Tuesday, February 19.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MACBEAN *v.* WEST END CLOTHIERS COMPANY, LIMITED.

Process—Expenses—Caution for Expenses — Restriction of Amount — Defender in Liquidation—Extension of Time—Limitation of Caution.

A receiver and manager was appointed by the English Courts to a limited company registered in London and carrying on business in Scotland. A petitory action having been brought against the company the receiver and manager lodged answers. The pursuer pled that those answers were unauthorised, which plea was sustained by the Lord Ordinary. The defenders reclaimed and amended the record by adding averments to the effect that by the law of England the receiver's action in lodging answers had been validated, which averments rendered necessary a case to ascertain the English law. The Court, on the motion of the pursuer, *ordained* the defenders to find caution for the expenses of the cause by 15th February, and on 19th February, on the motion of the defenders, extended the time for finding caution to 5th March and limited the amount thereof to £300, reserving to the pursuer the right to apply to the Court at any future stage of the process for additional caution.

Duncan Alexander MacBean, *pursuer*, brought an action against the West End Clothiers Company, Limited, having their registered address in London and carrying on business at 3 North Bridge, Edinburgh, *defenders*, concluding for decree for £179, 8s. 4d., £20, 11s. 4d., and £353, 18s. 11d. with interest, which sums the pursuer alleged the defenders owed to Charles Cole Pitcher, formerly chairman and managing director of the defenders, who had assigned his rights against the defenders to the pursuer.

Defences were lodged for the defenders by a receiver and manager appointed by the English Courts, who averred that his powers superseded the powers of the directors.

The pursuer denied the receiver's authority to defend the action. He *pleaded, inter alia*—"2. There being no defences lodged by or on behalf of the company, decree should be granted as concluded for."

On 19th June 1917 the Lord Ordinary (ORMIDALE) sustained the second plea-in-law for the pursuer.

The defenders reclaimed and amended the record by adding averments to the effect that by English law the receiver's action in lodging defences had been validated. Those averments rendered necessary a case for the ascertainment of the English law under the British Law Ascertainment Act 1859 (22 and 23 Vict. cap. 63).

On 5th February 1918 the Court recalled the interlocutor of the Lord Ordinary, and, on the motion of the pursuer, ordained the defenders to find caution for the expenses of the cause by the 15th February.

Thereafter the defenders moved that the time for finding caution should be extended and the amount limited. They referred to *Harvey* v. *Furquhar*, 1870, 8 Macph. 971.

On 19th February 1918 the Court extended the time for finding caution till 5th March 1918, and limited the amount thereof to £300, reserving to the pursuer the right to apply to the Court at any further stage of the process for additional caution, and to the defenders their answers thereto.

Counsel for the Pursuer—Constable, K.C. —Greenhill. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders—Blackburn, K.C. — Leadbetter. Agent—Donald Mackenzie, S.S.C.

HOUSE OF LORDS.

Friday, May 3, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, and Lord Shaw.)

GORDON'S EXECUTORS *v.* GORDON.

Contract—Constitution of Contract—Writing.

Where there are communings with a view to an agreement, it is a question of the intention of parties whether a valid and effectual agreement has been made requiring no formal instrument though such formal instrument is being prepared, or whether there is to be no valid and effectual agreement until the formal instrument is completed. *Circumstances* in which *held* a formal completed instrument was required.

Samuel Hunter Gordon, and two others, a majority and quorum of the executors of the late John Gordon, farmer, Cullisse, Nigg, in the county of Ross and Cromarty, *complainers*, brought a note of suspension and interdict against Alexander Paterson Gordon, farmer, Arabella, Nigg, *respondent*.

The *prayer* was—"That the complainers are under the necessity of applying to your Lordships for suspension and interdict against the said respondent, as will appear to your Lordships from the annexed statement of facts and note of plea-in-law. That the complainers consider that in the whole circumstances of the case they are entitled to have this note passed and interdict granted without caution or consignation. May it therefore please your Lordships to suspend the proceedings complained of and to interdict, prohibit, and discharge the said respondent from selling, disposing of, or intromitting with the stock, crop, implements of husbandry and plenishing on the said farm of Cullisse, and the furniture and plenishing in the dwelling-house thereon, and meantime to grant interim interdict or to do otherwise in the premises as to your Lordships shall seem proper."

