One might quite well suppose a case of one obligation occurring in a marriage-contract, where a wife purchased an annuity at so much money from a third person by a regular transaction of purchase and sale, and in the same deed—the marriage-contract—the parties concluded the transaction. Although the obligation were contained in the marriage contract, the clause of exemption would apply if the case were truly a proper transaction of purchase for money or money's worth, which this is not.

I may notice, before concluding, the inconveniences to which the argument on the respondents' side would necessarily lead if it were sustained. It is said that the obligations upon one side are to be regarded as a counterpart of the other, and therefore you have money's worth given for this annuity. Suppose a marriage takes place in which one of the parties has very little means indeed, and the other a large fortune,—it may be that all the husband offers is an insurance on his life as against £30,000 or £40,000 advanced and settled on the other side. If the argument maintained here be sound, then if the husband is able to advance £1000 only, or merely to effect an insurance on his life, it might just as well be said this is a valuable consideration given for the settlement of the larger sum of £30,000 or £40,000; and the settlement of that sum having thus been purchased, the amount shall be free from succession-duty. It would surely be very difficult to maintain that £2000 or £3000 was a valuable consideration for three times the amount. And so the Court might be put in every case to balance the considerations in each contract, and to say, is it or is it not the counterpart of the other—is it a valuable consideration in money or money's worth?

Again, it is said, if you find obligations on one side and another, they are to be regarded as counterparts of each other. The father or the relative of the lady gives certain sums of money, the father or relative of the husband gives other sums of money, and these are to be regarded as purchased not from the contracting spouses themselves, but from relatives intervening. Observe what is the effect of that view if sustained under the statute? It is not to exempt these sums from duty, because if the purchase is made by a relative it is plain the result is to make what he purchases his estate, and that estate, so made his, still becomes the subject of succession duty. You have an illustration of that in the case *in re Jenkinson*, 1856, 24 Beavan's Reps. 64; and it is plain that it is so from the statute. That view of the statute therefore leads to this anomalous, and to my mind extravagant, result, that if you have counterp rovisions of that kind in a marriage-contract, the succession-duty is payable, not with reference to the degree of relationship of the person who settles the money, but with reference to the relationship of the other party, the person who has purchased the settlement and who has thus settled the money. That might make a very serious difference to the parties, depending on the degrees of relationship of the relations who have intervened. I cannot read the statute as introducing anything so roundabout in the way of regulating the rules of succession, and providing what I should regard as a very remarkable element to deal with,—an element of chance in fixing the rate to be paid, because it varies according to the degree of relationship. I think it is much more reasonable to hold the money or estate provided in a marriage-contract as money or estate settled by the person who gives it, not money or estate purchased, and I think there is nothing in the statute to lead to a different result. On these grounds—and I cannot say I entertain any very serious difficulty about it—I am of opinion that this annuity is liable to succession-duty.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the Lord Advocate against Lord Curriehill's interlocutor, dated 13th March 1877, Recal the said interlocutor: Find and declare that the annuity of £3000 per annum provided to the late Lady Blanche Balfour, as in the Special Case stated, is chargeable with succession-duty; and remit to the Lord Ordinary to proceed in accordance with the above finding, with power to his Lordship to dispose of the expenses incurred in the Inner House."

Counsel for Pursuer (Reclaimer)—Lord Advocate (Watson)—Rutherfurd. Agent—The Solicitor of Inland Revenue.

Counsel for Defender (Respondent)—Kinnear. Agents—Gibson & Strathearn, W.S.

Wednesday, June 6.

FIRST DIVISION.

[Lord Craighill, Ordinary.

HEITON *v.* THE WAVERLEY HYDROPATHIC COMPANY.

Obligation—Contract of Sale—Negotiations which were held not to constitute a Completed Contract, and where Possession which followed was held not to be rei interventus.

A written offer to buy certain subjects was made, and correspondence and negotiations followed between the parties on either side with reference to certain conditions and stipulations not contained in the offer. The disposition was put in draft by the offerers' agents, and the offerer took possession and proceeded to make alterations upon the subjects in terms of the requirements of the sellers. He was afterwards called on to remove, and thereupon he brought an action to have it found that there was a concluded contract, which the sellers were bound to implement. The defenders were assoilzied, on the ground (1) that there was no concluded contract between the parties, and (2) that the possession could not amount to *rei interventus*, as there was no previous *consensus ad idem*, and it had not been got from those entitled to give it.

