the wife to settle instead of the husband. It was that of the Earl of March *v.* Sawyer, on whom Lady March had settled a mortgage to a very large amount, he being her second husband; but the deed being found in an iron chest after her decease, and no proof of its being ever delivered according to the prescribed forms, Lord March endeavoured to set it aside; and it afterwards came to be contended, whether John Dickie, as being his lordship's agent and attorney in the cause, was competent to give evidence? This House was then of opinion, that though the objection might affect his credibility, it could not be pleaded in bar of his competency. I am therefore of opinion, in the present case, that Malcolm's testimony could not be refused, and that, on the whole, it was an incontrovertibly just exception to the general rule of law, that an agent, attorney, or solicitor, was always competent to give testimony in any cause in which they might be employed, where it is impossible to come to that species of evidence in any other manner whatever, and therefore necessary."

It was ordered and adjudged that *that* part of the interlocutor of the 28th November 1771, complained of by the *cross* appeal be reversed. And it is declared that, to the purpose for which it was offered, the deposition of Archibald Malcolm ought to have been received as evidence and read. And it is further ordered and adjudged, that *that* part of the said interlocutor which is complained of by the original appeal, and also the interlocutor of the 7th March 1772, adhering thereto, be affirmed.

For Appellant, *E. Thurlow, Andrew Crosbie.*
For Respondent, *J. Montgomery, Al. Wedderburn..*

(M. 4392.)

JOHN BANE STEWART, and Others, Lessees of Glenfinlas - - - } *Appellants;*

MARGARET COUNTESS DOWAGER OF MORAY, and FRANCIS EARL OF MORAY } *Respondents.*

House of Lords, *24th March* 1773.

LEASE—INCOMPLETE CONTRACT—POSSESSION—LOCALITY LANDS—POWER TO LEASE.—An offer for a lease was made in writing by several tenants, and the landlord's factor wrote in answer to the subfactor, through whom the offers had come, that the landlord had read

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over the offers, and that the rent and duration of the lease were agreed to, but other points not fixed. He thereafter wrote as to those, and with instructions to get the lease drawn out, and signed by the tenants on stamp: This was done, and sent to him for signature, but the landlord kept it for two years, and died without signing it. In the mean time, he had allowed possession to be taken by the tenants;—on the faith of it they had proceeded to make dykes, and other improvements, and had paid two years' increased rent: Held, in all the circumstances of the case, that the lease was as effectual and binding, as if it had been signed by the Earl. Also, held that a lease may be granted by a fiar, after he had granted the same lands in liferent locality to his wife, to take effect in the event of her surviving him.

James Earl of Moray had let his lands of Glenfinlas to several small farmers, who, previous to 1765, possessed them as tenants at will, or upon tacit relocation; but, his lordship being at this time desirous to place them on a different footing, so as to raise a permanent rental, employed his factors in 1763, to treat with these tenants about a lease. By his contract of marriage with the respondent, his countess, she had been at this time provided and seized in the liferent of these lands, as locality lands.

When letting his lands, the Earl's practice was to order the tenants to give in written offers to the factor, on that division of the estate where the lands lay, which were usually transmitted by him to Mr. Maule, the other factor at his Lordship's residence, and by him laid before him for approval or rejection. The answer was always returned through the same channel, and the letter of the factor to the tenants was considered as tantamount to the letter of his Lordship.

The lands of Glenfinlas having been held, as above described, by eight different tenants, upon their being informed by the factor, of the Earl's wish to have a lease, they signed and presented to his Lordship, a joint memorial as to certain improvements which they had done, expressing their willingness to do more, and to pay a little more additional rent, on condition of their being made "certain of the possession for a considerable space." The tenants, thereafter, especially the chief of them, David Stewart, had an interview with Mr. Maule, whereupon the latter communicated his Lordship's intention to be, that they should send in an offer for a lease. Accordingly the tenants subscribed and delivered the following offer:—"We, David Stewart, John

