HOUSE OF LORDS.

Friday, March 8.

DUKE OF HAMILTON *v.* BUCHANAN.

(*Ante*, vol. xiv. pp. 253, 545.)

Landlord and Tenant—Lease—Constitution of Lease-offer— Consensus ad idem placitum.

Two offers were made for a lease of a farm, neither of which was accepted or rejected in writing; and possession followed by the offerer, who ascribed his possession to both offers. The landlord ascribed it to the second alone. Both parties were in *bona fide* in their averments. *Held* (*aff.* judgment of Court of Session) that there was no *consensus ad idem placitum*, and no completed contract between the parties.

This case was reported in the Court of Session, *ante*, vol. xiv. pp. 253 and 545.

The defender appealed to the House of Lords, and the pursuer took a cross-appeal, but did not insist in it.

At the conclusion of the argument on behalf of the appellant in the original appeal, their Lordships delivered judgment as follows:—

Lord Hatherley—My Lords, the present case comes before your Lordships under rather peculiar circumstances, from the nature of the demand and of the defence, and the consequent action of the Court below with respect to this litigation in all its aspects.

The Duke of Hamilton endeavoured by his action to enforce the taking of a lease by the appellant, whose case we have just heard argued upon the terms of a certain document signed by him on the 12th of September 1873. The appellant Mr Buchanan insisted that he was not to be bound by the terms of that document of the 12th of September 1873, unless there were also incorporated thereinto, or taken as part of the agreement that he had entered into with the Duke, a certain other document of the 14th August 1873, which I shall have presently to refer to, which he said was the foundation of the subsequent and final agreement of the 12th of September, and formed a part of the agreement which he so entered into with the Duke.

In the course of the proceedings below, the Lord Ordinary in the first instance decided, not receiving evidence in the cause but upon the pleadings as they stood before him, that the Duke's case was established as he had put it, and that Mr Buchanan, the defender in the action, should be compelled to take a lease upon the terms of the agreement of the 12th of September. Subsequently, when it was brought before the Inner Division—the Court of Appeal—that interlocutor of the Lord Ordinary was recalled, and the Court thought, upon the case being brought before them, that it was desirable that the case should be more thoroughly sifted, that further inquiry should take place, and that evidence should be led in respect of the litigation between the parties. That course was accordingly taken; evidence has been led—a considerable portion of it documentary, but a considerable portion also *viva voce*—evidence of which a very large part seems to have very little relevance to the matters in issue between the parties, and has therefore very properly not been read by the counsel at your Lordships' bar. The result upon the evidence so led was, that the Court came to the conclusion, when the matter was brought before them, that there never had been a *consensus* between the two parties with respect to the alleged agreement as to the taking of the farm of the Duke of Hamilton, which is the subject of the action—that neither had the one side established that the agreement of the 12th of September 1873 was final and complete between the parties as being agreed to on both sides, nor, on the other hand, had Mr Buchanan established that the agreement was what he said it was, namely, an agreement to be found in the offer he had made on the 14th of August 1873 and the document of the 12th of September in their conjoint operation, and that therefore the parties not being found to have come to a common *consensus*, the decision must be in accordance with the principles in a like matter of all civilized countries. Exactly the same principle prevails here as prevails in Scotland upon this particular point, and common sense dictates it, that where you have not found the parties coming to a common agreement, nothing can be done—there exists no agreement—the result is that they must both be left where they were at the commencement of the litigation. Unfortunately, in this case there may be difficulties and disadvantages attached to that which I do not enter into, because it appears to me, my Lords, that the last interlocutor pronounced in the cause by the learned Judges in Scotland provides, not for complete and entire justice between all the parties, but as far as it can provide for the result of this disastrous termination of the intended agreement between the parties.

Now, my Lords, it will not take me long to go through the more important matters which must form the ground of our conclusion in the case which we have just been hearing so ably argued. The Duke of Hamilton was minded—or rather the trustees, Sir Claude Scott and Mr Padwick, were minded—to let a particular farm. They had many farms on hand, as appears by a report made by Mr Robertson, their factor, but they were wishing to let a particular farm, which was about soon to become unoccupied, at a place called Flemington, and which had been in the occupation of one Archibald Russell. They were taking steps to let this farm; they proceeded, in the first instance, by way of advertisement, and they inserted an advertisement in a newspaper, which runs thus in their appendix—"Excerpt from advertisement in the *Glasgow Herald* newspaper of August 13, 1873, of farms to let on the Hamilton Estates in Lanarkshire." Amongst these farms advertised as being to let, one of them is thus described—"On the Hamilton estates, in Lanarkshire, for nineteen or such number of years as may be agreed upon, with entry to the arable land at Martinmas 1873, and to the houses and pasture at Whitsunday following, in Cambuslang parish, Flemington, as presently occupied by Mr Archibald Russell, containing about 460 acres, six miles distant from Glasgow. The present tenant is not to be an offerer." Then there was a description of

what the land was. Then there came a clause, which is perhaps not wholly unimportant—"The highest or any offer may not be accepted, and the measurements are not guaranteed. Further particulars will be given and offers received by Mr Stewart S. Robertson," who was then what is called "chamberlain"—that is, something like what we should call a steward—"at Hamilton Palace till 15th August next."

The next part of the narrative is to be found in the evidence of Mr Buchanan, the present appellant in the original appeal. He tells you that he saw the farm of Flemington advertised on the 13th of August, and he says, "I inspected it about August 1873." He must have inspected it either on the 13th or on the morning of the 14th, for that was the whole time that elapsed between the 13th, the date of the advertisement, and the 14th, the date of the letter that he wrote. He says—"I did not inspect the whole houses on the farm at that time. I inspected the main portion of the buildings—what is the principal part of the steading. I did not have a copy of the printed conditions of let with me at that time. I saw Mr Soutar Robertson after my inspection and before I made the offer of 14th August. I wished to understand upon what conditions the farm was to be let, and a copy of these conditions was then" (that is, at the interview) "put into my hands. We also made further inquiry with reference to the portion of the buildings that we had not inspected." He continually brings in the word "we." He has not distinctly said in his evidence who was with him at the time, but it appears that he had a brother with him, who was quite a young lad, who assisted him in looking over the property. "We inquired about the accommodation, whether it was suited for the farm, and Mr Robertson answered us that it was ample and sufficient for the working of the farm. There was a remark made about the large byre, but there was no guarantee of any alteration given on that occasion"—so that nothing certainly was then said about building or altering or doing anything else upon the farm. "The first remark that was made about that byre was made by my brother, who had accompanied me in my inspection and also to the chamberlain's office. He said that its present arrangement did not meet with our views, and that we preferred to have it arranged with the cows with their heads to the wall."

