[16*th March* 1837.]

Sir DAVID MILNE, Appellant.—*Sir Frederick Pollock—Buchanan.*

DAVID ROBERTSON, Esq., and others, (Trustees of the late Sir JOHN MARJORIBANKS,) Respondents.—*Attorney General (Campbell)—Sir William Follett.*

Sale.—Circumstances in which held (affirming the judgment of the Court of Session) that a correspondence relative to the purchase of a land estate did not amount to a concluded contract.

1st DIVISION.
Lord Fullerton.

BY various deeds of settlement the late Sir John Marjoribanks conveyed to the respondents in trust his whole property, heritable and moveable, which should belong to him at the time of his death, and particularly the estate of Simprim in Berwickshire which he had recently purchased from a Mr. Murray. They were directed to discharge all the debts due by Sir John, and to make payment of various legacies and annuities; for the fulfilment of which purposes they were authorized to sell or burden any part of the trust estate. After these purposes of the trust had been accomplished, they were directed, (if his circumstances should justify it,) to convey the whole of the heritable property which should remain unsold to Edward Marjoribanks, Sir John's eldest son, and to the heirs male of the body of Edward; whom failing, to his second son William, and to the heirs male of his body; whom failing, to certain other substitutes, under the fetters of a strict entail. During

the subsistence of the trust the trustees were directed to pay to Edward Marjoribanks such an annuity as they should deem fitting and proper, and, in the event of his death before a conveyance had been executed in his favour, to secure to his widow and younger children such provisions as he would have been enabled to settle upon them had he obtained possession of the trust-estate.

There were no similar provisions, in the event of Edward's death without issue, in favour of his brother William. On the contrary, it was provided, that in case the succession should open to William, an annuity of 250*l.*, settled upon him during his life, should then terminate, and in place of it an annuity of 200*l.* should be paid to his immediate younger brother Charles, and in case of the death or succession of Charles his annuity should cease, and a similar one be paid to his next younger brother David: Edward Marjoribanks, who was never married, died in India before his father, and the succession thus opened to his second brother Sir William. Under these circumstances Sir William was desirous that the purposes of the trust should be carried into execution as speedily as possible, and the trustees were anxious to concur in promoting this object.

An obstacle presented itself to the winding-up of the trust, arising out of the nature of the agreement which Sir John Majoribanks had entered into with regard to the purchase of Simprim. It formed part of the bargain with the seller, that the price, amounting to 37,000*l.*, should remain in Sir John's hands, bearing interest at the rate of $3\frac{1}{2}$ per cent., until final judgment should be

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pronounced by the House of Lords on a question with regard to the validity of the title. It was necessary that some means should be adopted for relieving the trustees from this large claim before they could venture to denude. The difficulty of accomplishing this was increased by the reluctance which was expressed both by Sir William and by the other members of the family to part with Simprim, by the desire which was felt to include it in the entail, instead of certain house property in Edinburgh, which in that case must have been sold, and by Sir William's declining state of health.

In this position of matters a meeting of the trustees was held on Saturday the 11th of January 1834, the minute of which bears as follows:

"Present — D. Marjoribanks, Esq.; George Wau-
"chope, Esq.; David Anderson, Esq.; Adam
"Anderson, Esq.

"The immediate winding-up of the trust having
"been strongly impressed upon the meeting, they
"direct Mr. Cuningham[1] to prepare a state of the
"whole affairs of the trust, balanced up to the 1st
"January, and to be ready on Wednesday next; and
"to be prepared to advise the trustees as to the prac-
"ticability of denuding of the trust and executing an
"entail, in terms of the trust-deed; and in doing so
"to have in view a sale of Simprim, and the entailing
"of the house property."

On the 14th, Mr. Adam Anderson, one of the trus-

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[1] Mr. Cuningham, W.S., (of the firm of Cuningham & Bell, W.S.), their agent.

tees, having met Mr. Milne, (the son of the appellant Sir David Milne,) stated to him that it was probable that Sir John Marjoribanks's trustees would part with Simprim, as they were very anxious to bring the trust to an immediate conclusion; and that, being aware that his father, Sir David, had formerly looked at it with some view to a purchase, he wished Mr. Milne to ascertain what were his father's sentiments in regard to it. In this conversation he stated that it had been mentioned among the trustees that it might be advisable to transfer the estate to a purchaser on the same terms as those on which it had been acquired by Sir John; and he referred him to Mr. Cuningham as the person from whom the necessary information could be obtained.

On the same day Mr. Milne addressed the following letter to Mr. Cuningham: — "Mr. Adam Anderson "spoke to me to-day regarding the wish of Sir John "Marjoribanks's trustees to dispose of Simprim, and "stated, that if Sir David Milne were still inclined to "become the purchaser of that estate, the trustees would "wish to transfer it to him. My father, to whom I "spoke on the subject, is not indisposed to enter into "the proposed transaction, if the terms are unobjec-"tionable; and therefore I will be obliged by your "sending here the papers, which may enable Sir David "to come to some resolution on the subject."

