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have been in the habit of recalling the attention of the Court of Session to the further consideration of the case, I would abstain for the present from either reversing or affirming the interlocutor, but would propose sending it back, by your authority, to the Court of Session, desiring them to review their several interlocutors, and upon that review to do what is just.

"I therefore move your lordships, in this very special case, to remit this to the Court of Session, and that they do review the several interlocutors complained of, and do, after such review, as to them shall seem meet and just."

It was ordered and adjudged that the cause be remitted back to the Court of Session to review the interlocutors complained of, and to do therein as to them shall seem just.

For the Appellant, *Sir Saml. Romilly, Thos. Thomson.*

For the Respondent, *Fra. Horner, Henry Cockburn.*

NOTE.—Unreported in the Court of Session. For further opinions of the judges, *vide* President Campbell's Session Papers, vol. 147, Nos. 11 and 12.

WM. KEIR, WM. CADELL, JAMES SCOTT, ALEXANDER ROBERTSON, and DONALD NICOLL, all occupying separate farms from, and Tenants of, the Duke of Atholl, . } *Appellants;*

JOHN, DUKE OF ATHOLL, . . . *Respondent.*

House of Lords, 15th July 1815.

LANDLORD AND TENANT—IMPROBATIVE LEASE—WRITING—POSSESSION—PAROLE—EXPENSE OF STAMPING—EXECUTION PENDING APPEAL.—Written offers were made by the tenants of the Duke of Atholl, through the suggestion of his factor, for fifteen years' leases of their farms, upon the footing of making and laying out money on improvements, and paying only a small increased rent. These leases were renewals of former ones. They entered on possession, made expensive improvements, and paid the landlord their rents for nine years, when they were warned to remove, although their leases had five years to run. No written acceptance had been returned to their offers, and no regular probative lease was gone into; and the landlord alleged that he had intimated to them that their offers were only accepted for nine years instead of fifteen. 1st, In an action of removing, held the lease good for fifteen years, and the tenants entitled to

damages for being ejected from their farms. 2d. It was objected that parole evidence to the effect, that the landlord had given a limited acceptance, was incompetent to contradict writing. Proof allowed before answer.

This was an action of removing raised by the respondent against the appellants, to have them removed from their respective farms, in which the following question occurred, Whether a tenant of lands, after having obtained possession, and continued in it for years, under a covenant of lease, and after having, on the faith of that covenant, made such permanent improvements as *no* prudent tenant would have made except upon the faith of his possession during the period of the covenant, is liable to an action of removing (ejectment) before the expiration of the term, where the written instrument or voucher of lease was not executed in the strict form of a legal deed?

The leases, the tenants stated, had been renewals of their former leases; and were finally agreed to with Mr Stobie, the Duke's factor, on 10th May 1800, for an endurance of fifteen years, which was Mr Stobie's own proposal; and it was also a part of these proposals that they should pay a small increased rent, and be at the expense of improvements.

The Duke's factor reduced this agreement into the shape of offers by the tenants addressed to the Duke, and he necessarily retained possession of these. His Grace was not, without their consent and knowledge, entitled to adhibit to these offers a qualified acceptance, or to limit the endurance thereof. At least, after the delivery of these offers, no intimation of any sort was made to the appellants by the Duke or his factor that the former disapproved.

The appellants entered on the possession of the farms, paid their rents, and made the improvements stipulated in their agreements, up till the 10th February 1809, when they got notice from the new factor, Mr Palliser, that their leases expired on 10th May 1809.

The sheriff repelled the defences, and decerned in the removing, against the tenants, *ut libellatur*, with £20 Scots damages against each of them. He afterwards recalled this interlocutor, and appointed the defenders to appear and be judicially examined, as craved by the pursuer. Their examination was negative of the point of any intimation having been made to them. He then allowed the pursuer to prove

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that they got notice that the acceptance of their offers was a limited acceptance, limiting the endurance to nine years.

An advocation was brought and passed to try the question, the appellants contending, that parole was incompetent to contradict a clear written title, and that the intimation of the alleged *restriction* of the endurance of the leases could only be established by writing. The bill having been passed, the Duke brought this interlocutor before the Court, and it being pressed to the Court that the proof allowed was *before answer*, it appeared to three of the judges that the point of law would be open after the proof was adduced, and that the bill ought, *in hoc statu*, to be refused. This was done by an interlocutor, remitting to the Lord Ordinary to refuse the bill and remit to the sheriff.

The respondent then presented a counter-bill of advocation, praying for a remit to the sheriff, to recall his interlocutor of 5th July, and to adhere to that of 12th May, decerning in the removing, but this bill was refused, and the cause then went back to the sheriff-court, and the proof was taken. The missives in the meantime had been stamped. The proof having been accordingly gone into, the sheriff, of this date, decerned the tenants "to remove summarily on the 24th July," "and "on that day decerned against them for the sum of £15, 8s. 9d. "of expenses, and £23, 14s. expended by the pursuer in gett-"ing the missives stamped."

March 2, 1810.

July 24, 1810.

On bringing this judgment under the review of the Court of Session, first by bill of advocation, which was passed, and then by reclaiming petition, the Court pronounced this interlocutor: "Alter the interlocutor reclaimed against, and remit "to the Lord Ordinary to refuse the bill of advocation, and "remit to the sheriff to supersede the term of removal till "Whitsunday next; to divide between the pursuer and "defenders the expense of stamping the missives of tack; "reserving for future consideration the question as to ex-"penses incurred in this Court, since presenting the present "bill of advocation, but prohibits the clerks of the bills from "giving out a certificate of refusal of the bill of advocation, "till the box-day in the Christmas recess." Both parties reclaimed against this interlocutor: And the Court altered their former interlocutor, "in so far as it divides between "the pursuer and defenders the expenses of stamping the "missives of tack; and remit to the Lord Ordinary to re-"mit to the sheriff to find that the defenders are not liable "in any part of the expense of stamping the said mis-

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"sives; also find neither of the parties liable to the other "in the expenses incurred in this Court since presenting the "present bill; and *quoad ultra* adhere to the interlocutor "reclaimed against."