Observed, that where parties are in dispute whether there is or is not a concluded bargain between them regarding heritable property, what is to be looked at is not the drafts of the proposed deeds, but the documents themselves which formed the bargain

Joint-Stock Companies Acts 1862 *and* 1867—*Obligation on the Public dealing with a Company to inquire into the Power of its Directors to bind it.*

Opinions (*per* the Lord President and Lord Shand) that there is a presumption that what is done by the directors of a joint-stock company is valid and binding on the shareholders, and that, though a third party dealing with them is bound to be acquainted with the conditions of the contract of the company, so far as made public, there is no obligation on him to inquire, for example, whether a particular general meeting, and the resolution under which the directors are acting, was duly summoned.

This was an action at the instance of Andrew Heiton of Darnick Tower, Melrose, against the Waverley Hydropathic Company (Limited), registered under the Companies Acts of 1862 and 1867. The summons concluded for declarator that on the 25th May 1874 the defenders sold to the pursuer certain subjects, viz., a field and orchard immediately opposite the Hydropathic Establishment, and a park adjoining it; and that that sale should be found to be valid and effectual, and the defenders ordained to implement it.

In the beginning of 1874 the pursuer addressed a letter to the defenders relating to the proposed purchase of the subjects named. At an extraordinary general meeting of the Hydropathic Company, on 25th March 1874, "the meeting remitted the whole matter to the directors, with power to sell or not the ground, and if a sale be resolved on by them, the meeting unanimously empowered the directors to sell the ground at such a price and on such terms and conditions as they shall deem advisable." Mr Ferguson and Mr Maughan, two of the directors, subsequently to this had several interviews with the pursuer, who eventually gave them power to communicate on his behalf an offer of £1650, subject to the condition that it should be at once accepted.

The following is an excerpt from the minute of a meeting of the directors held on 25th May:—"The sale of the fields to Mr Heiton was then brought under consideration, and after explanations received from Mr Ferguson on the subject, and his interview with Mr Heiton, the meeting agreed to sell the fields, and instructed the law-agents to enter upon negotiations with the view to protecting the company's interests, and appointed the finance committee to meet and advise with the law-agents anent carrying through a sale."

A formal offer was transmitted by Messrs Freer & Dunn, Mr Heiton's agents, to Messrs Watt & Anderson, the company's agents, on 6th July, as follows:—"As we understand that the directors of the Waverley Hydropathic have agreed to sell to Mr Heiton the field he wishes, at £1650, and have minuted a resolution to that effect on his behalf, we now beg to offer that sum, the conditions to be afterwards arranged, and we shall be glad to have your acceptance of this offer in course, along with a draft of the conditions which it is proposed by the directors to attach to the purchase."

The answer was dated 7th July 1874:—"The money consideration is not so important to our clients as the servitudes to be imposed over the field, to prevent its being used to the prejudice of the Waverley Hydropathic Institution and grounds, and it has been suggested to us, by one of the directors forming the committee having power to negotiate on this subject, that a meeting should be held with the committee and Mr Heiton, whereat the various conditions, burdens, and servitudes may be considered and disposed of."

Freer & Dunn wrote to Watt & Anderson on 8th July 1874:—"Mr Heiton is quite aware of the nature of the restrictions to be attached to the purchase, and we do not think there should be either much trouble or correspondence necessary in the adjustment of the terms. Please therefore let us have your formal acceptance of our offer, and the draft for consideration." And again, upon 17th July 1874:—"We have yours of yesterday, and understand from it that our offer of £1650 on behalf of Mr Heiton is accepted, on conditions to be afterwards arranged."

Watt & Anderson wrote on 18th July 1874 to Freer & Dunn:—"We have your letter, and regret to say that your offer of £1650 has not been accepted. All we have informed you is, that until the committee meets and instructs us, nothing definite can be communicated. Our clients are divided in opinion about the propriety of selling the fields, and Mr Heiton must induce a sale against the disinclination of several. The committee entertain a different view regarding a meeting in the first instance with Mr Heiton, and every member of it to whom we have spoken about your present communications to us still thinks a meeting with Mr Heiton in the first instance necessary." In Freer & Dunn's answer it was stated—"The price we hold fixed, the only point remaining being the technical one of the adjustment of the conditions, which is more a matter for the respective agents."

