LORD MURE—The Lord Ordinary has dealt in his note with two separate points—First, What is the effect of the clause of the deed that your Lordship has quoted? Second, What is the position of his estate after the way in which parties have dealt with it? If it had been necessary to separate these questions, I should have had considerable difficulty in concurring with his Lordship in his solution of the first of these questions, viz., that the estate was by this clause rendered moveable. I think it was heritable, because there was no direction to sell, and no necessity for the administration of the trust that there should be a sale. The best evidence of that is that parties have up to this time managed to avoid a sale, and yet have carried out the wishes of the truster. I find therefore it is not necessary, and being of the opinion which—I find from the short report in the Law Reporter—I expressed in the case of *Auld* v. *Mabon*, "that unless such conversion is indispensable, we cannot hold that the character of the succession is moveable," I must hold that the estate remained heritable. I see no difficulty about conveying to two or more beneficiaries a *pro indiviso* right where trustees have such powers as they had in that case, or as they have here. Therefore, if it had been necessary to look at the character of the estate at the date of the truster's death, I should have held it to be heritable. I concur with his Lordship, however, in thinking that the interests of the beneficiaries have become stamped with an heritable character from the actings of parties since they took over their sister's rights.

LORD SHAND—The result of my opinion is in concurrence with that of your Lordships, but I cannot agree with some of the views expressed by your Lordships. My opinion is in accordance with that of the Lord Ordinary as to the double nature of the case. In every case where a deed dealing with heritage followed by actings of parties comes before the Court, two questions necessarily arise—one, whether the intention of the granter of the deed produces conversion? and, in the next place, assuming that to be so, whether the actings of parties have shown a determination to stamp the estate as heritable? That there must be two questions is obvious from this consideration, that the intention of the granter of the deed has to be interpreted as at the date of his death, and that intention cannot be affected by the actings of parties. Now, I am rather of opinion—although after what has fallen from your Lordships I do not wish to express it confidently—that the truster's deed did operate a conversion, as the Lord Ordinary thinks. A division could not have been made except by sale unless the beneficiaries gave their consent to a different course. I quite agree with your Lordship in thinking that the word "divide" does not necessarily imply conversion; but I think that the *prima facie* meaning of that word in the case of a mixed estate of this kind, when you are dealing with the destination of the residue, is that there shall be a sale. I have heard no suggestion from the bar as to how this subject could have been divided otherwise. That part of the clause about his sister being entitled to get the property upon a valuation, rather bears out the view that the truster thought that in order to divide the estate it was necessary there should be a sale.

But I find a very clear and sound ground of judgment in the Lord Ordinary's note, which has been substantially concurred in by your Lordships. The actings of parties have established the character of the estate as heritable. They divided the moveable estate at once, but retained the heritable estate, buying out the interest of one of their sisters, and leaving the heritable estate among the others.

LORD DEAS—With the permission of your Lordship and of my brother Lord Shand, I wish to add a word of explanation for the sake of the law. It would be most misleading to the profession if it were thought that the question of conversion must be decided as at the date of the truster's death. That is not so.

The Court adhered.

Counsel for Pursuer—Asher—Moncrieff. Agent—Alex. Morison, S.S.C.

Counsel for Defenders — Trayner — Rhind. Agent—J. Young Guthrie, S.S.C.

Friday, June 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DUKE OF HAMILTON *v.* BUCHANAN.

(*Ante*, p. 253.)

Landlord and Tenant—Lease—Constitution of Lease—Offer.

Two offers were made for a lease of a farm, neither of which was accepted or rejected in writing. Possession by the offerer followed, which the landlord understood had reference to the second offer, the terms of which in an action he called upon the tenant to implement. The tenant said the possession had followed on both offers. After a proof—*Held* (1), on the evidence, that there had been a misunderstanding, the landlord ascribing the possession to the second offer, the tenant to both; and (2) that, in the circumstances, the legal inference was that there was no completed contract, and that decree fell to be given in terms of a conclusion of the summons to that effect.

