fulfil the stipulations in his contract with the landlords. It has not been seriously maintained that these imputations will support an issue. The charge complained of and put in issue is one of dishonesty, but I confess I see nothing in the article to suggest that the writer meant to impute fraud or dishonesty. The passage founded on is that in which it is said that matters would have been different "had the keeping of the place been entrusted to *honest*, careful, and persevering hands." But that phrase occurs where the neglect of the farm is the only subject of observation or discussion; and, in my opinion, by no straining can it be read as meaning more than that the farm was not honestly or diligently laboured, or, in other words, that care, perseverance, and honest labour were wanting to have it in a state of proper cultivation. If the pursuer had asked for an issue on an innuendo that the article charged him with bigamy, or forgery, or theft, he would have asked for something obviously so extravagant as to be inadmissible. There is a difference in the innuendo here put. It is a difference in degree only. The issue puts so unreasonable and forced a construction on the article that I think it ought not to be given.

The issue is, I think, open to the additional objection, that, as now framed, the innuendo differs from that put upon the record. The imputation complained of on record is that the pursuer is "dishonest as a tenant in the management of his farm," which, as I understand the language, means dishonest towards his landlords. The issue now adjusted substituted for this a charge of general dishonesty, not as a tenant, but as a man in his ordinary dealings. I put it to the pursuer's counsel during the argument whether he could point to any word or expression of general dishonesty, and he failed to do so. I think the issue should not be given, and that the article complained of is not actionable at the pursuer's instance.

Counsel for Pursuer—Lord Advocate (Watson) —Scott. Agent—W.S. Stuart, S.S.C.

Counsel for Defender — Balfour — Mackintosh. Agents—Pearson, Robertson, & Finlay, W.S.

Wednesday, January 24.

SECOND DIVISION.

[Lord Craighill, Ordinary.

BOWMAN *v.* WRIGHT.

Process—Jurisdiction.

A domiciled Englishman, residing in England, disponed, with immediate entry, all his heritable estate in Scotland, three days before an action was raised against him in the Court of Session, but infeftment was not taken by the purchaser till after the action was raised.—*Held* that no estate remained in the seller to found jurisdiction in respect of the possession of heritage.

This was an action at the instance of William Bowman, architect in Greenock, against William Wright, manager in London of the Great Britain Life and Fire Office, for payment of a professional account amounting to £322, 16s. 5d., alleged to have been incurred in connection with the erection of a villa formerly belonging to the defender at Pollokshields. The defender stated several defences on the merits, but he also pleaded that having neither domicile nor heritable property in Scotland when the action was raised, the action ought to have been dismissed. The pursuer pleaded that the defender was subject to the jurisdiction of the Court of Session, in respect that at the date of raising the action he had heritable property in Scotland, consisting of the villa at Pollokshields.

The following are the averments of parties so far as relating to this plea:—The defender averred that he, in September 1874, had removed to London, and had not since resided or had any dwelling-house in Scotland. The only intimation he received of the action was a copy summons sent to London by post. The summons was not served on him. Prior to the date of the raising of the action he had, on 30th March 1876, signed in London an absolute disposition of the subjects in favour of Alexander Laird, merchant, Glasgow. The price was paid at the same time, and the disposition delivered on 1st April, which was the term of the purchaser's entry. The pursuer averred that the defender had become owner of a piece of ground and villa erected thereon by feu-contract which was recorded in the Register of Sasines on 27th May 1873. The defender, or at least his wife and family, resided in the villa down to 1st April 1876, and his furniture was not removed till that date. The summons, containing warrant to inhibit, was raised on 3d April 1876, and of same date notice of inhibition was recorded in the General Register of Inhibitions, in terms of the Act 31 and 32 Vict. c. 101, sec. 155, and within 21 days thereafter the inhibition and execution thereof were duly recorded in terms of the said section. The disposition of the subjects granted by the defender on 1st April was not recorded in the Register of Sasines till 6th April 1876, that is, after the raising of the action. The defender was consequently feudally vested in and proprietor of the subjects at the date of raising the action.

