

circumstances, to maintain, as the petitioner does, that the respondent has ceased to have any right, because, when the parties were proceeding to adjust the terms of a formal lease, it was found that they had omitted in the negotiations to fix the duration, and the respondent declined to agree to nineteen years as the period. The parties are therefore brought to the inquiry, for what period does the law hold them bound? Upon the general principles now referred to, the Sheriff-Substitute has come to the conclusion that the respondent is entitled to possession as tenant of the farms for one year from the term of his entry."

On appeal, the Sheriff (MORRO) adhered to the interlocutor of the Sheriff-Substitute, and added the following Note:—"The Sheriff concurs with the views of the merits embodied in the interlocutor and note of the Sheriff-Substitute. The parties appear to have agreed that no lease for a term of years should be executed between them, thus superseding any question as to the number of years for which such lease should have endured under the previous communications between them; but the Sheriff sees no evidence of any agreement between the parties that the contract of location between them should be held as *funditus* null and void *ab initio*, or that it should be terminated at some intermediate period from Martinmas 1870 to Martinmas 1871. The respondent entered into lawful possession at Martinmas 1870, and the relation of landlord and tenant was established between him and the petitioner. He sowed the grain crop, or part of it, *in bona fide*, and would be entitled to the benefit of the maxim, *messis sementem sequitur*. In such circumstances a summary petition against the respondent, presented in May last, praying for immediate ejectment, appears manifestly inadmissible.

"It occurs to the Sheriff that there may be a doubt as to the relevancy and competency of the petition, and as to his jurisdiction in the circumstances to grant its prayer; but these points have not been raised, and he shall not enter upon them."

The petitioner appealed to the First Division of the Court of Session.

MACKINTOSH, for the appellant, argued, that there having been no concluded agreement of lease, the tenant was only a precarious possessor, who could be removed on reasonable notice.

Authority cited—*Fraser v. Brebner*, Feb. 10, 1857, 19 D. 401.

SHAND and KEIR, for the respondent, were not called on.

At advising—

LORD PRESIDENT—I do not think I ever saw a clearer case than this. The parties adjusted a contract of lease, complete in all respects except in regard to the period of its endurance, and under that lease the tenant, Mr Rannie, entered into possession, with the full knowledge and approbation of the landlord. He was removed at the end of the first year, after due warning and process of removal, to which he offered no objection; and the relation of landlord and tenant thus came to an end. A simpler case could hardly be imagined. Neither party was in a position to contend that a lease had been constituted for a term of years, for the landlord has removed the tenant at the end of one year, and the tenant has consented, and gone out. There is thus an end of the contract between them. But the landlord was most unfortunately induced, during the currency of the year, to present a petition to the Sheriff, praying for the summary

removal and instant ejection of the tenant. Now, if the tenant had not entered into possession under this incompleting contract, and the landlord was seeking to prevent him from doing so, the case would be very different, for the landlord was not bound to allow possession to the tenant until a clause had been added specifying the duration of the lease, which was originally intended to be for a term of years. But instead of insisting on that he allows the tenant to possess the subjects from Martinmas 1870 till 10th May 1871, and to carry on all the ordinary agricultural operations. But on 10th May he proposes summarily to eject the tenant whom he had allowed to sow the crops of the year. Anything so monstrous I never heard before, and do not expect to hear again.

The only other point requiring to be noticed is in regard to the occupation of the mansion-house. The landlord was, of course, entitled to interdict the tenant from entering into possession of it; but as this point was not disputed by the respondent, it cannot have occasioned any expense. There can, therefore, be no doubt that this appeal should be refused, with expenses.

The other Judges concurred, Lord Deas and Lord Kinloch observing that, but for the conduct of the parties, the important question might have been raised, Whether the omission of a clause specifying the duration of a lease would render it entirely null and void?

The Court accordingly refused the appeal, with expenses.

Agents for Appellant—Cotton & Finlay, W.S.

Agent for Respondent—Alexander Morison, S.S.C.

