ment; and it is without any exception. Now it is said, that the earlier act, 7 Geo. III. c. 27, does give a double assessment. I will even take it thus,—and it is impossible to put it stronger for the contention of the appellant:—Suppose that the act 1767 had in express terms enacted that certain heritors, owners, and occupiers of land (naming the lands) should be liable to a double assessment,—should be liable to be assessed for the parishes both of Edinburgh and of South Leith,—then I come to the act of 1845, and I find in § 46, that no owners or occupiers of lands are to be liable to a double assessment, or to an assessment in more parishes than one. Then comes § 91 of that act, which might not have been necessary had there been no contradiction, or apparent contradiction, or no inconsistency, or apparent inconsistency, between the provisions of that act and the previous acts. What does § 91 say: It states in express terms, that all provisions, laws, statutes, and usages, are to be considered as repealed, in so far as they are contradictory to, or "inconsistent with the provisions of this act." And it is worth considering, in inserting this proviso or this (as it were) saving clause, for the provisions of the act itself, (in that the legislature, so far as it might be contended that they were inconsistent with the provisions of the former acts, and that, therefore, they did not intend to repeal the provisions of the former acts), expressly mentions one local act saving that from repeal, and that all those laws, statutes, and usages, which are inconsistent with the provisions of the present act, shall be taken to be repealed, save and except an "act for the liquidation of the debt owing by the Charity Workhouse of the city of Edinburgh." It saves that act from repeal. All other acts generally inconsistent with the provisions of this act, are taken to be repealed. Therefore the parties setting up the earlier act as against this act, are in this dilemma,—that in proportion as the earlier act may be found to be more clearly inconsistent with the provisions of the 46th section, in exactly the same proportion is it clear that it falls within the 91st section; for, in that operation, it became a provision at variance and inconsistent with the provisions of this section.

My Lords, I think, with my noble and learned friend, that there is very great difficulty in seeing how, under the 35th section, the parish of South Leith could assess, for it says they are to assess, and that is the power which is given,—"It shall be lawful for the parochial board or boards of such parish or parishes to resolve that the assessment in such parish or parishes shall be imposed according to the rule established by such local act or usage,"—that is, supposing there is a local act or usage, then this parochial board is to be entitled here to make its assessment according to such local act and usage. But it is such assessment in the parish. "In the parish," here means, in this parish, or in any other parish to which any local usage or any local act may extend. I do not think it is necessary, however, to go into that topic at all. I consider that, taking the 46th section with the 91st section, and comparing the provisions which are set up as favourable to double assessment, by the contention on the part of the appellants, there is no room whatever for doubt. Then, that the assessment must be for Edinburgh, and not for South Leith, I think is too clear to require any further discussion.

Interlocutor affirmed with costs.

Second Division.—Lord Wood, Ordinary.—Atkins and Andrew, *Solicitors for Appellants.*—Richardson, Connell, and Loch, *Solicitors for Respondent Allan.*—Dodds and Greig, *Solicitors for Parochial Board of Edinburgh.*

MARCH 29, 1852.

JOHN HUTCHINSON, *Appellant*, *v.* Mrs. FERRIER or GORDON and Husband, as representing the late Charles Ferrier, Accountant in Edinburgh, *Respondents.*

Stamp—Proof—Lease, Missives of—*A question having arisen in an action of damages for wrongful possession of a piece of ground, and for using right of passage by it to a woodyard belonging to the defender, the pursuer, who claimed as tenant of the piece of ground under the town of Edinburgh, and who averred that he had been kept out of possession wrongfully, proposed at the trial to prove his right of tenancy by production of a series of letters from the chamberlain of the town of Edinburgh. These letters were objected to as incompetent evidence, in respect of want of stamp, and the presiding Judge sustained the objection.*

HELD (affirming judgment) *that the ruling of the Judge was correct; and* Opinion, *That the letters, even if competent evidence, were insufficient to prove the right of tenancy.*[1]

The late John Hutchinson, merchant in Leith, was proprietor of a piece of ground used as a woodyard, lying between the road leading from the south end of Morton Street to the Easter Road and Leith Links. On Hutchinson's death in 1830, his son, R. D. Hutchinson, succeeded

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[1] See previous report 13 D. 837; 23 Sc. Jur. 379. S. C. 1 Macq. Ap. 196: 24 Sc. Jur. 404.

to the yard, and shortly thereafter he conveyed it in trust to the late Charles Ferrier, who thereafter granted a lease of it to the appellant, to endure till Whitsunday 1837. At the time of becoming tenant of the yard under Ferrier, the appellant was, according to his averment, lessee under the town of Edinburgh, as proprietors, of a strip of ground lying along Morton Street. During his tenancy, the appellant, in 1832, made an opening through the wall between the strip of ground and the yard, and used it as an entrance or passage for the purpose of his business; but after ceasing to be tenant of the yard in 1837, he caused the opening to be closed up. This gave rise to litigation between him and Ferrier as to the right of access and right to the strip of ground, Ferrier conceiving that the right to these formed part and pertinent of the woodyard; but Ferrier was unsuccessful.

In 1843, Ferrier purchased the woodyard, and he then renewed proceedings (by declarator and interdict) for the purpose of having it found that he was exclusive proprietor of the right of access and of the strip of ground; but he was again unsuccessful.

The appellant then brought an action (in 1846) concluding for payment of £500 in name of damages, and in satisfaction, for the use of the piece of ground and passage during the period he had been kept out of possession.

In defence it was pleaded, *inter alia*, that the appellant had not disclosed in the summons, and had not exhibited, any title, either as tenant or otherwise, to pursue.

After a record was made up, the following issue was adjusted to try the case:—"Whether Hutchinson was tenant of the city of Edinburgh of the strip of ground, and whether Ferrier wrongfully took possession of a gateway in the wall of the strip as a roadway, and excluded the pursuer."

The case was tried by the Lord Justice-General and a jury on 26th December 1850. At the trial certain letters were put in by the appellant purporting to be leases of the ground by the City Chamberlain, and stating the letting to be at "present rent." Witnesses having stated that there was no lease, except those letters were leases, the defender objected to their reception as leases for want of a stamp. The judge sustained the objection, whereon the counsel for the pursuer declined to lead further evidence, and submitted to a verdict for the defenders, but tendered a bill of exceptions.

After argument on the bill of exceptions, the First Division of the Court, on 4th March 1851, sustained the ruling of the presiding Judge, and refused the bill of exceptions.

Hutchinson then appealed, maintaining that the judgment ought to be reversed, for the following reasons:—1. Because the presiding Judge incompetently directed the jury, that in consequence of the existence of the missives or letters referred to in Mr. Robertson's evidence, the pursuer's tenancy of the subjects referred to could not be proved without those letters.—Bell's Prin. 4th Ed. § 1187–1188; Ersk. 2, 6, 30; Stair, 2, 9, 4. 2. Because, supposing that the appellant was bound to produce the letters, the judgment was wrong whereby it was ruled that these letters constituted written leases, and that, therefore, they could not be given in evidence, because they were not stamped.—Tilsley on Stamp Laws, 2d Ed. p. 415; Chitty, by Atkinson, 3d Ed. p. 111; see also *Doe d. Hastings* v. *Waters*, 16 Law Times, p. 213; Bell's Prin. 4th Ed. §§ 1193, 1201, 1297; Ersk. 2, 6, 21, 24; Stair, 2, 9, 5, 6; Craig, 2, 10, 10; *Philips* v. *Hartley*, 3 C. & P. 121; *Doe d. Morgan* v. *Amos*, 2 M. & Ry. 180; Hunter on Leases, vol. i. Ed. 2, p. 389. 3. Because, even admitting that the letters were leases, and required a stamp, the appellant was entitled to prove his case by other evidence having no reference to those letters.—Chitty's Stamp Law, 3d Ed. p. 322.