Mr. Cuningham returned this answer on the same day: — "In terms of your request I beg to enclose "an outline of particulars of the estate of Simprim, "which will give you an idea of how it stands. I can "furnish more particulars if required; and I may "mention, that Mr. Bell of Swintonhill valued it, and

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" is of opinion that it is one of the most eligible pur-
" chases which could be made in Scotland. Another
" party has been spoken to, and is inclined to entertain
" the proposal, but he cannot fix till he hears from
" London."

Another meeting of the trustees was held on the 15th, at which Mr. David Marjoribanks attended on behalf of his brother Sir William, with a proposal for winding up the trust, and intimated, that if it was intended to sell Simprim, he would procure a purchaser. The following resolution was minuted in regard to Simprim: —" The only matter remaining to be adjusted is the " disposal of the estate of Simprim, and the trustees, " considering this in the light of an incomplete bargain, " where they have not the means, without hampering " very much the trust estate, of completing it, seeing " they have no funds in hand, are of opinion that they " would be justified in making over the transaction to " any third party willing to take it, more especially " when they consider that a possibility still exists of the " seller not being entitled to sell. Mr. Marjoribanks, " however, having stated that he thought it proper to " offer the transaction to the members of Sir John's " family before closing with any stranger, and that he " had accordingly written to Mr. Campbell Marjori- " banks on the subject, and expected an immediate " answer, the meeting quite approved of Mr. David " Marjoribanks's suggestion, and agreed to delay for an " answer from Mr. Campbell Marjoribanks; but they " consider it quite imperative this purchase should be " taken off their hands before the entail is executed. " Direct Mr. Cuningham, therefore, to prepare for the

" subscription of the trustees a deed of entail in con-
" formity with the trust-deed; and on the estate of
" Simprim being taken off the hands of the trustees
" to deliver the same, receiving from Sir William
" Marjoribanks, the party in whose favour the entail
" is made, an ample discharge in favour of the
" trustees."

Soon after this meeting had terminated Mr. Cuningham received a letter from Mr. Milne, dated on the same day, in which he expressed himself thus: — " My
" father has perused the statement sent by you as to the
" estate of Simprim, which Sir John Marjoribanks's
" trustees have proposed to transfer to him, and he
" desires me to say that he is willing to enter into the
" proposed transaction. You will therefore be so good
" as send him a note of the parochial and public bur-
" dens, &c., and the missives which passed between the
" former proprietor and Sir John Marjoribanks. Of
" course, after this intimation, Sir David Milne under-
" stands that any negotiation you may have opened with
" other intending purchasers will now drop."

To this letter Mr. Cuningham, upon the same day, returned the following answer: — " I am favoured with
" with yours of this date, but have not by me a copy
" of the minute of sale of Simprim, otherwise I should
" have sent it. In the meantime, however, I think it
" right to mention, that a meeting of the trustees of
" Sir John Marjoribanks was held this forenoon. At
" this meeting Mr. D. Marjoribanks stated that he
" thought it right to bring the matter under the notice
" of some members of the family; and the trustees were
" of opinion that this preference they ought to have, to
" the extent of knowing whether they inclined to treat

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" for it. Under these circumstances I am now barred " from proceeding farther until their determination is " known."

Upon the 16th Mr. Milne sent the following reply to Mr. Cuningham: — " It was with no small degree " of surprise that my father and I perused your note of " last night (only received this morning), stating, that " although Sir John Marjoribanks's trustees had made " a proposal to transfer Simprim to Sir David, and " which proposal he had accepted, yet they were after- " wards of opinion that the matter should still be kept " open for the consideration of other parties, who should " have a preference. Sir David has acceded to the " proposal of the trustees; and he could hardly have " expected that after he had intimated his acceptance, " they should give an opportunity to other purchasers " to deprive him of the estate offered to him. I am " sure, that when this matter is explained to the trus- " tees, they will not be disposed to resile from their " own proposals in the manner which the terms of your " letter imply."

Upon receiving this letter, Mr. Cuningham brought the whole correspondence that had passed with Mr. Milne before the trustees at a meeting which they held on that day. The minutes of this meeting bear, — " Mr. David Marjoribanks stated to the meeting that " he had found a gentleman, Mr. John Thomson, the " cashier of the royal bank, who was ready to take the " estate of Simprim, and completely to relieve the trus- " tees of all obligations incumbent on them and their " constituent by the minute of sale with Mr. Murray; " and the trustees being quite convinced that this " arrangement was most beneficial for the trust, they

" resolved to accept of this offer, and direct Mr. Cun-
" ingham to write Mr. Milne.
" Mr. Cuningham was authorized forthwith to enter
" into the necessary missives with Mr. Thomson, and
" to apply for the concurrence of Mr. Murray to the
" transaction."

In terms of this direction, Mr. Cuningham afterwards entered into formal missives of sale with Mr. Thomson, which were followed up by regular conveyances of the estate.