The Lord Ordinary, on 13th July 1876, repelled the plea of no jurisdiction, adding the following note:—

"*Note.*—The Lord Ordinary is of opinion that this plea cannot be sustained. The defender might have sold the property, or leased the property, or charged the property with debt, to any one ignorant of the disposition still unrecorded, and this consideration the Lord Ordinary thinks is enough to shew that, in the sense in which the words are received, when the application of the rule that possessors of heritable estate in Scotland are subject to the jurisdiction of the Scotch Courts is the point to be decided, the defender, notwithstanding the granting of the disposition, continued till it was recorded the possessor of the property. Authorities were cited on both sides at the debate. The defender referred to Erskine i. 2, 16, and to *Fraser* v. *Fraser*, 8 Macph. p. 400. The pursuer founded on 1 Hunter on Landlord and Tenant, 3d ed. p. 87 (2d ed. p. 81); Bell's Principles, 1181; 1 Bell's Com. (7th ed.) p. 66; and *Kirkpatrick* v. *Irvine*, 16 S. p. 1200. All that the Lord Ordinary has to observe upon these is, that the authorities adduced by the pursuer at least go the length which, in sustaining the jurisdiction of the Court in this case, the Lord

Ordinary has gone, and that those brought forward by the defender are not inconsistent with the judgment which has been pronounced."

The defender reclaimed, and argued—There is no case of fraud alleged, and there is an out and out transfer of the property by the defender. Erskine says (Inst. i. 2, 16) that the defender must be possessed of some estate or subject within the territory.—*Ferrie* v. *Woodward* (30th June 1831, 9 Sh. 854), where the opinion of the whole Court put the liability of defenders (English trustees holding land in Aberdeen) on their being entitled to the benefit of Scotch law in vindicating and protecting their property, which, if they do not appear, is subject to Scotch diligence. *M'Arthur* v. *M'Arthur*, (12th Jan. 1842, 4 D. 354), where the right of heir-apparency, without title completed or entry into possession, was held enough to found jurisdiction. This was because under Statute 1621, c. 27, the apparency could be adjudged by a creditor of the heir. In *Fraser* v. *Fraser and Herbert* (14th Jan. 1870, 4 Macph. 400) the Court based jurisdiction in an action of divorce on beneficial possession under a lease of shootings. In *Kirkpatrick* v. *Irvine* (23d June 1838, 16 Sh. 1200), founded on by pursuer, the defender was infeft in a mid-superiority, defeasible at the pleasure of the disponees; but there were elements of contract and personal citation which entered into the judgment. Lord Corehouse, however, proceeded on the possession of heritage. By analogy from the case of arrestment *jurisdictionis fundandæ causa*, the subject or the interest in the subject must be substantial, not illusory. *Lindsay* v. *London and North Western Railway Company*, 3 Macq. App. 99; *Shaw* v. *Dow and Dobie*, (2 Feb. 1869, 7 Macph. 449).

Argued for the pursuer—There had been a failure to take sasine and to record sasine prior to the raising of the action. The defender was undivested owner as regards the whole world except the disponee. He could grant a second disposition, or a security writ, or perhaps leases (Hunter, Landlord and Tenant, i. 87). His creditors, ignorant of the disposition, might adjudge. The legal possession remains with him till sasine (Bell's Com. i. p. 64). In *Kirkpatrick's* case there was infeftment; the publicity of the right was essential in questions of jurisdiction. There was an estate available for creditors. The doctrine of *tantum et tale* would not apply as in *Fleming* v. *Howden* (16th July 1868, 5 Macph. 658, and 6 Macph. 113), for there the obligation was disclosed in the title.