This case (the nature of which has been explained *ante*, p. 253) now came to be discussed upon the proof which had been led in terms of the interlocutor of 26th January.

In addition to the conclusion for declarator that a valid lease had been constituted between the parties, and that the defender was bound to implement it, the pursuer obtained leave to conclude further that "in the event of decree in terms of the foresaid conclusions or any of them not being pronounced, it ought and should be found and declared . . . that no valid contract of lease . . . had been constituted, and that the defender has no right or title to possess the said lands;" and there followed conclusion for a declarator of removing against him. There was a plea in law to the same effect.

The defender added the following plea in law—"(4) The defender is not bound to enter into a lease in terms of the offer of 12th September 1873 alone, in respect, 1, the defender's two offers of 14th August and 12th September 1873 are binding on the pursuer; or otherwise, 2, if the offer of 14th August 1873 is not binding, there is no contract between the parties."

The case is otherwise fully explained in the previous report and in the opinions of the Court.

Authorities—*Carruthers* v. *Thomson*, February 11, 1836, 14 S. 464; *Wilson* v. *Lord Breadalbane*, June 14, 1859, 21 D. 957; *Steuart's Trustees* v. *Hart*, December 2, 1875, 3 Rettie 192; *Freeman* v. *Cooke*, 18 L.J. Exch. 114, 2 Welsby, Hurlstone, and Gordon's Exch. Reps. 654.

At advising—

Lord Shand—[After stating the conclusions of the summons and the averments of parties.]—Substantially the question between the parties as presented on the original record is, whether, as maintained by the pursuer, the contract is to be found in the offer of 12th September and the conditions of let, or whether, as maintained by the defender, the three documents, viz., the letters of 14th August and 12th September and the conditions of let, are to be taken together as containing the agreement between the parties. There was no written acceptance of the tenant's first offer any more than of the second. If there had been, the acceptance would have described the offer accepted, and there would have been a completed written contract. The possession which followed on the documents referred to is said to establish the contract. Both parties appeal to the ordinary rule of law that where possession follows upon a written offer the lease is effectual and binding on the terms expressed in the writing.

But when the parties met in Court it appeared that they were and had been at variance from the first upon the question as to the writing or writings on the faith of which possession was taken. The pursuer maintained that the possession followed upon the letter of the 12th September and the relative conditions; the defender that it followed upon these and also upon the previous letter of 14th August.

The Lord Ordinary gave effect to the first of these contentions without proof, but upon a reclaiming note that interlocutor was recalled, and the parties were allowed a proof of their averments. I find in the report that your Lordship in the chair then stated—"The pursuer hereby undertakes to prove that possession was given, taken, and held under the second offer of 12th September, as distinguished from that of 14th August. In short, that possession is referable to the second offer. That averment is absolutely essential to success in the action. On the other hand, it is fairly enough represented in the next article that the defender's account was that possession was given and taken by him with special reference to the offer of 14th August alone."

The proof has now been taken, and it only remains to be mentioned that in the course of the discussion which followed the pursuer has added an alternative conclusion and a plea in law to meet the case of its being now held that there was no concluded contract, while the defender has added a plea to a similar effect.

