but as proved by the post-mistress from the markings on the letter, only in time for the evening delivery of the 25th. The pursuer declined to allow the defender to reject the lease which he alleged had been entered into, and a good deal of communing and correspondence ensued between the parties and their respective agents, the result of which was, that the pursuer agreed to postpone the term of the defender's entry to 26th August 1870 on condition of his at once signing a lease. The parties, however, failed to agree upon the terms of the said lease, and the pursuer was obliged to fall back upon the original contract contained in the above quoted offer and acceptance.

He pleaded—"The missives foresaid constitute a binding contract of lease, and the pursuer is entitled to have the same found and declared, as concluded for."

The defender pleaded—"The defender never having entered into a lease with the pursuer in the terms alleged, the defender should be assoilzied. The defender's offer, made in May 1870, having been timeously withdrawn, and, *separatim*, both parties having treated it as withdrawn, and arranged for a lease in different terms, the defender should be assoilzied. The parties, having agreed upon a lease, with entry as at 26th August 1870, the defender is not bound to accept the lease with any other term of entry."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 29th November* 1870.—The Lord Ordinary having heard counsel for the parties, and considered the argument, proof, and whole proceedings, Finds that, by the defender's letter to the pursuer, bearing date '18th May 1870,' quoted in the summons, he offered to take a lease of the 'Wilmington Corn and Flour Mills, and pig's-houses and boilings, &c., for ten years, entry at Whitsunday first, at the yearly rent of £80 sterling;' and that the pursuer, by his letter to the defender, bearing date 24th May 1870, begged 'to accept your' (the defender's) 'offer for my mill, subject to lease drawn out in due form:' Finds that the pursuer's said letter to the defender is not an acceptance of the defender's offer, in the terms on which said offer was made, but is materially different therefrom; and, in particular, that it is not an acceptance of the defender's offer for the 'pig-houses and boilings:' Finds it proved, in point of fact, that the pig-houses and boilings or boiling-house, referred to in the defender's said offer, are different subjects, or erections from the corn and flour mills, and are situated on a piece of ground at some distance from and unconnected with the mills: Finds, in these circumstances, that the pursuer has failed to establish his grounds of action: Therefore assoilzies the defender from the conclusions of the summons, and decerns."

Against this interlocutor the pursuer reclaimed.

WATSON and BLACK for him.

SCOTT and BURNET for the defender.

At advising—

LORD PRESIDENT—I cannot think that the Lord Ordinary has come to a right decision in this case. On the contrary, it seems to me that the two letters founded on make a good contract. No doubt they must be followed up by the preparation of a lease in due form in order that there may be something according to which landlord and tenant may work. That is a very ordinary thing; and if the parties have any difficulty about the terms, there are means whereby they can be easily settled; but that they are bound to enter into such a lease if the missives meet one another I cannot have the slightest doubt. Now, I do not agree with the Lord Ordinary's reading of the acceptance. Both parties knew perfectly well the subjects with which they were dealing, and in these circumstances the defender offered to take the mills and pigs-houses and boilings, &c., for ten years from Whitsunday first, at the yearly rent of £80. Now, here are all the essentials of a lease embodied in this offer. There is a sufficient description of the subjects for identification, there is the entry, the endurance of the lease, and the yearly rent; and this is all that is necessary to make a lease. The whole that Mr Erskine had to do was to answer, Yes; and if he had done so, or said anything equivalent, the contract would have been complete. Now what he does say is, "I accept your offer." If he had stopped there it would have been all right; but he goes on to say, "for my mill, subject to lease drawn out in due form." And it is seriously contended, and has been held by the Lord Ordinary, that the use of the word mill only shows that the acceptance referred to a different subject matter from the offer, and that this invalidates the contract. I have no doubt whatever that both parties were referring to exactly the same subjects, and in such cases it is not the words of parties but their understanding that we must look to. But to make matters better still, it is now contended that the addition of the words "subject to lease drawn out in due form," import a condition into the acceptance, and that as parties cannot agree about this lease, that therefore the contract cannot stand. I cannot agree to this view either. It did not require the offerer to consent to that, or the acceptor to stipulate for it. The landlord was entitled to require that his tenant should enter into a formal lease whenever asked embodying the terms of their contract.

The defender, however, has another defence which he seeks to establish—namely, that his offer was timeously withdrawn. On that matter I think the evidence has a very ugly aspect for the defender's case. There are circumstances which he was bound to explain, and which he has failed to explain. The letter of acceptance when recovered from the defender was not only in a state in which the pursuer says it was not when it left his hands, but in a state in which it could not have been. The only inference from this, failing all explanation, is that it was altered in the hands of the defender. Under these circumstances, all I shall say about the timeous withdrawal of the acceptance is that the evidence totally fails to establish it.

The result is, that the pursuer is entitled to have it found that a valid contract was entered into by the missives founded on, and that all that was required after that was to have this informal contract put into regular form. I am therefore of opinion that we should find the contract validly constituted, and remit to a conveyancer to draw a lease conform thereto.

The other Judges concurred.

Agent for the Pursuer—Wm. Mackersy, W.S.

Agent for the Defender—W. S. Stuart, S.S.C.

Tuesday, March 7.

SECOND DIVISION.

OTTO AND OTHERS *v.* WEIR.

Decree Arbitral—Parole Proof—Marches. A verbal

arbitration as to the line of march may be proved *prout de jure.*

This was an action of declarator as to the marches of two conterminous properties in the burgh of Sanquhar. The pursuers alleged that, in order to settle disputes, a verbal reference was made in August 1861, between Mr Macqueen, writer, Sanquhar, acting, or professing to act, for the pursuers, and the defender Weir, to two inhabitants of Sanquhar named William Russell and Robert Campbell, to lay down the exact boundary line, with the view merely to regulate the possession of the tenants. These referees met the parties on the ground, and marked off the line of fence between the respective back-yards. This line corresponds with that described in the conclusion of the summons.

After a proof, the Lord Ordinary (GIFFORD) gave decree, and added a note to his interlocutor, which contained the following passages:—"It was pleaded by the defender that the boundary being fixed under a verbal arbitration in 1861, followed by the erection of a wooden paling and a certain acquiescence, the present action is excluded. This defence required evidence, and proof thereof was included in the general proof allowed to the parties. On considering the proof, the Lord Ordinary has no hesitation in repelling the plea. His grounds shortly are—(1) A verbal reference regarding heritage, or the boundaries of heritage, and a verbal award thereon, are not binding on either party. (2) The authority to refer is not proved. The reference, such as it was, was gone into by the pursuers' agent, who stated that he did not tell any of his clients thereof till long after. (3) The same witness seems to prove that the reference was merely to fix a temporary fence, not the ultimate right of property. (4) The erection of the paling, which merely cost 24s., cannot be founded on as *rei interventus* establishing an heritable right. (5) There was no acquiescence; for as soon as the position of the paling came to the knowledge of the pursuers and their agent, they objected, and disputes ensued. (6) It is a matter of controversy whether the paling was really erected on the line fixed by the arbiters. There is evidence to show that the arbiters intended to fix the boundary as in a straight line with the west wall of Janet Currie's house—that is, the line contended for by the pursuers. There is no alternative, therefore, but to determine the real boundary according to the evidence. The title-deeds of the respective parties do not fix the boundary line. Each property is described as bounded by that of the other or neighbouring proprietor, leaving the marches to be fixed by immemorial possession. Now, upon the whole evidence, and taking into view the position and circumstances of the respective properties, the Lord Ordinary is of opinion that the line contended for by the pursuers is, as nearly as can be ascertained, the true boundary line between the properties of the pursuers and defender respectively."

The defender reclaimed.

NEVAY for him.

PATTISON for the respondents.

At advising—

The LORD JUSTICE-CLERK—If I had concurred with the grounds of the Lord Ordinary's judgment, I should have simply expressed my adherence, as, in a case like the present, the Lord Ordinary acts as a jury. I propose to concur in the result at which he has arrived, but, as matter of law of some importance has been raised, I will shortly state my opinion.

The point in which I differ from the Lord Ordinary is, that he finds the verbal arbitration invalid. This arbitration was, I think, the only sensible thing done by the parties in the case. Lord Cowan has put into my hand a passage from Mr Montgomery Bell's book on Arbitration, p. 53, in which he says—"Where parties have had a dispute respecting the marches of their adjoining lands, and have submitted the dispute to arbitration, parole proof has been repeatedly allowed, both of the submission and also of the award, the latter having been made in a practical and patent form, by the arbiters causing march stones to be set at their own sight in their determinate places in the boundary line. Gilmour states the doctrine of his day in these terms—'Differences about marches may be submitted and determined verbally; both submission and sentence may be proved *prout de jure.*'" That being, as I think, the satisfactory and sound principle, I cannot concur with the Lord Ordinary in thinking the arbitration is not binding.

It is said that Mr Macqueen had no authority to bind his clients. There is a strong presumption that he had authority. At all events, the parties paid one-half of the expense of the fence which was put up, and they paid Mr Macqueen's account, which contained charges with reference to the arbitration. I do not think they could repudiate this after seven years.

But it is said that the fence was not put up in accordance with the findings of the arbiters. I do not think that anything can bar the pursuers proving that. And I think that it has been proved.

The other judges concurred, and the Court adhered.

Agent for Pursuers—James Somerville, S.S.C.

Agent for Defender—Robert Finlay, S.S.C.

Wednesday, March 8.

FIRST DIVISION.

LAMOND'S TRUSTEES *v.* CROOM.

Trustee—Creditor—Preference—Liability—Co-Trustee—Agent and Principal. Testamentary trustees, who had *bona fide* made payments to beneficiaries and to postponed creditors out of the trust-estate, which unexpectedly proved insolvent, *held* personally liable to an unpaid preferable creditor to the extent of the funds thus paid away.

Trustees who employed one of their number to act for them in a foreign country, *held* liable for acts done by him within the general scope of his authority.

The late Mr Malcolm Lamond, a native of Scotland, died in November 1864 at Shanghai, where he had carried on business for some years. He left a trust-settlement executed in Scotland during a visit in 1863. Mr Thomas Smith, one of the trustees and executors named in the settlement, was at the time of Mr Lamond's death resident at Shanghai; the other trustees were all resident in Scotland. Mr Lamond was possessed of personal property both in China and in Scotland; he was also the proprietor of certain real subjects at Shanghai, over which he had granted a mortgage for 10,000 taels (a tael being about 6s. 8d.) in favour of Mr A. F. Croom. For the purpose of realising