The complainers pleaded, *inter alia*—"2. The compromise founded on by the respondent not having been agreed to by the complainers as deceased's executors or by all the beneficiaries, confers neither right nor title on the respondent to the stock, cropping, &c., of said farm. 3. In any event the alleged agreement not having been executed in writing by all interested parties is not binding, and decree should be pronounced as prayed for."

The following narrative of the *facts* is taken from the LORD CHANCELLOR'S opinion—"The action is one brought by the executors to restrain the present appellant from dealing with the farm of Cullisse (which is a farm which had been occupied by the deceased testator) or with the stock upon it, and the question whether there is a good answer to the claim of the executors depends upon whether a certain family arrangement was made between all the beneficiaries in the presence of the executors, that is, on the occasion on which the agreement is said to have been arrived at, which entitles the appellant to this farm as between himself and the other beneficiaries.

"The facts are of a somewhat complicated nature, and the House is very much indebted to the learned counsel for the appellant for the great fairness and clearness with which they indicated the essential points in this case.

"The action is brought by the executors, Samuel Hunter Gordon, John Scott Riddell, and James Hay, a majority and quorum of the executors of the deceased John Gordon, farmer, late of Cullisse, in the parish of Nigg and county of Ross and Cromarty. The action was brought against Alexander Paterson Gordon, farmer, of Arabella, in the parish of Nigg in the same county, and the prayer is this—'. . . [*quotes, v. sup.*] . . .' The defence rested, as I have stated, upon the alleged fact that a family agreement conferring a right to this farm had been entered into by all parties concerned. The testator was Mr John Gordon, farmer, who died on the 29th August 1915. He left about £30,000 of moveable estate, and there were two farms which he had occupied, one of which was Cullisse. The family left were two sons, Mr Samuel Gordon and Mr Alexander Gordon, and three daughters, Mrs Riddell, Mrs Forbes, and Miss Catherine Gordon. The will of the testator was dated the 5th May 1914. It is not necessary to read the whole of it, but there will be found this passage—'(Fourth) I wish the residue of my estate to be divided into six portions, one share to be paid over to each of my children except my daughter Catherine, who shall have two shares, and if any of my said children predecease me then the issue of each predeceasing child or children shall take equally among them the share of their predeceasing parent; but declaring (First) that as I have already paid over to my son Alexander' (that is, the present appellant) 'Two thousand pounds in cash and the stocking of the farm of Balmackie, amounting altogether in value to about Five thousand pounds, the same shall be brought into account in ascertaining the amount of the estate for division, and shall be deducted from the share falling to him or his issue.'

"Now disputes arose with reference to that provision about the £2000 which had been advanced to Mr Alexander Gordon. He considered it unfair that that should be deducted, as in his view it had been a matter of free gift to him by his father, and on the 1st September 1915 a compromise was entered into. It is an instrument signed by all the parties, sons and daughters, and the husbands of the daughters, and its effect is this. It states that the will had been left containing certain provisions as to the disposal of the estate, and the parties to the agreement were of opinion that certain of these provisions ought to be modified—'Therefore we are all agreed and hereby agree (First) That in ascertaining the amount of the estate for division Two thousand pounds of the money paid over to the said Alexander Paterson Gordon by his said father shall be held to have been a free gift to him and shall not be held to have been an advance to account of his share of the estate, but that Three thousand pounds of the money paid over to the said Alexander Paterson Gordon by his father shall be taken into account in estimating the residue of the estate for division and shall be held to be an advance to account of his share of the estate. (Second) That the sums of Five hundred pounds paid to each of the said Annie Hunter Gordon or Forbes and Jeannie Grindly Gordon or Riddell on the occasion of their respective marriages be held to be advances to account of their shares of the estate. (Third) That the said Catherine Elizabeth Gordon receive a legacy of the whole household furniture in the house at Cullisse and also One thousand pounds over and above her share of the residue of the estate. (Fourth) The residue then to be equally divided amongst the said Alexander Paterson Gordon, Samuel Hunter Gordon, Annie Hunter Gordon or Forbes, Jeannie Grindly Gordon or Riddell, and Catherine Elizabeth Gordon. It is hereby declared that these modifications of the said last will and testament are made because all parties are agreed that it is just to the said Alexander Paterson Gordon that they should be so made.'