This has been made a very important point between the parties, and therefore I have no doubt it is one of considerable importance, one reason given being that it would be less likely to promote disease if the cattle were all turned with their heads to the wall, than if they were turned with their heads towards each other, so that they would be breathing in each other's faces. It may or may not be so, but both parties appear to have thought it important. Mr Buchanan asked to have such an arrangement made, and Mr Robertson said, "I will not do it for the world." Why, I am not able exactly to say, but that is what he states in his evidence. "Mr Robertson said it had been a very expensive byre to put up in its present arrangement. There was nothing more said about it at that time. We asked on what terms the draining was to be done, and he said it was to be done at Government rate."

Then he proceeds to say, after telling of his going to Mr Robertson's office—"I afterwards made an offer on 14th August, and I then received a letter from Mr Robertson asking me to furnish references as to my means and agricultural ability." For that of course I must turn to the letters themselves, which are in evidence. This is the most important letter, dated the 14th of August, on which the whole argument has principally turned. It is addressed to Mr Robertson, and is in the following words—"Sir, 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 sterling, with the following understanding, that the landlord alter the present byre so as to array the stalls alongside 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." That latter clause is unimportant for the present purpose, but there are three distinct conditions there which it is necessary to notice—first, that there is to be an alteration in the position of the stalls; secondly, that additional byres for twenty cows are to be built; and thirdly, that the remainder of the houses and the fences are to be put in a tenantable state of repair.

My Lords, the answer to that letter is dated the 18th of August, and is signed by Mr Barr, a witness in the cause, who was a sort of clerk or person employed in the office of Mr Robertson, and who signs "for Stewart S. Robertson—D. C. Barr." It is this—"Dear Sir—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 reference as to your means and agricultural ability for the farm of Flemington." This was read by Mr Pearson, and the words "Before submitting your offer to the approval of the trustees" were commented upon by him, and once in fact he almost endeavoured to put it as high as if it meant that a proposition had been made to Mr Robertson and accepted by him subject to submission to the trustees. Now, all that Mr Robertson said, and all that apparently his duty to the trustees required him to say, was, before troubling them, to consider the question whether or not they would like the offer of Mr Buchanan to be accepted—before troubling them with any question at all about it, or entering into any discussion of the terms—he (Mr Buchanan) must be informed that if he should turn out to be the person making what they considered the best offer, he would have to be a person capable of paying the rent and carrying on the farm in a proper manner. Then his offer was to be put before the trustees for their consideration, and they were to be fully at liberty to do or not to do whatever they pleased, but before that was done he (Mr Robertson) was to be furnished with references as to the "means and agricultural ability" of Mr Buchanan "for the farm of Flemington."

Now, the question is, in the first place, What was done by Mr Robertson after having written that letter? His memory unfortunately is in a very imperfect state, but still there are a few facts which are sufficiently clear which we can arrive at by putting the things which occurred together and comparing them with his evidence.

According to his account, his habit was to make reports to his employers the trustees, to submit those reports ocularly to their view and judgment, and to take, as he says, *viva voce* directions from them in return as to what should be done with reference to the reports so presented. What he says in reference to this particular transaction is this—"I submitted the offer of 14th August to the Duke of Hamilton's trustees. I do not remember the date when I did so, but I have no doubt my report on the subject will be found at Hamilton Palace, or at least at the office." I should have said that Mr Robertson had ceased to be employed by the Duke's trustees in 1874, just a year after these transactions, and possibly his absence from the management may have contributed to impair his memory of the transaction. What he says upon the subject is this—"I have no doubt my report on the subject will be found at Hamilton Palace, or at least at the office. The trustees were Sir Claude Scott and Mr Padwick. It must have been" (this is true if he went to London) "between the date of my letter of the 18th August and 6th September that I submitted it to them, and the answer that I got from them would be in accordance with the missive that followed. It would be favourable to accepting Mr Buchanan as tenant as regards the rent." There is a very remarkable expression here, "as regards the rent." Now, the Court asks a question, to which he replies—"I would make" (which is a Scotticism, I think, meaning I did make) "a written report to the trustees on the matter. The authority I got from them was always *viva voce*. I took my reports" (again referring to documents and written things) "regularly to London and had them sanctioned. I must therefore have been in London between 14th August and 6th September."

The question then is, in the first place, Did the trustees ever receive this offer of the 14th August *ipsissimis verbis* from this gentleman? If he made any report, we are to expect, he tells us, to find a written one. Now, there is a written report in which the name of Mr Buchanan appears as the offerer of a sum of £1200 a-year by way of rent, and there is no other written report of that date about Mr Buchanan or about this particular farm. When we look at the date of that particular report, which I am now about to refer to, we find that it is dated "September 1873," not a very business-like mode of making a report, omitting the day of the month on which he makes it; but he says it must have been between the 14th of August and the 6th of September that he made it in London. That must be so, for this reason—there is a letter which I omitted to notice—for it is not important except as fixing this date—a letter of the 6th of September written to Mr Buchanan, inviting him to meet Mr Robertson at the office at Hamilton Palace on Friday next, as he puts it—"Please meet me here on Friday next at ten o'clock, instead of Thursday." The Friday was the 12th, and Thursday would have been the 11th. There had been some appointment by letter, or it may have been a verbal appointment, made for the Thursday; it was now changed to Friday, and that Friday was the 12th, on which day a subsequent offer, which I shall have presently to refer to, was made. That letter being dated at Hamilton Palace on the 6th of September, Mr Robertson justly says he must have been in London between the 14th of August and the 6th of September.

