provisions in the settlement of the testator, which necessarily imply that this was his intention, the party to whom the property is left, over which the heritable security exists, must take that estate with its heritable burden, and that there is no obligation upon the residuary legatees to pay that heritable debt out of the residue of the estate. In the present case there is no mention in Robert Murray's trust-disposition and settlement of the heritable debt; and there are, the Lord Ordinary considers, no expressions used therein which, by clear and necessary implication, shew that it was the intention of the testator that the heritable security over Dollarbeg for £6000 should be paid out of the residue of his estate, and that his nephew John Murray and his children should get the estate of Dollarbeg free of that burden. The clause in the trust-settlement directing payment of any just and lawful debts that might be due by the testator at the time of his death, including deathbed and funeral expenses, has not that effect; and the other expressions in the trust-settlement founded on by the children of John Murray are, the Lord Ordinary is of opinion, insufficient to prevent the application of the general rule of law. *Fraser* v. *Fraser*, November 13, 1804; Dict. "Heir and Executor," No. 3; *Bain* v. *Reeves*, January 29, 1861, 23 D. 416; *Douglas's Trustees* v. *Douglas*, January 17, 1868, 6 Macph., 223."

In regard to the second branch, the "argument for the younger children of Adam Murray was that, according to a sound construction of the agreement of 1864, the said sum of £5000 was to be put to the debit of John Murray, and imputed as a part-payment made to account of his share under the agreement of 1852 of the residue of Robert Murray's estate, upon the death of their aunt, Isabella Murray, whether John Murray survived her and succeeded to the liferent or not. The Lord Ordinary cannot adopt that construction of the agreement of 1864. John Murray did not, he thinks, by that agreement purchase as at its date, for a price then paid, the contingent right of liferent, the proceeds of which were, by the agreement of 1852, to be divided between him and the younger children. There was no price then paid, and that was not its object. The object of the agreement was, as it expressly bears, to avoid the inconvenience, trouble, and risk of dispute, which an annual accounting for the rents during the subsistence of John Murray's liferent would occasion. Under the agreement of 1852 John Murray was only bound to communicate to the younger children of Adam Murray a share of the proceeds of the liferent of Dollarbeg when he should succeed to, and during the time that he should enjoy, that liferent. His right thereto was contingent upon his surviving his aunt Isabella Murray, and if he did not survive her neither he nor the younger children of Adam Murray would get any part of the rents of Dollarbeg. By the agreement of 1864 the younger children of Adam Murray surrendered their contingent right to a share of the proceeds of the liferent which they had acquired under the agreement of 1852, and, in consideration of the surrender of that contingent right, John Murray agreed that £5000 should be placed to his debit, not absolutely but conditionally, the condition being, to use the words of the agreement of 1864, 'as soon as my liferent right to the said lands of Dollarbeg shall open to me by the death of our aunt Miss Isabella Murray.' But that liferent right to Dollarbeg never opened to John Murray, as he predeceased his aunt Isabella; and just as under the agreement of 1852 the younger chidren would have derived no benefit from his obligation therein contained to communicate that liferent during his lifetime, 'from and after the death of the said Isabella Murray,' so, the Lord Ordinary conceives, they can, under the agreement of 1864, derive no benefit from his obligation therein contained, that as soon as the liferent of Dollarbeg shall open to him, 'by the death of our aunt Miss Isabella Murray,' the sum of £5000 should be placed to his debit in the division of the residue of Robert Murray's trust-estate. In short, the Lord Ordinary considers that, by the agreement of 1864, the younger children renounced their interest under the deed of 1852 in a conditional right of liferent for and in consideration of a conditional lump payment of £5000, the condition in both cases being the opening of the liferent to John Murray. That condition never having been purified, the obligation as to the £5000 has, he is of opinion, no force."

Adam Murray, William Murray, and Others, reclaimed.

Each party brought under review the part of the Lord Ordinary's interlocutor adverse to them.

WATSON and BALFOUR for John Murray's children.