"Now that compromise having been made it might have been supposed to have been an end of the matter, but on the 8th September Mr Alexander Gordon wrote a letter in which he stated his position, which was this—The letter is addressed to Mr Hay of the firm of Messrs Adam, Thomson, & Ross, advocates, Aberdeen—'I refer to what took place after my father's funeral regarding his will'—that was the agreement of the 1st September to which I have referred—'As mentioned, I decline to recognise the will read to the relatives as a proper expression of my father's testamentary wishes or to have anything to do with it. I understand that the document prepared by you after the funeral, and which I signed as you are aware most unwillingly, was to embody an arrangement independent of the will altogether. Although I feel very

strongly regarding the whole position and am clear as to the course which ought to be taken in connection with it, I wish if possible to do anything I can to bring about an amicable adjustment, and therefore'—I leave out some immaterial words—'I am prepared, without prejudice and under reservation of my rights, to arrange as follows—(1) To adhere to the agreement signed on the day of the funeral'—that is, the agreement of the 1st September—'except as hereby modified, provided that my sister Catharine formally adopts the same after having the opportunity of being advised by an independent lawyer regarding its terms. This I consider necessary, because while the agreement gives, so far as I am concerned, only bare justice to myself regarding the £2000 received in a free gift from my father, it provides for my sister Catharine accepting less favourable terms than the will provides for her. (2) That I am paid within three months of this date the slump sum of £6000 in exchange for a discharge of all my rights and interests in my father's estate, to account of which would be placed the sum of £2000 due by me to that estate.'

"That letter of course entirely altered the situation, and the result was that after that letter had been circulated to all the parties a meeting was called on the 11th September 1915 at Mr Hay's office at Aberdeen. There was a great deal of discussion at that meeting. Those who were present were Dr Riddell, who was there himself and was alleged to represent his wife and Miss Catherine Gordon; Mr Forbes, who was said to represent his wife; Mr Samuel Gordon, and Mr Hay and Mr Walker, two lawyers who were solicitors for the executors. Mr Alexander Gordon, the appellant, was not present, but he was represented by Mr Sellar and Mr Duffus. Now a good deal of use has been made of the expression that So-and-so represented at that meeting someone who was not there. The expression "represent" is a very loose one. In the full sense it might mean that the person representing the other person was a plenipotentiary authorised to enter into a binding agreement on behalf of the person whom he represented; on the other hand it might merely mean that as the affairs of the family were to be discussed the representative was to look at the matter and take part in the discussion from the point of view of the person whom he represented, without having any authority to enter into a binding agreement on behalf of his constituent. There is a great deal of ambiguity to my mind in the term, and a great deal of uncertainty as to what the extent of the representation and authority was. Now a long discussion took place which ultimately ended in the document which is now set out. That is expressed to be an agreement among the beneficiaries in the executry. The parties were Alexander Gordon, Samuel Gordon, Annie Hunter Gordon or Forbes, Jeannie Gordon or Riddell, and Catherine Elizabeth Gordon, expressed to be the children and sole parties interested in the estate of the late John Gordon, farmer, of Cullisse, Ross-shire. The will of the 5th May 1914 is recited, and then the instrument proceeds thus—'That I, the said Alexander Paterson Gordon, decline to recognise the said will as a proper expression of my father's testamentary wishes or as a valid document; that we, the said Samuel Hunter Gordon, Annie Hunter Gordon or Forbes, Jeannie Grindly Gordon or Riddell, and Catherine Elizabeth Gordon, maintain that the said will is a valid will and a correct expression of the said John Gordon's testamentary wishes, and are to uphold the same and administer the estate thereunder; that an agreement was executed at Cullisse on the first day of September Nineteen hundred and fifteen after the funeral of the said John Gordon, the terms and arrangement contained in which I, the said Alexander Paterson Gordon, did not properly understand; that with a view to an amicable adjustment, and after negotiation, we, the whole parties hereto, have agreed to an arrangement in full settlement of all matters in dispute between us as follows.' Then the clauses of the agreement provide—'*First*, That I, the said Alexander Paterson Gordon, agree to accept and receive the sum of £6000 in exchange for a discharge of all my rights and interest in my father's estate, to account of which would be placed the sum of Two thousand one hundred and fourteen pounds twelve shillings and eleven pence due by me to that estate after taking into account a promissory-note for one thousand pounds granted by my late father to me. *Second*, That I do not accept the office as executor under my father's will. *Third*, That I take over as at fourteenth September Nineteen hundred and fifteen the whole stock, crop, implements, fencing, ponies and traps, tenant's rights under the lease generally, and including claims for unexhausted improvements, &c., at the value of Nine thousand pounds, I getting the benefit of the remainder of the lease in favour of my father. To account of the said sum of Nine thousand pounds there will be set the £6000 (the agreed-on value of my share of the estate), less the sum of £2114, 12s. 11d., leaving a sum of £3885, 7s. 1d.' Then there is a provision about the rents for which the estate is to be accountable.