Now, we find the report dated "September 1873," and we find no other report at all of Mr Robertson's with reference to the subject-matter in litigation. The report is as follows:—"The following farms will fall out of lease at Martinmas next"—which made me say that there were several farms to let at this time—"High Plewland." There appear to have been a good many farms mentioned. Then we come to "4, Flemington," and below we find this—"Flemington, let to Mr Archibald Russell at £988 of yearly rent. The offers for this farm are." Now comes a whole list of offers, and the one which figures first is "Andrew Buchanan, Glasgow, £1200." The next is "William Watt, Baldowan, £1120," and so on—there are a series of names. The offer of one of these persons was rather higher than Mr Buchanan's—it was for a rental of £1219—that was an offer by a minister or clergyman, the Rev. James S. Johnson—but all the others were below, and some of them considerably below, the offer made by Mr Buchanan. Then there are comments made by Mr Robertson upon the several offers. After naming the offerers he proceeds to say—"The present tenant, Mr Archibald Russell, during the latter part of his lease did not do justice to the farm, which has somewhat depreciated its value. The highest offerer is the Rev. James S. Johnson, who also offered and was accepted last year for Mid-Letterick. In the event of his being also accepted for this, he desires the right to sublet Mid-Letterick. His offers are on behalf of his son, who has never had a farm, and as this farm is in want of an experienced man, it would not be desirable to accept his offer, though a man of considerable means and a good business man." I have read that at length, merely to show the character of this report, and that it does not enter into these matters which Mr Robertson conceives it to be his duty to inform the trustees upon at some considerable length.

Next we come to this—"Mr Andrew Buchanan" (that is the appellant) "Glasgow, has offered good value for the farm, and is a man of considerable means, but has not been brought up thoroughly to agriculture, otherwise he would be a most desirable tenant." Then he says that "inquiries have been made about the next offerer," and he proceeds to mention another man of the name of Mr James Ferguson, who is the lowest offerer, and having gone through all those offers, he puts the matter, in the form that I have described, before the trustees by this report—there being no other report found, and he saying that whatever report he made was in writing, and the time being too short to admit of any other report, because the only time in which a written report could have been made was between the 14th of August and the 6th of September.

I think your Lordships can hardly take the fact to be otherwise than that this report was the only one—at all events it is the only one in evidence—that Mr Robertson ever made to the trustees on the subject, although I have read what he says in his evidence, namely—"I submitted the offer of 14th August to the Duke of Hamilton's trustees." But then this report would sufficiently correspond with that—he has submitted the offer; he has

not submitted it with all its terms and conditions, as he ought to have done, and it would have saved a great deal of trouble and litigation to all parties if he had done that, but he does mention the rent offered by all the offerers, including Mr Andrew Buchanan, and he gives his opinion upon him as being a desirable tenant.

Not one word is said by him as to the three stipulations made by Mr Buchanan with reference to the alteration of the stalls, with reference to the building of new byres for twenty cows, or with reference to putting the houses into a proper state of repair.

The date of the letter to which I have just referred was the 6th of September. On the 12th of September the meeting took place to which I have now to refer, and which is described by Mr Buchanan in his evidence. Mr Buchanan, speaking of this meeting with Mr Robertson, says—"We" (still speaking of his brother) "asked on what terms the draining was to be done, and he said it was to be done at Government rate. I afterwards made an offer on 14th August, and I then received a letter from Mr Robertson asking me to furnish references as to my means and agricultural ability. I gave him a note of where to apply to for references; that was done by letter. I afterwards received a letter fixing a meeting for Friday, 12th September. The first note I got was to meet on Thursday, but there was a second note came fixing Friday. I went to Hamilton on 12th September. I saw a number of gentlemen in the lobby when I went into the office"—they are described afterwards as being other tenants who had come there on the same sort of business. "I went into a room down stairs, on the right hand as you go in, where I found Mr Robertson and Mr Barr. When I went into the office or room Mr Robertson asked me to come inside—the two were sitting at a table, the one at the one side and the other at the other. I went inside the bar or counter and was accommodated with a seat beside Mr Robertson. He stated that he wished the conditions signed, but there were some reservations made upon them which Mr Barr would read, and Mr Barr did read them. When Mr Robertson spoke of the conditions, he said 'you have seen them,' and I said I had seen them, because I got a copy put into my hands the last day I was there. These were the printed conditions, and what Mr Barr read was a written addition, as I understood, to the conditions. It was written on the back of a copy of the printed conditions. I believe that is what he read."

Now, let us see what these conditions are which he was so asked to sign. They are described as "General conditions for leases of farms on the Hamilton estates in Lanarkshire"—first, "the farms and possession shall be let according to the marches or boundaries to be pointed out by proprietor," and so on. And then the "entry to the lands for tillage shall be at Martinmas, and to the houses and pasture at Whitsunday following," the same times as had been stated in the advertisement in the *Glasgow Herald*. Then there come numerous other conditions, upon which the proposing tenant is to take the property; and the 6th condition is this—"The tenant shall accept of the houses (unless otherwise agreed) as being in good repair at the commencement of his lease, and shall keep them and leave them in good repair, and no part of any dwelling-house or steading shall be injured or taken down or carried off for any purpose whatever during the lease without the special consent of the proprietor or his factor."

Mr Buchanan tells you in his evidence that he had received the conditions before he went to this meeting—he had not them with him—and we shall see what he says about their not being referred to. Although he had not them with him, he had seen them, and when at the meeting he was called upon to sign them. There were a good many other conditions, which it is not necessary specially to mention. I have read the important one, and that binds him down, unless some other agreement has been entered into, as having taken the houses as in a good state of repair, and as undertaking to keep and leave them in that good state of repair.

Now, my Lords, I go back to his evidence. He proceeds to tell you that Mr Robertson stated "that he wished the conditions signed, but there were some reservations made upon them, which Mr Barr would read, and Mr Barr did read them." Then a little further on he says—"Mr Robertson did not explain it to me before it was read, but after it was read he explained what was the meaning of it." That is the additional memorandum; there is no question about that. Then he says "that there was to be no compensation given for anything that was mentioned there, and that I was to be at liberty to improve the land at the tile-work," and so on. That is of some little importance, because it shows that at the meeting there were questions asked and answered, and Mr Buchanan, who had had the conditions to look at, was now aware that he was about to be called upon to sign the conditions.

