right to the balance in bank, the Lord Ordinary thinks that the cheque and the gift or bequest thereby constituted must be held as revoked by the liferent disposition subsequently executed by the husband. By that deed Mr Young gives his wife the liferent, 'for her liferent use allenarly,' of all his heritable and personal estate, 'which shall belong to me at the time of my death, wherever situated;' and he declares this provision to be 'in full to her of all claim for terce, *jus relictæ*, or any other claim, legal or conventional, competent to her or her representatives in the event of my death.' The sum in the Bradford Bank was undoubtedly personal estate, belonging to the husband at the time of his death, and it is difficult to hold that a 'liferent allenarly' of that sum, in full of all other claim, legal or conventional, was consistent at the time with a subsisting gift or bequest of the fee.

"But then it is said that the cheque, though bearing date 1st December 1859, must be held as of the date of Mr Young's death, like a testament, which is the last act of life. In a competition of testaments, however, it is the last in date which rules, and which revokes all prior in date and inconsistent therewith.

"Nor is it enough to say that the cheque is preserved from revocation by having been kept uncancelled by the testator, although he saw it, as is evidenced by two or more subsequent cheques having been cut from the cheque-book after the date of the liferent settlement. There are many motives which may induce a testator not to cancel or not to destroy a settlement or codicil which has become inoperative. He may wish to show what his intentions had once been. He may have in view the possibility of cancelling the later testament, or he may have no thought at all about the matter. But this will not prevent his last will from superseding all prior ones inconsistent therewith. It is impossible, and would be dangerous, to conjecture what the deceased's motives were for letting the old cheque stand in his cheque-book; and to act upon such conjectures would be to make a will for the deceased, and not simply to read and construe the will which he has made.

"(4) It is still more clear that in no possible view could Mrs Young or her representative claim the sum in the cheque if the liferent settlement is repudiated. and if recourse is had to the widow's legal rights. At best, the cheque and the liferent settlement must be read together as one deed or one settlement of the deceased's affairs. The widow and her representative cannot approbate the one and reprobate the other. This is the alternative view, as to which the Lord Ordinary has thought it right to make a separate finding.

"At the proof the parties mutually agreed to reserve all questions of vouching, and all mere questions of figures; and both parties concurred in asking the Lord Ordinary to decide the case by pronouncing such findings as would determine the rights of parties, and would enable them to adjust the accounting. This the Lord Ordinary has endeavoured to do in the foregoing interlocutor."

The pursuers reclaimed.

SOLICITOR-GENERAL and MACDONALD for them.

Without calling on GLOAG and MACLEAN, for the defender—

The Court adhered.

Agents for Pursuers—Paterson & Romanes. W.S.

Agents for Defender—Ronald & Ritchie, S.S.C.

Friday, November 3.

FIRST DIVISION.

DICKSON AND OTHERS *v.* BLAIR.

Sale—Heritage—Locus Pœnitentiæ—*Offer and Acceptance—Husband and Wife. Held* that an offer to purchase certain heritable subjects, held *pro indiviso* by two sisters, with acceptance thereof, did not constitute a completed contract of sale, in respect—(1) that the acceptance did not meet the offer; (2) that the consent of the husband of one of the sisters was not adhibited to the acceptance. *Held* further, that in the circumstances it was incompetent to prove the consent of the husband by reference to the oath of the husband and wife, in respect that their oath could not bind the other sister.

In March 1870 the defender Mr Blair offered to purchase certain heritable subjects in Causewayside, Edinburgh, held *pro indiviso* by the pursuers Mrs Dickson and her sister Miss Cowan. After some negotiations Mr Blair embodied his offer in the following letter, which he handed to one of the sisters:—

"7 *Livingstone Place*,

"Misses Cowan. *Edinburgh*, 11*th May* 1870.

"Madams,—I here make offer to you of the sum of four hundred pounds sterling (£400) for that northmost half of that house, together with the ground about the same, known by the name of the Broad Stairs, situated in Causewayside, Edinburgh, and the said price to be paid when titles are handed over to me or my agent, you giving a good and clear title, and the expense of transfer of title to be borne mutually by seller and purchaser. Entry to be given at Whitsunday first, when price will be paid.—I am, yours respectfully,

"ALEXANDER T. BLAIR.

"£400. 11*th May* 1870."

"*Note.*—My former offers to be cancelled.

"ALEX. T. BLAIR."

The following acceptance was returned:—

"*Edinburgh*, 12*th May* 1870.

