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:

In witness whereof, &c." The defender thereafter entered into possession of the farm, and this was an action of peclarator that a valid contract of lease had been constituted upon the terms of the offer, and that the defender was bound to implement its conditions and subscribe a formal lease.

The pursuer averred—"The said offer was accepted by the pursuer; and the defender, in terms thereof, was allowed to enter into possession of the said farm at Martinmas 1873 as to the arable land, and Whitsunday 1874 as to the houses and grass, and has since continued in possession of the said farm." He further stated that the draft of a formal lease embodying the stipulations in the offer and printed conditions was sent to the defender on 8th June 1874, but the matter lay over without objection till April 1875, when questions arose about the farm-buildings, and the defender intimated that he did not hold himself bound by the terms of the offer of the 12th September and of the draft lease afterwards sent, but that he had entered into possession upon the offer of 14th August, which the pursuer averred had been superseded.

The defender averred that the object of the interview of 12th September was to conclude the agreement formerly proposed by him, and he further stated—"Copy of the printed general conditions for leases of farms on the Hamilton estates in Lanarkshire, with the writing dated 12th September 1873 endorsed thereon, was produced, ready for the defender's signature, and the defender signed on the understanding and believing that he was signing mere conditions relative to and to be taken in conjunction with his offer of 14th August 1873. That offer and the conditions therein contained were not withdrawn or superseded as alleged by the pursuer." He complained, so soon as he got entry, of the insufficiency of the accommodation, and withheld payment of part of his rent in consequence. Some of the repairs asked by him were executed by the landlord, but there were many other defects, which led him to intimate, on 21st July 1875, that the landlord had failed to fulfil his part of the agreement. The defender further stated that he had always been ready to sign a lease in conformity with the first offer of 14th August, and the conditions of let stated in it.

The Lord Ordinary pronounced an interlocutor giving decree in terms of the declaratory conclusion, and he made a remit for the preparation of a draft lease. The following note was added :—

Note.—"The offer of 12th September 1873 is complete in itself, and makes no reference to any preceding offer. It was not accepted in writing, but possession followed upon it, and such possession is, in the opinion of the Lord Ordinary, equivalent to a simple written acceptance.

"The defender argued that an offer which he made on 14th August was to be read along with and as part of the offer of 12th September. But he does not allege that this offer was accepted in writing, or that *rei interventus* followed upon it. His case is, that when he signed the offer of 12th September 'he was signing mere conditions relative to and to be taken in conjunction with his offer of 14th August." This is an allegation of error, but it does not enable the Court to introduce anything into the contract which is not contained in the last and, as the Lord Ordinary thinks the only, accepted offer."

By a subsequent interlocutor the Lord Ordinary approved of a draft lease which was lodged, and ordained the defender to subscribe it.

The defender reclaimed, and argued—There was no formal lease. The offer was only a unilateral document, and there was no writ by the landlord. There was nothing to prevent the latter falling back upon the offer of August 14, and nothing in the fact of possession referable to the one offer more than to the other. Further, it was not said that the first offer was rejected. The second offer was in supplement, not in derogation of the first. There was room for enquiry as to the footing upon which matters had proceeded between the parties.

At advising—

Lord President—There are two interlocutors here under review. The first is dated 31st May 1876, by which the Lord Ordinary finds that "the defender is bound to implement the whole conditions and stipulations contained in the offer and printed conditions of leases libelled, and forthwith to enter into and subscribe a formal and valid lease of the lands and farm of Flemington in terms of the said offer and printed conditions;" and he remitted to a conveyancer to prepare the lease accordingly. The second is dated 18th October 1876, and by it his Lordship approves of the draft-lease, and "ordains the defender forthwith to enter into and subscribe a formal and valid lease of the lands and farm in question."

Now the foundation of these judgments is, that there was a complete and binding agreement between the parties that a lease should be entered into in terms of the offer dated 12th September 1873. The judgment to that effect has been pronounced on a closed record without reference to evidence upon the matter. But there was no complete written agreement. The completion was brought about by possession alleged to have taken place on an offer by the defender to become tenant, and therefore the question whether the agreement is completed depends (1) upon the terms of the offer, and (2) upon the terms of the *rei interventus*. It is said, further, that the taking possession by the tenant operated acceptance by the landlord.