Watt & Anderson again write to Freer & Dunn on 22d July 1874:—"The price may be regulated by Mr Heiton's acquiescence or refusal of the other terms of the sale, should it be effected—indeed every part of the bargain has still to be arranged, —and it was with the view of more expeditiously knowing Mr Heiton's willingness to consent to terms that our clients wished a meeting with him in the first instance. It was irregular for any of the directors to inform you what had taken place at their meeting, and until you receive official information they may alter or annul any resolution which they may form. We cannot agree with you therefore that the price has been fixed."

Nothing further was done by the Hydropathic Company, and the consideration of the sale was postponed till a meeting of the directors, held on 29th September following. The following is an excerpt from the minutes of that meeting:—"The directors have agreed to sell the Darnick field to Mr Heiton at £1650, but the transaction has not been completed, as the servitudes to be retained in favour of the company have not yet been arranged."

On 14th December following Watt & Anderson wrote to Freer & Dunn as follows:—"Referring to the meeting between the committee of the directors of the Waverley Hydropathic Company (Limited) and Mr Heiton, we are desired to obtain for the information of the directors before they resolve to sell the Darnick fields at the price of £1650, whether Mr Heiton is prepared to purchase them at that price subject to the following

restrictions and burdens, viz."—[*here followed the enumeration of the restrictions and servitudes.*] A correspondence followed as to the servitudes, in the course of which, on 18th December, Freer & Dunn wrote to Watt & Anderson:—"We understand that in the event of the establishment changing hands, or being converted into other purposes, these restrictions would cease. After you have got the views of directors on these outstanding points, we will be glad to hear from you again, and to receive the draft agreement of sale for final revisal."

The following is an excerpt from the minutes of meeting of the directors on 2d March 1875:—"The selling of the Darnick field to Mr Heiton of Darnick Tower was considered. The finance committee explained, that since it was remitted to them at last meeting they have had various meetings regarding the servitudes, and had got the company's agents, Messrs Watt & Anderson, to write terms to Mr Heiton's agents, Messrs Freer & Dunn, which said terms were read by the chairman to the meeting, with a letter from Messrs Freer & Dunn agreeing to certain alterations which had been suggested. When subjected to the said alterations, it was moved by Mr Ferguson, and seconded by Mr Ireland, that the field should be sold to Mr Heiton for the sum offered, viz., £1650, which was agreed to by a majority—Messrs Ireland, Philip, Scott, Carruthers, and Ferguson voting for the sale, and Messrs Davie, Maughan, Purves, and Robson voting against. The finance committee were then instructed to carry out the sale."

On 6th March 1875 Watt & Anderson wrote to Freer & Dunn:—"In dealing with the conditions of the proposed sale, the company will consider that Mr Heiton is agreeable to purchase according to the terms contained in our said letter of 14th December last, taken in connection with this letter. All burdens, conditions, restrictions, and others shall be created in favour of the company, and of their successors and assignees, and also in favour of them and their foresaids, as proprietors of the Waverley Hydropathic Establishment, and of the grounds surrounding the same, and parts and pertinents."

On 25th March Freer & Dunn wrote to Watt & Anderson:—"When Mr Heiton was here the other day, on his way to Edinburgh, we advised him to call on you and try and adjust in an interview the outstanding points, instead of prolonging a correspondence; and he writes us to-day that this has now been done. We will accordingly get the disposition prepared and sent for your revisal, and meantime you can be having the one to be granted by our Mr Freer to the company got ready for our revisal on his behalf." Next day Watt & Anderson wrote in answer:—"We have your letter. Mr Heiton has given no acceptance of the terms of sale as contained in our several letters to you, and perhaps it will be better that a written acceptance be sent. You can, however, go on with the preparation of the draft-disposition by the company to Mr Heiton, and send it to us with the titles, in order that we may prepare the draft-disposition by you to the company. Of course until there be a written acceptance there cannot be a concluded sale."

On 27th March Freer & Dunn wrote to Watt & Anderson—"We do not send a written acceptance of the terms of sale as asked for in your letter of yesterday, as we are not at one evidently as to the clause regarding the obligation to plant clumps of trees, having understood from Mr Heiton's last letter that the stipulation was departed from, and that all that our client was to be taken bound to do was to keep the obliquely shaded portion in permanent grass. We have written him on this point to-day, and meantime you can be revising our disposition and drafting your own."

Mr Macpherson, the house steward of the Hydropathic Company, wrote on the 31st March to Mr Heiton:—"I had your letter offering the orchard to the Waverley Hydropathic Company for £7 per annum sent to me by Mr Ferguson, and requesting me, if thought we should have it, to write to you an acceptance for the company, which I now do. Of course we expect it will be properly fenced to keep out sheep."