Mr. Cuningham, in terms of the instructions of the meeting, returned on the same day the following answer to Mr. Milne's letter: — " 16th January 1834. I was
" duly favoured with yours of this date, and was happy
" to have an opportunity of bringing it under the notice
" of the trustees of Sir John Marjoribanks at a meeting
" which took place at five o'clock to-day. The trus-
" tees, feeling very much surprised that you should con-
" sider that any thing amounting to a definite offer was
" made by them to you of the estate of Simprim, and
" still more, if it had been made, that they should
" causelessly resile from it, have desired me to remind
" you of what took place. It was at a meeting of the
" trustees held on Saturday last that the possibility of
" putting an end to the trust was first under their con-
" sideration, and the unfinished state of Simprim was
" urged as one of the greatest bars. As, however, it
" appeared to the trustees that Simprim might be dis-
" posed of, it was suggested by Mr. Marjoribanks that
" some member of the family would take it, or that
" (other matters being arranged) some one else might
" be found to do so; and, among others, your father's
" name was mentioned, but merely as a matter of com-

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" mon-place conversation. Mr. Anderson accordingly " in conversation mentioned the matter to you; and in " writing to us for particulars on the 14th, you state " that Mr. Adam Anderson had 'spoken to you,'—not " that he had made an offer, which he could not do. " In answering, I likewise made you aware at once " that other parties were in the field; and when the " trustees held their meeting yesterday forenoon, and it " was reported what was going on, Mr. David Mar- " joribanks expressed his opinion that the family were " entitled to a preference over any stranger, and it " certainly was not unreasonable in the trustees to come " into that view.

" In your letter of to-day you state that 'Sir John " 'Marjoribanks's trustees had made a proposal to " 'transfer Simprim to Sir David, and which proposal " 'he had accepted; yet they were afterwards of " 'opinion that the matter should be kept open for " 'the consideration of other parties who should have " 'a preference.' Without stopping to repeat that " there was no proposal (in the correct acceptation of " that term) ever made, I am desired to point out that " you have fallen into a mistake. The resolution of " the trustees, agreeing to give the members of the " family a preference, was passed at a meeting held at " four o'clock, and what is termed Sir David's acceptance " was not received till nine o'clock in the evening.

" In conclusion, I am further directed to state, " that Mr. Marjoribanks has come forward with " a proposal at this day's meeting, which has been " accepted."

To this letter Mr. Milne, on the same day, sent the following reply:—" I have this moment received your

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" letter of to-night, intimating that Sir John Marjori-
" banks's trustees, notwithstanding my father's accept-
" ance of their offer to sell Simprim to him, have re-
" solved on retracting that offer, and have apparently
" disposed of it to another. This intelligence has
" occasioned the utmost surprise both to my father and
" to myself, considering the nature of the communica-
" tions which have passed between us, and the character
" of the parties with whom he was transacting. You
" are aware that the proposal for the transfer of this
" estate to my father came first from the trustees, who
" by Mr. A. Anderson (one of their number) stated to
" me their anxiety to know whether Sir David was still
" disposed to purchase the property, and their willing-
" ness immediately to convey it to him. Mr. Anderson
" added, that in the event of Sir David refusing to
" become the purchaser, he believed that one of the
" Marjoribanks might be induced to come forward,
" though the trustees conceived that it would be more
" proper for them to dispose of the estate to a third
" party, rather than to a member of the family. Sir
" David therefore considers, as it was only in the event
" of his declining the proposal that the estate was to
" be transferred to Mr. Marjoribanks, his immediate
" acceptance of the trustees offer foreclosed any trans-
" action with that party. Whilst I have thus entered
" into this explanation, in answer to that part of your
" letter regarding Mr. Anderson's conversation with
" me, allow me to add, that Sir David considers, that,
" both in point of honour and in point of law, Sir
" John Marjoribanks's trustees are bound to implement
" their agreement."

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The correspondence was closed by the following letter from Mr. Cuningham to Mr. Milne:—"17th January "1834. In reply to your letter of yesterday's date, I "beg to inform you that the transaction in regard to "the sale of Simprim is closed.

"I am much surprised at the expression in your "letter, in which you say that the trustees of Sir John "Marjoribanks had retracted their offer, as you must "be aware that no specific offer was ever made to Sir "David, either verbally or in writing. By referring "to the first letter that I wrote to you on the subject, "you will see that I distinctly stated to you that there "were other parties in the field. Mr. Anderson stated "the same fact to you, when he first mentioned "the wish of the trustees to part with the property; "and so far from making any absolute offer he posi-"tively declined (although requested by you) to make "any written communication to Sir David, until his "wishes as to becoming a purchaser were in the first "instance ascertained.

"As to the law of the case, I do not think that a "single doubt can be entertained."

The appellant then raised an action of implement against the respondents, in which the Lord Ordinary (Fullerton) pronounced the following interlocutor:— "Finds, that there was no concluded bargain for the "sale of the lands of Simprim between the pursuer "and defenders; assoilzies them from the conclusions "of the action, and decerns; finds the defenders en-"titled to expenses, and allows an account thereof to "be given in, and to be taxed by the auditor."