We have now to consider the result of the proof, and I shall state what seems to me to be its import. It appears that the farm was advertised in August 1873, and that the defender having seen the advertisement inspected the farm, and either in the course of that inspection or at its close had an interview with Mr Stewart Robertson, the Duke's chamberlain. At that interview the defender stated that there were certain things he would desire to have done if he became tenant, and he immediately afterwards sent to the chamberlain the offer of 14th August, to which allusion has been made. This letter, it is quite obvious, contains special stipulations on matters which the pursner thought were of importance. It was followed by an application for references, on the footing that it was to be submitted for consideration to the Duke of Hamilton's trustees. It was not returned to the defender, but was retained and has been produced by the pursuer. Afterwards, there followed a letter requesting the tenant to attend a meeting at the chamberlain's office. The meeting took place upon 12th September, when the offer of that date was signed by the defender. The parties are not quite at one about what took place at that meeting, but it is clear that the business was very hurriedly transacted. Neither time nor opportunity was given or taken for discussion of the details of the lease. Mr Robertson's account of what took place is unsatisfactory. I am quite satisfied that at his examination he was quite ready to tell all he knew, but he had little if any recollection on the subject. The defender's account of the meeting shows that it was very hurried, and I am satisfied he is correct in saying that his offer of 14th August, which led to his being there, was not even referred to.

After this meeting the tenant obtained possession. Mr Robertson says his understanding was that possession was taken upon the last offer, while the tenant states that he would not have entered the farm on the terms of the last offer only, and that his act of possession had reference to both offers. Possession was given of the land under tillage at Martinmas 1873, and of the houses six months thereafter at Whitsunday 1874. Before the latter of these dates Buchanan in conversation with the landlord's representative had referred to the offer of 14th August as an offer which he considered binding. It is important to notice this, and that Mr Barr (the cashier in the chamberlain's office) in his evidence expressly states that Buchanan in asking to have the byre altered, and other changes effected, did so as matter of right, and referred to his letter of 14th August. By a letter dated 30th April 1875, Barr acknowledged receipt of a copy of that very letter. It is quite apparent that before that time Buchanan was maintaining his right to a lease in terms of the offer of 14th August.

It thus appears from the evidence that when possession was given the landlord gave it upon the faith of the letter of 12th September, and of that letter and the general conditions of let of the estate alone. It is equally clear, not only from the tenant's own evidence, but from other sources of proof, that he took possession on the faith of the previous offer in addition to the other documents above mentioned. There is no

written contract, and possession is needed to constitute *rei interventus*, in order to make a completed agreement. But as possession was given on one footing and taken upon a totally different footing, and as there was thus an essential misunderstanding in the acts of giving and taking possession, it appears to me that there is no concluded contract between the parties. There is a want of that *consensus ad idem* which is necessary to complete an agreement.

It is maintained that the tenant having signed the latter offer, and having gone into possession after its date, must be held to be barred from pleading that he took possession upon any other. There is no inconsistency, however, between the two offers, and a written acceptance might fairly have embraced both. In the first offer there are certain stipulations made for additional buildings, and that the existing buildings should be put into better condition. On the face of the articles of lease of the estates there is a provision indicating that there might be a separate agreement about the important matter of houses. The offer of 14th August had been entertained and retained by the commissioner, and it was natural that the tenant should believe, as he says he did, at and after the hurried meeting of 12th September, that both offers were to enter into the contract. In order to arrive at a different conclusion we must assume that on 12th September he meant to give up, and gave up, all the stipulations he had made in his letter of 14th August, and this without a word being said on the subject. There is nothing to show that that is so, and it appears to me to be impossible to suppose, in the absence of any reason to the contrary, that he meant to take the farm without these conditions; and there is no difficulty therefore in holding that he took possession upon the footing I have mentioned.

It is unfortunate that the landlord did not draw the tenant's attention to the missive which was in his hands. It may reasonably be said it was for Mr Robertson to call the tenant's attention to the fact that his previous offer was to be entirely laid aside and superseded. On the other hand, the tenant cannot be acquitted of blame in having signed the second offer without inquiry as to the effect to be given to the first.

