him in due course his (Mr Pole's) clients' copy of the lease. These amendments were of crucial importance, seeing that the pursuers' ability or inability to prove them would go far to settle the fate of the litigation. If Mr Marshall had authority on 1st December 1919 to bind his client to an agreement for a lease, there is nothing in the evidence to suggest that this authority was subsequently withdrawn. Accordingly he would not have exceeded his powers if on 27th February 1920 he had written to Mr Pole stating that he accepted the cheque for £5, 5s. 11d. as the first payment due by the tenants to the landlord under their agreement for a lease, and adding that the agreement accordingly no longer remained in suspense until the landlord should have signed the formal lease. If Mr Marshall possessed authority to bind the defender to an agreement for a lease, the fair construction and effect of his conduct and letter were what I have stated. On the other hand, if he possessed no such authority, it seems to me that the incident of the cheque and letter had no legal importance or effect of any kind. It amounted merely to this, that Mr Marshall, without the knowledge or authority of his client, accepted payment of his expenses before they were due. He ought, of course, to have written to Mr Pole that he would send a receipt for the money and a copy of the lease as soon as his client had signed the lease, and that meanwhile he retained the cheque uncashed. No doubt Mr Marshall had implied authority from his client to accept payment of the cost of the lease, but that of course assumed the existence of a lease binding upon both parties. I am unable to understand upon what theory an authority given by a landlord to his law agent to receive payment from a tenant of the cost of preparing a lease and of getting it signed by the landlord can be construed as empowering the solicitor to make an agreement with a person who was not the tenant binding the landlord to accept him in that capacity.

As regards the extent and nature of Mr

Marshall's authority, the only direct evidence is that of himself and of the defender, and they both deny in unqualified terms that Mr Marshall had any authority to bind the defender to an agreement for a lease. The Lord Ordinary, however, commented unfavourably upon the defender's evidence as regards both its substance and the manner in which it was given; and he expressed the opinion that it was a "mere afterthought" on the part of the defender to suggest that he had expressly instructed Mr Marshall to insert a clause in the formal lease (which the defender was to see and approve of) protecting the defender against any claim for internal repairs. The Lord Ordinary made no express criticism upon the evidence of Mr Marshall, which was to the same effect, but he evidently took the view (in which I concur) that Mr Marshall must have been mistaken in supposing that the matter of repairs bulked prominently in the instructions which he received from his client. If that had really been so, Mr Marshall's failure to allude to the subject of repairs in his correspondence both with Mr Pole and with the defender, and his subsequent failure to submit the draft of the lease to his client for approval, would be inexplicable. These criticisms, however, while they detract from the value of the evidence of these two witnesses, do not alter the fact that the burden of proving Mr Marshall's authority to bind the defender lies upon the pursuers in the first instance. The question then comes to be whether there is indirect evidence which either establishes that Mr Marshall had authority to bind his client, or which at least shifts the burden of proof to the defender as regards this point.

The pursuers' counsel maintained that the defender impliedly authorised Mr Marshall to make an agreement with Mr Pole for a renewal of the existing lease when about the middle of November 1919 he handed Mr Pole's letter of inquiry to Mr Marshall with instructions to reply to it. This contention seems to me to be unreasonable, and no authority was cited in support of it. On the other hand, it is, I think, almost in itself fatal to the pursuers' case on this question of authority that Mr Marshall did not attempt or purport to exercise the power of binding his client to a lease at the time when he naturally would have made use of it, if his client had thought it proper and necessary to confer this power upon him, viz., early in December 1919 after the whole terms and conditions of the proposed new lease had been agreed on between the two solicitors. It is also significant that, although Mr Pole's clients were obviously anxious to obtain a lease, Mr Pole did not suggest to Mr Marshall that the letters of 25th November and 1st December 1919 should be adopted as holograph, and that if necessary he and Mr Marshall should ask their clients to approve of this being done. For my own part I doubt whether the defender would have granted this request if it had been made to him.

The pursuer's counsel further founded upon the terms of Mr Marshall's letter to the defender of 1st December 1919, stating that he had now got Mr Pole's "acceptance on behalf of the lessees of your terms for the renewal of the lease of above premises" and mentioning the rent and duration of the lease, and that the expenses of the lease were to be borne by the lessees. I do not think that this letter assists the pursuer's case as regards Mr Marshall's authority. If the letter could not reasonably convey any meaning except that the writer had bound the defender to grant a lease to Jamieson's trustees in certain terms, it would have been a matter for observation that the defender did not at once express his disapproval. On the other hand, if the letter when fairly read may mean no more than that the parties were now at one as to the terms of the proposed lease, it throws no light upon the extent of the authority which Mr Marshall had received from his client. I see no reason to suppose that Mr Marshall intended to make a representation to the defender which would have been contrary to what he knew to be the fact, viz., that he had not bound the defender to anything, and I see no reason to suppose that the defender placed an interpretation upon the letter other than what was intended by the writer. There remains one fact which gives some appearance of support to the pursuer's case, viz., that Mr Marshall did not submit the draft of the proposed lease to the defender for his approval before he caused it to be engrossed and sent to the intending tenants for their signature. Mr Marshall explained, however, that the omission to submit the draft to his client was a departure from his usual practice and was due to inadvertence.