"Note.—The alleged conversations between "Mr. Milne and Mr. Anderson must be thrown en-

" tirely out of view. The only inference that can be " drawn from the opposite statement on this point is, " that there was a misapprehension on one side or the " other, but on which side it is now confessedly im- " possible to ascertain, and indeed, considering the " subject in dispute, incompetent to investigate by " parole proof, even if that were attainable. The " question must be determined by the correspondence, " and on that the Lord Ordinary entertains no doubt.

" The case of the pursuer must rest on the assump- " tion that the letter of Mr. Cuningham of the 14th " January constituted an offer of the estate to him or " the terms contained in the enclosed paper, and that " the transaction was concluded by his acceptance of " that offer in the letter from his son of the 15th " January; and his case would have been a strong one " if he had made it out as laid in the summons. It is " there averred, that at the meeting of the trustees on " the 11th of January ' it was resolved to apply to the " ' pursuer to become the purchaser of the estate,' and " that ' for the purpose of making an offer of the said " ' estate to the pursuer, a minute or missive was drawn " ' out by the said trustees, or under their direction, " ' setting forth the terms on which they were willing " ' to convey to the pursuer,' and that the said minute " or missive was transmitted to the pursuer in the " above-mentioned letter of Mr. A. Cuningham. But " this statement is not only unsupported—it is in " some essential particulars disproved by the written " evidence. First, It does not appear that the trustees " had come to the definite resolution of parting with " the estate, and certainly there is no proof that they " had formed even an intention of offering it to the

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" pursuer. Secondly, It is proved that the 'note of " 'particulars,' termed by the pursuer a 'minute or " 'missive,' was not drawn up by the direction of the " trustees for the purpose of making an offer to the " pursuer, but was drawn up by their agents for the " information of another party, who had some intention " of purchasing. Thirdly, The letter of the 14th " January was addressed to the pursuer by Mr. A. Cun- " ingham, who was only the agent of the trustees, and " who had no power to make an offer. Though en- " closing the 'note' already referred to, that communi- " cation was described as 'an outline of particulars, " 'which will give you an idea of how it stands.' " And the letter clearly imported that a similar com- " munication had been made to and was then under " the consideration of another party.

" In these circumstances, the Lord Ordinary is of " opinion that the letter of the 14th January must be " viewed, not as an offer of the estate on the terms " contained in the enclosed 'note,' but merely as the " communication by an agent of the information which " he possessed respecting it. He conceives that the " first letter which admits of being construed as an " offer is that of the 15th January; and it is clear " that that offer never was accepted by the trustees."

A reclaiming note against this judgment having been presented by the appellant to the First Division of the Court, their Lordships, on the 19th February 1836, after hearing the appellant's counsel (without calling on the respondents counsel) adhered to the Lord Ordinary's judgment.[1]

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[1] 15 Dunlop, B., & M. 533.

Against these interlocutors the present appeal has been brought.

Appellant.—The conclusion in point of law necessarily deducible from the facts of this case is that there was an effectual and valid agreement of sale concluded between the parties, under which the respondents are legally bound to transfer the estate of Simprim to the appellant and his heirs. Upon this subject it may be sufficient to refer generally to the situation and transactions of the parties as already stated; but it may be necessary farther to explain, that no particular form of instrument is requisite to constitute a valid contract for the sale of real estate according to the law of Scotland. It is required, indeed, that such contract shall be in writing, but it may be effectually constituted by letters written and signed by the parties or their authorized agents, or, though not written, yet signed by them in presence of two witnesses. A contract undoubtedly binding and obligatory may be concluded by a correspondence between the parties or their agents, all that is necessary to complete it being that the parties shall be agreed as to terms, and their mutual consent to these terms clearly expressed in a writing which the law holds probative, viz., either written and signed by them, or if not written signed by them in presence of two attesting witnesses. Now the powers of sale enjoyed by the respondents under the trust deed are indisputable, as well as their resolution to exercise these powers, adopted on full deliberation, and, according to their own views of the state of the trust affairs, dictated by absolute necessity. So strongly was this necessity felt in the situation of the respondents, who found themselves in possession of an estate of which they had no funds

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to pay the price, that in their minutes they themselves declare that "they would not be justified in retaining the "estate if any one offered to relieve them of the bargain."

Having under this strong conviction come to the determination of selling, and having turned their attention to the appellant, and mentioned his name at their first meeting as a probable purchaser, the matter is communicated to him through his son by one of their own number. Without pressing that communication beyond the limits of the admission made by the respondents, still it is clear that there was then distinctly announced to the appellant, not only their intention to sell, but their desire to know whether he was willing to purchase, and that for particulars he was referred to Messrs. Cuningham and Bell. The appellant immediately stated to these gentlemen that he was willing to purchase, and requested farther information; and they then transmitted to him the note of particulars, containing all the necessary information, and concluding with the express offer made in the name of the respondents; viz., that "Sir John's trustees would place any one in his shoes "by just assigning it over." The appellant instantly accepts this offer, by declaring that he was willing to enter into the transaction, and adding that important intimation which demonstrates the understanding of the writer of the letter, that it was a definite acceptance of the offer, and made a concluded transaction, that, "of "course, after this intimation, Sir David will understand "that any negotiation you may have opened with other "intending purchasers will now drop."

It will be particularly observed that in his reply to this letter Mr. Cuningham, although he endeavours to draw back from the transaction, does not found that

attempt on the allegation that he was not sufficiently authorized or empowered by the respondents to sell the estate; no pretence of that nature is brought forward; neither does he object to the perfect sufficiency of Mr. Milne's letter as an acceptance; but his only excuse or justification is the statement of Mr. David Marjoribanks's wish to bring the matter under the notice of some members of the family, and of the consent of the trustees to give them a preference, in consequence of which he states himself as barred from proceeding "until "their determination is known," that is, the resolution of the members of the family referred to.

According to the singular views entertained by the respondents on this subject, they seem to imagine that they had contracted no obligation of any sort to the appellant in consequence of what had passed with him. It is quite clear that no tender was ever made to Mr. Campbell Marjoribanks until after the appellant had transmitted to the respondents his definitive acceptance of their offer; and though they allege that his acceptance was not actually received by them until the evening of the day on which they had sanctioned the application to Mr. Campbell Marjoribanks, still it is undeniable, in the first place, that a prior offer had been made to the appellant on the preceding day; and, secondly, that they were in possession of his acceptance of that offer in sufficient time to have countermanded any proposal to Mr. Marjoribanks; yet they seem to contend that they were at liberty, under these circumstances, and in the face of what had passed with the appellant, not only to conclude a transaction with Mr. Campbell Marjoribanks, but after he had rejected their offer to commence a new negociation with a different party, and even to send

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the estate a-begging for a purchaser, until they should succeed in finding a gentleman willing to relieve them of the burden.

The appellant cannot but consider these notions as proceeding upon material fallacies, and on a total misapprehension by the respondents of the ground on which they stood in point of legal obligation. Such views are calculated to shake the stability of all similar transactions, and to overthrow all confidence between parties in the important commerce of landed property. It may be very true that as long as the respondents chose to confine to themselves and to the minutes of their own proceedings the knowledge of their difficulties, and of the necessity under which they were placed of selling Simprim, from want of funds to pay the price, they might be in no danger of committing themselves to third parties; but when they made these matters publicly known, by framing and circulating the note of particulars, and tendering a transfer of the right in different quarters, the case was most materially altered. Above all, when one of their number opened an express communication with the appellant, announcing their anxious wish to sell, and sounding him as to his willingness to purchase, and when this ended in an offer made in their name to convey the estate to any one, which, though in its terms general, received an individual determination and direction by its transmission to the appellant, they necessarily put themselves into his hands, and for a time tied up their own, making the transaction dependent on his determination, provided it should be a simple acceptance of their offer (as it was), and declared without any undue delay. To hold, as the respondents maintain, that after the transmission of the offer to the

appellant, and while the matter was in dependence, but much more after it had been concluded by his acceptance, they were entitled to embark in new transactions with different parties, and finally to sell to another on the very terms to which the appellant had consented, besides being, as is humbly submitted, repugnant to every legal principle, would be to introduce a dangerous laxity in this important class of transactions, and to deprive the purchaser of all the security which is at present understood to be derivable from a reliance on the good faith of the seller.

Where the proprietor of an estate has adopted and made publicly known a resolution to sell, and having made offers of sale without success, selects a particular individual as a probable purchaser, to whom he announces his wish to sell, and his desire to know if he be willing to purchase, and where this is followed by the transmission to him of a written statement descriptive of the particulars, and concluding with a declaration that he, the proprietor, is ready to transfer the property to any one in the terms therein set forth, the appellant humbly maintains that this must and can only be considered as to all intents and purposes an offer of sale of the estate to that individual. Such was the precise character of the communications made to the appellant; 1st, a statement made to him by one of the respondents themselves that they were anxious to sell, and desirous to ascertain his views as to purchasing; and, secondly, the transmission to him of the note of particulars, stating they were "anxious to get quit" of the estate, that "the "price is under twenty-five years purchase of the "rental, and is a most eligible bargain," and concluding with that decisive declaration that they would put any

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one in their place by assigning over the right agreeably to their statement in their minutes, that "they would "not be justified in retaining the estate if any one "offered to relieve them of the bargain." Again, therefore, the appellant repeats, that to every fair and substantial purpose, and according to any views of sound or just construction with which he is acquainted, such a communication was a plain offer of sale of the estate to him; and considering it as such he maintains that the respondents were bound for a reasonable time to await the issue of that offer, and were in the interim debarred from entering into new transactions or negotiations with other parties. If the appellant had then either rejected or unduly delayed his answer to the offer, the respondents might in that case have been at liberty to deal with others; but it has been seen that without the delay of many hours he at once met the offer of the respondents by a decided acceptance, whereby the transaction was completed, and the door effectually shut against all farther negotiation.

The respondents appear to lose sight of one material consideration; viz., that there was here no difference as to the terms of the bargain, on which ground so many negotiations break off. The parties in the present case are not at issue upon any question of terms; neither is there any objection of a personal nature that has been or can be stated against the appellant. But while he is wholly unexceptionable as a purchaser, and while he has from the commencement distinctly accepted the terms offered, he is told that the estate is to be sold to a posterior offerer who gives no better terms. This however is a proceeding which he humbly maintains the respondents are legally barred from adopting in the face of the

transaction with him. It will be observed that in the very first letter of the 14th Mr. Milne distinctly states to the respondents that the appellant is not indisposed to enter into the transaction, but requests information. If therefore it was the intention and purpose of the respondents to give an arbitrary preference to certain individuals, in respect of their belonging to the family of the truster, over all others, though offering the very same terms, they were clearly bound to have stated this in limine, and it was their duty to have warned the appellant, on the very threshold of the negotiation, that he was losing his time and labour, as, if he were even to come up to the terms, and to agree to all that was required, still there was a determination not to sell to him, but to prefer the Messrs. Marjoribanks. But the conduct of the respondents was the reverse of this; they first intimate to the appellant their purpose to sell, and inquire as to his views of purchasing; they furnish him with all particulars, and declare their readiness to convey to any one who will agree to their terms; they encourage his known wish to purchase by holding out the estate as one of the most eligible bargains in Scotland, and they stimulate his fears by representing that there is another offerer in the field; and then, when the appellant at once accepts their offer, and agrees to the terms, they coolly tell him that truly they cannot sell the estate to him or to any stranger, as they have determined to give a preference to the family of Sir John Marjoribanks. However faithless and unjustifiable such conduct may be, it is impossible to dispute that it is the course which the respondents have followed in the present case, and for which they are endeavouring to obtain a legal sanction. They first use every means to

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lead the appellant into the negotiation, pledging themselves to transfer the estate on specific terms, and then, when he declares his acceptance of these, they pretend to sell on the very same terms to a different party, who never appeared in the transaction until after the appellant's acceptance was in their hands.

The resolution to prefer the family, as it necessarily operated as an absolute bar against any sale to strangers, so it was an equal bar against all negotiation with strangers; and if the respondents had been to adopt or act upon that principle, they ought to have refrained from any dealing with strangers; they ought to have made no tender or offer of the estate to any one, and kept it out of the market until the determination of the family should be known. But, with deference, the communications that were confessedly made to strangers, and particularly to the appellant, amounted to a clear departure from and waiver of any such resolution, even if it had been then entertained. By offering the estate to him on certain terms they necessarily bound themselves to convey it to him if these terms should be accepted; and when these were definitively accepted the transaction was closed, and the agreement effectually concluded. It will be particularly observed that this excuse about preferring the family to strangers, when stated, as it is by Mr. Cuningham, as a reason for breaking faith with the appellant, is a mere pretence, as it plainly appears from the minutes that the respondents had never adopted any such resolution, and that the utmost length to which they had gone was to resolve to delay closing with the appellant until Mr. Campbell Marjoribanks's resolution should be known, from which it necessarily followed, that when that resolution was

announced, no alternative remained but to conclude the transaction and complete the sale to the appellant.

Respondents (whose counsel were not called upon to argue the case at the bar of the House). — There was no concluded bargain between the pursuer and defenders for the sale of the lands of Simprim, either by offer on the part of the defenders accepted by the pursuer, or by offer on the part of the pursuer accepted by the defenders, so as to close the transaction in a manner obligatory on both parties or either of them.

The whole case of the appellant rests upon the assumption that the respondents had made a special offer to him to sell the estate of Simprim; for unless such offer was made to him it was impossible for him to accept it, so as to conclude a binding contract between the parties.

The appellant has been somewhat at a loss to specify when and how that offer was made. He may say, either, (1.) That the offer was made by Mr. Anderson, in the course of his verbal conversation with Mr. Milne on the 14th January; or, (2.) That it was made by Mr. Cuningham, by his written communication to Mr. Milne on the same day.

The respondents had not even resolved to sell Simprim at all until their meeting of the 15th of January, at which time they also resolved to make the first offer to the members of Sir John Marjoribanks's family. Mr. Anderson, therefore, had no power or authority from the trustees, either written or verbal, to make the alleged offer to the appellant or to Mr. Milne.