It was suggested that the Court might still adjust a lease between the parties upon the footing that a good deal had been already done to carry out the stipulations of the 14th August, and that there was evidence that others of them had been departed from. But there is no averment and no plea to that effect. The pursuer has never taken up the position that some things had been done and others abandoned, and there is no proof upon that matter. There was evidence as to the details of the transaction, including the actings of the defender and of the chamberlain, and of the servants of the Duke of Hamilton, but this was only admitted for the purpose of ascertaining how far the defender thought the stipulations he had made material. If the evidence had shown that he thought these stipulations immaterial, that fact would have gone far to show that the defender did not think the offer of the 14th August important, or deem it part of the contract. Assuming that these stipulations were in his view part of the contract, nothing has subsequently occurred to deprive him of his right to have these made effectual; and if evidence of actings had been offered, in order to enable the Court now to settle a lease on that footing, giving up these stipulations, I would have rejected it, as dealing with a matter which had not been sent to probation.

In this case, which I take to be a very special one, it is clear on the whole that possession was given and taken upon different views held by the two parties respectively, and so under a mutual misunderstanding I think it follows that there is no valid or binding contract of lease. I therefore am of opinion that decree should be given in terms of the declaratory conclusion of the summons to that effect. With regard to the conclusion for removing, which must also receive effect, it would be desirable that it should if possible be made the subject of arrangement without further litigation. The defender having laid down the crops of the present year must be allowed to reap them. There are mutual claims to be adjusted, for rent on the one hand, and beneficial expenditure of a permanent nature on the land on the other, and all these matters would very properly form the subject of a judicial reference.

Lord Deas—As Lord Shand has said, this is a very peculiar case, and can hardly be a precedent for any other. In ordinary circumstances, if there is a document, almost of any kind, between landlord and tenant, showing the subject let, the amount of the rent, and the endurance of the lease, a lease may be framed upon these data at the sight of the Court. That is the ordinary rule. The peculiarity of this case is that there are two documents, either of which, if it had existed alone, and was followed by possession, might have founded a claim for a lease. There is a further peculiarity, that these two documents are not inconsistent with one another. The lease might be framed on either of them, or upon both of them. Both were in possession of the landlord when the interview with the tenant took place. One was hanging on the file in the chamberlain's office, and the other was lying before the parties. It was in these circumstances that your Lordships allowed a proof of the whole circumstances, to show whether the possession followed on one or both of these documents. The conduct of the landlord's factor at that meeting, to say the least, was very loose. He made no allusion to the document which was hanging in his office. He had no proper recollection of the matter, and in these circumstances, without going into detail, I come to the conclusion, with Lord Shand, that it is impossible to say what was the bargain between the parties, and that it is clear there was a misunderstanding between them. Both may have been to blame—the tenant in not being more specific, and the factor for the slipshod way in which the negotiations were conducted.

I come therefore to the conclusion that there was a misunderstanding for which both parties were to blame. We cannot therefore adjust a lease without running the chance of mistaking the bargain. Therefore I think we must give effect to the alternative declaratory conclusion of the summons, and in doing so it is not to be supposed that we are departing from the ordinary rule, in compliance with which the Court frequently adjusts a lease in the event of a dispute between the parties as to its terms.

LORD MURE concurred.

LORD PRESIDENT—The great peculiarity of this case, in my appreciation, is that there were two offers made for the farm by the intending tenant, neither of which was either accepted or rejected in writing. Accordingly, the two offers, standing together, were a proposal or proposals on the part of the tenant, and nothing more. In order to convert these, or either of them, into a complete and binding contract, it was necessary that possession should follow. Nothing else could give effect to this one side of an inchoate contract. Possession did follow, but the question is, on which of the offers did it follow, for neither was accepted and neither was rejected? The landlord says that it followed on the second offer, which in his view necessarily superseded the first offer. The tenant says that possession followed on both offers, that neither was rejected, and that both are necessary to the completion of his right.

The object of allowing a proof was to endeavour to ascertain which of the two views was true—whether the possession had reference to the one offer or to both. The result is, to show that the landlord's representative ascribed the possession to one offer, the latter of the two, and believed that the tenant was acting on the same understanding. The tenant, on the other hand, ascribed the possession to both offers, and believed that the landlord's representatives understood he was doing so. If I disbelieved the statements of either party I could then see my way to hold that there was a concluded contract, as I could then decide to which view I was to give credence. But I am in the position of believing both sides to be perfectly honest. I think the landlord or his representative forgot about the first offer, and I am just as ready to believe that the tenant had both in his mind, and regarded both as of importance.