"Mr Alexander T. Blair, Livingstone Place.

"Sir,—We accept of your offer of the 11th inst. for the property belonging to us in Causewayside, the price to be payable on your receiving a valid disposition, the expense of which, including stamp and revising, to be paid mutually by seller and purchaser. As we know of no encumbrances on the property, no search will be given; and you must take the title on that footing, or there is no bargain. Entry to be given Whitsunday first, at which time price will be paid.

"JANE COWAN or DICKSON.

"JESSIE COWAN.

"£400. 12*th May* 1870."

According to the defender's averments, these missives were exchanged in the presence of Mr and Mrs Dickson and Miss Cowan, and were entered into with the knowledge and consent of Mr Dickson.

The defender treated the transaction as a completed contract of sale, and made some arrangements with one of the tenants of the premises, by which the tenant agreed to cede possession in consideration of a payment of £7. He also appears to have executed certain small repairs on the premises.

The pursuers, on the other hand, took the position that there had been no completed contract of sale, and on the 27th September 1870 they raised the present action, concluding for declarator that they had the sole right to the premises in question, and, in the event of it being necessary, for reduction of the offer and acceptance of 11th May 1870. They pleaded that the missives were null, or at least reducible, for the following among other reasons:—

"(2) The pursuer Mrs Dickson was a married woman at the date of the said pretended acceptance, and the concurrence of her husband was not obtained or adhibited thereto, and can only be proved *scripto*, and there was no judicial ratification.

"(6) The pretended missives or letters not being in all particulars at one, but differing essentially from each other and from the footing, express understanding, and condition of granting, and there never having been that *consensus in idem placitum* necessary to constitute the contract of sale, the pretended missives do not form a concluded agreement."

The defender pleaded—"(3) The missives sought to be reduced having been entered into with the knowledge and consent of the pursuer John Dickson, and the said John Dickson having acquiesced in and adopted and homologated the said missives, and his said wife's acts in entering into the same, and into the contract expressed therein, and *rei interventus* having taken place upon the faith of the said missives, the pursuers are bound to grant to the defender a disposition in terms thereof, and the action is untenable."

The Lord Ordinary (JERVISWOODE), on the 28th February 1871, pronounced an interlocutor, finding, as matter of fact, that the concurrence of John Dickson, the husband of one of the pursuers, was not adhibited to the acceptance of 11th May 1870 (No. 10 of process), and has not since been obtained thereto in writing: "Therefore finds, as matter of law,—*First*, that the said acceptance is null, in so far as the same purports to be the writ of the said Jane Cowan or Dickson; and *second*, that in respect thereof, and that the alleged concurrence of the said John Dickson to said acceptance can only be proved *scripto*, the averments by the defender, of knowledge and consent, and of acquiescence and homologation on the part of the pursuer the said John Dickson, and of *rei interventus* on the part of the defender, with reference to the said offer and acceptance, are irrelevant in bar of the conclusions of the present action: and, with reference to the foregoing findings, appoints the case to be enrolled, with a view to further procedure, reserving meanwhile the question of expenses."

The defender then tendered the following minute of reference to the oath of Mr and Mrs Dickson:—"Black, for the defender, stated that he hereby referred to the oath of the pursuers John Dickson and Mrs Jane Cowan or Dickson the question, Whether the said pursuer, John Dickson, consented to the missive, No. 10 of process?"

The Lord Ordinary, on the 17th March 1871, refused to sustain the minute of reference, in respect that the missive was granted by a married woman without consent of her husband, and is consequently of no force as her writ. On the 25th May 1871 his Lordship decerned in terms of the conclusions of the summons.

The defender reclaimed.

FRASER and BLACK, for him, argued—A verbal contract of sale of heritage, followed by *rei interventus*, and proved by oath, is binding; Erskine, b. iii, t. ii, 3; *Rait* v. *Galloway*, 26th Nov. 1833, 12 S. 131; *Gowans* v. *Carstairs*, 18th July 1862, 24 D. 1382. So also is an improbative contract in writing followed by *rei interventus*. Here we aver that, at the moment that the wife signed the acceptance in the same room, the husband gave his consent. If the husband had been the proprietor of the subjects it would have been competent to prove the contract by his oath, always supposing that *rei interventus* had followed. Much more then can his mere consent be proved by his oath, where that is all that is necessary for the validity of the contract. It is not necessary that the husband's consent should be given in writing at the time; *Cochrane* v. *Hamilton*, 23 Feb. 1698, M. 6001.

ASHER and HUTCHISON, for the pursuers.—It is incompetent to convert a null document into a binding document by the oath of a person who did not sign it, and was not a party to it. In any view, Miss Cowan cannot be bound by the oath of Mr and Mrs Dickson; she is entitled to say that the only document which she signed was null and void, and therefore that there was *locus pœnitentiæ*. As the bargain was for the sale of the whole property, not of either *pro indiviso* share, it cannot be a good bargain against one sister and not against the other. Authorities—*Landale*, 12th June 1762, M. 14,677; *Caddell* v. *Bruce*, 3d June 1749, Kilkerran, No. 10, "Proof," p. 445; *Napier* v. *Dick*, 21st Nov. 1805, Hume, 388.

At advising—

LORD DEAS—In so far as this case is rested on written probative missives, I am clearly of opinion that on the face of these missives there was no concluded bargain. The offer of 11th May 1870 stipulates for a clear and good title. The answer of the 12th May says—"As we know of no incumbrances on the property, no search will be given; and you must take the title on that footing, or there is no bargain." It is plain that these missives do not meet one another. The acceptance is qualified by a material condition, which is never accepted by the offerer. Clearly there is no legal proof of a written bargain. There is another objection equally conclusive, the want of concurrence of the husband of one of the ladies. It is not necessary to determine whether that concurrence could be proved by the oath of the whole pursuers. Counsel of the defender took time to consider whether he should amend the reference to oath, and declined to do so. The minute of reference, as it stands, contains no reference to Miss Cowan's oath. Suppose it was ever so competent to prove Mr Dickson's by the oath of the pursuers, it cannot be proved by the oath of him and his wife. This was a bargain for the sale of both *pro indiviso* halves of the property, not for either of them separately. How is Miss Cowan to be bound by the oath of Mr and Mrs Dickson? This is conclusive without entering into the general question, whether the consent of the husband can be proved by oath. The question of *rei interventus* does not arise. It is not a verbal bargain that is alleged. Even if it were, there is no relevant *rei interventus* averred. All that the defender avers, are some arrangements with the tenant, which cannot affect the landlord.

LORD ARDMILLAN—The question raised relates to the sale of the whole heritable subjects held *pro*

indiviso by two sisters—not the sale by either sister of her half. The first question is, whether there was a completed transaction. I have come to the conclusion that there was not. The second question is with regard to Mr Dickson's concurrence. I think that the consent and concurrence of the husband, in so far as regards the disposal of his wife's interest, is clearly necessary, and must be given at the time. This is an attempt to prove *post tantum temporis* the concurrence of the husband otherwise than by writing. And it is proposed to make this binding on both ladies. I cannot see how Mr Dickson's oath can bind Miss Cowan. In the next place, I think there is no verbal contract to which *rei interventus* can be applied as excluding *locus pœnitentiæ*. This is not a verbal contract—it purports to be a written contract. If its defects could be supplied by *rei interventus*, it must certainly be *rei interventus* of the clearest character, and plainly referable to the faith of the contract. None such is here averred.

Lord Kinloch—In this case it lies with the defender to make good, in opposition to the general title of the pursuers, that a valid contract took place under which he acquired right to the subject in question in the character of purchaser.

The case as stated by him is not one of verbal contract, followed by *rei interventus*. It is an alleged case of written contract. He produces certain written documents, which he alleges constitute the contract. With reference to the objection that one of the contracting parties was a married woman, and that her husband had not adhibited his concurrence, he offers to prove by the oath of Mr and Mrs Dickson that the husband did in reality consent.—"Black, for the defender, stated that he hereby referred to the oath of the pursuers, John Dickson and Mrs Jane Cowan or Dickson, the question, Whether the said pursuer, John Dickson, consented to the missive No. 10 of process?"

In this state of things I consider myself freed from the necessity of considering how matters would stand if the alleged case were one of verbal contract, followed by *rei interventus*. The defender has entirely excluded himself from the condition of one who stands on such a case. It is settled and trite law that a verbal contract concerning heritage, intended to be set up by *rei interventus*, cannot be proved by parole evidence, but must be established by oath of party. The defender does not offer to prove a verbal contract by the oath of the pursuers. His minute of reference is strictly confined to the matter of concurrence in a written deed produced. Even therefore had a verbal contract been averred, it is not offered to be proved by the only competent evidence. It is only in combination with proof of the contract by reference to oath that proof of *rei interventus* is admissible. The *rei interventus* may itself be proved by parole evidence. But there is no room for such evidence unless the verbal contract is established by reference to oath. The defender, doubtless for sufficient reasons, has made no such reference.

The question then arises, whether there is here any written contract, either sufficient in itself or capable of being made so by the establishment of Mr Dickson's concurrence through means of a reference to oath? I am of opinion there is none such.

In the first place, I think the written documents show that no concluded contract of any kind ever passed between the parties. The defender's offer of 11th May 1870 expressly set forth as one of the conditions of the bargain, "you giving a good and clear title." The answer by the pursuers of 12th May stated, "as we know of no incumbrances on the property, no search will be given; and you must take the title on this footing, or there is no bargain." This was an express declinature of one, and a very important, part of the defender's offer. It is not shown that the defender ever agreed to this altered proposal. The reverse seems proved by his letter to Mr Lee of 8th June 1870, written after parties had come to be at variance; in which he says, "I have no other offer to make, which offer is dated 11th May 1870. Misses Cowan's title must be in accordance with my offer of 11th May 1870." The parties therefore never came to a concluded agreement. And in this view it is immaterial to inquire whether Mr Dickson's concurrence can now be established by the proposed reference. For, supposing it to be established never so clearly, there was still no concluded contract, and the defender's case fundamentally fails.

But secondly, and independently of this circumstance, and assuming that the writings showed on their face a concluded contract, I am of opinion that the contract is null for want of Mr Dickson's concurrence in his wife's act, and that this concurrence cannot be established by means of reference to oath. The concurrence of the husband was not of the nature of a consent by a third party interested, taking away a personal objection. It was essential to the act of the wife, which without such concurrence was null. The writing without such concurrence operated no legal effect. I am of opinion that the concurrence was as necessary to be given in writing, as the wife's own agreement. I do not inquire whether it required to be adhibited at the time of the wife's subscription, or might be expressed subsequently. I do not pronounce on the point. At whatever time given, I think it was indispensable it should be given in writing as much as the wife's own signature. And if so, I think the want cannot now be supplied by a reference to oath. It is trite that a contract as to heritage must be expressed in writing, or else there is *locus penitentiæ*. If the written contract wants an essential party, there is in the eye of the law no writing at all, and *locus penitentiæ* remains. I consider this to follow from the essential principles of our law in regard to contracts as to heritage. The want of Mr Dickson's concurrence, expressed in writing, I conceive to operate as a fatal flaw in the contract, wholly incapable of being rectified by any reference to oath.

I am therefore of opinion that Mr and Mrs Dickson are not bound in any legal contract to the defender, and cannot be brought under an obligation by means of the proposed reference to oath. And I think the Lord Ordinary is clearly right in holding that Mr and Mrs Dickson not being bound, Miss Jessie Cowan is not more bound than they. For the proposed sale was not of separate *pro indiviso* shares, but of the whole subject; and if there is no contract as to one of the proprietors, it is an incomplete contract as to the others. Miss Jessie Cowan may have other pleas besides this; but into these I do not now enter, because I think this consideration is sufficient to support the judgment, as given in her favour, as well as that of the other pursuers.

LORD PRESIDENT—I concur that there was no completed contract of sale in the missives founded on by the pursuer, the condition in the acceptance never being acquiesced in by the purchaser. With regard to the other ground of judgment, I am inclined to confine myself to the circumstances of the present case. I give no opinion on the general question, whether under any circumstances the concurrence of the husband can be proved by reference to the oath of husband and wife, where they are the sole contracting parties on one side. The reference in this case is clearly inadmissible, Miss Cowan cannot be bound by the oath of Mr and Mrs Dickson. I propose we should recall the interlocutors of the Lord Ordinary, and express in an interlocutor the grounds upon which we are all agreed.

The following interlocutor was pronounced—

"Recall the interlocutor of the Lord Ordinary of date 28th February 1871; also the interlocutor of 17th March 1871; also the interlocutor of 25th May 1871: Find that the missives founded on by the defender do not constitute a completed and effectual contract of sale, in respect the condition in the alleged acceptance by the sellers, that the title must be taken by the purchaser on the footing that it was not to be accompanied by any search of incumbrances, was not assented to by the purchaser: Find that the concurrence of the husband of one of the sellers (Mrs Dickson) not being expressed in the alleged written acceptance by the sellers, cannot be competently proved by the reference to the oath of the pursuers Mr and Mrs Dickson, as proposed in the minute No. 55 of process; Refuse to sustain the said reference: Find it unnecessary to decern in terms of the reductive conclusions. *Quoad ultra* repel the defences; and find, declare, and decern, in terms of the remaining conclusions: Find the pursuers entitled to expenses.