Tuesday, March 5.

GORDON v. WALKER.

Process—Amendment—Proof—Expenses—Rei Interventus.

In an action before the Sheriff for damages for failure to implement a contract of sale, alleged to have been constituted by informal missives, the pursuer averred *rei interventus* in general terms, but neither stated nor proved any specific acts:—*Held* not entitled to amend the record in the Court of Session, or to lead additional proof, with a view of averring and proving such specific acts of *rei interventus*.

Observed, that an interlocutor by the Sheriff, affirming the judgment of the Sheriff-Substitute, without mentioning expenses, carries the expenses of the appeal.

This was an appeal from the Sheriff-court of Aberdeenshire, in an action at the instance of William Gordon, joiner, Aberdeen, against George Walker, farmer, North Mains of Barra, for "the sum of £1000 sterling, being damages sustained by the pursuer in consequence of the defender having fraudulently failed and refused to implement a written contract or bargain entered into and completed by him with the pursuer on or about the 21st day of November 1864, by which bargain the defender bought, and the pursuer sold, for £440 sterling, the property marked No. 7 in the Square of Old Meldrum, belonging to the pursuer, with expenses."

The pursuer founded on an offer to purchase, holograph of the defender, and his acceptance

thereof, which, however, was neither holograph nor tested. He also averred that the bargain was followed by *rei interventus*; but there was no specification of the acts alleged to constitute it.

After a proof, the Sheriff-Substitute (DOVE WILSON) pronounced the following interlocutor:—

“*Aberdeen, 15th November 1871.*—Having considered the cause, Finds in point of fact—(1) That the defender, on 21st November 1864, made to the pursuer an offer to purchase from him certain heritable property, ‘the transfer to be at Whitsunday 1865,’ and that the defender accepted said offer; (2) That the defender’s offer was holograph, but that the pursuer’s acceptance was neither holograph nor tested, having been written by the defender, and simply subscribed and addressed by the pursuer; (3) That the defender resiled from said bargain prior to the term of entry, and before the occurrence of any act of homologation or *rei interventus*: Finds, in point of law, that the bargain so constituted, and not followed by homologation or *rei interventus*, in regard to the sale of heritage, is not binding on either party, even to the extent of authorising a claim for damages for non-implementation. Therefore assizes the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses of process; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.

“*Note.*—The question as to the validity of a bargain as to heritage, made in a manner similar to the present, and not followed by homologation or *rei interventus*, having been settled by the recent case of *Goldston v. Young*, Dec. 8, 1868, 7 M. 189, it is needless to discuss it. Whatever may be thought of its equity, the law is quite settled that where a bargain about heritage stands on missives, both the offer and the acceptance must be holograph or tested, in order to make the bargain binding, even to the extent of authorising a claim of damages for its breach. It is considered of importance to the law that all such writings should be formal.

“The only question for consideration in this case is therefore whether the bargain has not been followed by such homologation or *rei interventus* as would make it binding. Three acts were relied on by the pursuer to show that it had—(1) That the defender had let part of the property; (2) That he had paid part of the price; and (3) That he had entered on possession by removing the contents of an ashpit. The proof seems to the Sheriff-Substitute to have failed in each instance. The only evidence of the letting consists of the defender’s admissions that he let part of the property to certain parties on condition of his becoming proprietor. The parties to whom he let the property were not aduced, and therefore it must be assumed that this conditional letting was all that took place. Such acts were not the acts of a proprietor, but those merely of an offeror for the property. The alleged payments of part of the price are equally unproved. The £7 spoken of in the defender’s evidence is said to have been advanced by way of loan, and as it was advanced some time before the price was due, there is no presumption that it was given on any other footing. The sum of £4 paid by the defender’s present agent was not paid till long after the dispute had arisen; the obligation granted for it bears that it was a loan, and it is not made to appear that the defender had any connection with it. The alleged entering the premises

to remove manure, if done at all, was not a thing done by the defender in the character of proprietor. His title as proprietor could give him no right to take possession of the moveables on the property. Considering the nature of the objection to the formality of the bargain, very slight evidence of homologation or *rei interventus* would have been sufficient, but there must be something which would fall within the principles applicable to those matters.