The circumstances of the case are peculiar. The first offer which was made by the tenant was dated 14th August 1873—[*reads as above*]. That offer was never accepted, but, as we can see from the averments and communications of parties, it was also never rejected. The answer was made by the pursuer's factor by letter on 18th August, in which he says—"Before submitting your offer for the consideration of His Grace the Duke of Hamilton's trustees, I will be obliged by your furnishing me with references as to your means and agricultural ability for the farm of Flemington." So far from being a rejection of the offer, that letter amounted to a provisional entertainment of it. Otherwise it would not have been worth while to ask a reference. What took place afterwards we do not see until the meeting of the 12th September, arranged for by a letter addressed by the factor to the defender, dated 6th September 1873. It is impossible to read that letter without seeing that there must have been verbal communications in the interval. These may have dealt with references as to means and agricultural ability, or they may have had a bearing on the terms and views of parties as to the

completion of the lease. Be that as it may, the meeting was held upon the 12th September, and the defender states that when he signed the offer on that day he supposed it was an offer embodying the stipulations contained in the prior one of the 14th August. There is an entire omission of the conditions of the offer of 14th August with reference to the alteration of the existing and the erection of additional byres, but included in it were the printed conditions imposed upon all persons offering for leases upon the Hamilton estates. That offer was never accepted any more than the first had been. It is an improbative document, and is not validly tested.

Thereafter possession was given and taken, and the parties are at variance when and how that was done and what were the circumstances of it. The pursuer says—"The said offer was accepted by the pursuer, and the defender in terms thereof was allowed to enter into possession of the said farm at Martinmas 1873 as to the arable land, and Whitsunday 1874 as to the houses and grass, and has since continued in possession of the said farm." What is meant by the offer being accepted is, I presume, that possession was allowed to follow upon it. It is conceded that there was no written acceptance. The averment is relevant only in respect of the insertion of the words "in terms thereof." Otherwise it is utterly irrelevant, and there can be no lease. The pursuer hereby undertakes to prove that possession was given, taken, and held under the second offer of 12th September, as distinguished from that of 14th August. In short, that possession is referable to the second offer. That averment is absolutely essential to success in the action. On the other hand, it is fairly enough represented in the next article that the defender's account was that possession was given and taken by him with special reference to the offer of 14th August alone.

Without the determination of the matter of fact it is impossible to decide the case. When we look to the record it is not so clear whether the defender means to contend that possession is to be ascribed to the offer of the 14th August or to both offers together. But that does not matter. Whichever of the two contentions is to be made the foundation of the defence, it requires matter of fact to be proved before either the one or the other can be established. If there had been a written contract, although only in missives, we could not have gone beyond it. For in that case possession would have been immaterial, because it would have been natural, and its quality could not have entered into the question whether the contract was completed or not.

It appears to me therefore that before we can decide the question, which I think is prematurely decided by the Lord Ordinary, we must know the history of the transaction. And I do not know that there are any circumstances attending the giving and taking possession which will not be very material for the decision of the case.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of the cause, with the printed copy of the reports of commission and diligence, No. 57 of process, and heard counsel, Recal the interlocutors of Lord Rutherfurd Clark, Ordinary, of 31st May and 18th October 1876; Allow parties a proof of their averments on record, the proof to be taken before Lord Shand on a day to be afterwards fixed by his Lordship."

Counsel for Pursuer—Gloag—Asher. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Defender—Balfour—Keir. Agents—H. & A. Inglis, W.S.

Saturday, January 27.

SECOND DIVISION.

HOULDSWORTH *v.* BAIN AND OTHERS.

(See *Ante*, vol. xiii, p. 187.)

Landlord and Tenant—Lease—Minerals—Removing.

It was agreed between the landlord and tenant of a colliery that, in the event of the tenant's death during the currency of the lease the landlord should be entitled to resume possession of the colliery "at a valuation if he should at any time be dissatisfied with the working thereof by the representatives." The tenant having died, his representatives entered into possession under the lease, and the landlord, on 3d February 1874, gave them notice that he was dissatisfied with the working of the colliery, and had resolved to resume possession.—*Held* that the representatives were entitled to reasonable time after the date of the notice to obtain and adjust the valuation, and to complete the arrangements necessary for the cession of the colliery, and that until the Whitsunday term 1874 was such reasonable time.

Reparation—Landlord and Tenant—Lease—Minerals—Failure to Remove.

Principles upon which the Court, acting as a jury, assessed damages due to the landlord of a colliery by the tenants, who had failed to remove from the colliery when required by the landlord to do so in terms of an agreement between them.

This was an action at the instance of James Houldsworth of Coltness against William Bain and others, trustees of the deceased Alexander Brand, and representatives of the deceased Robert Brand in a lease from the pursuer of the Greenhead coal-fields under a portion of his estate. In the lease the pursuer had reserved right to resume possession of the colliery "if he should at any time be dissatisfied with the working thereof by the representatives" of the said Robert Brand. On 3d February 1874 the defender intimated that he was dissatisfied with their working, and had resolved to resume possession of the colliery in terms of the lease. The defenders refused to cede possession, but the Court, in an action at the instance of the pursuer, found that they were bound to do so. This present action concluded for £10,000 in name of damages or violent profits said to be due on account of the defenders' failure