ASHER for Adam Murray and others.

Besides the cases referred to by the Lord Ordinary, the recent case of *Macleod's Trustees*, June 28, 1871 (*ante*, p. 597), was mentioned.

At advising—

LORD PRESIDENT—I have no doubt that the Lord Ordinary is right in both branches of the case. In order to relieve the disponee of a particular estate of a heritable debt attached to it, out of the general estate of the truster, clear and distinct implication of such intention on the part of the truster is necessary. There is certainly no such implication here.

As to the second branch we are now informed that at the date of agreement (1864) John Murray was forty-two, and his aunt Isabella, the liferenter of Dollarbeg, seventy. The free income of Dollarbeg cannot exceed £260. The younger children of Adam Murray represent John Murray as paying £5000 for this contingent liferent of £260. He could not have dreamed of such a thing. But I entirely agree with the Lord Ordinary, that on the mere construction of the deed of agreement the succession to the liferent and its actual enjoyment by John Murray was a condition precedent to the deduction of the £5000.

LORD DEAS—I concur. As regards the first branch this is a much clearer case than *Macleod's Trustees*.

LORDS ARDMILLAN and KINLOCH concurred.

The Court adhered. No expenses.

Agent for Adam Murray and Others—James Webster, S.S.C.

Agents for the Children of John Murray—Maclachlan & Rodger, W.S.

Saturday, July 7.

CORBETT *v.* ROBERTSON.

Contract of Sale—Conditions—Disposition. A, by a minute of sale bound himself to sell a piece of ground to B under certain conditions. In an action at the instance of B to compel A to grant a disposition, A averred that B had

incapacitated himself from fulfilling the conditions. The Court, before answer, appointed B to lodge a draft of the disposition which he proposed that A should execute.

In August 1869 a minute of sale was entered into between John Robertson of Blairbeth, of the first part, and Thomas Corbett, of the second part, by which the former agreed to sell to the latter a piece of ground on the road between Glasgow and Govan, containing 4818 square yards at 7s. 6d. per square yard. The fourth article of the minute was as follows:—"The second party shall forthwith proceed to erect on the said piece of ground dwelling-houses of a suitable description for working-people, and of a good and substantial style of workmanship; and the fronts thereof, towards said intended street, shall be built of at least good hammer-dressed or squared rubble, in courses; and the second party shall be restricted from erecting any other buildings than those above provided for on said ground, or making any other use thereof, or disposing of the same for any other purpose, during the period of ten years from and after said term of entry."

In February 1870 Thomas Corbett entered into an agreement with the Trustees of the Clyde Navigation, by which he agreed to sell, at a price to be fixed by arbitration, the piece of ground mentioned above, "but subject to any obligations, restrictions, and others contained in the agreement as to the sale of the said ground between the said John Robertson and the first party, in so far as the said John Robertson has not discharged or agreed to discharge the said obligations, restrictions, and others."

The agreement proceeded—"3. It shall not be competent for or allowable to either party, either verbally or in writing, to make any allusions in the proceedings in the arbitration to the fact that the first party had purchased the ground with no view of personal gain, but with the intention of erecting a number of cottages on the English plan, as a model to the working men of Glasgow, nor to the obligation come under by the first party to build nothing but workmen's houses upon the ground; neither shall there be any question raised before the arbiters as to the possibility of the first party getting as suitable or more suitable ground for the purpose above referred to in other situations. 4. In addition to the price of the said piece of ground, as fixed by the said arbiters or oversman, the second party shall pay to the first party the expense paid or incurred by him in any way connected with his purchase of the said ground; and the second party shall also pay to Hugh Barclay, architect in Glasgow, the sum of £70 sterling as compensation for professional services to the first party in preparing plans, &c., which have been rendered unnecessary in consequence of the sale by the first party to the second party, and thereupon the said plans shall become the property of and be delivered over to the second party."

The present action was brought by Corbett, with consent of the Trustees of the Clyde Navigation, to compel Robertson to grant a disposition in implement of the minute of sale of August 1869.