The respondents supported the judgment on the following grounds:—1. Because the writings tendered in evidence by the appellant were such as by law require a stamp, and were, therefore, properly rejected as being unstamped.—Act 55 Geo. III. c. 184, § 2; *Atherstane* v. *Bostock*, 2 M. & Gr. 511—2 Scott, N. R. 637; *Burton* v. *Reevel*, 16 M. & W. 307—*Morgan* v. *Bissell*, 3 Taunt. 65; *Doe d. Hughes* v. *Derry*, 9 C. & P. 494; *Doe d. Philip* v. *Benjamin*, 9 Ad. & Ell. 650; *Pearce* v. *Cheslyn*, 4 Ad. & Ell. 225; *Wilson* v. *Smith*, 12 M. & W. 401; *Gordon* v. *Anderson*, 3 W. S. 1; *Prosser* v. *Phillips*, Bull. N.P. 269. 2. Because the use proposed to be made of the document in this case was not such as to entitle the appellant to have it received without a stamp, if in its own nature it required a stamp.—*Skene* v. *Spankie*, noticed in 1 Bell on Leases, 313, 4, Note c.; *Matheson* v. *Ross*, 6 Bell's Ap. Ca. 374; *Scott* v. *Burd*, 8 D. 25; *The King* v. *Inhabitants of Castlemorton*, 3 B. & Ald. 588; *Hawkins* v. *Warre*, 3 B. & C. 690; *The King* v. *Hall*, 3 Starkie, 68. 3. Because the existence of the leases being proved by the appellant's own witness, and the leases having been tendered in evidence by the pursuer, they became a necessary part of his case, and he could not otherwise prove his right of tenancy. *Fielder* v. *Ray*, 6 Bing. 332; *Reed* v. *Deere*, 7 B. & C. 266; *Vincent* v. *Cole*, 3 C. & P. 481; *Stephens* v. *Pinney*, 8 Taunt. 327; *Strother* v. *Bar*, 5 Bing. 137; Taylor on Evidence, 280, 303.

R. Palmer Q.C., and *W. Forsyth*, for appellant.—1. Were the documents leases? The town-clerk, in his evidence, said that he could not let for more than a year at a time, and the letters had reference only to a term of one year. The Burgh Regulations Act, 3 Geo. IV. c. 91, made a forfeiture ensue if a lease was for a longer term than one year. We are not, therefore,

bound to construe the correspondence in an illegal sense, and the letters must be taken to constitute distinct and separate leases for each year, and not to amount to one lease only, as the Lord Justice-General seemed to imply. The distinction is well known here between a lease and an agreement for a lease—which is this, that if the document, though having the form of an agreement, and expressly contemplating a subsequent formal instrument, yet amount in effect to a present demise or letting, by giving a present right of occupancy, it is a lease; if it do not create an actual tenancy, it is an agreement for a lease. Now, many cases prove, that if the lessor was under an incapacity to give a present right, this went to shew the document was only an agreement for a lease.—*Doe d. Coore* v. *Clare*, 2 T. R. 739; *Hayward* v. *Haswell*, 6 Ad. & Ell. 265; *Doe d. Bailey* v. *Foster*, 3 C. B. 215. The letters here cannot all be leases. Some are mere inquiries followed by verbal answers, and therefore are entirely verbal contracts, and need no stamp.—*Drant* v. *Brown*, 3 B. & C. 665. One is not signed by the lessor at all, and therefore is no lease.—*Doe d. Marlow* v. *Wiggans*, 4 Q. B. 367. The others do not amount to a present and actual tenancy. At the very most, none but the missives for 1839 could be held to be a lease. Nor can the letters be held to be even agreements for a lease. Are these documents, then, within the Stamp Act? Not being leases, they do not need a lease stamp; and if they are agreements, being for less than £20 of yearly value, no agreement stamp is required.—*Doe d. Morgan* v. *Amos*, 2 M. & Ry. 180; 1 Hunter's Landlord and Tenant, p. 389. Upon the whole, the documents were improperly rejected for want of a stamp. 2. Was no other evidence admissible? We admit, that if it sufficiently appeared that the contract was constituted by a written instrument, the latter must be produced. But holding that the letters were merely correspondence and not leases, how could the fact of a correspondence having taken place between the appellant and the city of Edinburgh, prevent him from proving his tenancy by entries in the city books, and by payment of rent?

[LORD TRURO.—Is a missive letter not a contract in writing? Is it not, in fact, the contract of letting?]

No; a missive is a mere communication in writing—at least here they amounted to no contract. Besides, the sole question to be proved was one of occupancy. The terms of the occupancy were of no importance.—*Augustien* v. *Challis*, 1 Exch. 280. The rent and the lease are quite distinct, and it was not necessary to go into the latter. Even in cases of ejectment, that is, between landlord and tenant, the fact of tenancy alone need be proved.—*Doe d. Wood* v. *Morris*, 12 East. 237. And that may be done by shewing payment of rent.—*R.* v. *Holy Trinity*, 7 B. & C. 611. Under the issue, no other fact required to be proved. And taking the evidence as it stands, that fact is made out, for the town-clerk said rent had been paid.

[LORD BROUGHAM.—Your counsel at the trial did not contend he had given evidence enough. The moment the Judge ruled that the letters could not be received, he retired.]

We say now the evidence was complete, as to the fact of tenancy, without the letters.—*Augustien* v. *Challis*, 1 Exch. 280. And the objection came too late, for the witness had already answered the question.—*Whitfield* v. *Brand*, 16 M. & W. 282. The evidence of payment of rent came out of the pursuer's witness, and, therefore, further evidence was superfluous.

[LORD TRURO.—The practice is this:—The defender tries to make out his case by the pursuer's witnesses if he can; and if he do so, it is enough; but if he do not, he can still prove by his own witnesses that there was a contract in writing, and then it must be gone into, and the former parole proof must be struck out.]

If the evidence was not sufficient as it stands, we were prevented at the trial from giving any more which might have equally well satisfied the issue. Besides, we were not bound to prove a tenancy for the whole period from 1837 to 1846, and therefore we were entitled to damages *pro tanto*. As it is impossible to hold all the letters to be leases, we were entitled, therefore, to prove the tenancy corresponding to the period where there was no lease, and to recover damages proportionally.

Byles, Serjt., and *Anderson* Q.C., for respondents.—The question between the parties was one of title or no title. The summons alleged that the pursuer was *de facto* entitled and the defender excluded, while the defender alleged that he was *de facto* entitled and the pursuer excluded. The question of title was, therefore, expressly raised by the pleadings. The issue was twofold—1. if there was a tenancy; 2. if, under any part of that tenancy, there was a wrongful intrusion. Though the intrusion was to apply to any part of the period, yet the title was to extend over the whole period, the tenancy being to be proved from year to year. To prove the *first* part of the issue, witnesses were called, and a foundation was laid for proving, not an agreement, but a lease from the city. It comes out of the pursuer's own witness during the examination-in-chief, that there were missives, and he was thereupon bound to produce these, because they were the best evidence.

[LORD CHANCELLOR.—The question of title might have been set up under the second part of the issue, but then the Judge stopped the pursuer before he came to that part.]

[LORD TRURO.—Yes; all that the pursuer had proved when the missives came out was, that he was tenant of something. The property had not been identified. The question seems to be,

then, if, the moment the written documents came out, he was bound to go into them at once, setting everything else aside.]

He was bound to go into them if they were leases. It was, then, necessary to see if they were leases; and the Judge, for this purpose, having certain information given him, held they were so. All that is necessary to constitute a lease in Scotland, is, that the subject, the rent, and the term, be stated.—Bell's Prin. § 1193. These requisites here were contained in this form—"The ground in Morton Street you now hold at the same rent from Whitsunday next."

[LORD CHANCELLOR.—But "present rent" does not state what was the rent. You can't import into each letter information derived *aliunde*.]

Bankton (2, 9, 4) does not say the amount of rent must be stated, but merely that "rent" must be spoken of.

[LORD TRURO.—Do you consider there is any difference between the law of Scotland and England as to what amounts to a lease? Here no formality whatever is necessary. Bacon's Abridgment (Lease) says, any words that shew an intent that one shall divest himself of the possession, and the other shall come into it for a determinate time, make a lease.]

Perhaps less formality is required in Scotland. Thus a mere memorandum signed by the lessee alone, is a lease.—*Murray* v. *Bain*, Mor. 15,179; 1 Bell on Leases, 313 (note). The cases cited to shew that the letters here were mere agreements for leases, all contained such words as "I agree to let," "I agree to grant a lease," &c.; but here the words are, "Am I to be a tenant," "Yes, you are to be tenant." There is here no agreement *de futuro*. The landlord says, "You can take the ground," and the tenant takes it. But even supposing the letters for 1839 alone amounted to a lease, then, by tacit relocation, the tenant would, for the future years, continue to hold on the same terms. We hold, therefore, each group of letters here amounts to a tack. They are not mere executory agreements, and are contracts only in the same sense as all leases are described as contracts in the law of Scotland.—Ersk. 2, 6, 20. A lease, when followed by possession, gives a real right against all the world.—1 Bell's Leases, 313, 4. Even a lease which is imperfect may be made good by a *rei interventus*; and what was at first an agreement for a lease, becomes a lease the moment it is acted on.—*Gordon* v. *Hall*, Mor. 15,178. So here, if these letters amounted at first only to proposals, they became leases by possession following.

[LORD CHANCELLOR.—Then what stamp was necessary?]

A lease stamp.

[LORD CHANCELLOR.—How can a document which needs no stamp, or has the proper stamp, so vary its character by reason of extrinsic circumstances afterwards occurring, as to become liable to a fresh duty? How can a stamp duty have a relation backwards?]

There may be difficulties in holding this, but similar effects are produced here sometimes in the case of cheques. 2. It is said, even though the letters needed stamps in questions between the parties, yet this was not necessary where they were used between third parties, or for a collateral purpose. But that doctrine of law depends, not upon the document being used between third parties, but upon the purpose for which it is used. Thus an unstamped document may be put in evidence to prove handwriting, but not for a purpose which goes to its essence.—*Matheson* v. *Ross*, 6 Bell's App. Ca. 374; *Evans* v. *Protheroe*, 2 M'N. & G. 319; *Scott* v. *Burd*, 8 D. 25. There was nothing collateral here. The pursuer was proving the fact of tenancy for the direct purpose of attacking our right. 3. If other evidence was admissible? No other evidence was admissible.—*Cotteril* v. *Hobby*, 4 B. & Cr. 465; *Smith* v. *York*, 16 Eng. Jur. 63; 21 L. J. Q. B. 53. It was not too late to take the objection here, for the appellant's case had not been made out. In *Whitfield* v. *Brand*, 16 M. & W. 282, the case was complete. See also *Fielder* v. *Ray*, 6 Bing. 332. The case of *R.* v. *Holy Trinity*, *supra*, was explained afterwards by Bayley J. in *R.* v. *Inhab. of Rawden*, 8 B. & Cr. 708. If the appellant, therefore, could not get through his case without making it appear that missives existed, he was bound to produce these missives.

[LORD CHANCELLOR.—Though the point is not raised in the pleadings, I wish to know—1. Whether the town-council could, by mere letters, let the property of the city in this way? 2. If so, Whether they could delegate this power to the chamberlain?]

The council had this power. The practice is, when an offer is made to the council, their acceptance is entered on the minutes, and this entry amounts to a completed lease without any other formality. And what the council could do, they could authorize the chamberlain to do. *Lastly*, Unless the admission of the documents would have led to a different result, no new trial can be granted.—13 & 14 Vict. c. 36, § 45.

Forsyth replied.—There is either nothing in the evidence to prove that the corporation had power to grant leases good against singular successors, or it proves our case. We must take the whole evidence, or none of it; if none of it, there is no evidence of power to let at all; if the whole, it proves the tenancy as it stands. As to *rei interventus*, it is absurd to say that a stamp-duty can be varied by matter *ex post facto*. It is said each group of letters is a lease. This cannot be so in at least two instances. The Judge was, therefore, wrong in ruling that they all amounted to leases.

[LORD BROUGHAM.—The reason may be wrong, and the ruling may be good.]

The Judge said, that not only were these letters leases, but our case lay within their four corners. Now, suppose these letters had been waste paper, could we have been prevented from proving a tenancy? The Judge was wrong, therefore, so far. It is said the signature of a lessee alone may make a good lease if rent is received, but the effect of that is merely by way of estoppel—it bars the lessor from quarrelling the lease. Yet, after all, this question is mainly one of "parcel or no parcel," *i. e.* whether the gateway, &c. used by Ferrier was part of that which was let to Hutchinson? Now, on looking at these letters, they do not define the ground at all, and the Judge never looked at them to see if they referred to this spot in question, as he was bound to do. [LORD CHANCELLOR.—Then, if the letters did not define the ground, *i. e.* if they were beside the point, why do you complain of their rejection?]

It is not because the Judge said they were immaterial, but because he would not allow us to go into any other evidence, that we complain.

[LORD TRURO.—There is another point. Your own pleadings shew that neither you nor the city were in possession of this spot of ground and gateway during the whole period, and yet you bring an action of damages for disturbing you in the possession. Now, how could the relation of landlord and tenant be created between you and the city in these circumstances? The city could no more let than it could sell what was in adverse possession.]

It was only as a matter of fact that a tenancy had never been created. But our pleadings merely say, that we were prevented having the full use of the ground let to us by the city, and surely that was a good cause of action.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case it was thought necessary by your Lordships to consider the different points which were argued at the bar. Since the argument, the attention of my Lord Brougham and of myself has been drawn by my Lord Truro to the frame and contents of the bill of exceptions, and upon that I apprehend now that our decision will turn. I always regret when we have to decide a case upon a question not argued at the bar; but still, as the point appears to be free from doubt, it is upon that point that the decision will rest. At the same time, I have satisfied myself that the merits of the case will agree with the question of form, and that, both upon the form and upon the merits, the order complained of must be affirmed with costs.

The question in contention, which has led to a great deal of litigation, and which has already in another form been the subject of appeal to this House, turns simply upon a right of way between two pieces of ground, a woodyard belonging to one party, and a strip of ground held under the city of Edinburgh by the other party; and the question now turns upon the right of the appellant to claim damages in respect of the wrongful entry and possession (excluding him from the possession) of that gateway, which, he asserted, formed a part of the ground which he held under the city of Edinburgh.

My Lords, when the case was originally argued, the two issues were directed which appear upon the record. Now, at the trial, two witnesses were examined for the pursuer, who had the affirmative, both of whom swore that there had been no lease for years granted expressly, but one of whom stated that the property had been held from year to year, and that there never was any lease of it. This is Robertson's evidence. There never was any lease to him. He was annually asked if he was to continue, and he answered, and ordinary missives passed every year relative to that ground, in the form of letters. The counsel for the defenders here objected, that in respect of the existence of these missives or letters which are in process, the pursuer cannot prove his tenancy otherwise than by their production. Then comes this very singular statement, which is very well calculated to embarrass anybody who has to decide this case:—"The following statement was merely to explain the facts for informing the Court in reference to this objection, but not as evidence to the jury." In point of fact, therefore, nothing went to the jury—it never got to the jury, and the question itself was never submitted to the jury. Then comes this statement—"Looks at letters." Who looks at letters? "They began in 1836 and go down till 1846. The first year from 1836 was at a rent of £16, and it has been the same ever since. Shewn two receipts for 1837 by Mr. Turnbull—these are for £8 each half-year, and it has continued £16 ever since, he is quite sure." Your Lordships will observe, that although it might be a fair inference here that it is the witness who looks at the letters, it is not stated, nor is it stated what the letters were. So far as we have gone, there is nothing whatever to identify any particular letter. Then "the Lord Justice-General, after argument of counsel, sustained the objection, that the letters or missives which passed between the city chamberlain and the pursuer, offered in evidence,"—[now, it does not appear that they were offered in evidence to begin with, for it is stated that they were only to instruct the Court, and not to be offered in evidence]—"are not stamped, and, therefore, could not be admitted as proving leases between Mr. Hutchinson and the city of Edinburgh, of the subjects in question, and that these being in existence, the tenancy cannot be proved without them." Your Lordships will observe, that here is no assertion that they are leases, or that they were tendered as leases; but the ruling is, that the letters offered in evidence were not stamped, and, therefore, could not be admitted as proving leases.

Now, it will be seen in a moment that the exception is to a different point. The exception is not to the ruling—the exception is this—"The counsel for the pursuer excepted to the above ruling, that the letters which passed between the city chamberlain and the pursuer, during the period in question, constituted written leases." There was no such ruling. He stated that to be the ruling, but the ruling which is the subject of the bill of exceptions is of a totally different nature. It is, that, not being stamped, the letters could not be admitted as proving leases, but there was no ruling by the Lord Justice-General that they did constitute written leases. Then it goes on—"and which not being stamped, could not be given in evidence, nor the contents thereof, nor the pursuer's tenancy proved without them:"—The consequence of which is, that the ruling is one way, and the bill of exceptions is another, and, therefore, does not meet the case:—"And it being stated by the pursuer's counsel, that in consequence of the deliverance of the Judge, he would not lead evidence, nor ask for a verdict, the jury did then, under the direction of the Judge, deliver their verdict finding for the defenders."

The appellant, therefore, upon that occasion, withdrew from the contest. He did not pursue the question as he should have done; he did not attempt to tender any other evidence, and therefore it appears clearly that there is nothing here which the House can deal with as regards the bill of exceptions. What are the letters? The letters are in an appendix; but (my Lord Truro having drawn our attention to the fact) although they are in the appendix, they do not form part of the bill of exceptions. On the contrary, there is not a single reference or single sentence to include them, or in any manner to cause them to form part of the bill of exceptions; and it is perfectly clear, when your Lordships come to look at the letters, that they could not have been tendered, either according to the real ruling of the Judge, or according to the bill of exceptions, because many of those letters which are in the appendix are no more leases, or even agreements for leases, than any paper upon your Lordship's table. They are in relation to the property, but in no respect, upon any construction, constituting either a lease or an agreement for a lease, and therefore it is perfectly clear that those letters so in the appendix, which do not form part of the record, are letters which could not properly have formed part of the record, according to the ruling in the bill of exceptions—and not forming part of the record, your Lordships are not at liberty to took at them. It has been ruled in this House repeatedly, from *Galway* v. *Baker*, 5 Cl. and Fin. 157, down to the *Bishop of Derry's case*, 12 Cl. and Fin. 641, that your Lordships are not at liberty to look out of the record, and that in cases of difficulty infinitely greater than that now before your Lordships. These letters, therefore, not forming part of the record, they cannot be looked at; and then there is no question to trouble your Lordships with.

My Lords, that would be quite sufficient for the decision of this case. But, as regards the merits of the case, I think it is equally clear. The merits stand thus:—The question to be proved was the tenancy, but it was not a question to be proved ordinarily between lessor and lessee, nor was it a common case in which a man had actually had demised to him property beyond dispute. But it was a question in which Ferrier, the defender, setting up an adverse title which he had not succeeded in establishing in himself, but setting up an adverse title, it became essential that the pursuer should have shown a title in himself, not in the ordinary way of holding simply as a tenant, but showing that he had from the city of Edinburgh a title superior to the title of Ferrier, because it really was a question of title in dispute. It was not a question of a clear undoubted demise by A to B, and then an entry by C,—but it was a case in which C had held during the whole period of the supposed tenancy, and therefore claimed to hold in his own right, and adversely to the city itself—therefore it was a question of a totally different nature. Consequently, in order to recover upon the merits, it would have been necessary for him to have shewn that he actually had held the property rightly under the city of Edinburgh. Now he has shewn no such thing, when the letters are produced independently of the question of title. I myself cannot be certain, my Lords, in the way in which this case is brought before your Lordships, whether the city of Edinburgh are not fighting this case in the person of the appellant, and taking this indirect mode of establishing their title as against the defender; I do not know that it is so, but I should think it not at all improbable that it should be so. But if they have taken that course, it is a mistaken course, and they must try their title in a very different way.

Now, my Lords, the way in which Mr. Hutchinson held this property—if he did hold it under the city of Edinburgh—was, by these missives or letters, a yearly letting. They were restrained from letting for more than a year—a yearly letting took place by letters, "Do you wish to continue for another year at the same rent?"—"Yes, I do;" or, "Am I to continue for another year?"—"Yes, you are." Ferrier was all this time enjoying the gateway in question. Now, it did not seem to be disputed at the bar that this property so held by Ferrier was capable by the law of Scotland of being demised. That point was not raised. It might have been made a question, whether you could demise that which was adversely in the hands of another person, and for which possession could not be given. Looking at the nature of a contract for a lease in Scotland, I shall say no more upon that point. It was admitted in that argument, that if the letters in question amounted to an agreement, and were not leases, then they did not require to be stamped;

so that the letting in that way was certainly considered to be valid. But it was urged at the bar, and at the same time in the pleadings, your Lordships find, that the question is always raised, whether or not the property was let.

Now, my Lords, when I come to look at these missives or letters—which I am now looking at for the purpose of satisfying your Lordships that you can decide upon the merits in perfect agreement with the strict rule of pleading to which I have referred—I find that it never could have been the intention of either of these parties to give to Mr. Hutchinson any right to this property which would enable him to proceed against Mr. Ferrier, or what is much more important, to proceed against themselves. If Mr. Hutchinson, under these missives, was at liberty to maintain this action, he could maintain an action against the city of Edinburgh for demising to him property which they had no title to do—and they might be liable to a similar action to this, with £500 damages laid, for not giving to this gentleman the possession of that gateway which formed part of that strip of ground, the whole of which was let at £16 a-year, from year to year. Now, my Lords, when we come to look at the letters, it is impossible to suppose that the parties had any such thing in contemplation as an actual letting which should give a right of that sort. Here is one of the letters—"I am not due you £64. I am due you the sum of £56, less whatever sum I am entitled for that part of the ground claimed by Charles Ferrier, and which sum is consigned in the Bank of Scotland in your and my own name. I cannot think you are serious in asking me to find security for a paltry sum of £16 a-year." Your Lordships see, therefore, that he claims a deduction from the sum which is due from him, in respect of that part of the ground claimed by Ferrier, "and which sum is consigned in the Bank of Scotland in your and my own name." So that there was a security actually provided, according to this letter, for the very thing which is now made the foundation of a claim for £500 damages against Ferrier, and that, as between lessor and lessee, explains the nature of the contract.

Then comes Robertson's answer—"Before accepting of your offer of the 3rd instant, which I received this morning, I beg to submit the following proposition, which is fair and reasonable in itself, and which has been approved of by the city treasurer—it is this, that you pay over to me at once the rent of the strip of ground at Morton Street down to the last term, allowing to remain in our joint names £2 each year of the said bygone rent, without prejudice, until the question in dispute is settled. You will thus have to pay me £49, and there will remain in the bank £7, the interest to remain in like manner till the question is adjusted." Now, my Lords, there is an express stipulation, not that Mr. Hutchinson is to have the ground at all events, and is to have the right of bringing an action against the city itself for not having performed the contract in the lease—not giving effect to the demise, nor giving any right of action against Ferrier, but stipulating for a very trifling sum, being set aside to answer the loss which should accrue if he did not get possession. What the parties therefore were looking to was this—You shall have the property if it is recovered from Ferrier, but if Ferrier will not give it up, then you shall have £2 a-year, which is the measure of its value, and that you will have secured to you in the way which is here pointed out.

Now, my Lords, there is also a letter of which the postscript is—"It may not be out of place here my remarking, that it would almost appear to any one the city was afraid to establish their right to the piece of ground claimed by Ferrier—otherwise, why not take possession of it after so long having had the favourable judgment of the Supreme Court, particularly as it is well known his only object is the keeping of the gateway into his property open, having let his woodyard to the present tenants with that entrance." So that, in writing this letter, he does not at all suppose that he has any right to enforce the possession of this ground as against Ferrier; but he rather taunts him, if I may use the expression, in this way—"I rather fancy you are afraid. Why do not you take possession of this ground when the title has been established as against Mr. Ferrier?" It is not therefore a right set up to demand as against the city the possession of the ground, nor the assertion of a right of action against Ferrier,—but it is calling upon the landlord to enforce his own title.

Then, my Lords, in a subsequent letter, he says—"In making the concession which the Magistrates and Council have agreed, I hope it cannot be said that I have been very unreasonable, knowing (as you do at least) that I have been kept out of a part of the strip of ground, and that the best part too, for eight years now, by Charles Ferrier, who claims it as his property, and who, for aught I know, may be able to establish his right to it; but I shall be sorry if he did." Here, then, my Lords, there is a concession required from the landlord by the tenant in consequence of an adverse claim, and the probability of an adverse title in this party to the property in question, and then an acknowledgment that that concession has been made to him. He thinks it will not be deemed unreasonable if he asks it in consequence of that adverse possession, and that adverse claim. I submit to your Lordships, therefore, that it appears perfectly clear, putting a fair and candid construction upon all this correspondence—looking at it, not as a Court of Law, which your Lordships are not entitled to do, but looking at it for the purpose of ascertaining whether the merits are with the party or not against whom your Lordships will probably decide—that this property was never intended to be demised in a way so as to create a tenancy absolutely

as between the city of Edinburgh and this gentleman, and that, therefore, upon that ground alone, he never, in the true sense of the question intended to be submitted to a jury, could have recovered the damages, or any portion of the damages, which he sought. I believe, my Lords, that my noble and learned friends will agree with the view which I have detailed to your Lordships. My Lord Truro will probably state more at large that which we are indebted to him for having pointed out upon the bill of exceptions, and which I have slightly referred to.

I move that your Lordships do affirm this order with costs.

LORD BROUGHAM concurred, and merely referred to Lord Truro's written opinion, with which he entirely agreed.

LORD TRURO.—My Lords, after what has fallen from the other noble Lords, and also from a consideration of the ruinous litigation which has been going on respecting the property in question, I think your Lordships would be well satisfied in pronouncing your judgment, shewing to the parties that you have considered the merits of the case, as well as the more formal parts of it; and upon every part of the case, as it appears to me, the judgment which my noble friend on the woolsack has proposed to pronounce upon the present occasion, is one consistent with the law and with justice.

Before entering upon the consideration of the precise points in the judgment, it may be convenient to review the circumstances out of which the litigation has arisen.

The appellant's father, John Hutchinson, was the owner, and also the occupier, of a piece of ground used as a woodyard, and he at the same time occupied an adjoining piece of ground as tenant under the corporation of Edinburgh, sometimes under a formal lease, at other times under a yearly letting.

By 3 Geo. IV. c. 91, §§ 5 and 8, the corporation is restricted from letting the corporate property for more than a year, except by public roup. Upon the death of the appellant's father, the property, which had belonged to him, by force of some judicial proceedings came under the control of John Ferrier, who afterwards became the owner of it, and the respondent claims under him. Upon the death of the appellant's father, the appellant himself came into the occupation of both properties, holding the one as tenant under Ferrier, and the other under the corporation.

The plot of ground in dispute lies between the two properties, and the question is, of which of the adjoining properties the plot forms a part.

It is to be regretted that there is no written evidence of title on either side, nor any evidence of enjoyment as to the disputed spot prior to Whitsunday 1837, except during the time when the same person occupied both the adjoining properties. Since 1837, it is the case of both parties, and is admitted on the record, that the respondent has been in exclusive possession of such disputed spot, and the woodyard,—the appellant having during the same time been in the occupation of the adjoining ground under the corporation of Edinburgh, in whose right the appellant claims such ground.

The respondent states, but of which there is no proof, that the title-deed of the corporation states the length of their ground, and that length so stated will be satisfied by excluding the disputed spot. By reason, however, of the absence of title-deeds, and of all evidence as to enjoyment when the respective premises were occupied by distinct persons, the case as to title is left very short of proof.

Under the circumstances, the present suit is instituted against the respondent to recover damages by way of compensation, in respect of his having exclusively occupied the disputed spot from Whitsunday 1837 to Whitsunday 1846. The appellant in his condescendence, founds his claim upon the fact, that he was the tenant of such ground under the corporation, during the period for which he claims compensation. There were two issues for trial. The *first* was, whether or not, during the period from Whitsunday 1837 to Whitsunday 1846, the pursuer was tenant of certain grounds there described, the real question being parcel or no parcel as to the disputed spot of ground. The *second* was, whether the respondent, during the period mentioned in the first issue, entered upon that ground, and wrongfully enjoyed and possessed it.