Mr Buchanan makes this important statement—"Mr Robertson and he had been speaking of a certain amount" (that is, as to what Mr Buchanan was to receive for any ground taken or damaged), "and he asked me, 'Have you any objection to that?' I said 'No, none.' There was nothing said on that occasion about my offer of 14th August being superseded—it never was mentioned at all." Therefore we have got it clearly that at this meeting, if nothing had been arranged before, as I apprehend it had not, for the reason that the trustees had never had the proposal of the 14th August before them, and Mr Robertson never had any order from the trustees to adopt that proposal, it certainly was not on the 12th of September talked of or mentioned in any way whatever. The expression is, "it was never mentioned at all."

My Lords, that being so—the proposals contained in the letter of the 14th of August never being mentioned at all—on the 12th of September Mr Buchanan signed this other document on the back of the conditions—"I, Andrew Buchanan" (residing at such a place), "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," and so on, upon which he was to be paid so much per acre. I need not

read that through. "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, the words 'one-half of' on the fifth line from the bottom of page second being deleted." That of itself, again, is not unimportant. The terms were talked of and the additional terms were mentioned; the particular set of words about the words "one-half," which have no vital bearing at all upon the character of the lease, but still formed part of the conditions on which it had been proposed that the lease should be granted, were deleted.

The thing was therefore talked over and the discussion was acted upon, and what one has to ask oneself now is, not whether Mr Buchanan was in some way or other under the mistake of supposing that the terms of his offer of the 14th August was accepted, but one has to consider the higher proposition which he is contending for, and hoping to establish before your Lordships, namely, that the Duke's authorised agents were so aware of this agreement on his (Mr Buchanan's) part being intended, as he says, to embody his letter of the 14th of August, and the terms therein contained about the alteration of the stalls in the byres, and the additional byres for twenty cows, and putting the houses into good repair, as to bind and estop them—now (that was the expression used) that is to say, as to prevent them—from saying, we did not intend to embrace that letter of the 14th of August in this agreement; we gave you our terms on the 12th of September; we put those terms before you; we explained them fully to you; nothing was said about the former letter, and we conceived that we were letting this farm to you as we let farms upon the estate to all other tenants, upon the terms stipulated for as set terms of lease, unless altered in the document of the 12th of September.

I apprehend, my Lords, that it is impossible to say that there was anything here which could lead either Mr Robertson or Mr Barr, his subagent—for he was present at the time—still less the persons for whom they were agents, into the notion that there had been imported into this document, executed by an ordinary signature on the back of an instrument in such a form, something to be added thereto, or that there was anything to be substracted therefrom. There was nothing to lead them to suppose that the letter of the 14th August was embodied therein so as to form part of the agreement. If that had been intended, it was clearly the duty, as it appears to me, of both the people on the one side and on the other to express it plainly. If the matter had been more calmly considered, according to some of the evidence—it appears that there was conversation going on during the time in the office—something might perhaps have been said about that. But it is perfectly consistent with a reasonable view of the ordinary way in which people conduct their business to believe that Mr Robertson thought that the agreement he was proposing at this moment was that which is expressed in the instrument which was afterwards duly executed, and that what had previously passed amounted only to this—there was first a letter from Mr Buchanan introducing himself as an offerer, then there was a letter treating him as having made an offer, which was well worth consideration, then references were given as to his character and means. Those references were satisfactory, and he was thought to be a person whose proposals might be considered. Finally, my Lords, the result of this consideration appears to me to be embodied in this agreement of the 12th of September.

However, this is a question which it is hardly necessary to enter into now, because the Duke of Hamilton hardly insists upon his cross-appeal; indeed he does not insist upon it at all now. He brought the cross-appeal solely to meet the possible case of the House coming to the conclusion that there was an agreement, and altering the interlocutor from what it now is. It now is an interlocutor with which the Duke says I am content, because the Court below has held that there is no agreement at all, for we were never *ad idem* —there never was a *consensus* between us two—I am content to take things in that state, and do not insist upon having the agreement performed by Mr Buchanan according to the terms of the document executed on the 12th of September, and excluding all the terms of Mr Buchanan's letter of the 14th of August. I need not enter into that aspect of the case, for it has not been entered into at the bar. A wise discretion has been exercised by those who advised the Duke of Hamilton in the matter.

Now, my Lords, I do not lay down any principle of law; I only dwell upon the facts. Upon the facts I do feel that although the subsequent proceedings cannot, as my noble and learned friend on my left (Lord Blackburn) has already said, have any bearing upon the construction of that which took place in September 1873, yet they may throw light upon what the views and dispositions of the parties were at that time, and that is evidence which tends strongly to show what the state of mind of Mr Buchanan was, for Mr Barr, who gives evidence on the side of the Duke's trustees, says candidly enough—When I had demands made upon me by Mr Buchanan for the alterations of this byre and for the building of a new byre, and for making repairs, Mr Buchanan made those demands by way of insisting upon a right to them. He tells us what language passed, and there is no doubt in my own mind upon the subject. I think the evidence authorises and compels one to say that on Mr Buchanan's side he thought that those stipulations which he had made in his letter of the 14th of August would form part of the agreement, but unfortunately neither the one side nor the other took care to put them into a clear and intelligible shape in the course of the treaty. The result was that they found they had come to a conclusion upon different premises, and therefore there was no real agreement whatever between the parties.

As I said before, the English and the Scotch law are very much alike upon this particular class of cases with reference to contracts. There is a very remarkable instance in a case before Lord Eldon, namely, *Stangroom* v. *The Marquess of Townsend's Trustees* and *The Marquess of Townsend's Trustees* v. *Stangroom*, reported in 6 Vesey, where the circumstances were exactly the same as they are here—the one side filing a bill for specific performance of the agreements, with an adjunct, and the other filing a bill for specific performance

of the agreemant as it stood, without the adjunct; the result was that the Court could not arrive at the conclusion that there was any agreement at all, and dismissed both the bills. I apprehend, my Lords, that that is the consequence which must follow upon the present occasion.