When the evidence, both parole and documentary, is considered as a whole, I think that the pursuers have not succeeded in proving that Mr Marshall possessed the authority which they undertook to prove in their amendment of the record. It follows that the ground of action developed in the 4th article of the condescendence has failed.

It was suggested in the course of the argument that the defender might be held barred from resiling on a different ground, viz., in consequence of his solicitor having retained in his possession for nearly a fortnight the engrossed lease signed by the intending lessees. No case of this kind was attempted to be made on record, and the pursuers' senior counsel admitted that he could not successfully maintain it.

There remains for consideration the ground of action set forth in article 3 of the condescendence. I am of opinion that the correspondence between the solicitors shows that they were of one mind in regard to the terms of the proposed lease, and that it was not proved that one topic, viz., that of repairs, had been reserved for subsequent consideration. I am also of opinion that the defender not having expressed any disapproval of the terms as set forth in Mr Marshall's letter to him of 1st December 1919 must be held to have approved of them. It is true that Mr Marshall made a mistake when he reported in that letter that there was to be a break in favour of either party

at the end of two years. The defender, however, did not depone that he attached any importance to having such a break, and accordingly this mistake is in the circumstances immaterial. Again, the letter of 1st December 1919 omits to mention a point for which Mr Pole had expressly stipulated, viz., that the terms of the proposed new lease should in other respects be the same as under the existing lease, but this, I think, was implied in Mr Marshall's letter to the defender. It follows, in my judgment, that there existed as from 1st December 1919 a sufficient *consensus in idem* between the intending lessor and the intending lessees to form the basis for a binding lease, provided that the informal consent of the parties evidenced by the correspondence had been followed by *rei interventus* sufficient to clinch the bargain. It is always a question of circumstances whether acts or omissions following and in reliance upon an informal agreement are sufficient to constitute *rei interventus*. Something depends also upon the nature and the special terms of the bargain sought to be set up. The *rei interventus* in the present case is insufficient, because the pursuers have not proved their averment in condescendence 3 that the defender well knew that in reliance on the informal agreement Jamieson's trustees (the pursuers' authors) took no steps after December 1919 to endeavour to obtain a lease of another shop in Wishaw. Nor can it reasonably be maintained that the defender ought to have anticipated that the trustees would abstain from taking any such steps. As much or as little might be said in every case of an agreement which is not expressed in proper form so as to be in itself binding. I prefer not to offer any opinion as to how matters would have stood if the pursuers had been able to prove their averment of knowledge on the part of the defender. None of the cases cited to us seemed to me to lend any support to the view taken by the Lord Ordinary in favour of the sufficiency of the *rei interventus* in the present case.

The interlocutor ought in my opinion to be recalled and the defender assoilzied.

LORD CULLEN—It is clear that Mr Marshall had at least instructions from the defender to negotiate terms for a proposed lease—that is to say, to ascertain whether the pursuers would be willing to accept the terms which his client insisted on. The question remains whether Mr Marshall had authority from the defender to go further than mere negotiation, and at his own hand to take the final step of entering into a binding agreement for the granting of a lease. If he had this authority he was in a position, without reference back to his client, to execute a probative document which would bind his client and leave no *locus pœnitentiæ*.

In transactions regarding heritable property by way of leasing, selling, or otherwise it is everyday practice for law agents to act as intermediaries. They may act as mere negotiators, or they may have power to enter into binding contracts on behalf of their clients. While it is not uncommon for them to act in the latter capacity, there is no presumption that they have power to contract. This is freely conceded by the pursuers. The onus accordingly lies on the pursuers to show here that Mr Marshall had authority not merely to negotiate but also to make a binding contract. I am of opinion that they have not discharged that onus. The direct evidence of the defender and of Mr Marshall is to the effect that the latter was employed merely to negotiate, and had no authority so to contract. The Lord Ordinary says he does not regard the defender as a credible witness. He makes no adverse comment on Mr Marshall. The result is that the evidence of these two persons does not advance the pursuers' proof of authority. The contrary was not, as I understood, maintained by Mr Chree. His contention was that authority to Mr Marshall to contract could be inferred from the terms of the correspondence between the law agents taken in combination with the actings of the defender and Mr Marshall.