The defender averred—"1. The pursuer, in or about the month of April or May 1869, entered into a treaty or negotiation with the defender for the purchase of the piece of ground mentioned in the summons. His professed object was to acquire the same for the erection of model houses or cottages for working people, in the improvement of whose condition he professed to take a deep interest, and for that end had established the well-known cooking depots in Glasgow for their use. The defender, who had purchased the lands of Cessnock in 1868, was desirous of furthering the pursuer's scheme. 2. The pursuer, throughout the negotiation, assured the defender that the sole and exclusive object which he had in view was the erection of said model houses; he exhibited plans and elevations of his proposed cottages or houses, prepared by an architect, to the defender; and the price was discussed with express reference to that object. The pursuer stipulated that this matter should not be made a term of the bargain, but the defender declined to accede to that stipulation; and it was finally settled that the ground was to be sold by the defender, and bought by the pursuer, at the price of 7s. 6d. per square yard, exclusively for the building of model houses thereon; but the period of restriction was limited to ten years from the date of entry, viz., from Martinmas 1869. 3. The value of the ground thus agreed to be sold was then for general purposes (that is, not restricted to the particular use specified in the bargain) about 15s. per square yard, and is now worth a larger price. It is in, and has a considerable frontage to, the main line of road between Glasgow and Govan; is presently available for building purposes; is adjacent to or within the burgh of Govan; is in the near neighbourhood of large shipbuilding yards and other public works; is suitable for the erection of such works or for shop property, from which very large rents may be derived. Both the pursuer and defender were aware of these circumstances; and the defender was willing, and agreed to sacrifice a certain proportion of the value of his ground with reference to the object which the pursuer professed to have in view in making the purchase, and on the faith that it would be carried out." . . . . "5. The pursuer has never taken a single step to implement the terms of his contract by proceeding to build the houses stipulated for, and has no intention of doing so. 6. The pursuer, in or about the month of February 1870, entered into an agreement with the Clyde Trustees, whereby he sold to them, so far as he had power to do so, or professed to sell to them, the piece of ground in question, and he thereby ceased to have any interest in the ground, and put it out of his power ever to implement or carry out the terms of his contract with the defender; and the Clyde Trustees have no intention, and have no powers under their Statutes, to enable or entitle them to erect the houses stipulated for in the agreement, and they made the purchase for the purpose of forming a dock or harbour in communication with the river Clyde, or other works for the purposes of their trust."

The defender pleaded:—"1. The pursuer having violated the said agreement as condescended on, and incapacitated himself from implementing his part thereof, has thereby forfeited his right to enforce implement thereof against the defender. 2. In the event of the pursuer being found entitled, notwithstanding his violation of the said agreement, to a conveyance of the said ground from the defender, the latter is entitled to have inserted in the disposition to be granted by him such clauses as may be necessary for giving effect to the whole stipulations in the said agreement."

The Lord Ordinary (JERVISWOODE) allowed parties a proof before answer of their respective averments, the defender to lead.

The pursuer reclaimed.

WATSON and MACLEAN, for him, argued that the averments of the defender ought not to be admitted to probation either before answer or otherwise. The defender cannot found upon any alleged understandings of parties before the minute. These are entirely out of the field. It is not disputed that the minute is a binding and concluded agreement. The statement might be relevant in an action for setting aside the contract of sale on the ground of error or fraud; but they have no relevancy in this action. The pursuer is entitled to a disposition in terms of the minute; and when he has got his disposition there is nothing to prevent him selling, subject, of course, to the conditions. The interlocutor of the Lord Ordinary should be recalled, and a draft disposition ordered to be lodged.

SOLICITOR-GENERAL and ASHER, for the defender —The pursuer has got the ground subject to an obligation to put it to a certain use. He has disclosed on record that it is not his intention to put it to that use. He has shown this by selling the ground as unrestricted ground to the Clyde Navigation Trustees, who have no power by their statute to erect workmen's houses.