At advising—

Lord Justice-Clerk—This is no doubt a question of importance. The pursuer is an architect in Greenock, and in November 1872 he was engaged by the defender to make plans for a villa at Pollokshields, and the action is brought for the price of work done on that employment. The villa was erected, and was occupied for some years by the defender. But before citation he had removed to London. He is an Englishman, and he is now a domiciled Englishman. On 20th March 1867 he had sold the villa by a delivered disposition, with entry on 1st April. He had no other property, and the question therefore is, whether infeftment not having been taken by the disponee, there remains a sufficient basis of jurisdiction? The Lord Ordinary has decided the case on the analogy of a series of cases which no doubt establish that the possession of an heritable subject or of an heritable right, however small the value, is sufficient, even if the estate be one not very tangible, as a mid-superiority. I think that there was here no jurisdiction—that the citation of the defender was ineffectual. There was, no doubt, remaining in his person an infeftment on which a second purchaser or a tenant might have relied. But there was no substantial interest. The jurisdiction which is based on the ownership of heritage is not like that based on arrestment *jurisdictionis fundandæ causa*, which is admittedly a fiction introduced for the benefit of commerce. It depends on beneficial interest; and that distinction appears in *Cameron* v. *Chapman* (9th March 1838, 16 Sh. 907). Now here the defender had sold his interest, which became vested in the purchaser, and although by the technical forms of feudal conveyancing and the necessity of registration the disposition might have been evacuated in favour of third parties in *bona fide*, that is not a beneficial right remaining in the seller, but a mere power, the exercise of which is contingent on the seller's fraud. Now here that contingency has not occurred, but has been rendered impossible by the subsequent infeftment of the seller. We must, therefore, recal the Lord Ordinary's judgment and dismiss the action.

Lord Ormidale—The question for the determination of the Court in this case is whether there is jurisdiction over the defender. The pursuer maintains there is, in respect that at the date of raising the action the defender had heritable property consisting of a villa and some relative ground in Scotland. On the other hand, the defender denies that when the action was raised he had any heritable property in Scotland, the villa and ground referred to having been previously sold by him.

It cannot be disputed that the fact of a person having heritable property in Scotland is sufficient to give jurisdiction over him in this Court, not only in all actions relating to that property, but generally in all actions of a merely pecuniary nature. The same rule applies to jurisdiction founded by the arrestment of moveable funds or estate. And the jurisdiction so founded, either in respect of the defender having heritable property, or of his moveable funds or estate being arrested *jurisdictionis fundandæ causa*, is not limited to the heritable property or to the funds arrested, but is also general, and will sustain pecuniary actions to any amount. Nor is it of any consequence that the heritable subjects or the arrested funds are of small or trifling value or amount. It is enough that there is some heritable property or some arrested funds, however small or trifling. The principle upon which the rule has been recognised is that where there is property funds or effects fixed within the jurisdiction which, although not immediately brought into question by the action, and wholly incommensurate with the claim sued for, may be affected by the judgment or decree to be pronounced, that is enough to constitute jurisdiction. And provided there is jurisdiction constituted in either of the ways now explained against a defender, it is of no consequence that he is a foreigner, and is not, and never has himself been, personally resident in

Scotland, and may be in complete ignorance of any action that is brought or contemplated against him.

A jurisdiction so anomalous and peculiar is plainly, I think, not to be sustained unless it is made to appear very clearly and unmistakeably to exist; and certainly it ought not to be extended beyond the limits within which it has hitherto been exercised. None of the precedents referred to in the Lord Ordinary's note appear to me to be in point, although they may more or less serve to illustrate the principle.

Now in the present case the action was raised on the 3d of April 1876. But the defender had left Scotland and taken up his residence in London in September of the previous year; and he had also sold the villa and ground—the only heritable property to which the pursuer refers as founding jurisdiction against him—and executed a disposition thereof in favour of the purchaser on the 30th of March, which was delivered on the 1st of April 1875, three days before the summons was served by being left at the house the defender had occupied when resident in Scotland. About this state of the facts there was no dispute at the debate. The conclusion, therefore, seems inevitable that when the present action was raised against the defender he had no heritable property in Scotland; and it not being pretended that there was jurisdiction against him on any other ground, his plea of want of jurisdiction ought in my opinion to have been sustained, in place of being repelled, as it was by the Lord Ordinary.