"Now it is common ground that that document was not signed by all the parties to it. Very soon after the 11th September a quarrel ensued between Mr Samuel Gordon and Mr Alexander Gordon. Mr Samuel Gordon resiled and said he would not have the document signed. It had been signed I think by all the parties except Mrs Forbes. By Mrs Forbes it has never been signed, and it was not contended and could not be contended that the document had been completed by the signatures of all the parties. It is of course absolutely clear that it never was executed as a probative instrument; but assuming that a probative instrument was not necessary at all, it was not signed by all the parties, and the contention put forward on behalf of the appellant was that there was a complete and concluded agreement at the interview which took place on the 11th September; that

that agreement was a good and binding agreement, and that the instrument to be executed was merely to record its terms; and therefore, although the instrument was never executed by all the parties, there was a complete and binding agreement which would afford a defence in the action brought by the executors with reference to the farm of Cullisse. That is a possible state of things. It is possible in point of law."

On December 12, 1916, the Lord Ordinary (ANDERSON) pronounced this interlocutor—"The Lord Ordinary having considered the cause, refuses the prayer of the note of suspension and interdict, and decerns; and having heard counsel on the question of expenses finds the respondent entitled to expenses against the complainers, allows an account of said expenses to be given in, and remits the same when lodged to the Auditor of Court to tax and to report."

On a reclaiming note the Second Division, on December 15, 1917, pronounced this interlocutor—"The Lords having considered the reclaiming note for the complainers against Lord Anderson's interlocutor dated 12th December 1916, and having heard counsel for the parties, recal the said interlocutor reclaimed against, suspend the proceedings complained of in the note of suspension and interdict; interdict, prohibit, and discharge the respondent from selling, disposing of, or intromitting with the stock, crop, implements of husbandry, and plenishing on the farm of Cullisse mentioned in the note, and the furniture and plenishing in the dwelling-house thereon, all the property of the complainers as at 25th October 1915, and decern: Find complainers entitled to expenses, and remit to the Auditor to tax the same, and to report."

Alexander Paterson Gordon, the respondent in the note of suspension, appealed to the House of Lords.

At the conclusion of the argument for the appellant—

LORD CHANCELLOR—[*After narrating the facts*]—The law on the subject of agreements ultimately reduced into writing or where a further instrument is contemplated has been elaborately considered in more than one case cited at your Lordships' Bar in the course of the argument, and I think that the best and clearest definition in a short compass of the law on the subject is that found in the judgment of Lord Wensleydale in the case of *Ridgway* v. *Wharton*, to which my noble and learned friend Lord Haldane called attention in the course of the argument. That case is reported in 6 House of Lords Cases, beginning at p. 238, and the observations of Lord Wensleydale which I shall presently quote occur at p. 305. The case was in 1857, and in the head-note there occurs this passage—"If there is a signed paper signed by an agent duly authorised thereto, which paper, though agreeing to do something leaves the subject-matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together so as to constitute a contract valid under the Statute of Frauds. The contract so constituted by the act of A's duly authorised agent will be binding on A, though the second paper may have been sent by the agent to A's solicitor to put it into form, provided that the agent and the person with whom he was dealing agreed that it should be sent for that purpose but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form"; and at the bottom of p. 305 and the top of p. 306 Lord Wensleydale deals with the law on this subject in a statement which, like everything which comes from him, is a model of completeness, of terseness, and of clearness—"If two parties," he says, "have agreed or talked together upon an agreement and it is understood between them that that agreement is to be reduced into writing, nothing binds them but that writing. If parties agree finally to be bound by any terms, and then for the sake of preserving a memorial, having agreed to be bound by the original terms, they get a document drawn up, there is no doubt that they are bound by the original terms, provided they are such terms as can be binding without writing and are not void under the Statute of Frauds. The formal doctrine is only ancillary. If the original understanding is that the terms are to be reduced into writing, and that the parties are not to be bound until the terms are reduced into writing, then each party has a right to withdraw before the agreement is signed. I apprehend I do not state a proposition of law to which my noble and learned friend will not assent." That refers to a passage of arms which had taken place earlier in the case between Lord Wensleydale and Lord St Leonards, and the observation which Lord St Leonards interjected at this point is valuable as showing that he agrees with the statement of law which I have quoted from Lord Wensleydale. "I apprehend," says Lord Wensleydale, "I do not state a proposition of law to which my noble and learned friend will not assent. (Lord St Leonard's—Not as you have stated it latterly.)" So that we have the authority of both these noble and learned Lords for that proposition as to the law upon the subject. The matter was very elaborately discussed in the well-known case of *Rossiter* v. *Miller* in your Lordships' House in 1878, which is reported in Law Reports, 3 Appeal Cases, at p. 1124. In that case there had been a long correspondence between the parties, and the question was whether there was a concluded bargain to be found in the correspondence, or whether it was all contingent upon the execution of a formal instrument; and Lord Cairns as well as the other members of the Court in that case are very clear upon what the law is. At p. 1139 Lord Cairns says this, after having referred to a case decided by Lord Westbury—"My Lords, I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the

construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot upon a correspondence of that kind find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made." And at p. 1145 Lord Hatherley says this—"My Lords, I have already made an observation upon what has been urged with regard to the statement that a solicitor would be directed to prepare a formal agreement. That in no way varies or alters the offer already made, or the agreement if that offer was accepted simpliciter." And at p. 1151 Lord Blackburn deals with the same subject in a lengthy passage which has been referred to during the argument, the effect of which is really given at the beginning of his Lordship's judgment on that page—"I quite agree with the Lords Justices that (wholly independent of the Statute of Frauds) it is a necessary part of the plaintiff's case to show that the two parties had come to a final and complete agreement, for if not there was no contract. So long as they are only in negotiation either party may retract, and though the parties may have agreed on all the cardinal points of the intended contract, yet if some particulars essential to the agreement still remain to be settled afterwards there is no contract. The parties in such a case are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." In that case your Lordships' House was dealing with a case of correspondence where all the terms which were said to constitute a concluded agreement before any formal instrument had been drawn up were contained in the letters, and were all in writing, so that there was no uncertainty as to what had been said. Where there are no letters it is a great deal more necessary that the Courts should be careful, where parties have had conversations which it was contemplated would end in a complete agreement, in saying that there was a complete and concluded agreement by the conversations although no instrument was ever executed, because you have not got the thing in writing. In a case of correspondence, although it is informal, you at least have got a record in the letters of what was said by the parties as to which there can be no uncertainty; but it is everyday experience that there is most extraordinary difficulty in making out with reference to a mere parole agreement what was really said and meant by the parties; and although in theory, and rightly so, the law is the same with reference to parole conversations intended to lead up to a written agreement as it is with reference to correspondence which is to lead up to a formal agreement, yet in practice there ought to be very much more caution in applying what is the abstract doctrine of law to the case of conversations than in applying it to the case of letters, for the reason I have ventured to indicate. One approaches this case, therefore, as to what took place at the meeting on the 11th September from that point of view. The parties who were present I have mentioned. The conversation went on, I think, for one or two hours, and then when they were about to go to lunch it was suggested that the result, the terms, should be reduced into writing, and accordingly it was put into writing and was typed, but a binding document, as I have mentioned, was never completed. But now it is said that although the document was never completed, and although the parties at that interview contemplated and arranged that there should be a document in writing, that never having been achieved, you may find in the evidence of what took place at the interview a completed agreement which affords a defence to these proceedings by the executors against Mr Alexander Gordon.

Now we have had an analysis of the material evidence on this point. The evidence of four witnesses for the then complainers, the present respondents in the case before your Lordships, and three witnesses for the respondent in the proceedings in the Court of Session, the appellant in the case before your Lordships. The complainers' witnesses whose evidence was appealed to on this point were Mr Hay, Mr Walker, Mr Samuel Gordon, and Dr Riddell. I am not going to read their evidence *in extenso* of course, it is rather long. I cite one or two passages, but I may say that one must take the effect of the evidence on the mind as a whole, and the effect distinctly left on my mind after a perusal and consideration of that evidence is that the parties did not intend to be bound except by the writing in which the conversation was to eventuate. They had arrived at terms and got the terms put into writing, but the document—the thing, the one thing which was to bind them—was that document when signed.