As regards the correspondence, I am unable on a consideration of it to see anything in it which is inconsistent with the view that Mr Marshall was doing more than negotiating terms. There is a discussion about terms, and ultimately I think terms were adjusted. But they were terms for a proposed lease. Nowhere can I find that Mr Marshall either represented that he had power at his own hand to grant or agree to a binding lease, or that he expressed such a consent. As regards the actings, apart from the terms of the agents' correspondence, the pursuers found on the terms of Mr Marshall's letter of 1st December 1920 to the defender, reporting the pursuers' acceptance of the defender's terms. I think that the pursuers strain this letter. Its terms do not seem to me to be inappropriate to the position of an agent who, having been employed merely to adjust terms for a proposed lease, finally reports to his client that negotiations have resulted in an adjustment. In the next place, the pursuers found on the fact that Mr Marshall proceeded at his own hand to draft a lease, send it for revisal, and on receiving it back revised to engross it and send it to the pursuers' agent for signature by the pursuers. If the defender had known of these proceedings they would have borne a different significance. In point of fact, however, he had no knowledge of them. But even in the absence of knowledge by him, the fact of Mr Marshall having acted as he did is said to be sufficiently symptomatic of the authority which the pursuers ascribe to him. I confess that I have difficulty in seeing clearly how the defender can be affected by actings of Mr Marshall of which he was ignorant, in the absence of evidence apart that he had authorised them, and I do not think there is such evidence of authorisation. On the contrary, Mr Marshall depones that it was contrary to his practice in dealing with the defender's affairs to send the draft lease without first submitting it to the defender for approval, and that his doing

so arose from an oversight. And I am unable to see any sufficient ground for holding his evidence to be false and inacceptable.

If Mr Marshall did not have authority to conclude a binding lease at his own hand, his premature acceptance of the payment of £5, 5s. 11d. as the expenses of the lease is unimportant. It was not authorised by or known to the defender. The money was to be paid for the formal lease if and when completed by execution. The payment of it was made and accepted by Mr Marshall but of course without the lease being completed.

With regard to the pursuers' plea of *rei interventus* founded on their refraining from looking out for other premises, I quite agree with the view that inaction may, in a particular context of circumstances, take the character of *rei interventus*. But in the present case, *esto* there was an informal non-binding agreement leaving right to resile on both sides, the pursuers were free to seek for a lease of other premises more acceptable to them, with a view to resiling. Whether they should take this course or not was a matter for their own discretion. In point of fact they abstained from taking it. But that they they did so is not shown by the evidence to have been known to the defender. No attempt is made to prove such knowledge on his part. And in absence of any knowledge by him I am unable to see how the pursuers' inaction in this respect could be said, as *rei interventus*, to affect him so as to bar his *locus pœnitentiæ*.

I concur in the judgment which your Lordships propose.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender from the conclusions of the action.

Counsel for the Pursuers and Respondents — Chree, K.C. — W. A. Murray. Agent—T. M. Pole, Solicitor.

Counsel for the Defender and Reclaimer —MacRobert, K.C.—Gentles, K.C.—Berry. Agent—Thomas J. Addly, Solicitor.

Saturday, July 15.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

CARMONT AND ANOTHER, PETITIONERS.

Process — Petition — Competency — Nobile Officium — Petition Amended in Inner House—Amendment Rendering Petition Competent in First Instance only before the Junior Lord Ordinary — Power of Inner House to Deal with Petition so Amended—Distribution of Business Act 1857 (20 *and* 21 *Vict. cap.* 56), *sec.* 4.

Where a petition is competently brought before the Inner House on a reclaiming note the Distribution of Business Act does not impose any restraint on the power of the Court to allow an amendment designed to facilitate an appeal to the *nobile officium*, even though the effect of that amendment is to change the petition into one which could only have been presented in the first instance to the Junior Lord Ordinary.

A petition under the Trusts (Scotland) Act 1921 for the appointment of a judicial factor or new trustees was amended on a reclaiming note in the Inner House by deletion of the references to the Trusts (Scotland) Act 1921 and by the addition of a crave for sequestration. *Held* that the amendment did not render the petition incompetent as one which should in the first instance have been presented to the Junior Lord Ordinary.

The Distribution of Business Act 1857 enacts —Section 4—"... In particular all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.—"4. Petitions and applications for the appointment of judicial factors. . . ."

John Carmont, advocate, Edinburgh, and another, a majority of the Trustees of No. 2 Branch of the Edinburgh Division of the Comrades of the Great War Association, *petitioners*, presented a petition under the Trusts (Scotland) Act 1921 for appointment of a judicial factor upon heritable property at 22 Forth Street, Edinburgh, or for the appointment of a new trustee or trustees, for authority to resign, and for exoneration and discharge. The petition did not contain a crave for sequestration of the estate. Answers were lodged for Lawrence Walls and others, members of No. 2 Branch, *respondents*, and minutes approving the petition were lodged on behalf of the British Legion and the United Services Fund.

On 18th March the Lord Ordinary (ASHMORE) appointed a judicial factor and authorised the petitioners to resign.

The respondents reclaimed, and argued that the petition was incompetent under the Trust Act 1921 in respect that there was another trustee who was not a party to it and who had not resigned, and that it should have been presented in the first instance to the Junior Lord Ordinary, and could not be granted without sequestration of the estate.

The Court continued the cause to allow the petitioners an opportunity of amending the petition, and on 22nd June 1922 allowed the petition to be amended and granted warrant for service upon John Stewart, Leith, the other trustee, and upon the Comrades of the Great War No. 2 Branch, Limited. The amendment consisted of deleting from the petition all reference to the Trusts (Scotland) Act 1921 and of adding to the prayer a crave for sequestration of the estate held by the Trustees.