" Stewart, John Bane Stewart, Donald Stewart, James
" Stewart, Robert Stewart, Duncan Stewart, and Alexander
" Stewart, present tenants and possessors of the lands and
" grassings of Glenfinlass, and Wester Bridge of Turk, do
" hereby make offer to the Right Honourable James Earl of
" Moray, our master, of the sum of £200 sterling money,
" of yearly rent, for a nineteen years' tack of the foresaid
" lands and grassings, with their pertinents, and that besides
" freeing and relieving his Lordship of all public burdens,
" conform to use and wont. In testimony whereof, we have
" subscribed these presents, at Glenfinlass, the 30th July,
" 1764 years." (Signed)

This offer was laid by Mr. Maule before the Earl, who wrote the other factor Mr. Moir, mentioning that the Earl had Aug. 13, 1764. read over the offer, " and, as I told you, he will insist for gold pounds; however, I shall endeavour to have the matter soon brought to some bearing." And in another letter, 19th September 1764, he says, " The Glen affair I have
" not thoroughly adjusted; but the rent is to be 200 guineas;
" and he has condescended to give a nineteen years tack;
" but the closing I have not yet got settled, nor the steel
" boll, with the entry, which must lie over until I return
" from the north, which I hope will be at the end of next
" month, and then will do my best to have every thing
" finished concerning it. *The two most material things are*
" *done*, the *rent* and *number* of *years*."

These letters were communicated to the tenants by Mr. Moir, the factor, as appears from the latter's letter to David Stewart, of date 23d September 1764. Sep. 23, 1764.

Soon after Mr. Maule's return from the north, the other points were adjusted; and he wrote Mr. Moir with particular instructions to draw out the lease, the tenants having agreed to give the rent sought by the Earl. A lease was drawn out, extended on stamp, signed by all the tenants, and sent by Mr. Moir the subfactor, to Mr. Maule, the other factor, for his Lordship's signature. When they signed it, David Stewart got Mr. Maule's letter of instructions to Mr. Moir to keep as their security and warrant until the lease was signed, but this was lost. They had possession under their old rights, but their possession was continued under the new lease from Whitsuntide 1765; and under this they had paid two rents to his Lordship's factor, Mr. Moir, for two half-years, when thereafter the Earl died, without signing the lease on his part.

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The Countess having been provided with a locality out of these lands, and considering that the lease, which being signed only by one of the parties, was informal, and therefore not binding on her, brought an action of removing against the tenants before the sheriff, and having obtained decree in absence, the tenants brought a suspension of the same. The Countess separately maintained, that supposing the lease formal and binding against the heir, yet it was still ineffectual as against the Countess, because she, being infeft in a liferent locality out of these lands prior to the date of the lease, the Earl could not grant any such lease to her prejudice, to affect materially her liferent, after it should open, without her consent.

Jan. 29, 1772. The Court of Session, of this date, repelled the reasons of suspension, and decerned; but, on reclaiming petition,

July 23, —— they found "that the late Earl of Moray, notwithstanding "of the prior liferent, by way of locality granted to the "Countess, and her infeftment thereon, had right to grant "tacks of the lands contained in the said locality, effectual "against the Countess; but find that the lease in question, "not having been regularly executed by the said Earl, is "not effectual against the said Countess; and therefore in "so far adhere to their former interlocutor, finding the let-"ters orderly proceeded, and refuse the petition, and de-"cern; and ordain the suspenders to remove from their "houses, biggings, yards, and grass, at Whitsunday 1773, "and from the arable lands at the separation from the "ground of the crop 1773."

Against these interlocutors the tenants brought the present appeal; and a cross-appeal was brought by the respondents, regarding that part of the last interlocutor which found that the Earl, notwithstanding the liferent locality, had power to grant the lease.