Therefore what I should suggest to your Lordships is this—I find on looking through the proceedings before us that there are no less than six interlocutors appealed from. The first two are interlocutors of the Lord Ordinary, namely, an interlocutor of the 31st May 1876, in which he decreed the acceptance of a lease by Mr Buchanan upon the terms of the document of September the 12th, and an interlocutor of the 18th October 1876, which was consequential upon the former interlocutor. Those two interlocutors have been recalled by the first of the subsequent ones, which I am now about to mention, by the First Division of the Court of Session. I apprehend that your Lordships' House therefore will not have to deal with those two, they being recalled by one of the interlocutors we are about to affirm, namely, the interlocutor of the 25th January 1877, and the following interlocutors depending thereupon. The interlocutor of the 25th January 1877 recalled the Lord Ordinary's interlocutor, and put the case in proof—that is to say, directed proof to be led with regard to the transaction in the cause. The interlocutor of the 23d of May 1877 followed upon that; the interlocutor of the 8th of June followed upon it also; and the interlocutor of the 4th of July 1877 was the final interlocutor, I think, now complained of by the appellant. It decided that there was no agreement, and that both parties therefore must be content to remain in exactly the same position as they were in antecedently to this litigation.

My Lords, I propose to say nothing as to the first two interlocutors, but to affirm the four subsequent ones, and to dismiss the appeal with costs, so far as those costs have not been increased by the cross-appeal of the respondents. I also propose that the cross-appeal be simply dismissed.

Lord O'Hagan—My Lords, I am entirely of the opinion which has been expressed by my noble and learned friend who has addressed your Lordships, and I have really nothing material to add to his observations.

The case is one of a peculiar character, certainly in some respects. Your Lordships are asked to enforce a contract for a lease, and you have two forms of contract presented to you on the one side and on the other. Before you can come to any conclusion upon the case you must necessarily be satisfied that one of those forms of contract was common to the minds of both parties. For the purpose of a contract you must have a confluence of minds and an identity of purpose; and the question we have really to consider is, Whether upon the facts, as they are presented to us in the evidence, we can make out such a confluence and such an identity? In my opinion it is impossible to do so. The case is peculiar in this respect—as has been observed by some of the learned Judges of the Court below—that you have here two offers for a lease which are not at all contradictory or repugnant, as the learned counsel said at the bar, to each other. You might spell out a lease from the two of them, and I gather from the proceedings in the Court below that that was attempted in the argument there. The Court was asked to make out a lease, taking a bit from this and a bit from that, on the ground that there is really no contradiction between the one and the other, that the one adds to the other, but that the one does not contradict the other. The Court very properly said that that was impossible, because, although they do not contradict each other—the one is very different from the other. The value of the one is evidently very different from the value of the other, and it is very plain that contracting parties who would willingly have adopted the one, would as willingly, and indeed decidedly, have rejected the other. That is the state of things with reference to these two forms of offer.

Now, what is to be said as to the adoption of either the one or the other? Neither of these two offers in itself made a contract. Both of these offers required either to be accepted in writing, or, as in this case, to be followed by possession; both of them were followed by possession. The question is really, to which of them is that possession referable? Is it referable to the offer of the 14th of August, or is it referable to the offer of the 12th of September, or is it referable to both of them? It was contended by the very learned counsel for the appellant that it is referable to both of them. It is also contended, or it was contended—but the contention has been given up here—that it was properly referable only to the last of the offers.

Now, we have in the case a great deal, I think, to indicate that, so far as one of the parties was concerned (Mr Buchanan), he had some reason, at all events, to think that the possession might fairly be referable to both the offers. I think that is tolerably plain. He had, in the first place, made that offer in writing—he had made that offer after a consideration of the circumstances of the property, and he had made that offer after an objection taken by him to the condition of the property. And you have this very material argument certainly on his part, that when he made that offer the offer was not immediately rejected, and, in point of fact, it was not rejected at all. A letter was written by Mr Robertson the day, I think, after the sending of the offer, and in that letter he did not say I object to any term of your offer; he did not say, I reject any term of your offer; he simply said, I will refer the matter to the consideration of the trustees. No doubt that, in the absence of any subsequent proceeding in reference to the offer, would naturally have led a man to the conclusion that the offer would be, or was likely to be, accepted by the trustees. That was a very natural conclusion, I think, for Mr Buchanan to form from what had occurred. On the other hand, as I suggested myself in the course of the argument, Mr Robertson did not undertake for himself either to accept or to reject the offer. All he said was, it shall be submitted to the consideration of the trustees. Still, that is a circumstance, beyond all doubt, which naturally induced in Mr Buchanan's mind, in the absence of any subsequent communication from Mr Robertson, the notion that his offer probably was accepted.

There are other circumstances in the case, no doubt, which might have led to the same conclusion. For instance, you have indications in

Mr Robertson's own statement of communications as to repairs and as to the drainage, as to which, certainly, there were communications between them, and which are not referred to at all except in the document of the 14th of August. All that is very forcible on the part of Mr Buchanan, and was most powerfully put to us by the learned counsel who appeared for him at the bar. And then, finally, we have this, that when the matter came to be concluded on the day on which the lease was really accepted, or supposed to be accepted, we do not find anything said about this particular offer.

I think it is only fair to say that all these circumstances lead me to the conclusion that Mr Buchanan in this matter acted with perfect *bona fides*, that he has been a perfectly honest man from the beginning to the end of the transaction, and that if anyone is to blame—although he is to blame in a certain way—other people are to blame, at least equally.

Now, my Lords, if there is honesty on both sides—if, on the one hand, we believe the representation on the part of Mr Buchanan that he took the offer of the 14th of August as the real offer, or at least as an offer on which he had a right to stand; and if, on the other hand, we see reason to consider that Mr Robertson, who, I am sorry to say, does not appear to have been a very accurate business man in all respects, was still an honest man—he had no motive to deceive, he had no motive to swear falsely—if we believe that Mr Robertson really believed that the document of the 12th of September was the document relied upon between the parties at the time, then we have a case of want of confluence of will, want of identity of purpose. We have the possession given on the one side with reference to the document of the 14th of August and the document of the 12th of September together; we have, on the other side, the possession given with reference only to the document of the 12th of September. If so, we are left without anything to determine in any way that there was an agreement between the parties in the giving of that possession which could be made the foundation of an opinion that the possession was referable to the one document or to the other, or to both. It comes round really to that.