But then it would appear that the purchaser of the defender's villa and ground had not registered his disposition in the Register of Sasines till the 6th of April 1875, three days after the present action was raised; and, founding on this circumstance, the Lord Ordinary in the note to his interlocutor states that the defender continued till after the action was raised "possessor of the heritable property," meaning the villa and relative ground, and therefore subject to the jurisdiction of this Court. This, I think, is an entire fallacy. The defender had previously to the action being raised parted with the villa and ground. He had not merely sold it to another, but granted and delivered a disposition to it to the purchaser, whose entry to possession was the 1st of April, three days before the pursuer's action was raised. The defender was therefore neither the owner nor possessor of heritable estate in Scotland at the time the action was raised, and therefore there was no jurisdiction over him. It is true that the defender may be said in a certain sense to have remained undivested of the mere title to his property till the purchaser requested his disposition; and, as remarked by the Lord Ordinary, he might have resold the property or leased it to another, or charged it with debt to any one ignorant of the sale which had been previously made and of the unrecorded disposition to the purchaser, but he could have done none of those things honestly, and, so far as he himself was concerned, any of the acts would have been fraudulent and invalid. It is impossible, therefore, to hold that the defender was in any fair or correct sense, when the present action was raised, either the owner or the possessor of the heritable subjects in question. It is true that a third party acquiring from him a title to these subjects onerously and in good faith—that is to say, for a full price and in ignorance of the prior sale, and getting his disposition recorded before that of the prior purchaser—would be, in competition with that former purchaser, preferred as the owner; but no such case has here occurred. The question is not whether jurisdiction might not be constituted against such second purchaser as the proprietor or possessor of the heritable subjects referred to, but whether there is jurisdiction over his author, the defender, merely because he might in certain supposed circumstances have succeeded in perpetrating a gross fraud. Besides, as the case actually stands there would be jurisdiction over the party to whom the defender sold the property, and that just shows that there cannot be at the same time, and in respect of the same subjects, jurisdiction also over the defender.

For these reasons I am of opinion that the ground of the Lord Ordinary's judgment is erroneous, and that the defender's plea of want of jurisdiction ought to have been sustained, in place of being repelled.

Lord Gifford—I am of opinion that the defender William Wright was at the date of this action (3d April 1876), and at the date of the citation following thereon, not subject to the jurisdiction of this Court either in respect of his being proprietor of heritable subjects situated in Scotland, or on any other ground disclosed in the pleadings. I think therefore that the defender's preliminary plea, that he is not subject to the jurisdiction of this Court, must be sustained, and that the action accordingly falls to be dismissed.

The only ground upon which it is maintained that the defender is subject to our jurisdiction is that at the date of the action and of the citation the defender was proprietor of heritable subjects in Scotland, that is to say, of a villa and ground at Pollokshields, near Glasgow. The defender, indeed, is designed as residing at Earnvale, Pollokshields, near Glasgow, but it is admitted that he ceased to reside there long before the present action was raised, and that at the date of the action he had no domicile there, either actual or constructive. The sole ground of jurisdiction therefore is, that although resident in England, he was proprietor of a villa in Scotland. It is not said that the defender had any moveable property or effects in Scotland, and at all events none of the defender's moveables having been arrested in order to found jurisdiction the pursuer can only rely upon the defender's proprietorship of the heritable subject.

There is no doubt that the defender was at one time proprietor of the villa in question, but sometime before this action was raised the defender had sold it to a purchaser, with entry at 1st April 1876. A formal disposition in favour of the purchaser was executed by the defender on 30th March 1876, and the price was paid and the disposition delivered to the purchaser on 1st April 1876, being three days before the defender was cited in the present action, and two days before the summons was raised or signeted. It is not disputed that the sale was a real and *bona fide* sale, that the price was duly paid, and that the disposition was delivered prior to the raising of the action. The disposition is in the usual terms; it gives entry as at 1st April, being before this action was raised; and it was intended entirely to divest

the defender of all interest whatever in the subjects sold. The defender after receiving the price and delivering the disposition retained or reserved no beneficial right whatever in the subject, and, as in a question with the purchaser, he had nothing whatever to do with it.