“The Sheriff-Substitute has, for the reasons stated, come to the conclusion that there was no bargain between the parties which the law can enforce. As the pleas which the defender has maintained are of a very strict kind, and in themselves have not much equity, it is only fair to him to say that he did not maintain them until brought into Court to defend himself against a perfectly extravagant demand, and that immediately after resiling from the bargain he tendered to the pursuer a sum amply adequate to cover any damage which the pursuer had sustained.”

The pursuer having appealed, the Sheriff (GUTHRIE SMITH) pronounced this interlocutor:—

“*Edinburgh, 17th January 1872.*—The Sheriff having heard parties’ procurators on the pursuer’s appeal against the interlocutor of 15th November last, and having considered the record, proof, productions, and whole process—dismisses the appeal, affirms the interlocutor appealed against, and decerns.

“*Note.*—The contract founded on is not in a form which the law recognises as binding, and there are no circumstances inferring homologation or *rei interventus*. No part of the price was paid, for the small sums received by the pursuer were given as a loan, and although the defender said to one of the tenants that he was not to be removed, and promised to let a part of the premises to a new tenant, he did so in both cases conditionally on his becoming proprietor. It is plain that these cannot be founded on as acts of possession; they rather show that the defender was still doubtful whether he would complete the transaction. Matters being thus entire, the defender, in resiling from the transaction, was simply exercising his legal right, and no damages are due.”

The pursuer appealed to the First Division of the Court of Session.

J. A. REID, for him, craved the Court to delay the hearing of the cause, in order that an opportunity might be given him to amend the record, by specifying the acts founded on as constituting *rei interventus*, and thereafter to prove them.

MAIR and RHIND, for the respondent, were not called on.

At advising—

LORD PRESIDENT—The missives here were plainly insufficient to make a valid contract of sale, and therefore the agreement could be validated only by *rei interventus*. It follows that the pursuer must have known when he raised this action that his whole case depended upon his establishing sufficient *rei interventus*. He was therefore bound to come into Court prepared to state and prove the circumstances on which he founded, as constituting *rei interventus*. Now, the proof is an utter blank on this subject; none of the witnesses say anything about it. The proposal now made to us is substantially, not to lead additional proof, or to supplement a defect arising from oversight in the inferior court, but to begin to prove the case, for practically not a single step has been taken as yet.

I am therefore not prepared to sanction the pursuer's proposal. The interlocutor of the Sheriff-Substitute, which has been adhered to by the Sheriff, seems to me to dispose of the case in a perfectly satisfactory manner.

The other Judges concurred.

The Court accordingly refused the appeal, with expenses.

Counsel for the respondent pointed out that the Sheriff had merely affirmed the interlocutor of the Sheriff-Substitute, without saying anything about the expense of the appeal in the Sheriff-court.

LORD DEAS—I think we have had occasion before now to observe that such an interlocutor ought to be understood to carry the expenses of the appeal. If the point has not been previously reported, it should be reported now.

Agents for Appellant—Philip, Laing, & Monro, W.S.

Agent for Respondent—William Officer, S.S.C.

Thursday, March 7.

SECOND DIVISION.

SPECIAL CASE—ROOPE AND BALL.

Legacy—Clause of Survivance—Vesting.

A. died leaving a trust-disposition to trustees, with directions that they should hold his whole means and estate for the life of his wife, and on her death, after paying certain legacies, to pay over the residue among their nieces "equally among them and the survivor of them." One of the nieces predeceased the widow. *Held* that her share had not vested in her, and could not be claimed by her representatives.