There are one or two passages which I should like to refer to. In Mr Hay's evidence there is a passage which I think not unfairly sums up the case. This question is put to him—"Didn't you think that an arrangement had been come to which had settled the whole matter?—(A) Yes, if everybody had agreed. (Q) Didn't you think at the moment that the whole matter had been settled?—(A) Yes, because I thought the others would agree." There your Lordships

really have the matter in a nutshell. Mr Walker was called, but I do not think his evidence on this point substantially adds anything to that of Mr Hay. Then Mr Samuel Gordon was called, and there is one short passage to which I would like to call attention—"(Q) After you got the respondent's signature to the agreement" (that is, Mr Alexander Gordon's signature), "did you understand he was bound by it?—(A) No. (Q) What was the point of getting his signature?—(A) So that he would understand what the proposed agreement was, but it would not be binding unless we were all bound by it, and I can explain my position about that." Then Dr Riddell, another witness for the complainers, was also cited on this point, and he says this—"(Q) And the ladies gave you no such authority?—(A) Absolutely none. I never said at the meeting that I represented or that I had authority to represent either of the ladies." That is as to the matter of representation upon which I have made some observation. "(Q) You were present and would look after your wife's interests?—(A) I suppose I represented her in one sense. (Q) But you were not, however, clothed with any special authority to conclude an agreement for them?—(A) No, not for them, I had no authority from them."

So much for the witnesses whose evidence on behalf of the complainers was referred to upon this question. I now turn to the three witnesses who were called on behalf of the respondent, the present appellant. Mr Sellar says this—"(Q) When you came back and stated that the respondent was prepared to agree to these terms, was anything said by the other parties as to settling the whole matter?—(A) Yes, they were very pleased to hear that he had accepted it, and Dr Riddell especially insisted that it should be put down in writing. Mr Duffus hesitated very much before agreeing to do this, and he would only do it on two conditions. The first of his conditions, as far as I recollect—in fact I am sure it was a condition—was that this now was considered a complete bargain, and the second condition was that they would guarantee that all the other members of the family, the beneficiaries, would sign the document as well as his client the respondent." It seems to me that in that sentence is contained a statement which really is fatal to the contention that there was a completed agreement. The condition was that they would guarantee that all the other members of the family, the beneficiaries, would sign the document as well as his client the respondent. And Mr Duffus gives evidence at length; the passage is rather too long to read, and I do not think it adds anything very material. I turn to the third witness for the respondent, Mrs Forbes. She had stopped at home while her husband started from Gullane, where they were, to go north to this meeting at Aberdeen. She says that he represented her interests at that meeting—"(Q) Of course personally he had no interest except through you?—(A) Except my interest, and he knew quite my ideas. We had often talked about all that had occurred in the past. He fully knew my wishes. (Q) And had he your authority to settle for you?—(A) He had. On Saturday the 11th I received a telegram from my husband. I have not got that telegram, but to the best of my recollection it said—'Everything satisfactorily settled, meet me in Edinburgh'—I forget whether it was the Monday or the Tuesday—'to sign the settlement,' or 'to give your signature,' or something to that effect. (Q) It was made perfectly clear that the thing had been settled?—(A) Satisfactorily settled." Well, of course no one quarrels with that expression so long as the effect of being settled is not pushed too far; it is an expression which can be perfectly well used when the parties have arrived at terms, but there is to be no completed agreement until the document has been executed. My impression on this evidence, taking it as a whole and in detail, taking the broad effect and the effect of the particular passages, is that they did not intend that there should be a completed agreement—a binding agreement—except on the execution of a document which embodied the conclusions which they had arrived at at the meeting of the 11th September. That being so, it seems to me that there is an end of this appeal. Mr Sandeman opened the appellant's case with perfect fairness, and he conceded that if your Lordships were against him on the question of the effect of the agreement it was wholly unnecessary to go into the question of law or the question how far some of the parties to this intended instrument had executed it only under conditions which had not been performed. That being so, it appears to me that the appeal fails.

VISCOUNT HALDANE—It is unnecessary for me to subject the evidence to an examination in detail, for I entirely agree with the analysis which has been made of it by my noble and learned friend on the Woolsack, and I agree also with the result in law at which he has arrived. I only desire to add a few observations upon the canon of construction which has guided me to the same conclusions as that which he has reached in weighing that evidence.

In a case such as the present it would of course have been open to those concerned to reach a definite and concluded agreement in conversation or by correspondence. Such an agreement is not the less a real one if the parties have, as part of its terms, stipulated that there is to be a further agreement embodying its substance and also other terms which they are subsequently to settle. In such a case the later agreement when concluded and executed will supersede the earlier one. But until then the earlier agreement stands and binds.