Against these interlocutors, so far as unfavourable to them, the present appeal was brought to the House of Lords by the tenants. But, notwithstanding this appeal was duly intimated to the respondent, he made a new application to the Court, wherein he contended that, under the terms of the late Act of Parliament, he was entitled to eject the appellants, which was duly carried into execution.

Pleaded for the Appellants.—1st, That it is the established law of Scotland, that a lease may be effectually constituted by any writing, however informal, provided it has been followed by possession; and an *offer* by a tenant when followed by possession, and the rent offered, is received by the proprietor, is as obligatory as an acceptance in writing. The giving of possession to the tenant, and accepting payment of rents, show consent and approbation, and the proprietor is not entitled to resile *quia res non sunt integræ.*

Every one of the authorities referred to, goes to show that this is the law of Scotland, and nothing can be stronger than the case of the Countess Dowager of Moray, where it was decided by a judgment of this most Honourable House, that a lease which had never been signed by the landlord, but had remained in his possession, with the signature of the tenants alone, was rendered valid by subsequent acts of acquiescence. In this case it is admitted by the respondent, that the agreement and arrangement founded on, was entered into by Mr Stobie, the Duke's factor;—that written offers were given stipulating a fifteen years' lease by the tenants in consideration of their making certain improvements, and that on the faith of such lease, they entered into possession, made these permanent improvements, amounting to the sum of £440, and paid their additional rents for nine years. It would, therefore, be a great breach of good faith, if they were to be deprived of the benefit of the remaining years of the lease.

2. If a proof by witnesses to limit the term of endurance of the lease was competent, the Duke has totally failed in establishing the allegations which he undertook to prove, and as he rested his cause on that issue, namely, that it was intimated to the appellants that they were only to have a *nine* years' lease, the action of ejectment ought to be dismissed.

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No doubt Mr Palliser had impetrated from three of the appellants, an offer at that time, as if the leases were then to expire, but this was done under certain pretences, and under such deception as could give no support to the respondent's case. Lastly, By putting a construction on the late Act of Parliament regarding possession, which the legislature never intended, the appellants have been ejected from their farms, notwithstanding of their appeal. If it shall appear injustice was done to the appellants, your Lordships are enabled by the said Act, to give them relief, making it competent to your Lordships to give such judgment as the case requires. On the whole, the appellants humbly hope that your Lordships will reverse the interlocutors, and remit the cause to the Court, to ascertain the amount of damages the tenants have sustained.

Pleaded for the Respondent.—By the law of Scotland, writing is essential to the constitution of all transactions concerning land, and, among others, of leases of lands. Those entered into by informal or improbative writings, or verbally, constitute no obligation binding in law, and may, therefore, be resiled from at pleasure, by either party, so long as matters are entire, and no *rei interventus* has taken place; but the rule of *rei interventus* is not applicable to this case. Their plea is, that they entered into possession, paid rents for eight years, and made improvements on the faith of bargains of leases for fifteen years. But of the very existence of this bargain, which forms the basis of the appellants' plea in defence, there is not a trace of evidence. In fact it never did exist, unless a mutual contract between two parties could be constituted by the will only of one of them, without the consent of the other, which would be absurd. That in the present case, no bargain for leases for fifteen years ever was entered into between the appellants and the respondent's factor, Mr Stobie, is clear. 1st, Because the factor had no power to grant leases for that term of endurance. His power was expressly limited to nine years. 2d, Because Mr Stobie only wrote down offers as to two of the tenants, and the Duke instantly disapproved of them, and *expressly limited their duration* to nine years.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of in the said appeal be, and the same are hereby reversed. And it is hereby further ordered and adjudged

that the leases or agreements for leases of the several possessions of the appellants did not expire till Whitsunday 1815; and that the appellants are entitled to be paid and reimbursed, the amount of the damages severally incurred or sustained by them for or by reason of their having been respectively removed from their farms previously to such expiration of their leases or agreements for leases, including such costs as they have respectively reasonably been put to, or have reasonably sustained in the Courts below, or upon hearing their appeal. And, by consent, let such amount be ascertained by Dr Andrew Coventry, Professor of Agriculture in the University of Edinburgh, who shall report such amount to the Court of Session. And it is further ordained that the said cause be remitted back to the Court of Session, to do therein as to the said Court shall seem just, consistently with this judgment.

For the Appellants, *J. Haggart, D. Macfarlane.*
For the Respondent, *Wm. Adam, Ar. Fletcher.*

NOTE.—Unreported in the Court of Session.

(Muir-burning).

Major-General ROBERTSON of Lude; JOHN STEWART, his Cowherd, and JAMES JACKSON, his Tenant, . . . } *Appellants;*

The Most Noble the DUKE OF ATHOLL, *Respondent.*

House of Lords 5th July 1815.

DAMAGES FOR MUIR-BURNING.—In prejudice to the proprietor of Atholl forest, of his right of deer hunting and muir-game on part of the forest over which the appellant held a servitude of grazing his cattle, the appellant, General Robertson, set fire to the heath on that part. Held him liable in damages.

This case arose out of the circumstances of the appeal between the same parties reported *ante*, vol. iv. p. 54.

There the property of the seven shealings was held to be in the Duke, and a right of servitude of grazing his cattle on the same found to belong to the appellant, General Robertson, subject to the Duke's right of deer hunting, the latter always giving notice previous to his intention of hunting, so that the appellant's cattle might be removed.