The legal inference from that statement of fact is irresistible. There was no *consensus in idem placitum*, and therefore no mutual contract was concluded. The contract is said to have been completed not by writing alone, but by writing on the one side, followed by possession on the other. But the possession here is so ambiguous as to be no substitute for writing. On that state of the facts, the legal inference is that there was no contract. I therefore concur with your Lordships that we ought to give decree in terms of the declaratory conclusion of the summons.

The Court decerned in terms of the second declaratory conclusion of the summons as amended, and appointed parties to be heard on the conclusions for removing.

An interlocutor was at a later stage pronounced decerning in terms of the conclusion of removing, and of consent fixing the terms of removing at Martinmas 1877 as to the arable land, and Whitsunday 1878 as to the houses and grass. All claims competent to the defender in connection with his possession of the farm were reserved.

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

Counsel for Defender — Fraser — Lorimer. Agents—H. & A. Inglis, W.S.

Friday, June 8.

FIRST DIVISION.

[Sheriff of Forfar.

LOCKHART *v.* MOODIE.

Sale—Partnership—Joint-Adventure.

Circumstances in which *held* that a purchase had been made on behalf of a joint-adventure, and that therefore the joint-adventurers were liable *in solidum—diss.* Lord Mure, who thought that the purchase was made on the credit of one of the joint-adventurers only, that the thing purchased had afterwards been contributed by him to the joint-adventure, and that therefore the purchaser alone was liable.

This was an action for £992, the price of 10,000 spindles of yarn, bought by Messrs N. & N. Lockhart, flax-spinners, Kirkcaldy, against Messrs Moodie & Co., bleachers and yarn merchants, Dundee, and Mr Robert Mackenzie, merchant there. The contention of the pursuers was that the yarn in question had been purchased from them by Mr Mackenzie on account of a joint-adventure between him and Messrs Moodie & Co., and that therefore Messrs Moodie & Co. were liable to them for the price, Mackenzie being bankrupt. The defenders Messrs Moodie & Co., on the other hand, maintained that the purchase had been made by Mackenzie on his own account, and that though the goods had afterwards been made the subject of a joint-adventure between them and Mackenzie, that had been accomplished by a separate sale by Mackenzie to the joint-adventure. In point of law, therefore, they contended that there was no liability on them, the purchase being made by Mackenzie as an individual, not as a partner in the joint-adventure.

The purchase in question was made in February 1875. It was stated in a memorandum from Mackenzie to Moodie & Co. to have been carried out on the same footing as a previous transaction in September and October 1874. On neither occasion did Moodie & Co.'s books show any trace of a purchase by them and Mackenzie from Mackenzie, while on the occasion of the former purchase there was an entry of the purchase having been made from "N. & N. Lockhart, per Robt. Mackenzie, on joint a/c with him." Mr Moodie in his evidence stated that the arrangement, as he understood it, was that they should purchase from Mackenzie on joint-account with him a quantity of yarn at 1s. 11d. per spindle. This Mackenzie was at liberty to buy wherever he pleased. For the yarn purchased by Mackenzie, Lockhart was to receive 1s. 11¼d. per spindle. Mackenzie did not defend the action.

The Sheriff-Substitute (CHEYNE) pronounced the following interlocutor:—

"*Dundee, 30th May* 1876.—The Sheriff-Substitute having resumed consideration of the case, Finds as matters of fact (1) that the yarns mentioned in the account annexed to the summons were sold by the pursuers at the rate specified in the said account to Mr Robert Mackenzie, a defender in this action, against whom decree in absence has been pronounced, and that the price has not been paid; but (2) that the pursuers have failed to prove that in purchas-