As I have said the parties *may* contract in this fashion. But when they desire to do so they must make the intention plain of closing the negotiation in its first stage by a completed bargain. For if it appears that they have negotiated with the view of not stopping there but of proceeding to embody the result in a written instrument, it is presumed that until they have all duly

executed that instrument the point has not been reached at which an agreement enforceable by law was to be the outcome. This presumption is one of intention and yields to definite expression of intention to the contrary if such exists. But apart from such an expression of contrary intention it is not legitimate to infer that the parties meant to stop short of what they have shown that they set out to do any more than it is legitimate to pick out letters from a continuous correspondence and, abstracting from the sequence and the character of the correspondence as a whole, to fix the parties by particular letters, however apparently definite, at which they have not made it plain that they intended to pause. In both cases the question is what does the evidence disclose as the object aimed at, and what was about the series of steps meant by those concerned to be taken as preliminary to full finality in the process of binding themselves. To answer this question it is always necessary to look as a whole at the series of steps actually taken, and to avoid inferences based on anything short of the entirety of the process. I think that this is what the numerous authorities in the books may properly be looked on as having laid down. In substance it signifies that here as elsewhere the truth is the whole and nothing short of the whole.

LORD SHAW—I beg to express my entire agreement with the judgments which have just been pronounced.

The agreement which was partially signed on the 11th September was an agreement of a very important character. It was not a simple agreement of sale, a simple agreement of loan, or a simple agreement falling within any of the single categories known to the law. It contained at least two elements of very great importance. By the third section of it there was a substantive provision that one of the sons of the late Mr Gordon should become, by the assistance I presume of the executors, entitled to the lease of a farm tenanted by his deceased father. It was a valuable farm, and a provision is made that he shall enter into possession of it—that he shall have not only the stock, farm implements and the like, upon it, but that he shall become entitled to the lease of it. The executors as in right of the lease would be by their assent to this arrangement under contract to assign their rights in the farm and lease to Alexander Gordon. The whole beneficiaries in the estate would be bound to assent to this transfer of important assets and to be parties to the assignation of an important portion of the deceased's heritable estate, viz., the current lease of his farm. The executors would of course not have been bound by any arrangement of this kind unless the entire beneficiaries of the deceased's estate had been able to produce before them a writing sufficient under the law of Scotland for their purpose.

There were two ways of approaching this question. The first was to consider whether an agreement of that kind which was neither holograph nor probative could be looked to by courts of law in Scotland. The Court below did so approach it, and I refer in particular to the careful judgment from that point of view, although this House has approached it from what we may think a more radical standpoint, viz., as to whether there was any completed agreement at all. I must not be held as expressing any opinion in the way of dissent from what Lord Dundas has enunciated as our law.

There is, however, another point which from the same point the agreement would have had to be considered, viz., did it not require to be probative in respect of another principle, namely, that it was of an innominate and complex character. That would have required the consideration of a variety of authorities, including certain passages from the Institutes of Mr Erskine, and a very important judgment, hitherto considered a leading judgment in the law of Scotland, namely, that of Lord Benholme in the case of *Edmondston* v. *Edmondston*, 1861, 23 D. 995.

That point, however, equally with the one in reference to heritable rights, is not one which requires to be now decided by this House, because I agree with my noble and learned friends who have preceded me that there was here no concluded contract of parties.

When parties make a verbal arrangement courts of law are justified in attaching vital importance to the consideration of whether it was part of their intention to reduce these arrangements to writing. If that was part of their intention that view would be given effect to, and until the writing be not only signed by one but completely signed, that is signed by all, there is no contract at all and no signatory is bound.

There might conceivably be another and intermediate stage between an actual and completed contract signed by all and a state of matters in which no party is bound, and that is where the agreement is signed by one under the express though somewhat rare provision that he shall be bound although the others are free. I find it difficult in my own mind to figure such a case, but certainly the present is not a case of that description.

On the primary proposition did these parties mean to have a written contract, your Lordships are relieved from discussion at length by the actual document to which certain of them set their hand, and by the second proposition, which seems to be completely confirmed, namely, that beyond all doubt they did not mean to be bound until all the members of the family had adhibited their signatures.

The learned Lord Ordinary, Lord Anderson, attaches great weight to the evidence of a well-known citizen, Mr Sellar, the vice-convener of the county of Aberdeen, and in virtue of his evidence the Lord Ordinary gives an opinion favourable to the appellant. I also attach the greatest weight to Mr Sellar's evidence, but I view it, as my noble and learned friend on the Woolsack has viewed it, as not giving any countenance to the conclusion arrived at by the Lord

Ordinary, but as confirming the contrary opinion. I hold Mr Sellar's evidence to be conclusive upon the fact that it was a condition made between the parties on the 11th September that all the members of the family should sign that document before any of them were held bound.