Agent for Pursuers—J. B. W. Lee, S.S.C.
Agent for Defender—D. Curror, S.S.C.

Tuesday, November 7.

KINNEAR (FERGUSON'S TRUSTEE) *v.* MRS JANET TAINSH OR FERGUSON AND OTHERS.

Husband and Wife—Conjugal Rights (Scotland) Amendment Act, 1861 (24 *and* 25 *Vict. c.* 84). A married woman succeeded to a legacy of £500, the *jus mariti* not being excluded. To the extent of £405 it was invested in the purchase of heritable subjects, the disposition being taken to the husband in liferent and the wife in fee. It was not proved that the husband was insolvent at the date of the purchase, but six months thereafter he was sequestrated. *Held*, in an action of reduction at the instance of the trustee in the sequestration, that the settlement was not more than a reasonable provision for the wife.

In 1869 the defender Mrs Ferguson succeeded to a legacy of £500 from an uncle. The *jus mariti* was not excluded. The legacy, to the extent of £405, was invested by Mr and Mrs Ferguson in the purchase of certain heritable subjects in Portobello. The price of the subjects was £705, the remaining £300 being raised by a loan from the Standard Investment Company, secured over the premises. A feu-charter was obtained from the superior, by which the subjects were disponed "to and in favour of the said Janet Tainsh or Ferguson, and the said George Ferguson, her husband, in conjunct fee and liferent, and to Helen Ferguson, only child procreated of the marriage betwixt the said George Ferguson and Janet Tainsh or Ferguson, and to any other child or children which may yet be procreated of said marriage, jointly, in fee." The charter contained a declaration that, notwithstanding the destination therein, it should be competent to the said Janet Tainsh or Ferguson "to sell or burden the said subjects, and exercise every other right of ownership." The charter was dated 7th August, and recorded 30th August, 1869.

On the 26th February 1870 George Ferguson was sequestrated, and on 9th March the pursuer was elected trustee. On the 12th July 1870 he raised the present action against Mrs Ferguson and George Ferguson, for himself, and as taking burden on him for his wife, and also as administrator-in-law for Helen Ferguson, only child of the marriage, to have it declared that the subjects in question were purchased by George Ferguson, to the extent of £405, with funds which belonged to him *jure mariti*, and are his property notwithstanding the feu-charter: and that the subjects are now vested in the pursuer, as trustee on the sequestrated estate of George Ferguson; or otherwise that the conveyance in favour of the said Janet Tainsh or Ferguson was a donation by George Ferguson in her favour, made *stante matrimonio*, and while he was in insolvent circumstances, and is now revocable by the pursuer, in the bankrupt's right; or otherwise that the conveyance is null, under the Act 1621, c. 18. The summons also concluded for reduction of the feu-charter, so far as it imported a conveyance in favour of the wife or children.

Defences were lodged for Mrs Ferguson and her husband. They pleaded—"(1) The investment of the legacy left by the female defender's uncle being made, not in contemplation of bankruptcy or in the knowledge of insolvency, and not as a donation by a husband to his wife, but as a moderate and suitable provision for her out of funds to which she had in equity the primary right, the deed in question, in so far as favourable to her, ought to be maintained. (2) The legacy in question being money to which the female defender has a primary equitable right, the pursuer ought not to be allowed to obtain possession of the property paid for by it, without making a provision for her adequate to secure her against absolute want."

A proof was taken, chiefly on the point whether George Ferguson was or was not insolvent at the date of the purchase of the property.

The Lord Ordinary (MURE) found that it was not proved that George Ferguson was insolvent at the date of the purchase: "Finds that previous to that date no provision had been made, by antenuptial contract of marriage or otherwise, by the defender George Ferguson in favour of the other defender; finds, in these circumstances, in point of law, that the defender George Ferguson was entitled to apply a portion of the said legacy in making a reasonable provision for the other defender; and that the application of the sum of £405, in the purchase of the said property to the extent of £250, and the destination thereof in favour of the defender Mrs Ferguson, to the same extent, was, in the circumstances, a reasonable provision, and was not revocable by the said George Ferguson, and is not revoked by his sequestration; and that the defenders are, to that extent, entitled to be assoilzied from the conclusions of the action; but