That being the state of the case, although we do not blame the one party or the other in one sense, at the same time we must blame them both in another sense, because Mr Buchanan would have done infinitely better if he had been a little more vigilant—if, when he came to enter into the final agreement and had these documents thrust into his hands in a very hurried way, he had said—This is a very important matter. I am going to give £1200 a year for a farm under the Duke of Hamilton. I will see what this document is; and seeing that the document had no reference to the conditions inserted in his antecedent offer, it was certainly his interest, if not his duty, to say, I only make this offer in connection with my former offer, attaching to it all the conditions contained in that former offer. It would have been his interest, and I think it would have been his duty, if his attention had been called to the matter, to have taken that course. On the other hand, it appears to me very clear that it was the duty of Mr Robertson, or of those who represented the Duke of Hamilton, to have said—Observe now, we hold your offer, which we have filed in the office. We know all about that. We promised you that it should be considered by the trustees, and we have given you no answer from the trustees, but we now beg to tell you, do not be under a mistake. If you sign this document, you sign it as an integral and final document in itself, and you can have no reliance at all upon the document of the 14th of August.

It is extremely unfortunate that neither of the parties did what both of the parties ought to have done respectively in the case. But unfortunate as that is, the result, in my mind, is clear—namely, that there was no *consensus ad idem placitum*. There was a mutual misunderstanding between them, and therefore the judgment of the Court below ought to be affirmed.

Lord Blackburn—My Lords, I also agree that the judgment below should be affirmed, and the appeal dismissed on the terms as to costs which have been mentioned by my noble and learned friend now on the woolsack.

The facts are really what are in dispute here. I do not think that the law has been in the least degree questioned either in the Court below or in the argument at the bar. The facts here seem to have been these—Mr Buchanan was let into a farm by the Duke of Hamilton. I say the Duke of Hamilton, although it was really by his trustees. In fact, the person really acting in the matter was the chamberlain of the Duke, but the Duke was responsible for them all, and it may be said shortly that it was the Duke of Hamilton who let Mr Buchanan into possession. Both Mr Buchanan and the Duke thought it was for a lease for nineteen years, but they quarrelled afterwards, upon discovering that they were not agreed as to what the terms of that lease were to be.

Now, nobody has disputed that the law stands thus—That if it can be made out what the terms agreed upon were, although they were not reduced into writing and properly signed on both sides, so as to make a binding contract which would operate as a lease, or as terms of a lease, without anything more—if it can be made out that a person has been let into possession upon these terms—the lease is to be according to the terms upon which he was so let into possession. And it is equally not disputed that if the two parties were not agreed upon the terms—if the one thought it was black and the other thought it was white—the letting him into possession under that mutual mistake about the terms agreed to on both sides would operate nothing as to making a lease. It would put him into possession, with all the consequences that followed upon possession, no doubt, but the supposed tenant must remove as soon as that mistake was discovered, and the supposed landlord must take back his land. I am extremely sorry that that should happen in this case, because here was a nineteen years' lease supposed to be agreed to, and about four years of that had run before it was discovered that there was no binding agreement for a lease at all, and that the parties were under a mutual mistake. And I fear it must necessarily follow that there has been pecuniary loss, probably on both sides—certainly on the side of the tenant. I am very sorry that that should be so, but it is utterly out of the power of your Lordships to hinder it.

There is another thing which has been said, and it is perfectly true in law. It is not enough that the parties were not agreed. It may have been that one of them meant one thing and the other the other. Nevertheless, according to the law both of England and of Scotland, if the one has so conducted himself—has so spoken and so acted—that if he had been a reasonable man he would have known that the other side believed that he did agree to certain terms, and if the other side did, in fact, in consequence of his so acting, believe it, it matters not that the man did not really mean to do it. He would be, as it is said in Scotland, personally bound to admit that he was bound by the terms which the other side had been led to believe were the terms relied upon by him. In England it would be said that he was estopped by denying that those were the terms. The idea is the same in both countries, and it is founded upon perfect justice.

Upon that, my Lords, I must say that I cannot see any ground here for such a preclusion or estoppel on either side. The first question—whether or no the parties were *ad idem?*—is a question of pure fact. The Duke of Hamilton is clearly bound by what Mr Robertson did and said as his agent, and the question is, Did Mr Robertson, at the time he let the plaintiff into possession of the farm, *bona fide* believe that he was letting him in upon the terms of the offer which was signed by him on the 12th of September, or did he really think that he was letting him in upon the compound terms that would be composed by the offer of the 14th of August and the offer of the 12th of September taken together? Mr Robertson says that he did not believe the latter, and he thought he was letting him in upon the terms of the offer of the 12th of September, and upon those terms only. I can see no reason for doubting his veracity in that respect.

Many arguments were pointed out, and various things said, to show that he could not have believed that. It was said the buildings were avowedly out of repair and—the Duke of Hamilton, under Mr Robertson's advice, subsequently spending, I think, as much as £400 or £500 in putting them in repair—could he for a moment have supposed that Mr Buchanan was going to enter upon the lease with the buildings so out of repair on terms and conditions which would amount to this, that he was to be taken to have accepted them in good repair at the commencement of his lease? I can see no absurdity in that at all. Mr Robertson himself explains what I suppose everybody would probably know from their own experience to be a very common thing on a large estate like this, or, indeed, on any estate, whether large or small. The landlord of course has, as a general rule, to put the premises, or see that the outgoing tenant has put the premises into proper repair before the incoming tenant takes possession; and it is a very common thing to do what has been done in this case, in order to avoid disputes at the end of the year's lease, to say that the tenant shall be bound to accept them as being in good repair when he comes in, and that at the end of nineteen years' lease it shall not be open to him or to his representatives (for he may be dead then) to say, I am not to put the premises in good repair now at the end of the lease, because they were not in good repair when I came in. That is met by saying—You have accepted them as being in good repair when you came in.