A correspondence then followed between Freer & Dunn and Watt & Anderson as to the delay in the revisal of the draft-disposition, in the course of which, on 20th April, the former said:—"The company have given him possession, and it is a little awkward that he should be possessing and going on with his improvements in planting, &c., without a title." On 5th June Watt & Anderson wrote to Freer & Dunn:—"We return the whole titles and documents you sent us, and likewise draft disposition in favour of Mr Heiton and relative draft inventory revised. We stipulate, however, that the Waverley Hydropathic Company (Limited) shall still have an opportunity to go over and consider the draft disposition now returned before being extended, in case that we may have overlooked conditions which should be inserted in it."

The following is an excerpt from the minutes of meeting of the finance and works committee, held on 15th June 1875:—"Mr Davie then read and submitted to the meeting a requisition he had received from the following shareholders of the company, viz.—[*here followed the names of nine shareholders*]—the said shareholders holding not less in the aggregate than 100 shares of the company, requesting the directors to call an extraordinary general meeting of the company, to consider the propriety of selling or not the Darnick fields, and, if necessary, to pass a special resolution on the subject. Mr Ferguson, after the agent of the company had read at Mr Ferguson's request the minute of the directors of 2d March last, agreeing to sell the fields and appointing the finance committee to carry through the sale, and after he, Mr Ferguson, had pointed out that the minute had been signed by the chairman, left the meeting at this stage, without giving any explanation. Mr Davie stated that trees had been planted in the Darnick fields, and that sheep had been grazing in them for several days, and considered that this use of the fields was illegal and without authority, because there was no concluded sale of them. Mr Maughan desired to be recorded in this minute that he protested and objected to the whole proceedings of Messrs John Ferguson and Thomas Ireland in connection with their negotiations subsequent to 2d March last, to sell the Darnick fields to Mr Heiton, as having been gone into by them without authority, and therefore being null and void. The meeting consider that as the servitudes had not been finally

arranged, and that there was no sale of the fields, and also in respect of the foresaid requisition it would not be prudent to proceed further in the matter of the sale of the Darnick fields, and instruct the agents not to proceed further with the matter, and to write to Mr Heiton's agents that further negotiations are suspended in the meantime and calling their attention to the illegal conduct of Mr Heiton in planting trees and grazing sheep upon the fields, and requesting the immediate removal of the same. The meeting agreed that Mr Davie should forthwith call a meeting of the directors, to be held on Wednesday, 23d June current, to call an extraordinary general meeting of the shareholders, to consider the propriety of selling or not the Darnick fields, and to authorise the proposed additions and alterations to be made upon the company's establishment at Skirmish Hill."

The following correspondence followed:—Watt & Anderson on 15th June wrote to Freer & Dunn—"With reference to the negotiations for the sale of these fields to Mr Heiton, we are instructed by a committee of the directors of the Waverley Hydropathic Company (Limited) to intimate, as we do, that in the meantime these negotiations are suspended. There was brought under the notice of the committee that trees have been planted and sheep grazing for several days in the fields. If such have been done by Mr Heiton's orders, the committee consider that he has acted very improperly at the present stage of the negotiations, and without authority from the company, and we have to request him to remove at once these encroachments and refrain from encroaching till arrangements are finally concluded." Freer & Dunn wrote in answer:—"We have yours of yesterday, the meaning of which we are at a loss to understand. . . . . Mr Heiton got possession of the ground as proprietor with the knowledge and consent of the company, and thereupon proceeded to let the fields and plant trees and make other improvements, in the belief that in due time the formal part of the transaction would be completed. If you refer to our letter to you, written so far back as the 20th April last, you will find from it that this is so—in fact we understand the company itself is one of his tenants, and has taken the orchard from him for the season at a certain rent. The dispositions were revised last week, and we were only waiting a sketch of the ground from Mr Heiton to return them to you for engrossment, with a view to their signature." On 16th June Watt & Anderson replied:—"Mr Heiton had no right or authority to take possession of the fields. May we ask who gave him authority to do so? The company did not give it to him, and no one has been authorised by the company or the directors to give him possession. He has taken possession, if you be correct in what you say, at his own hands, and we must call on him at once to withdraw from it and remove his encroachments. The essential parts of the proposed sale, viz., the conditions, servitudes, &c., have not been considered by the company, and are not finally adjusted. How you can say that the formal parts of the sale have only to be adjusted we do not understand. The company, in general meeting, or by its directors, have not become tenants of Mr Heiton, and have not taken the orchard from him, as you allege. As to your statement that the draft disposition was revised, we have only to refer you to our letter returning it, and have to repeat that it must be returned to us before extension on stamp, in order that we may get the approval or disapproval of it by the company, or any alterations on it which the company may require."