The affirmative or *onus* of proof upon both issues, was upon the appellant. It may be doubted whether the issues were so aptly framed to try the real point in dispute, as they might have been. The object of the issues would seem to have been to ascertain—1. Whether the disputed spot formed part of the ground belonging to the corporation of Edinburgh: but, under the terms of the issue, a title to ground, answering the description in the issue, might have been proved without the evidence shewing whether the disputed piece of ground formed a part. 2. Supposing the title of the corporation to such spot was established, still, having regard to the admitted fact, that at the date when the appellant's claim commences, that is, at Whitsunday 1837, and throughout the entire period embraced in the claim, that is, up to Whitsunday 1846, the respondent was in exclusive adverse possession of such disputed spot, claiming title,—still it would remain a question, whether the corporation had let such spot to the appellant. 3. In regard to time, the issue is in terms entire, and not distributive, although it might be that the appellant was tenant of the disputed spot for a part of the time only. That it was intended to be entire, is most

probable, from the form of the second issue, which is, whether the respondent, during any part of the time aforesaid, possessed the disputed spot; and upon that issue, a finding of an entry and possession by the respondent during a part of the time, would be inconclusive and nugatory, unless the first issue was entire. The form of the issue, however, may be accounted for when it is remembered, that in fact there was no variation in the circumstances from Whitsunday 1837 to Whitsunday 1846, the period to which the inquiry was confined.

The issues as framed, when applied to the admitted facts, seem to give rise to the following questions—*1st*, Is the disputed spot part of the ground belonging to the corporation? *2d*, Was it included within the letting by the corporation to the appellant from Whitsunday 1837 to Whitsunday 1846? *3d*, Inasmuch as such disputed spot was during the whole period of the letting (that is, from Whitsunday 1837 to Whitsunday 1846) in the adverse possession of the respondent claiming title, even supposing the spot did belong to the corporation, and was intended to be included in their letting to the appellant, it would be questionable whether such letting in point of law constituted the relation of landlord and tenant, in regard to such disputed spot.

In the Scotch law, the word "tenant" is synonymous with lessee, and is not satisfied by a holding at will or by sufferance, as it is in the English law; and the word "missive," in the Scotch law, imports an interchange of written documents between persons, by which a contract is created. I would also observe, that by the Scotch law, any note or memorandum in writing which imports the intention of the parties to deal with the possession, whether signed by both or only one of the parties—and it does not matter which party may sign—operates as a lease where possession has followed. It is also material to observe, that a lease, however formal, passes no interest in the land, but operates merely as a personal contract, until possession is acquired by the lessee under it; and the granter warrants not only the title, but the possession of that which he lets, and is liable to damages if he does not bestow possession on the lessee; and possession by the Scotch law is of much more importance in perfecting titles of every sort to land, than by the English law.

Now, my Lords, upon a reference to the record, it will be observed, that the proceedings upon the trial, and the bill of exceptions, are not set forth satisfactorily or formally. One of the exceptions to the ruling of the Judge is, that he held certain letters or missives to be inadmissible in evidence; but it is only to be collected inferentially, that any, or if any, which of the letters were ever tendered in evidence, or considered as comprised within the principle of rejection laid down by the Judge, the documents set forth being subject to very different constructions and considerations.

My Lords, it will be proper to attend to the precise manner in which the documents in question came before the Judge, and the manner in which the objection to them arose. The appellant called Robertson to prove the letting, and he said that he knew the property occupied by the appellant, and that he had occupied it from year to year,—that there was never any lease to him,—he was annually asked if he was to continue, and he answered,—and the ordinary missives passed every year, relative to the ground, in the form of letters. Now there is no suggestion throughout the case, of any verbal letting; and the question is, whether or not the effect of Robertson's evidence is, that the letting took place by writing—that is, by entry, or letters, or missives. If such was the effect of the evidence—the issue being, whether the tenancy included a precise and definite spot—it seems to follow, that the only evidence against a third person, that such letting did include the disputed spot, would be the written documents. Much might have been evidence in a question between the lessor and lessee, by way of admission, which would not be evidence against a person claiming adversely, and that in a question of parcel or no parcel, and in relation to a spot of which neither the corporation nor the appellant had been in possession during the term.

My Lords, it appears by the record, that upon the statement by Robertson, that ordinary missives passed annually relating to the ground, in the form of letters, the respondent's counsel required the missives to be produced, to shew what was comprised within the letting or demise—or, in other words, whether it included the disputed spot. The case does not state that the appellant's counsel objected to produce them, but proceeds by saying, "Looks at letters. They began, &c., *ut supra*." Then, in the appellant's case, it is thus stated—"It is proper to explain, that the letters were not produced in process by the appellant, or tendered in evidence by him." And again, "They were not offered in evidence by the appellant." It is not easy to collect the precise effect of the statements set forth in the case. It is not said that the documents were tendered in evidence, but the contrary is rather to be inferred from the words which follow, and which is a part of the statement,—that they were offered for the information of the Court, and not as evidence to the jury. The record proceeds in the words—"Looks at letters." It is not said who looks, nor at what letters, nor who produced or identified them. I presume it is meant that the Judge looked at them. The case proceeds with the statement of facts of which no evidence is given, and it does not mention who stated the facts. It is said, "The first year from 1836 was at a rent of £16, and it has been the same ever since." The record proceeds thus:—

"Shewn two receipts for 1837, by Mr. Turnbull." It is not said by whom or to whom such receipts were shewn, nor by whom produced, nor how authenticated. The word "shewn" would seem to mean, shewn to the Judge; but the latter words of the statement, "he is quite sure," must refer to some one else—most likely the witness Robertson.

There having been no statement that the letters had ever been tendered in evidence, or that their admissibility had been objected to, the record states,—"The Lord Justice-General, after argument of counsel, sustained the objection, that the letters or missives offered in evidence are not stamped, and therefore could not be admitted as proving leases of the subjects in question." Now, whether this ruling applied generally to all the letters which had been shewn, or only to such as imported an agreement to let or to take, may be uncertain, but the Judge's remark could not, with equal propriety, be applied to all the letters that are afterwards set out, some of them having nothing in them importing either a letting or a taking.

Now, my Lords, it is essential to the validity of a bill of exceptions, that it should set out, and authenticate by the Judge's signature, the letters or written documents which the Judge rejects, especially in a case in which the propriety of the rejection depends upon the contents of each letter or document. Upon this occasion, the Judge's signature does not purport to authenticate any letters or documents; but after the bill of exceptions is set out, there is a statement, unauthenticated by any signature, to the effect, "That the following are the missives or letters referred to in the bill of exceptions;" and then follow several letters of very different import and effect from each other.

Unless the Judge's signature can be deemed to authenticate the letters which were included within this ruling, I think the House cannot deal with this exception at all. There is no rule more inviolably observed, than that the merits of exceptions to a Judge's ruling must be decided upon with reference to the matter apparent upon the record, and that the appellate Court will never look beyond the record, and the House cannot go out of the bill of exceptions to inquire to which of the letters in particular it did apply. My noble and learned friend has referred to the cases which are distinct authorities upon that part of the case, namely *Galway* v. *Baker*, 5 Cl. and Fin. 157; *Gordon* v. *Graham*, 8 Cl. and Fin. 107; and *Lord Tremleston* v. *Kemmis*, 9 Cl. and Fin. 749, 771.

My Lords, I have inspected the original petition of appeal presented to the House, which is in manuscript on parchment, and which purports to set out the record of the bill of exceptions. That document does not, however, set out the letters, but a printed paper is annexed to the petition, which sets out the letters, and which has the name of "Walker," an officer of the Court, attached to it. The appearance of the document, I think, imports that the copy of letters did not form part of the record signed by the Judge, nor was annexed to it, nor authenticated by the Judge's signature. But assuming the letters which were rejected to be sufficiently authenticated by the Judge's signature, still I think the ruling must be deemed to apply to those letters only which contain expressions importing a contract to let or to take, and which, by the Scotch law, would operate as leases. The Judge sustained the objection to the admissibility of the letters as proving leases, because they were not stamped as leases; and, if they were tendered as proving leases, I think he was right; and certainly the Judge's language imports that the letters had been offered in evidence as proving leases, and the ruling only excludes them as proving leases. If the appellant either offered the letters in evidence, or was desirous of using them for any other purpose, that other purpose should have been stated, and the Judge should have been called upon to decide upon their admissibility for the purpose stated. But the Judge having held them to be inadmissible as proving leases, no statement was made of their being offered for any other purpose.

My Lords, I have before noticed the assertion of the appellant, that the letters never were offered in evidence on his part, and it must be admitted that the record does not state that he ever did; and the fact is to be inferred only from the expression of the learned Judge in delivering his opinion. Unless the contrary of the appellant's statement appears, that the letters were never offered in evidence on his (the appellant's) part, the appellant cannot be permitted to except on account of the rejection of documents which he never offered as evidence, and I think that the exceptions can only be maintained by the appellant's establishing that the rejected letters were admissible in evidence as proving leases, although not properly stamped as leases.

My Lords, it was also remarkable that the counsel for the appellant, in his reply, strongly urged that the letters had no reference to the spot in dispute, and persisted in the assertion even after my noble and learned friend opposite arrested his attention to the effect of his objection; and the letters are certainly fairly open to objection in this respect, but the objection operates against the appellant. Among other irregularities apparent upon the record, it will be seen that the counsel, in stating his exception to the Judge's ruling, affected to repeat the Judge's direction. But the Judge having ruled that the documents were inadmissible as proving leases, the exception imputes to the Judge the having ruled that the letters constituted leases. This variation was very irregular, because the Judge who finds his ruling correctly stated in one part of the record, may be taken off his guard by his expressions being varied in another part, and his signature

may be obtained without the variation being called to his notice. Such a course should be narrowly watched and checked.

Now, my Lords, in the result, I think Robertson's evidence proved the letting to be by writing. Regard being had to the question to be tried, I think that the appellant was bound to produce such writing—that such of the documents as tended to prove, or were tendered in evidence to prove, a letting, or an agreement to let, were inadmissible unless stamped,—and that such letters as were not evidence of a letting of ground which included the disputed spot, were *res inter alios acta*, and not receivable at all against the respondent, and the rejection, therefore, not the subject of exception. The terms of the Stamp Act, 55 Geo. III. cap. 184, are—"Lease or tack, &c., at a yearly rent not amounting to £20, £1. Lease or tack of any kind not otherwise charged in this schedule, £1: 15s." The appellant relies upon a part of the schedule which speaks of agreement, minutes, or memorandum of agreement, made in England or Scotland, without any clause of registration, where the matter thereof shall be of the value of £20 or upwards, £1. The appellant contends, that the documents in question amount only to agreements, and the subject-matter is under the value of £20, and therefore is not subject to an agreement stamp. But, upon reference to the authorities, it will be seen as quite clear, that, contrary to English law, an agreement to demise, however informal, by whomsoever signed, or whether signed or not, is a lease, and that such agreements require to be stamped as leases.

The result, my Lords, of the present appeal, however, will not depend altogether upon the question, whether the letters were improperly rejected, inasmuch as, by 13 and 14 Vict. c. 36, § 45, it is enacted, "That it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived." It therefore must be considered, what effect ought to have been given to the letters as maintaining the issue on the appellant's part, if they had been received in evidence and submitted to the jury; and, for that purpose, regard must be had to the precise question raised by the issue.

I am inclined to think, that the fact, that at the commencement of the period from which the appellant claims to have been tenant—viz. Whitsunday 1837 throughout to its termination in Whitsunday 1846—the respondent was in entire and exclusive possession of the ground in dispute, is decisive of the present case, as, by the Scotch law, even the most formal lease or tack does not give any possessory interest in the land which purports to be demised, until the proposed tacksman or lessee entered into possession of the land, actual or constructive; and, in this case, there was neither,—the disputed spot, as shewn by the record, being at the time in actual adverse possession of another person throughout the whole period of time—not therefore admitting either actual or constructive possession on the part of the lessor or lessee. I think there is no evidence even of a constructive possession; because, from the time that the appellant ceased to hold and occupy as tenant under the respondent—that is, after Whitsunday 1837—from that time the respondent has been in possession of the disputed ground, and there is no evidence that, at any antecedent period, any person occupied the disputed ground who did not at one and the same time hold under the owners of the land on each side.

It may therefore be said, my Lords, that although there may not be a case to negative the title of the corporation to the disputed ground, there was certainly no affirmative evidence given, either of title or possession, on the part of the corporation, or of the appellant who claims under it. I can discover no authority in any Scotch law books tending to support a claim of the nature of that urged by the appellant under the lease, where possession has not been had under it of the ground in dispute; but it seems to me, that even if evidence had been given of the title of the corporation to the disputed spot, the circumstances connected with the possession would have repelled the appellant's claim; and that, even supposing there had been an instrument clearly purporting to demise the spot in question, the appellant would have had no case against the respondent; and that he could neither have maintained a process of removing, which is equivalent to ejectment, against the respondent, nor any other remedy for damages in the nature of rent or mesne profits, but that his remedy would have been confined to the corporation, and that the process of removing could only have been maintained by it.

I think further, my Lords, that a very serious question exists, whether the disputed spot was included in the demise by the corporation to him, during any part of the nine years in respect of which he claims in the present case; and regard being had to the knowledge of the appellant, year after year, that he could not get possession, still greater doubt would have arisen as to the land having been demised for each year of the whole term. The authorities that I have referred to, namely, Erskine, pp. 362 and 371, and Stair, 3, 2, 6, appear to have a material bearing on the question of the appellant's claim against the respondent, in relation to the effect of the respondent's possession of the disputed ground during the whole of the nine years, quite independent of any other question; because, if the absence of possession under the circumstances would have precluded the appellant's right to a verdict under the issue of tenancy, even if the letters

had been received in evidence, the present appeal must be dismissed under the authority of the statute.

The question, however, my Lords, remains to be considered, whether there was sufficient evidence to warrant a verdict that the disputed ground was let to the appellant under the description set out in the issue. Supposing the letters from which the letting is to be collected had been received in evidence, it seems to me that the letters either leave the point uncertain, or negative the disputed ground being included. The first letter, which contains nothing very material, only speaks of "the area in Morton Street." The letter is dated 28th January 1836. The second letter, dated 8th February 1837, which relates to the letting from Whitsunday 1837 to Whitsunday 1838, refers to "the property occupied by you in Morton Street." Of course this meant, occupied under the corporation, the appellant at the date being an occupier under the respondent, as also under the corporation. In the letting from 1838 to 1839, it is, "If I am to continue your tenant in Morton Street." The answer by the chamberlain is, You may remain "in the premises possessed by you." Now, this time, it is clear that the disputed ground was not possessed by the appellant. It was in the actual possession and occupation of the respondent. Then, in the letting from 1839 to 1840, the appellant writes, "If I am to be continued as tenant in the strip of ground in Morton Street, Leith, at the rent which I now possess it at." The answer speaks of the "property belonging to the city of Edinburgh in Morton Street." Then, in the letting from 1840 to 1841, it is asked, Do you intend to continue tenant in the property "presently occupied." Those words are expressly introduced by the corporation. At this time the appellant did not occupy the disputed ground. The answer still farther confirms that, by talking of ejecting Ferrier, under whom the respondent claims. From 1841 to 1842, the language is, "Tenant in the property presently occupied." The answer is, I shall remain tenant "of the strip of ground in Morton Street." From 1842 to 1843, the language is, "premises occupied by you." There is no other evidence of an answer; but there is an indorsement of what purports to have been intended as an answer, but it is doubtful if it was ever sent. It begins, "I have received your letter of yesterday," which would purport to be written on the 28th January; but the next letter refers only to a letter of 3d February, and speaks only of "the strip of ground in Morton Street." There is no evidence of a letting this year. From 1843 to 1844, there is no evidence; and the next letter speaks of the "property in Morton Street;" and in another part the appellant speaks "of the premises I have so long possessed." The postscript, which my noble and learned friend read, shews that neither the corporation nor the appellant was at this time in possession, as the appellant asks why the corporation does not take possession. From 1844 to 1845, the only part of the letter that is material, says, "Knowing, as you do at least, that I have been kept out of a part of the strip of ground by Ferrier, who claims it as his property, and who, for aught I know, may be able to establish his right to it; but I shall be sorry if he did." Indeed, to suppose, after a review of these letters, that the corporation are writing to this gentleman as to "property which you presently occupy," and he is writing to them in the same language,—and then his saying, "Why do you not take possession of such and such property? I am afraid Mr. Ferrier may establish rights to it, though I shall be sorry for it,"—and then to contend, that as to that particular disputed spot so out of possession, and to which another was claiming an adverse title, the corporation intended to include that within the general description of "premises in Morton Street,"—seems to me to be attended with very considerable doubt; and it will be seen, that there is no description in any part of those letters of a letting by the corporation, which shews that the disputed spot was comprised in the letting. Therefore it was said that there was considerable plausibility in the objection which was urged by the counsel on the part of the appellant, that in truth the letters did not apply themselves to the issue—namely, whether the disputed spot was parcel or no parcel of the piece of ground generally described in the letting by the corporation. I repeat, that that objection was rather against the appellant, than for him.

Attending to the circumstances of the case, and considering that the respondent was throughout, after the appellant ceased to be his tenant, in obstinate adverse possession of the disputed spot, I cannot deem it probable that the corporation should intend to demise the spot to the appellant, and thereby give, year after year, a claim for damages, by reason of his being kept out of the possession of such disputed spot. It would seem to be a fair intendment, that the corporation let only what was in its possession, or in the possession of the appellant, its tenant at the time of the letting. I think the letters, if received in evidence, would not have maintained the affirmative issue of the appellant, and that the jury ought, upon such evidence, to have found a verdict for the respondent. It cannot properly be said or surmised that the appellant might have had other evidence, which, if the letters had been received, he might have given, and which, when coupled with the letters, would have maintained the issue on his part; because, if any such evidence was in existence, the appellant was bound not to leave its existence, and its probable effect, to conjecture, but he was bound to tender it in evidence, that the Judge might see what it was, and judge of its effect, and that a court of error or revision might see how far the letters, if

received, aided by such other evidence, ought or might reasonably be supposed to have affected the verdict.

Now, my Lords, no observation arises in regard to the effect or value of the parole evidence independently of the letters, because the appellant not only did not request that evidence to be submitted to the jury, which he was bound to do, but he in express terms withdrew it from the jury, and declined to ask for a verdict; and further, there is no exception upon the ground that that evidence was not submitted to the jury, and, under the circumstances, there could not be any such exception.

My Lords, the remaining exception refers to the opinion expressed by the Judge, that the missives or letters being in existence, the tenancy could not be proved by any other evidence. Upon this point, I submit to your Lordships that no exception lies, and that it was the duty of the appellant's counsel, if he had any other evidence which he was prepared to contend ought to have been received in maintenance of the issue, he was bound to produce it, and if rejected upon its being tendered, to except to the rejection; and that it was not competent to the appellant to rest upon the opinion so expressed by the Judge. The respondent had a right to see what that evidence was; and he might not have objected to it, or might have waived any objection, although the evidence might have been objectionable, preferring to rely upon some answer to it, or upon its failing to satisfy the jury, rather than to risk the case upon the validity of the objection; but by the appellant choosing to rest upon the opinion expressed by the Judge, the respondent was deprived of the exercise of that discretion, and the Judge could not waive the production to the prejudice of the respondent.

Upon the whole, my Lords, it appears to me, by the appellant's evidence, that the letting by the corporation was by writing, and that as the issue was a distinct precise issue, whether a specific defined spot of ground was included in the demise, the appellant was bound to produce the written document by which the demise had taken place. The distinction is obvious between the evidence receivable to prove the mere fact of A being tenant of B, where the subject of the tenancy is undisputed, and where the sole question is, if A is tenant of some precise disputed spot—in other words, where the question is, parcel or no parcel of the land let. I also think that upon the bill of exceptions, even if it sufficiently appears that the letters were at all offered in evidence, it must be taken that they were offered as proving leases, and for no other purpose, and that so offered, they were properly rejected, not being stamped. I also think that the bill of exceptions ought not to be allowed, because the letters—the rejection of which is the ground of the exception—do not sufficiently appear upon the record to enable the House judicially to apply the ruling to them. It also appears to me, my Lords, that if they had been read to the jury, they did not furnish sufficient evidence to warrant a verdict that the ground purporting by the letters to be let, comprised the disputed spot: That if the letters did purport to let the disputed spot to the appellant, there was no sufficient evidence of title in the corporation to that spot, to warrant a verdict. Further, my Lords, regard being had to the fact, that neither the corporation nor the appellant were in possession of the disputed spot during any part of the time mentioned in the issue, I think even a formal lease would not, *quoad* the disputed spot, have created the relation of landlord and tenant, as between the corporation and the appellant, in a sense that would sustain the present suit. I am also of opinion, that the ruling of the Judge, that the tenancy could not be proved by any other evidence, did not furnish a valid ground of exception, for the reasons I have stated.

Upon the whole, my Lords, I entirely concur in the view which is taken by my noble and learned friend upon the woolsack, and also submit to your Lordships, that this appeal ought to be dismissed with costs, and that the judgment of the Court below ought to be affirmed.

Interlocutor affirmed with costs.

First Division.—G. H. Lang, *Appellant's Solicitor.*—Evans and Clode, *Respondent's Solicitors.*

MARCH 30, 1852.

THE EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY, *Appellants*, *v.* JOHN LEVEN, W.S., *Respondent.*

Lands Clauses Act—Statute 8 and 9 Vict. c. 19—Clause—Construction—Petition to Sheriff, Competency of—Process—*A railway company entered into an arbitration with A, a landowner, as to the price of land to be taken by the company. A subsequently refused to abide by the decree-arbitral, and brought a reduction of it, in which he succeeded; but before decree of reduction was obtained, A served a notice on the company, under* § 36 *of the statute* 8 *and* 9 *Vict.*