The pursuer, however, maintains that as the disposition in favour of the purchaser was not recorded until 6th March 1876,—this recording under the recent statutes being equivalent to infeftment—the defender must be held to have been feudal proprietor of the subjects till that date, and was therefore liable to the jurisdiction of the Scotch courts, not only in the present action, but in all personal actions of any kind in which he might be cited at anytime before the purchaser chose to record the disposition, and thus take infeftment in the subject which he had purchased.

I do not think that the view contended for by the pursuer is well founded. It would lead to very startling results; for in the general case a purchaser is not bound to expede infeftment in any heritable subject which he has bought, and as it might happen that although a person had absolutely and out and out sold his heritable property and left the country—it may be forty or fifty years—he would still be subject to the jurisdiction of the Scotch courts, merely because the person to whom he had absolutely sold his property so long before had not chosen to complete his title. I think it is impossible to hold this.

It appears to me that the principle on which jurisdiction is founded in respect of heritable property rests not on merely nominal property, but on real and beneficial interest in some heritable subject. It does not rest on what your Lordship has called a mere fiction, but must have something real and substantial in the party against whom jurisdiction is sought to be established. It is shown in this, that at the date of the action the defender had really no heritable property in Scotland, and as there is no other ground relied on by the pursuer I think the objection to the jurisdiction must be sustained.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for William Wright against Lord Craighill's interlocutor of 13th July 1876, Recal the said interlocutor: Sustain the first plea-in-law for the defender; and dismiss the action; and find him entitled to expenses, and remit the same to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Asher—Pearson. Agents—J. & J. H. Balfour, W.S.

Counsel for Defender—Alison. Agents—Dove & Lockhart, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DUKE OF HAMILTON *v.* BUCHANAN.

*Landlord and Tenant—Lease—Constitution—Offer—*Rei interventus—*Parole Evidence.*

A tenant made offer for a farm, and afterwards signed a second offer—as he alleged on record "on the understanding and believing that he was signing mere conditions relative to and to be taken in conjunction with" the offer previously made. There was no written acceptance by the landlord of either offer, but possession followed. In an action of declarator by the landlord that the tenant should be obliged to implement the conditions and stipulations of the second offer, and to enter into a formal lease in terms of it, the defender answered that his possession was not referable to that offer.—*Held* (reversing the Lord Ordinary's judgment) that a parole proof of the facts and circumstances attending the giving and taking of possession was competent and necessary.

In this action the Duke of Hamilton was pursuer, and Andrew Buchanan, tenant of the lands and farm of Flemington, defender. The defender upon 14th August 1873 had sent to the Duke's Chamberlain the following offer for Flemington farm:—"I hereby offer for the farm of Flemington in Cambuslang parish, and presently occupied by Mr Russell, for a lease of nineteen years, the yearly rent of £1200 stg., with the following understanding, that the landlord alter the present byre so as to array the stalls along side walls, and erect additional byres for twenty cows; also to put the remainder of the houses and the fences in a tenantable state of repair. The landlord to drain requisite drainage at Government rate when called upon by the tenant." This offer was answered by a letter requesting references as to the defender's "means and agricultural ability for the farm." A meeting afterwards took place upon 12th September according to arrangement by a letter from the Chamberlain dated 6th September. This letter was in the following terms:—"Please meet me here on Friday next, at 10 o'clock instead of Thursday." At the meeting on 12th September the defender signed the following offer for the farm:—"I, Andrew Buchanan, residing at No. 28 Bellgrove Street, Glasgow, do hereby make offer to the trustees of His Grace the Duke of Hamilton of the sum of £1200 sterling of yearly rent for a lease of the farm of Flemington, in the parish of Cambuslang, as presently let to Archibald Russell, but excepting therefrom whatever ground has previous to my entry under the said lease been taken off the farm, or damaged by pits, roads, railways, plantations, or in any other way, for all which I am to have no claim for compensation, and on the understanding that for whatever ground may be taken from the farm for any of these purposes during the currency of my lease I am to be paid at the rate of £6 p. imperial acre; the lease to commence at Martinmas next as to the lands for tillage, and Whitsunday thereafter as to the houses and pasture grass, and to endure for nineteen years; and I agree to the foregoing printed conditions of let: