tion of fraud or non-compliance with conditions-precedent) for the ordinary tribunal, a tribunal which from its composition may consist of persons competent by their experience to deal with the questions which ordinarily arise when the value of destroyed or injured property has to be ascertained, and by their freedom of movement able to investigate upon the very spot the necessary condition, does the law of Scotland on the ground of general public interest refuse to enforce this contract which the parties have so made for themselves? My Lords, the authorities which have been so exhaustively dealt with by my noble and learned friend Lord Watson satisfy me of the contrary; and I think therefore that your Lordships should give effect to the contract by adopting the motion now made.

Their Lordships reversed the interlocutors appealed from, and assoilzied the appellants from the conclusion of the action, and reserved the question of costs.

Counsel for the Appellants—Sir Horace Davey, Q.C.—Ure—Alex. M'Clure. Agents—Loch & Goodhart, for T. & R. B. Ranken, W.S.

Counsel for the Respondent—Sol.-Gen. Sir J. Rigby—Salvesen—E. B. Pymar. Agents—Clulow & Gould, for Thomas M'Naught, S.S.C.

COURT OF SESSION.

Tuesday, November 29.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

KINNIMONT *v.* PAXTON.

Contract — Agreement — Evidence of Contract—Breach of Contract—Damages.

K wrote to P—"*Novbr. 10th* 1891.—I hereby agree to take those premises situated at Canal Loading Wharf, presently occupied by John Paxton, 87 Gilmore Place, from this date, and to relieve him of rent from Novbr. 11th 1891 till the expiry of his lease, and to pay him for fittings the sum of fifteen pounds stg., including engine and boiler, &c." P wrote to his landlord—"As I intend giving up those premises, and have secured another tenant, I will take it as a great favour if you could arrange with him from this date for a three years' and half-year's lease." P gave this to K, who delivered it. P subsequently cancelled this letter, and broke off negotiations with K, who sued him for damages for breach of contract, founding on the letters of 10th November. It was pleaded in defence that the pursuer's letter, being neither holograph nor tested, was inadmissible as evidence, and further, that the defender had not accepted the pursuer's offer.

Held (1) that the letter was binding, and evidence, although neither holograph nor tested, because respecting the purchase of the fittings it was merely a writing *in re mercatoria*, and respecting the premises it was merely a bargain that the pursuer should relieve the defender of his liability for rent; and (2) that the pursuer's letter was not an offer requiring acceptance, but the written expression of a contract already made, and therefore that the pursuer was entitled to damages for breach of contract.

In 1890 John Paxton, manufacturer, Edinburgh, leased from James M'Kelvie the stable and loft at Manure Wharf, Fountainbridge, at a yearly rent of £14, payable at Whitsunday and Martinmas. The lease excluded sub-tenants without M'Kelvie's consent in writing. In November 1891 Paxton gave up his business in Edinburgh, and desiring to dispose of his plant and premises, he entered into negotiations with Robert Kay Kinnimont, manufacturer, Edinburgh, and upon 10th November 1891 handed to him a pencil draft of the following letter, No. 26 of process, which on the same day Kinnimont extended and gave to Paxton—"I hereby agree to take those premises situated at Canal Loading Wharf presently occupied by John Paxton, 87 Gilmore Place, from this date, and to relieve him of rent from Novbr. 11th till the expiry of his lease, and to pay him for fittings the sum of fifteen pounds stg., including engine and boiler, &c." Upon the same date Paxton wrote to M'Kelvie's trustees, the proprietors of the premises, this letter, No. 17 of process:—"Sirs,—As I intend giving up those premises at Canal Loading Wharf, and have secured another tenant, I will take it as a great favour if you could arrange with him from this date for a three years' and half-year's lease. By doing so you will greatly oblige yours, JOHN PAXTON." He handed this letter to Kinnimont, who delivered it to John Merry, clerk to Mr James M'Kelvie junior, who acted for the late Mr M'Kelvie's trustees, and who at that time was absent from Edinburgh. Paxton afterwards entered into negotiations with other parties for the transfer of the premises, and upon 14th November 1891 he called at M'Kelvie's office, and stated that the arrangement between Kinnimont and him had fallen, and that he cancelled the letter formerly given. It was returned to him, and was never shown to Mr M'Kelvie junior. Upon 14th November Kinnimont was informed that the agreement was at an end, and in December Paxton purchased the premises from M'Kelvie's trustees for £115, and let them to other parties.

In December 1891 Kinnimont brought an action in the Edinburgh Sheriff Court against Paxton, claiming £100 as damages for breach of contract.

The defender maintained—"There was no completed contract between the pursuer and the defender."

Upon 9th June 1892 the Sheriff-Substitute (RUTHERFURD) found in point of fact, *inter*

alia—"(3) That the defender gave up business in Edinburgh about the beginning of November 1891, and that on the 9th or 10th of that month the parties entered into an agreement for a sale to the pursuer by the defender of certain plant and fittings in the premises aforesaid at the price of £15, and a transfer to the pursuer of the unexpired period of the defender's lease of these premises, provided that the landlord would consent to accept the pursuer as tenant during that period, and for some time longer;" and found in point of law "that the defender was not entitled to withdraw his said letter, No. 17 of process, and to resile from his agreement with the pursuer in the manner stated: Therefore repels the defences, and finds the defender liable in damages to the pursuer, assesses the damages at the sum of £10 sterling, &c.

"*Note.*—It appears from the defender's statement in evidence that in the month of November last he had given up business in Edinburgh, and was working in Hawick. It was therefore natural that he should endeavour to dispose of the plant in the premises which he occupied at Fountainbridge, and at the same time be relieved of his obligations under the lease. Apparently for that purpose he entered into negotiations with the pursuer, and it is not matter of dispute that a sum of £15 was fixed as the price of the defender's engine, boiler, &c. The defender, however, endeavours to make it appear as if this were a matter altogether apart from the pursuer's obtaining the landlord's consent to his occupation of the premises. In the opinion of the Sheriff-Substitute the evidence shows that that was not so, and that the pursuer's agreement to purchase the engine, &c., was conditional upon the landlord's consent being obtained to a lease of the premises in his favour. This is shown, not only by the parole evidence, but also by the terms of the defender's letter to the landlord, No. 17 of process, dated 10th November 1891, in which he states that he has secured another tenant. The defender no doubt says that he wrote that letter at the pursuer's request, 'just to feel the way, and see how things would stand,' but the Sheriff-Substitute does not think that to be a satisfactory explanation of his purpose in writing the letter in question. On the contrary, it seems to him, as already stated, that the letter shows that an agreement had been at its date concluded between the parties, subject to the landlord's consent being got to a lease in the pursuer's favour.

"Now, if that be so, it was plainly an implied condition of the contract that the defender should do nothing to prevent the landlord's consent from being obtained. In place of that, however, before any answer could be received from Mr M'Kelvie, the defender entered into negotiations with other parties, with the result that on Saturday the 14th of November he called at Mr M'Kelvie's office and asked his clerk, the witness Merry, to return the letter, No. 17 of process. Merry states that he declined to do so, and the defender left saying that he cancelled the letter, and that the arrangement between him and the pursuer had fallen through. Accordingly Merry says that he never showed the letter to Mr M'Kelvie, who knew nothing about the matter until after the present action had been raised. In these circumstances the Sheriff-Substitute is of opinion that the defender acted in *mala fide* and in breach of his agreement with the pursuer, and that he has thus rendered himself liable in damages."

The Sheriff-Substitute awarded £10 as damages.

Upon 25th July 1892 the Sheriff (BLAIR) found that the pursuer had failed to prove that "the defender entered into an agreement with the pursuer to assign to him the lease of the premises in question sometime occupied by the defender, and to sell to pursuer a steam-engine and certain other plant for the sum of £15; therefore assoilzies the defender from the conclusions," &c.

The pursuer appealed, and argued—There was a bargain or contract between the parties. One wished to get rid of the premises, and the other expressed his willingness to take them. The bargain was thus completed. If the proprietor had refused to take the pursuer as his tenant, that might have been a different thing, but M'Kelvie never got an opportunity of considering whether he would take Kinnimont as tenant or not, and he was prevented having that opportunity by the defender's action. If *rei interventus* was necessary to the conclusion of the bargain, then there was sufficient by the letter written to M'Kelvie stating that the defender had secured a tenant for the premises. It had been held that the retention of a lease by the landlord, with a definite ish and entry, was enough to make a binding bargain—*Forbes* v. *Wilson*, February 22, 1873, 11 Macph. 454; *Ballantine, &c.* v. *Stevenson*, July 15, 1881, 8 R. 959.

The respondent argued—There was here no concluded bargain for the lease of the premises to Kinnimont as a sub-tenant. There was an agreement to take the engine and fittings by the pursuer, and an offer for the lease. The letter by the defender to M'Kelvie did not complete the bargain; it merely offered a tenant. Until M'Kelvie approved of the tenant there was no completed bargain, and the defender was entitled to resile; he had done so by getting the letter back from M'Kelvie—*Fulton* v. *Johnston*, M. 8446. As no completed bargain had been made, the pursuer had no claim for damages—*Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587; *Malcolm* v. *Campbell*, December 9, 1891, 19 R. 278.

At advising—

LORD TRAYNER—I agree with the Sheriff-Substitute. I think there was here a bargain or contract entered into between the parties, and that the defender has committed a breach of that contract to the damage of the pursuer. What the contract between the parties was, appears to me to

be plain enough from the evidence before us, both written and oral. Indeed, the oral evidence need scarcely be appealed to, for the pursuer's letter of 10th November 1891, No. 26 of process, sufficiently instructs the terms of the contract. By it the pursuer agreed to take the premises then occupied by the defender off his hands, to relieve him of the rent thereof till the expiry of his lease, and to pay him for the fittings in the premises, including an engine and boiler, for the sum of £15. It is said that this letter cannot be looked at in respect it is neither holograph nor tested. When rightly regarded, that letter did not require to be either, in order to make it binding or to make it evidence. As regards the purchase of the fittings, it was properly a writing *in re mercatoria*. As regards the premises, it was not a bargain to the effect that the defender should grant or the pursuer take a lease of the premises. It was merely a bargain that the pursuer should relieve the defender of a liability he was then under for the payment of rent to his own landlord. It was no doubt part of the agreement between the parties that the premises for which that rent was payable should be transferred to the pursuer, and both knew that this could only be done with the landlord's consent. The bargain about the premises came therefore to this, that the defender, so far as he was able, would aid the pursuer in obtaining the premises, and he was impliedly bound to do nothing which would hinder the pursuer in getting the necessary consent of the landlord. I think the defender so understood the bargain, and so agreed. In pursuance of that agreement, and in exchange for the letter I have referred to, the defender wrote the letter dated 10th November, No. 17 of process, to the landlord, in which he said he had secured another tenant for the premises, and asked, "as a great favour," that they would arrange "with him" for a lease. This letter the defender handed to the pursuer to be by him delivered to the landlord, and it is plain enough to my mind that in doing so he represented the pursuer as the tenant he had secured with whom the landlord was asked to make the new arrangement. It is said, however, that the bargain was not completed because the defender did not accept the pursuer's offer contained in the letter No. 26 of process. I think that letter was not an offer requiring acceptance. It was the written expression of a contract already made. The defender's signature to it would have bound him. But I think he testified his assent to the terms of that letter by his writing to the landlord in the terms in which he did, and by delivering that letter to the pursuer to be used by him in furtherance of the contract as clearly as if he had subscribed the agreement itself. What followed the making of the bargain was (without going into the details), that before the landlord had the opportunity of considering whether he would agree to the transfer of the lease, the defender announced to him that the transaction with the pursuer was off, and that the letter he (the defender) had addressed to the landlord was cancelled.

I think this was a distinct breach of contract between the parties—a breach committed by the defender for the purpose of enabling him, as it did, to make a better bargain for himself with other parties. For this breach of contract I think the defender is liable in damages to the pursuer. The amount of damages awarded by the Sheriff-Substitute seems to me to be very ample, and although I might have been disposed to have awarded a smaller sum, I do not feel called upon to interfere with what the Sheriff-Substitute has done. I think therefore that the Sheriff's interlocutor should be recalled and that of the Sheriff-Substitute affirmed.

LORD RUTHERFURD CLARK, LORD YOUNG, and the LORD JUSTICE-CLERK concurred.

The Court adhered to the Sheriff-Substitute's interlocutor.

Counsel for the Appellant—Kennedy—W. Thomson. Agents—Gray & Kinnison, S.S.C.

Counsel for the Respondent—Guthrie—Craigie. Agents — M'Call & Andrews, S.S.C.

Saturday, December 10.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MORE (LIQUIDATOR OF THE BURNT-ISLAND OIL COMPANY, LIMITED) *v.* DAWSON AND OTHERS.

Company—Liquidation—Power to Carry on Works—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 95.

The liquidator of an oil company applied to the Court under section 95 of the Companies Act 1862 to authorise him to carry on the company's business for six months, and to declare that the expenses thereby incurred should be a first charge on the company's assets. In support of the application the liquidator stated that the oil trade was then subject to a severe depression, which rendered the property of the company unsaleable except at a ruinous sacrifice; that he considered it of great importance that the works should be kept going for a time, until it was seen whether a sale could be effected on reasonable terms, or a favourable scheme of reconstruction carried through; and that the probable result of an immediate stoppage would be the sale of the works as a broken-up concern, whereas if they were carried on, there might be a chance of selling them as a going concern.

The great majority of the debenture-holders and unsecured creditors con-