Freer & Dunn wrote on 17th June to Watt & Anderson—"We had certainly understood that Mr Heiton had got possession with the consent and knowledge of the company, as we formerly advised you, and that the latter had become his tenants of the orchard, but in the circumstances it will not be necessary to argue whether you or we are correct in these points. The committee of directors and Mr Heiton arranged the conditions of sale at their meeting at Melrose, and the draft disposition received from you expresses these in the main correctly enough. We return you both your and our draft dispositions and inventory of titles. If you accept our alterations, which we suppose you will do, as they are not in any sense important, but rather verbal—good and well; you can then get your draft engrossed for signature, and return us ours that we may do the same."

At a meeting of the directors of the Hydropathic Company, held on 23d June, it was resolved that an extraordinary general meeting of the shareholders of the company should be held, in terms of a requisition by shareholders to that effect, "in order to consider the propriety of selling or not selling the fields of Darnick" to Mr Heiton. It was resolved that such a meeting of shareholders should be held "in terms of the requisition, and for the purpose of considering the proposed servitudes to be created in favour of the company over the Darnick fields." Along with the circular calling the meeting there was distributed amongst the shareholders a statement detailing what had taken place in regard to the sale since the meeting of the directors on 2d March.

The following is an excerpt from the minutes of the meeting of 6th July—"Mr Maughan moved as follows, viz.—'As the directors have been proceeding in the proposed sale of the Darnick fields without having first obtained the sanction of the shareholders, in the manner prescribed by the articles of association, I move that this meeting disapprove of the whole proceedings of the directors as to the fields in question, and also disapprove of the proposed servitudes as being insufficient, and hereby cancel all apparent authority under which they (the directors) have been hitherto acting, and instruct them to cease from all further negotiations with Mr Heiton.' The motion was carried by a majority against an amendment.

Mr Heiton had planted trees and grazed sheep on the fields in question, and was forthwith called on to remove these encroachments, which was eventually done by the hands of the defenders' servants. He then removed from possession of the fields, reserving all rights.

Mr Heiton now brought this action for implement of the contract of sale, and, alternatively, for damages in respect of non-implement.

The defenders averred that the resolution passed at the extraordinary general meeting of the company on 25th March 1874, held under sections 50 and 51 of the Joint-Stock Companies Act 1862,

empowering the directors to negotiate a sale of the subjects libelled was illegal. The meeting could only be held after giving the shareholders due notice of its purposes and the business to be brought before it. The articles of association of the company also provided, with reference to the proceedings at general meetings of the company, under section 36 thereof, "that five days' notice at least, specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members;" and under section 40 thereof, that "all business shall be deemed special that is transacted at an extraordinary general meeting." The notices given to the shareholders made no mention of any proposal by the pursuer as to the sale of the fields in question to him, or that the sale of the fields was to be under consideration, and such business was not in contemplation at the time when the notices were despatched to the shareholders. The directors had no power under the articles of association of the company to sell, dispone, and convey any part of the heritable property of the company except with the consent of the shareholders at a general meeting specially called for that purpose, and such meeting was never called, and such consent was never obtained from any general meeting called specially for that purpose.

The defenders alleged that there was no concluded contract of sale, and further stated that any possession the pursuer might have obtained was taken by him at his own hand, and without the knowledge, authority, or consent of the company, or directors, or committee of directors. Under the draft disposition, as prepared by his own agents, the term of entry was proposed to be the last day of signing the extended disposition.

The pursuer, *inter alia*, pleaded—"(1) In respect that there was a concluded and valid agreement for the sale and purchase of the lands in question, as between the pursuer and the defenders, they are bound to grant a conveyance in his favour in terms thereof. (2) *Separatim*, the contract of sale libelled is validated *rei interventu*. (3) The defenders having agreed to sell the said lands at the price offered by the pursuer, on the footing that the terms of servitudes should be afterwards arranged, and there being no dispute between parties regarding these terms, the pursuer is entitled to decree in terms of the first conclusion of the summons."

The defenders, *inter alia*, pleaded—"(3) The resolution with reference to the fields in question, adopted at the meeting of the company on 25th March 1874, having been passed in violation of the provision of the statute and the articles of the association, anything done under the remit contained therein was *ultra vires* of the directors and committee of directors, and is not binding on the company. (4) No concluded contract or agreement of sale having been entered into between the pursuer and defenders at the date libelled or any other time, the action is groundless, and cannot be maintained. (5) The pursuer is not entitled to found to any extent or effect on any alleged possession of the said fields on his part, in respect 1, that there was no concluded contract or agreement between the parties, and 2, that such possession was taken by him at his own hand, and without the knowledge, authority or sanction of the defenders."

The Lord Ordinary allowed both parties a proof of their averments, but upon a reclaiming note the First Division recalled that interlocutor, and allowed the pursuer a proof before answer of his averments relating to possession, and to the defenders a conjunct probation.

The result of the proof sufficiently appears from the Lord Ordinary's judgment, and from the opinions delivered by the Court subsequently.

The Lord Ordinary pronounced an interlocutor sustaining the defences, and assoilzieing the defenders from the conclusion of the summons. The following note was appended:—

"*Note.*—The proof which was allowed by the Court by the interlocutor of 18th July last related only to *rei interventus*, and as it was before answer; all the pleas on the record have till now been left untouched. The Lord Ordinary consequently felt a disinclination to deal with the constitution of the alleged contract as evidenced by writs which were founded on, although technically not proved. But his hesitation yielded to the desire expressed by both parties that the value of the writs referred to should be judged of on the assumption of their authenticity.

"1. The first question naturally is the relevancy of the pursuer's averments to set up independently of *rei interventus* a concluded contract. The Lord Ordinary thinks that these, read in the light of the relative documents, are insufficient. In the first place, it is not said that the minute of directors of 2d March 1875, which in the end came to be relied on, was intimated to the pursuer; and, in the second place, it is plain that there were things, and material things too, upon which at the date of that minute parties were not agreed.

"2. The next thing is the question whether there is a concluded contract? That there were negotiations, and that in some things there was an agreement, is undoubted, but it is at least as clear that upon other things neither at 2d March 1875 nor at any time afterwards was there an agreement. What are called 'servitudes' remained matters of controversy. The ground in question had been bought by the defenders for the amenity of their establishment, and if they were to sell, it was of vital importance that conditions by which that amenity would be secured should be made articles of the contract. These, in truth, were more important than a little more or a little less in the way of price. Consequently, they were always in the front, and the very first letter which was written by the agents of the defenders to the agent of the pursuer, after receiving instructions consequent upon the proceedings of 2d March 1875, recapitulated the conditions upon which the defenders were to insist. That the matter was then open both the agent of the pursuer and the pursuer show in their subsequent letters, and before there had been an agreement the shareholders interfered and put an end to the negotiation. These things, the Lord Ordinary thinks, are demonstrated by the documents, and hence the relative finding in his interlocutor.

"3. The pursuer founds on his alleged possession for two purposes. The first of these is to make out that even if at the middle of March 1875, when, as he says, he began to act as proprietor of

the ground, some of the conditions as to servitudes had not been arranged, these are to be held as swept away by the fact that he got possession. Whether the relaxation for which he asked, or whether the restrictions on which the defenders insisted, are the things to be thus got rid of was not explained to the Lord Ordinary; but this omission is immaterial, because both parties so conducted themselves in their subsequent communings and correspondence as to show that the pursuer had not taken, and certainly had not been given, possession on the assumption that thereby everything hitherto unsettled was determined. This is one of the things which distinguishes the present case from *Colquhoun* v. *Wilson's Trustees*, 22 D. 1035. The Lord Ordinary may add that there is another distinction afforded by the warnings repeatedly given by the agents of the defenders that till there was an official intimation that the contract had been concluded, or, to use the words which occur in a subsequent letter, till there was a written acceptance of the terms offered by the defenders 'there cannot be a concluded sale.'

"As regards the exclusion of *locus penitentiæ*, which is the purpose for which the efficacy of *rei interventus* is usually invoked, the Lord Ordinary thinks that the so-called possession is unavailing in the circumstances of this case. The want of form or authentication in the writings might be made up by *rei interventus*, but the want of consent necessary to the completion of a contract could not be thus supplied."