Might I add *en passant* that I am not surprised at such a condition in the circumstances of this case and of this family. They seem to have changed their view as to the distribution of their father's succession from month to month, and it would almost appear from day to day, and it was eminently necessary in a case of that kind that all the members of the family should know that all were bound.

I now come to the suggestion which is made that notwithstanding the writing having broken down because of this, that one signature of a member of the family has not been adhibited, and that two signatures, one of a beneficiary and one of an executor, have not been adhibited, still according to Mr Sandeman in a strenuous and clear argument it is established that verbally they had all agreed. Such a proposition is answered I think by this consideration, that the party asserting that all have agreed must be bound to state at what point of time that agreement was reached. By Mr Sellar's evidence, and it is the only evidence in the case, it is conceded that such an agreement for all was not reached until all the signatures had been adhibited. When then were all agreed? Says Mr Sandeman, they were all represented at the meeting of the 11th. By what nature of representation I am not at all clear in my own mind. Whether they were the powers of a plenipotentiary, to which my noble and learned friend on the Woolsack has alluded or not, I cannot say, but certain it is that before tho two signatures were obtained—and they have not been obtained yet—one of the parties who had not signed had resiled, and two of the daughters who had signed the document have declared that they had signed it under certain conditions which have not been fulfilled. Nothing looser in practice can be imagined than to found upon a contract under which, during any period of days or weeks, this situation should arise, that some parties to that contract were bound while the others remained free. Mrs Forbes and Mr Hay remained free to decline to adhibit their signatures on the document, and until they did so the others were either bound or they were free. In my opinion they too were absolutely free.

In addition to the authorities cited from the Woolsack I would beg to refer to this sentence in the judgment of Chief-Justice Lord Denman in the case of *Latch* v. *Wedlake* (11 Adolphus and Ellis, 959, at 965) — "Wherever an instrument," said that learned judge, "is to be executed by several parties, there must be some interval between the execution of each, and if all be not present at the same time that interval may be considerable, and it cannot be contended that the mere fact of execution by one conclusively binds him where that has been done on the faith that all will execute, and any one shall refuse." That is the present case. It was open, it is open now, to Mrs Forbes and Mr Hay to refuse to sign that document. How then can it be said that the other parties were all bound when and so long as one or more of the parties remained free? The thing seems to me to be a contradiction in logic and quite unfounded in law.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant—Sandeman, K.C.—R. C. Henderson. Agents—Wilson & Duffus, Aberdeen—Alex. Morison & Co., W.S., Edinburgh—Beveridge & Co., Westminster.

Counsel for the Respondents—Solicitor-General for Scotland (Morison, K.C.)—D. R. Scott. Agents—Adam, Thomson, & Ross, Aberdeen—Scott & Glover, W.S., Edinburgh—Slack, Munro, Saw, & Co., London.

Friday, June 7, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, and Lord Parmoor.)

LANARKSHIRE COUNTY COUNCIL *v.* INLAND REVENUE.

(In the Court of Session, June 28, 1917, 54 S.L.R. 508, and 1917 S.C. 603.)

Revenue—Stamp Duty—Local Government—Exemption from Stamp Duty—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 168—*Housing of the Working Classes Act* 1890 (53 *and* 54 *Vict. cap.* 70), *sec.* 57 (1)—*Housing, Town Planning, &c., Act* 1909 (9 *Edw. VII, cap.* 44), *secs.* 31 (*f*) *and* 53.

The Public Health (Scotland) Act 1897, section 168, enacts—"All bonds, assignations, conveyances, instruments, agreements, receipts, or other writings made or granted by or to or in favour of the local authority under this Act shall be exempt from stamp duties.

The Housing of the Working Classes Act 1890, section 57 (1), enacts—"Land for the purposes of this part of this Act may be acquired by a local authority in like manner as if these purposes were purposes of the Public Health Act. . . ."

Held that the exemption from stamp duty applied only where the local authority was acting under the Public Health Act, and not where acting under the Housing of the Working Classes Act 1890 or the Housing, Town Planning, &c., Act 1909.

This case is reported *ante ut supra.*

The Lanarkshire County Council appealed to the House of Lords.

At the conclusion of the argument for the appellants—

LORD CHANCELLOR—This case has been very clearly argued by Mr Brown, and