The late John Strang, LL.D., Chamberlain of the city of Glasgow, by his trust-disposition, dated 30th May 1863, and codicil, dated 5th December 1863, conveyed to the parties therein named the whole estate, heritable and moveable, which should belong to him at the time of his death, as trustees for the purposes therein written; and by the said codicil he made certain additional bequests, and gave some directions to his trustees. The truster, by the said trust-deed, directed his trustees to hold the whole residue of his means and estate, heritable and moveable, for the life of his wife, and in behoof of his wife, Elizabeth Anderson, and to pay the whole free annual produce of said residue to her during her life; on the death of his wife to pay certain legacies; and, lastly, to pay and divide the residue of his whole means and estate to and among his three nieces, Elizabeth Machen or Roope, daughter of Mrs Ramsay Strang or Machen, his sister, and Mary and Elizabeth Knox, daughters of Mrs Isabella Strang or Knox, now deceased, also his sister, and that equally among them, and the survivors of them, share and share alike. Mrs Isabella Strang or Knox was the wife of Edmond Dalrymple Hesketh Knox.

Dr Strang died on 23d December 1863, survived by his wife and by Mrs Elizabeth Roope, Mary Knox, and Elizabeth Knox, who is now the wife of William Clare Ball. Mrs Strang enjoyed the life of the residue, and died on 9th August 1871, survived by Mrs Roope and by the said Elizabeth Knox, now Mrs Ball. Mary Knox died unmarried and intestate on 18th December 1868.

Mary Knox's domicile at the time of her death was in Ireland, and, according to the law of that country, her father, the said Edmond Dalrymple Hesketh Knox, was entitled to her whole personal estate.

With reference to the foregoing facts, the parties respectively requested the opinion and judgment of the Court on the following question:—

"Whether the said Mary Knox, at the time of her death, had a vested right and interest, to the extent of one-third, in the residue of the estate of the said Dr John Strang?"

The clause in the deed upon which the question principally turned was as follows:—"and *Lastly*, I direct said trustees to pay and divide the residue of my whole means and estate to and among my three nieces, Elizabeth Machen or Roope, daughter of the said Ramsay Strang or Machen, and Mary and Elizabeth Knox, daughters of the said Isabella Strang or Knox, and that equally among them and the survivors of them, share and share alike, but not subject to the *jus mariti* of any of their husbands, or to the debts or deeds or the diligence of the creditors of any of said husbands."

MILLAR, Q.C., and KEIR for Mrs Elizabeth Machen or Roope.

WATSON, for Mr Ball, as administrator for the Rev. E. D. H. Knox.

The Court unanimously answered the question in the negative, being of opinion that the vesting was postponed until the death of the lifeentrix, and that, as Mary Knox had predeceased before that event, her representatives could claim no share in the residue of Dr Strang.

Agents—John Auld, W.S., and Melville & Lindsay, W.S.

Friday, March 8.

FIRST DIVISION.

CHARLES COWAN AND COLIN MACKENZIE
v. LORD PROVOST LAW AND OTHERS
(TRUSTEES UNDER THE EDINBURGH
AND DISTRICT WATERWORKS ACT,
1869).

Interdict—Trustees, Powers of Statutory—Expenses of unsuccessfully promoting a Bill in Parliament—Edinburgh and District Waterworks Act, 1869—Waterworks Clauses Act, 1847 (10 and 11 Vict., c. 17).

Interdict granted (*diss.* Lord Deas) at the instance of two ratepayers within the district over which the trustees acting under the Edinburgh and District Waterworks Act, 1869, have power to levy assessments, against the said trustees applying the trust-funds in their hands in payment of the costs incurred by them in an unsuccessful application to Parliament for powers to bring in a supply of water from new sources, or levying assessments for the purpose of paying such costs.

This was a note of suspension and interdict presented in July 1871 by Mr Charles Cowan of Logan House, and Mr Colin Mackenzie, W.S., two of the ratepayers within the district over which the Edinburgh and District Water Trustees have power to levy assessments.

The respondents were the whole body of Trustees acting under the Edinburgh and District Water-