The pursuer reclaimed, and argued—It was enough for him to show that the agreement as to the subject, price, servitudes, and restrictions was complete. If *rei interventus* were distinct and unequivocal, it went a long way to complete a contract. The facts of possession, of the letting the fields, the planting, and other alterations, were proved, and amounted to *rei interventus*. The possession was well known also to the other contracting parties. Every material condition of the sale was agreed to in writing, and the controversy was rather about the form of words in which effect was to be given to it. The possession further showed acquiescence. With reference to the defenders' third plea in law, a resolution of the directors would bind the company in a matter with third parties, though they might be liable in damages to the shareholders for the consequences of its informality.

Authorities — *Colquhoun* v. *Wilson's Trustees*, March 20, 1866, 22 D. 1035; and (with reference to the legality of the resolution at the extraordinary general meeting of the company); *Royal British Bank* v. *Turquand*, June 2, 1855, 6 Ellis and Blackburn 327, 24 L.J., Q.B., 327; *Agar* v. *The Official Manager of the Athenæum Life Assurance Society*, 3 Scott's C.B. Reps., N.S., 725, 27 L.J., C.P. 95; *Prince of Wales Assurance Society* v. *The Athenæum Life Assurance Society*, 3 Scott's C.B. Reps., N.S. 756; *ex parte Eagle Insurance Company*, 1858, Kay and Johnson's Reps. 549, 27 L.J. Ch. 829.

Argued for the defenders—(1) There was here no completed contract. *Rei interventus* could not be pleaded here to any extent, because there was no *consensus ad idem* between the parties. (2) The resolution passed at the extraordinary general meeting empowering the directors to sell was invalid, as no notice of the motion had been given to the shareholders. It was true that in so far as a power was given to the directors by the articles of association to be exercised under conditions, third parties dealing with the company were entitled to hold that these conditions had been complied with. But wherever the power was not authorised by the articles of association, and was unusual, it was different. It would be dangerous if the directors could bind a company where the articles of association required the consent of an extraordinary general meeting called after due notice. There was no ground for sanctioning so great a departure from the rule that an agent's powers are limited by his mandate.

Authorities—*Ernest* v. *Nichol*, 1858, 6 Clark's H. of L. Cases 401; *Burns* v. *Pennell*, 2 Clark's H. of L. Cases 497; *Darsey* v. *Tamar, Kit. Hill, and Callington Railway Company*, June 8, 1867, L.R., 2 Exch. 158.

At advising—

Lord Deas—This is an action at the instance of Mr Heiton to have it found and declared that the Waverley Hydropathic Co., who have an establishment near Melrose, have sold to him certain fields adjoining that establishment and adjoining his estate. The negotiation took place with the directors of that company and the finance committee acting under their authority. Now, I do not call in question the power of the directors nor the power of the finance committee to sell that property. The real question, I think, is, whether there was or was not a concluded bargain? Now, it is matter of trite law that a bargain for the sale and purchase of heritable property in Scotland must be in writing. The writings of the directors or the writings of the finance committee are quite sufficient if the import of them is clear. I do not think that it is contended on the part of Mr Heiton that on the face of the writings there was a concluded sale. It is quite clear that there were points, and those of importance, in dispute to the end. Those fields were of the greatest possible importance to this company for the amenity of their establishment, and it is not wonderful therefore that from the first there was a difference of opinion among the directors as to whether a considerable money price was a sufficient temptation to sell. It was of importance to them to have their reserved rights over the fields fixed, and it was likewise of importance that those reservations should go into the titles in such a way as to be binding in all time coming. This company might wish to give up the establishment to another similar company, or they might wish to sell it to a different kind of company—a lunatic asylum or an infirmary, for instance. There are various other kinds of establishments in selling to whom it would make the greatest possible difference whether they could transfer, in a binding form, to the purchasers the reservations in regard to the amenity of those fields. Now, it is quite clear upon the face of the correspondence that upon these reservations in particular the parties never came to one. On the contrary, they came to be quite opposed to each other upon the vital matter of some of these reserved rights, and as to whether they were to fly off or not in the event of a resale—reservations which were rightly regarded as of greater importance even than the amount of the price.