The law of Scotland has effectually provided for the embarrassing consequences likely to occur from giving legal efficacy to mere verbal communings in cases of

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this kind. Such is the imperfection of human memory, and so apt are parties to differ as to the terms and nature of a verbal communication, that it has been considered wise and even necessary to give no legal efficacy to a mere verbal communication in regard to heritable subjects, and to require, as an essential solemnity of every obligation or contract regarding heritage, that it shall be reduced to writing. Mr. Erskine (b. iii. t. 2. § 2.) states the law of Scotland upon this subject as follows: — "From this general rule, that every lawful "agreement, even verbal, is obligatory, the custom of "Scotland has excepted all obligations relating to heri-"table rights, which are utterly ineffectual if they are "barely verbal; for in the transmission of heritage, "which is justly accounted of the greatest importance "to society, parties are not to be catched by rash "expressions, but continued free, till they have dis-"covered their deliberate and final resolution concern-"ing it, by writing. This exception, therefore, takes "place in obligations concerning land rights; first, "Where the obligation arises from the contract of "sale in consideration of a price to be paid, notwith-"standing, that sale, being a consensual contract, may, "when the subject is moveable, be perfected without "writing. It holds, 2dly, even where the heritable "right is only temporary, as in a lease, which, when "constituted without writing, hath no force but for one "year, though the parties should have verbally agreed "that it was to last for a number of years (Durie, July "15, 1637, Skene); and though the tenant should, in "consequence of the bargain, have entered into and "continued in the possession of the farm for two years "(Durie, July 16, 1636, Keith); 3dly, No verbal agree-

" ment in relation to heritage is binding, though it " should be referred to the oath of the party himself " that he had agreed to it; for so long as writing is not " adhibited both parties are considered to have a right " of resiling as from an unfinished bargain. 4thly, " Where an agreement concerning heritage is executed " in the form of mutual missives, both missives must be " probative, otherwise either party may resile, as in the " case of an incomplete minute or contract; and of " consequence, a written offer verbally accepted may " be resiled from."

The appellant then maintains that Mr. Alexander Cuningham's letter to him of 14th January, enclosing the note of particulars, constituted an offer by the trustees, by accepting which he was entitled to close the transaction. The letter of Mr. Alexander Cuningham itself plainly contains no offer, either on the part of the writer or of his constituents the trustees; it is just such a letter as a law agent was fully entitled to write to a party requiring from him information as to an estate for which he intended to make an offer. There was enclosed in this letter a note of particulars; and the appellant's main argument was founded upon the transmission of this document to him. He was at great pains to impress the Court below with his own very peculiar view of the nature of this document. He called it a missive or minute, which he alleged had been drawn up by order of the trustees, with special reference to himself, as the instrument of carrying into effect a previous resolution of the trustees to make a special offer of the estate to him.

To all this the respondents answered, that the appellant's allegations as to the said note of particulars were

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in every respect incorrect. It has been proved that this document was not the result of any resolution of the trustees in reference to the appellant, nor intended as the means of carrying that resolution into effect. The note of particulars was not a missive addressed to any individual, but a mere general statement of information relative to the estate. It had been drawn up by the law agents in the ordinary course of their duty, considering that a sale of this estate had been contemplated by the trustees. A copy of it had in fact been sent to another intending offerer, before the appellant's letter of inquiry had been answered by the transmission of a copy to him. The trustees, as a body, had no knowledge of this document; and Mr. Anderson, in his conversation with Mr. Milne, did not refer to it in the terms alleged by the appellant.

Mr. Milne did not ask for a certain missive or memorandum, which these gentlemen had to deliver to him from the trustees, but merely information requisite to enable him "to come to some resolution on the "subject." In terms of this request, Mr. Alexander Cuningham, another partner, enclosed "the outline of "particulars of the estate of Simprim," in order to give the appellant "an idea of how it stands." Information was all that was asked, and information was all that was furnished. In the same letter, Mr. Cuningham plainly tells the appellant that the same information had been furnished to another party, who, before making up his mind, had been obliged to write to London. In Mr. Milne's next letter he does not pretend to consider the note of particulars as being addressed to himself, nor does he pretend that Mr. Cuningham, by sending it, had made him an offer of the estate. The first sen-

tence of his letter completely shews the distinction. He says, — " My father has perused the statement sent by " you as to the estate of Simprim, which Sir John " Marjoribanks's trustees have offered to transfer to " him." There is here obviously a distinction made between the statement sent by Mr. Cuningham and the offer which the appellant asserts Sir John Marjoribanks's trustees had made to transfer the estate to him.

After all, this letter of Mr. Milne's of the 15th January has very little the appearance of a document intended to finish and conclude a bargain. In Mr. Milne's letter of the 14th January he says—" My father, to " whom I have spoken on the subject, is not indisposed " to enter into the proposed transaction, if the terms are " unobjectionable; and therefore I will be obliged by " your sending here the papers," &c. In his letter of the 15th Mr. Milne uses language very nearly the same—language cautious and ambiguous—which might either be held as the commencement or the completion of a negotiation. He says—" My father desires me to " say, that he is willing to enter into the proposed trans- " action. You will therefore be so good as to send him " a note of the parochial and public burdens, &c., and " the missives which passed betwixt the former pro- " prietors and Sir John Marjoribanks." This letter of Mr. Milne ought truly to be considered as merely the commencement, and not the conclusion of a negotiation. It was the offer—the somewhat cautious offer, of a party who still called for further information, and who might plausibly have argued, that he was not conclusively bound by that offer, if the parochial and public burdens had turned out to be large, or the missives of the sale with the former proprietor to be unsatisfactory. Yet