Now, my Lords, although it is not a prudent and business-like thing to do it if it can be helped, yet, quite consistently with this, everyone knows that you cannot get people to hurry things forward, and that, consequently, a landlord may not have got everything finished in the way of repairs before a lease begins. He will find that his tenant will delay in telling him what he wants. He will find that his factor will delay in getting masons and workpeople to come; and it will be found, almost to a certainty, that when the tenant does come in the premises will not be in repair, and then, although the tenant comes in upon the terms that he is bound legally to accept them as being in good repair, and he does so accept them, there is a moral understanding that if he comes within a reasonable time to the landlord to point it out, the landlord shall do that which in equity and fair dealing he would have done before to the premises if there had been time enough, and if something had not come in the way—that is to say, the landlord will put them in repair afterwards.

Now, so far from it being an impossible thing, to my mind, that Mr Robertson should believe that Mr Buchanan was relying on that, I have very little doubt that hundreds of tenants do rely upon that, and in this particular case Mr Buchanan would not have done anything foolish if he had relied upon it; for it appears that, in fact, whilst the Duke of Hamilton and his people did not agree that he had bound himself to the terms of the letter of the 14th of August, and that, consequently, he (the Duke) was specifically bound to put the premises in repair himself, nevertheless they did act upon this honourable understanding to the extent of spending £400 or £500—I forget the exact amount. I do not say that that shows that Mr Buchanan relied upon this, for I think Mr Buchanan believed that he had got his offer of the 14th of August accepted, so as to have a binding contract upon the Duke to that effect; but I do say that I cannot draw the conclusion that Mr Robertson, when he says that he believed that Mr Buchanan was acting upon the contract of the 12th of September, must be saying what was not the case, because he could not suppose that Mr Buchanan came in so. I do not think that would be at all a fair conclusion.

Then again, Mr Buchanan is pressed with this question—In August you had asked for additional byres for twenty cows. Did you think about that? He says, Yes. Then it is said that if, while a lease is going on, it is found that the tenant does really want more accommodation, the custom of the estate and the honourable understanding is to give it to him, if it is considered that it would be really a good thing and improve the estate, and that therefore it is probable that Mr Buchanan would have got the byres for twenty cows if, after being in occupation of the farm, it had been found that they were really required, and that the building of them would improve the farm. Upon that, my Lords, I make again the same remark. I do not think that Mr Buchanan was relying upon that, because I think Mr Buchanan was under the belief that he had got a binding bargain; but I cannot say that I see anything improbable in Mr Robertson thinking that he relied upon it.

Then, as to the alteration of the byre, so that the cows would turn their heads to the wall instead of being face to face, I do not pretend to form an opinion as to whether that would be a judicious or an injudicious change ; but it is clear from the letter of the 14th of August that Mr Buchanan wanted to have that done, and it is equally clear that in the instrument of the 12th of September there is not a syllable alluding to that or anything that could lead anyone to suppose that that was granted, and there is nothing afterwards that I can find that shows that the Duke of Hamilton or his people ever did or said anything that led, or ought to have led, Mr Buchanan to believe that he was to have that done.

My Lords, upon this I come to the same conclusion as that which is expressed by the Lord President. If I could think that either of these people was lying, I should have no difficulty in finding for the other side; but believing them both to speak the honest truth, and believing them both to have blundered, I must say it seems to me that the terms were never agreed upon, and consequently the lease fails.

Again, is there anything which amounts to estoppel? I have already almost disposed of that in my previous remarks. There would be a stronger ground for estoppel if the Duke of Hamilton could contend that Mr Buchanan in signing the proposal of the 12th of September, which, on the face of it, seems to me complete in itself, had acted in a way that would lead the Duke's agent, as a reasonable man, to think that he had waived all his former proposals, and was making that as a new proposal. If it had stood alone upon that, without anything more, I am inclined to think that that might have been a good enough ground for the Duke of Hamilton to stand upon in support of his original claim, to say that the lease should be executed on the terms of the document of the 12th September. But then it does not stand upon that. The Duke of Hamilton must be identified with Mr Robertson. Mr Robertson knows the circumstances under which that instrument of the 12th September was signed. He knows the hurried way in which it was done. He knows the previous offer that was made; he knows all about it. I cannot say, under those circumstances, that Mr Buchanan has behaved in such a way as should have led Mr Robertson, as a reasonable man, to think that he had waived his previous offer, and consequently to preclude and bar by personal exception Mr Buchanan from denying that he was bound by the instrument of the 12th September, and by that alone.

Then, taking it the other way, what is there to bind the Duke—taking Mr Robertson again to be the same thing as the Duke, which I think he was—what is there to prevent him from saying that he did not believe that the letter of the 14th of August was still adhered to and persevered in? It was argued by Mr Lorimer that there was a duty laid upon Mr Robertson pointedly to warn Mr Buchanan in this way—Do you understand what you are about in signing this instrument of the 12th September, which is, on the face of it, a complete agreement with the conditions on the back; do you understand it is a complete offer—a complete proposal in itself—do you know what you are about, because if you mean to adhere to your letter of the 14th of August now is your time to say so? I see nothing to warrant that. If he had been his attorney it would have been a different thing, or if there had been anything in his position to make it his duty to give advice to him. Unfortunately, Mr Buchanan, who ought to have thought of that, did not think of it then, and two months elapsed from September until Martinmas—until the 15th of November—during all of which he had ample time to read and to consider what would be the effect of the conditions which he had signed—during which two months he seems to have put the instrument in his pocket, and not to have used the time for any purpose at all—and he enters upon the lease without taking the trouble to think whether what he had somewhat hastily done on the 12th of September really expressed his intention or not. I must say that it would be a very strong thing indeed to hold that the Duke of Hamilton was estopped by the act of his agent, and was bound to say that he understood and knew that Mr Buchanan was requiring him (the Duke) to do either of these things—to have the old byre altered, or a new byre built, or the houses repaired. As a matter of bargain, I do not see that one can say that at all.

It comes round, therefore, altogether in the result to what I have already said, that the tenant, having been let into possession when the parties were not *ad idem* upon the terms, simply leaves that possession to be terminated as soon as they discover that they were not *ad idem* upon the terms. And as regards the difficulty of providing for the consequences to the tenant, on the one hand, of having held possession for three years upon what he supposed to be a nineteen years' lease, when in fact he had not got such a lease, and, on the other hand, to the Duke, of thinking that he had got a responsible tenant at a rent of £1200 a-year for nineteen years, when in fact he had not got one. I am afraid those consequences cannot be provided for at present, at all events by your Lordships.