Pleaded by the Appellants.—Although a probative writing, duly executed on stamped paper, be necessary to the valid constitution of a lease, yet a lease of lands may be binding, though the instrument be defective. Thus, if there be writing of some kind, though wanting the usual solemnities, and improbative, yet if possession follow, and acts are done on the faith of it, the lease will be good. In the present case, letters passed between the parties—an offer on one side, agreed to in the essential parts on the other, and thereupon a regular stamped lease drawn out by the instructions of the landlord's factor, signed by the tenants, and handed to the

factor for the Earl's signature. Upon this possession follows, and two years' rents are paid and accepted of by the landlord's factor, under the new lease. These latter facts, *rebus ipsis et factis*, constitute such a *rei interventus* as effectually cuts off the power to resile, and sufficiently validates the defect in the lease, arising from the Earl not having signed it before his death. Besides, as by the tenants signing the lease, they were effectually bound to every obligation; and as they had actually proceeded to implement these obligations, in paying rent, making improvements, building dykes. &c., it was not in their power to recede after delivering this lease to the Earl, from their bargain, so the Earl ought also to be held bound, by retaining the lease for so long a time in his possession, though unsigned, and was not entitled to hold himself loose, by not signing it, while the tenants were bound to him. Besides, it is in evidence, that during the two years he was in possession of the lease, the Earl had signified his acquiescence in it, which acquiescence was communicated by Mr. Maule to Mr. Moir, and by the latter to the tenants, who proceeded, on the faith of this, to lay out money on improvements, and to pay the increased rents, as under a concluded lease. *Separatim*, and as to the cross-appeal, if the lease which was thus homologated, and on which possession followed, was good against the Earl, it was for the very same reason good against the Countess his lady; because her liferent locality of these lands, which was to take effect if she survived the Earl, and only at his death, did not debar him from granting leases of the lands so set apart for her liferent provision.

Pleaded for the Respondents.—By the law of Scotland, to the right constitution of a lease for more than one year, writing is necessary in order to bind the parties, and this writing must also be probative and stamped. The lease in question, not being subscribed by the Earl, could not bind him, and if so, could not be raised into a lease for 19 years by mere acts of homologation. The writing and several transactions which preceded the written lease, cannot amount to more than a verbal treaty to execute a lease for years; but there is nothing better settled in the law of Scotland than that, however explicit such verbal agreements may be made, they have no efficacy but as leases for one year, and consequently, however strong these acts of homologation might be, they could not alter the nature of the right or agreement, by converting a lease for one year into a lease

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for many. But in truth, the acts of homologation pleaded are ineffectual as such. They were not the Earl's acts. The rents were not received, nor the discharges granted by him; and he merely received the money, without knowing the particular source; but whatever may be the effect of receiving such rents otherwise, surely it can never have the effect of converting a contract, unsubscribed by one party, into one regularly subscribed by both parties. *Separatim*, The Countess had acquired the liferent of these lands by her marriage contract; and as, after the constitution of this right, the Earl's own power over these lands was reduced to the nature of a naked liferent, he could not grant a lease so as to affect her liferent, although he might have done what he pleased with reference to his own.

After hearing counsel, it was

Ordered and adjudged that *that* part of the interlocutor of 23d July 1772, complained of by the *cross* appeal be affirmed. And it is further ordered and adjudged that the interlocutor of the 29th January 1772, and also so much of the interlocutor of 23d July 1772, as are complained of by the original appeal, be reversed; and it is hereby declared, that, under all the circumstances of this case, the lease in question is as effectual and binding as if it had been signed by James, late Earl of Moray, deceased; and it is further ordered, that the reasons of suspension be sustained.

For Appellants, *Al. Wedderburn, Andrew Crosbie.*
For Respondents, *Ja. Montgomery, Thos. Lockhart.*

(M. 15,425.)

ROBERT HAY, Esq. second Son of Alexander Hay of Drummelzier, Esq. } *Appellant;*
GEORGE MARQUIS OF TWEEDDALE, - *Respondent.*

House of Lords, *6th April* 1773.

ENTAIL.—Clause of Devolution in a Deed of Entail.

Sir Robert Hay was proprietor of the estate of Linplum, and having no issue of his body, but being attached to his family and name, he executed a deed of entail in regard to