with the judgment in the former case, the discharge can be reduced? The only ground of reduction in both cases is essential error. The first question is, whether the alleged error is proved to exist? second, whether, if proved, it has the effect of enabling them to reduce the discharge? First, then, as to the matter of fact, the averments in the two cases are almost *verbatim* the same. In the former case the Court was of opinion that it was not proved that Mr Anstruther was under the error alleged. That Mr Anstruther changed his mind is neither averred or proved. Nor can it be said that there is any additional evidence which we had not in the former case, unless it be Mrs Mercer's recollections of what her father said. According to my view, nothing more than a power of division was claimed by him and his wife in 1847, and nothing more was claimed by him in 1861. It was no new idea he had to communicate to Mrs Mercer. He could have had no object in misrepresenting her position to her. In any view, he could have limited her position to much less than £5000. He knew that it was the men of business he had to satisfy, and they were satisfied that Mrs Mercer was not renouncing any right to which she was entitled under her father and mother's marriage-contract. It would be most dangerous to set aside solemn contracts on vague reminiscences. Beyond these, there is no other evidence which was not before us in the former case; and I do not think that the allegation is proved in this case, more than in the other, that Mr Anstruther believed that he had the power of absolute disposal over his wife's estate, or that those acting for Mrs Mercer so believed. What the lady herself believed is of comparatively little importance. It is now said that they were all under a different error, viz., that Mr Anstruther was the fiar of his wife's estate, subject to a protected succession on the part of the children. This is not averred on record, and moreover it is an error inconsistent with the existence of that alleged. Mr Anstruther could not believe himself at the same time absolute owner, and a limited fiar under the most onerous of contracts. But assuming that he took this view, he must have held the same view in 1847; and if it is a good ground of reduction in this case, it was also in the case of Smith Cuninghame. Whatever was the nature of the error, it cannot be the ground of reduction unless it can be shown to have given rise to the contract. Mrs Mercer had no power of exacting payment. Mr Anstruther might by unilateral deed have limited her to a much less sum; and all that she says is, *Quomodo constat*, that if Mr Anstruther had known that he was liferenter and not fiar, he would have restricted her to £5000?

An important feature in this case is that the deed sought to be reduced is an *inter vivos* deed, which came into operation at its date. For five years this deed stood on the public records, and no challenge was made. Even Mr Anstruther's second marriage was allowed to pass, and not till he was dead was the challenge made, when Mrs Anstruther could no longer execute such deeds as would rectify the error. If, notwithstanding lapse of time and the death of one of the parties, a deed standing on the public records can be reduced on grounds like the present, I think it follows, not only that Miss Lucy Anstruther might have challenged her discharge with equal success, but that Mr Anstruther, if he had been alive, would have had the authority of your Lordships for reducing his own marriage-contract.

Agents for Pursuers in both actions—Hamilton, Kinnear, & Beatson, W.S.

Agents for Defenders—A. & A. Campbell, W.S.

Thursday, March 7.

ERSKINE *v.* GLENDINNING.

Lease—Offer and Acceptance—Formal Deed embodying Contract. Circumstances in which it was found that a valid contract of lease had been constituted by offer and acceptance, though the latter did not exactly meet the former in form of words, and that the addition of the words, "subject to lease drawn out in due form," did not import a condition into the acceptance, that being a thing the landlord was entitled to insist upon, under any circumstances, if the contract, as embodied in the missives, was validly entered into.

In this action the pursuer, Mr Erskine, residing in Dalbeattie, sought to have it found and declared that by a certain letter of offer, addressed by the defender Mr Glendinning, also residing there, to him, and which letter of offer was in the following or similar terms:—"*Dalbeattie, May 18th*, 1870.—Mr Erskine, Sir,—I hereby offer to take a lease of the Wilmington corn and flour-mills and pigs'-houses and boilings, &c., for the period of ten years, entry at Whitsunday first, at the yearly rent of £80 sterling. (Signed) THOMAS GLENDINNING." And by a certain letter of acceptance, addressed by the pursuer to the defender, and which letter of acceptance was in the following or similar terms:—"*Dalbeattie*, 24 *May* 1870.—Mr Thos. Glendinning, Sir,—I beg to accept of your offer for my mill, subject to lease drawn out in due form.—I am, Sir, yours truly, JAMES ERSKINE;"—there was constituted a valid contract of lease between the pursuer and defender, and that the defender thereby became the pursuer's tenant in the corn and flour-mill and machinery therein in Dalbeattie belonging to the pursuer, and known as Wilmington Corn and Flour-Mills, with the pig houses, boiling-house, and piece of ground on which the said pig-houses and boiling-house are situated, and whole pertinents connected therewith; and that for a period of ten years from and after the 26th day of May 1870, at a yearly rent of £80 sterling.

The defender's offer had been written and delivered upon Saturday, 21st May, but had been antedated to the 18th, in consequence of its being exchanged for another offer, in which there were some errors, and which was put in on the 18th, the last day for receiving offers according to the pursuer's advertisement. The pursuer averred that he had verbally accepted the offer upon receiving it on Saturday the 21st, but the date of his written acceptance was Tuesday, 24th May. This letter was sent to the defender by messenger, as alleged by the pursuer, on the evening of the 24th, though the defender denied receiving it till the 25th. When produced in Court, the date had been altered by erasure into 25th. Upon 24th May the defender wrote, withdrawing his offer, and posted it to the pursuer, who only lived about 200 yards from the post-office, as the defender deponed, in time for the early morning delivery of the 25th;

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**