Lord Gordon—My Lords, I quite concur in the judgment which has been proposed by my noble and learned friend on the woolsack. In the present case there was no difference of opinion between the Court below in the First Division. The Lord Ordinary at first decided the case upon the view that here is a tenant in possession and upon referring to the document which the landlord says is his title. But when the case came before the Second Division, their Lordships—I think very properly—were of opinion, although the able and learned Lord Ordinary's opinion is entitled to very great consideration, but they could not decide upon that view, but that they must inquire into the circumstances under which the tenant got into possession. The ordinary way of contracting a lease is by an offer and a written acceptance; but there may be a contract of lease established by an offer followed by possion. But then you require to have it clearly proved that that possession followed upon the written title, which is brought forward as the foundation of the tenant's right. The Second Division ordered inquiry, and very properly did so, and I venture to think that the opinions expressed in forming that judgment were very clear and distinct indeed. Then, when the inquiry was made before Lord Shand, he reported the evidence to the Court, and they considered it,

and came to the unanimous opinion that the evidence did not establish that the offer of the 14th August constituted the title upon which possession followed, and therefore the title common to the proprietor and to the tenant; but that the evidence led to this—that you could not say whether the possession followed exactly either upon the title of the 14th of August or upon the title of the 12th of September. The result was, that the Court were clearly of opinion that the Duke of Hamilton had not made out his case founded upon the offer of September, and, under the circumstances, that they could not dispose of the case upon the footing of giving the right to the Duke of Hamilton or to the defender. That difficulty—as both my noble and learned friend Lord Blackburn and my noble and learned friend now on the woolsack have explained to your Lordships—has occurred under almost similar circumstances in England, and the same solution was adopted then which is proposed to be adopted in the present case.

The only further point raised was that there was a case of personal bar to be raised against the Duke of Hamilton through his advisers. The Duke of Hamilton personally was not mixed up with the transaction; but it was said that his advisers to some extent laid themselves open to the plea of personal bar. That depends a good deal upon the good faith of the parties. I think it was acquiesced in by all the learned Judges in the Court below that both parties were acting in perfect good faith, but that they were under a mistake, and therefore that there could be no other solution of the difficulty except that adopted in England—namely, to find that there was no bargain, because there was not a *consensus ad idem placitum*. The only Judge, I think, whose judgment was relied on, or prominently relied on, by the appellant was Lord Deas, who very naturally expressed some difficulty in deciding against the tenant, but at the same time quite concurred in the result arrived at in the Court below. His Lordship says—"I come therefore to the conclusion that there was a misunderstanding for which both parties are equally responsible." That, I think, brings the case to its proper solution, that there is a misunderstanding for which both parties are equally responsible. "We cannot therefore adjust a lease without mistaking what was intended." Accordingly, the course your Lordships propose now to take is, to say that there is no agreement out of which you can frame a lease for the parties, who had been acting under a misunderstanding and not agreeing with one another. I quite concur in that.

The four interlocutors of 1877 complained of affirmed, and the appeal dismissed with costs, so far as those costs have not been increased by the cross-appeal. The cross-appeal dismissed without costs.

Counsel for Appellant (Defender)—Pearson, Q.C.—Lorimer. Agents—Martin & Leslie—H. & A. Inglis, W.S.

Counsel for Respondent (Pursuer)—Benjamin, Q.C.—Mackintosh. Agents—Connel, Hope, & Spens—Tods, Murray, & Jamieson, W.S.

Monday, April 15.

SINCLAIR *v.* FLETCHER'S TRUSTEES AND OTHERS.

(*Ante*, vol. xiv. p. 662).

Teinds—Interim Locality—Relief—Prescription.

Held (*rev.* judgment of the Court of Session), in a claim by an overpaying heritor under an interim locality against the representatives of a heritor who had been exempted from all payment under the interim locality, and who had ceased to be a heritor in the parish more than forty years before the claim for repetition was made, that the negative prescription applied and extinguished the ground of the claim.

The circumstances of this case are fully reported of date July 18, 1877, 14 Scot. Law Rep. 662, 4 R.

The second and third parties appealed to the House of Lords.

In moving the judgment of the House—

LORD CHANCELLOR—My Lords, in this case I propose to state very shortly the grounds for the motion which I am about to propose to your Lordships, for I have had the advantage of being made aware of the opinions which some of your Lordships entertain and are about to express upon the case, and with those opinions I entirely concur.

My Lords, the question arises in this case with regard to lands which are called the lands of Wester Monkrigg, in the parish of Haddington. Those lands belonged between the years 1808 and 1825 to one General Fletcher or to his trustees, and the first set of appellants on the record represent him or them. The same lands from 1825 to 1833 belonged to Mr Andrew Fletcher of Saltoun, and he is the third appellant, and the person who is called the third party on the record. In 1833 Mr Fletcher conveyed the lands to a Captain Keith, and since that time—that is to say, for more than forty years—Mr Fletcher has had nothing whatever to say to the lands. Between 1808 and 1833 there was an interim locality for the augmentation of the stipend of the minister of the parish, and the common agent allocated in the course of this interim locality no part of the augmentation upon the lands of Wester Monkrigg. He and everyone else believed that those lands were exempt from the obligation of contributing to the stipend of the minister. That is now known to be wrong, and consequently the respondent Sir John Sinclair or his predecessor paid more in respect of his lands in the parish (the lands of Stevenson) than he ought to have paid, and the case raises the simple question as to the right of Sir John Sinclair to recover against the appellants in respect of the lands of Wester Monkrigg the excess—or a portion of the excess—which Sir John Sinclair has thus been obliged to pay.

Now, my Lords, of course from the short facts which I have stated it follows that the year when the lands of Wester Monkrigg were sold—the year 1833—was the last occasion in respect of which any right to be recouped for the overpayment fell or accrued to Sir John Sinclair in respect of the lands of Stevenson, and *prima facie*,