The Court pronounced the following interlocutor: —"Recal the interlocutor of the Lord Ordinary, and, before answer, appoint pursuer to lodge a draft of the disposition which he proposes that the defender should execute, reserving all questions of expenses.

Agents for Pursuer—Maconochie & Hare, W.S.
Agents for Defender—J. & R. Macandrew, W.S.

Saturday, July 8.

HENDERSON *v.* DAVIDSON.

Sale—Contract—Nullity—Weights and Measures—Statutes 5 Geo. IV. c. 74, and 5 and 6 Will. IV. c. 63. Orders were given for meal by the boll. The meal was delivered and accounts rendered at so much per stone. *Held* that the contract was not null under the Weights and Measures Acts.

This was an appeal under the Debts Recovery (Scotland) Act 1867, from the Sheriff-court of Caithness, &c.

James Henderson, Pulteneytown Mills, Wick, sued David Davidson junior, fishmonger, for £45, 5s. 6d., being the balance of an account for meal.

The defender admitted that he gave orders to the pursuer to furnish meal to sundry fishermen, and that the account was rendered, but claimed credit for £30, 1s., alleged to have been paid to account.

At the proof the pursuer produced the orders. The defender requested time to examine them, and craved a continuation for that purpose. He led no evidence in support of his statements. The Sheriff-Substitute continued the case till next Court-day, and then, the defender failing to appear, circumduced the term of proof, and pronounced an interlocutor decerning against the defender for the sum concluded for.

"*Note*—It is very seldom that furnishings made in the course of trade, in addition to being duly entered in duly-kept books, are so verified as by the productions and proof furnished by the pursuer in this case. An opportunity was given to the defender to examine and redargue the evidence thus supplied, but he has been confessedly unable to impugn the same."

The defender appealed.

The Sheriff (THOMS) altered, and found the defender only liable in payment of £14, 2s. 3d.

The grounds of the Sheriff's judgment were—(1) that all the orders were not proved to have been signed by the defenders; (2) that none of the orders refer to stones, while the entries in the account refer mostly to stones, and the rest to sacks; (3) that 22 of the orders refer to bolls, which is not an imperial measure, and the contracts thereby evidenced are null under 5 Geo. IV. c. 74.

The pursuer appealed.

MACKINTOSH for him.

BURNET and M'KECHNIE for the defender.

At advising—

LORD PRESIDENT—The judgment of the Sheriff cannot be supported. I see no justice in it, nor good law either. The objection that the contract was illegal under the Weights and Measures Act is quite untenable. The contract was completed by delivery of the meal, rendering of the accounts by the pursuer, and acceptance of the accounts by the defender without objection. In the accounts the meal is charged at so much the sack or stone. The Sheriff seems to think that the pursuer was not justified, or at least that he has not proved that he was justified, in sending the quantities of meal which he did, because it is not proved that the quantities sent corresponded with the quantities ordered. The answer to this is, that the account was several times rendered, and no objection taken. He had a very good opportunity in the proceedings before the Sheriff-Substitute. He takes time to look through the orders, and never appears again; a practical confession that he had no good defence. The same answer applies to the objection that it is not proved that the orders were signed by the defender. He was in the witness box, and he never denies his signature. The Sheriff-Substitute is quite right.

LORD DEAS—I concur, both as to the question under the Weights and Measures Acts and as to the merits. The defences are stated by the defender himself, and that makes them all the more valuable in ascertaining the facts. He admits that the account was rendered as far back as September 1866, and twice subsequently; that during the whole of that time he never made any objection, except one which strengthens the pursuer's case. He sends back the account on one occasion, not to make objections to it, but in order that credit might be given for alleged payments; which payments he has failed to prove.

LORDS ARDMILLAN and KINLOCH concurred.

The Court recalled the interlocutor of the Sheriff, and found the defender liable in expenses in both Courts.

Agents for Pursuer—Horne, Horne & Lyell, W.S.
Agent for Defender—John A. Gillespie, S.S.C.