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while the appellant entered upon this negotiation, with a power of retreat still open to himself, he at the same time seems to have intended that the sellers should have no similar alternative; for Mr. Milne's letter concludes as follows:—" Of course, after this intimation, Sir David " will understand that any negotiations you may have " opened with other intending purchasers will now " drop." This last clause of Mr. Milne's letter is one of great importance. If the appellant had really believed that the trustees had made a special offer of the estate of Simprim to him, he must also have believed and understood that they could enter upon no negotiation with any other party until he had declared his determination. To suppose that the trustees, at one and the same time, had made separate offers to several individuals, was absurd. The appellant might suppose the trustees had invited several parties to offer, but he never could have imagined that he had put in the power of several individuals at the same time to accept. He had been made distinctly aware, by Mr. Alexander Cuningham's letter, that he was not the only party who had been spoken to on the subject; and the clause of the letter last quoted plainly shews his conviction, that as least until the receipt of that letter the trustees were entitled to maintain, and of course to conclude, a negotiation with another party. The true meaning, therefore, of this clause is plainly this:—" I am aware that you " have invited other parties besides myself to make an " offer. I now declare to you that I am willing to offer " for this estate. I make you a proposal which is so " definite, at least, if not conclusive, as to entitle me to " insist upon your not treating with any other purchasers " until my offer is disposed of."

Even understanding this letter of Mr. Milne in the sense most favourable for the appellant's argument, it is quite plain that he understood the trustees were entitled to have preferred any other purchaser until the moment when they received Mr. Milne's letter of the 15th January. Now in point of fact that letter was not received until after the meeting of trustees at which they resolved to give a preference to the members of Sir John Marjoribanks's family.

LORD BROUGHAM.—In this case, my Lords, I do not think it necessary that we should hear counsel on the part of the respondent. I must say that I quite agree with the Court below that this was very near being a contract, indeed so very near that a single word omitted, or perhaps one or two words added, would have made it a binding contract; but I am not prepared to say that it is a binding contract as it now stands.

The only view in which it is capable of being put for the appellant is to take the supposed contract as comprised in these two letters, written by Sir David Milne's desire, in the first of which he says he is not indisposed to enter into the proposed transaction if the terms are unobjectionable, and therefore desires the particulars to be sent. Then the particulars are sent; and then he follows that up with a second letter; saying—not in words but in substance—that he has received those particulars, and that he is willing to enter into the proposed transaction. I think it may be also assumed, upon a reference to what Mr. Cuningham says, in answering that first letter, that he sends him some particulars, but that he has others. He then says in the second letter, "send me the particulars of the parochial and public

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"burdens and the missives." Now no great deal turns upon that, and indeed it only appears to contain the former negotiation, which I am not prepared to say would be binding upon him. There is some little doubt whether the parochial and public burdens had not been stated and deducted in the particulars communicated to Mr. Cuningham in answer to the first note, and which particulars are to be found in folios ten and eleven of the appellant's case. Upon the whole I am willing to adopt the appellant's construction of the word profits, leaving the clear profit of 196*l.*, that is, deducting the interest of three and a half per cent. upon the purchase money of 37,000*l.* from the 1,490*l.* in the manner there stated. I rather incline to think that the respondents gave the particulars of the estate after the deduction; but still Sir David Milne might wish to know, not merely what the rental of the estate was after deduction, but what the amount of the burdens was, which it does not appear was furnished to him. Upon the whole, therefore, I am inclined to agree with the decision of the Court below, and not to advise your Lordships to call upon the respondent to argue this case, because it cannot be supposed that any thing in the course of the argument upon the respondents part will tend to weaken the opinion I have at present formed.

Lord Lyndhurst.—I concur in the opinion expressed by my noble friend. I think that the first letter means nothing more that this,—I am willing to treat with you upon the subject if the terms are unobjectionable,—and thereupon certain particulars were communicated. And then he again says, "I am willing to treat with you "because there is a letter of Mr. Milne's using the same

"expression, but I wish for further information." I wish you to give me an account of such and such things; that is all that relates to the contract, and I cannot consider that as a closed transaction.

Attorney General.—I trust your Lordships will affirm this decision, with costs, in the Court below. The Judges were unanimous, and they determined there as your Lordships have done here, having merely heard one side of the case, there having been this appeal from the Lord Ordinary to the Upper House, and then this appeal to your Lordships House; and your Lordships being clearly of opinion that there was no contract, I trust your Lordships will think this is a case which is to follow the common rule.

Sir Frederick Pollock.—My learned friend should not omit in his statement, that when the Judges below affirmed the decree it was without costs.

Lord Lyndhurst.—Unless there is a good case the costs ought always to follow the usual course.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors therein complained of be and the same are hereby affirmed. And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

JOHN MACQUEEN—SPOTTISWOODE and ROBERTSON, Solicitors.