That was the state of matters when the agents came to think it might expedite matters to be preparing in the meantime the drafts of the deeds. I take it to be perfectly clear law that when parties come to this Court disputing whether there is not a concluded bargain, what we have to look at is not the drafts of the proposed deeds, but the documents themselves which formed the bargain. We must look to these, and according as we find these to stand we must direct the drafts of the deeds to be adjusted. That is the ordinary way. But that rule is most clearly applicable here, because we see upon the face of the correspondence that when it was proposed to have drafts of the deeds this was not upon the footing that there was a concluded bargain, but that it might save time tentatively to be preparing drafts of the deeds in the meantime. And when those drafts were not finally adjusted, and were not approved of by the directors, as it was expressly stipulated in this correspondence that they should be before they were to be binding, I take it to be perfectly clear that what we have to do with is the question how the bargain stood at the time upon the face of the correspondence. If there was a concluded bargain, we should order the deeds to be framed in conformity with that bargain, but if there was no concluded bargain, we are to find that there was none. As I have already said, Mr Heiton does not contend, and cannot contend, that upon the face of the documents when those drafts were proposed to be prepared there was a concluded bargain. He cannot found upon those drafts as a concluded bargain, for the parties never came to be at one about them. They never were submitted to the directors of the company, and the only answer he makes to that is—"That is all very true, but I am in possession of the ground, and I must therefore be held to have conceded the disputed points in favour of the company." Now, to found that plea it is very clear, I think, that he must have got possession from the parties entitled to give him possession, namely, the directors or the finance committee; but I do not find that he either got possession from the parties entitled to give him possession or that those parties ever sanctioned that possession in a way to support that plea. What an individual director may do goes for nothing. The directors were by this time all at sixes and sevens on the subject. There may be things not altogether adjusted in a bargain even of heritable property, in regard to which there may be an implication from the possession being given and taken that these are conceded by the purchaser, but it would be, to say the least of it, a very serious question whether that could apply to things of such vital importance as were in dispute here. I only say that would be a question of difficulty, for the conclusive answer here is that possession was not given by those representing the company, who alone could give possession, and therefore that question does not arise. With those views of the case, it is really not necessary to go into any great detail, but I may just glance over the documents in order to show clearly that that is the result.

It is sufficient to begin with the letter of 6th July 1874, from Mr Heiton's agents to the agents for the company, in which they say —"As we understand that the directors of the Waverley Hydropathic have agreed to sell to Mr Heiton the field he wishes, at £1650, and have minuted a resolution to that effect on his behalf, we now beg to offer that sum, the conditions to be afterwards arranged, and we shall be glad to have your acceptance of this offer in course, along with a draft of the conditions which it is proposed by the directors to attach to the purchase." Now, it is perfectly plain that the offer of £1650 upon conditions to be afterwards arranged was not a binding offer at all, and that a mere agreement as to the price could not form a concluded sale. The conditions were everything in a bargain of this kind. The answer is—"The money consideration is not so important to our clients as the servitudes to be imposed over the field to prevent its being used to the prejudice of the Waverley Hydropathic Institution and grounds, and it has been suggested to us by one of the directors forming the committee having power to negotiate on this subject that a meeting should be held with the committee and Mr Heiton, whereat the various conditions, burdens, and servitudes may be considered and disposed of." Then we have another letter from the purchaser's agents, in which they say—"We have yours of yesterday, and understand from it that our offer of £1650 on behalf of Mr Heiton is accepted on conditions to be afterwards arranged." There is plainly no bargain there. Then the company's agents write to the purchaser's agents—"The price may be regulated by Mr Heiton's acquiescence or refusal of the other terms of sale, should it be effected; indeed every part of the bargain has still to be arranged, and it was with the view of more expeditiously knowing Mr Heiton's willingness to consent to terms that our clients wished a meeting with him in the first instance. It was irregular for any of the directors to inform you what had taken place at their meeting, and until you receive official information they may alter or annul any resolution which they may form. We cannot agree with you therefore that the price has been fixed." Then we have the report of the directors—"The directors have agreed to sell the Darnick field to Mr Heiton at £1650, but the transaction has not been completed, as the servitudes to be retained in favour of the company have not yet been arranged." Then, again, the purchaser's agents write to the company's agents—"We understand that in the event of the establishment changing hands or being converted into other purposes these restrictions would cease." Then you have this letter from the agents for the company, in which they say they "may be disposed to modify the conditions and restrictions mentioned in the event of their selling the fields to Mr Heiton." They do not say they do it, but only that they may be disposed to do it. Then you have this from the agents of the company—"All burdens, conditions, restrictions, and others shall be created in favour of the company, and of their successors and assignees, and also in favour of them and their foresaids, as proprietors of the Waverley Hydropathic Establishment, and of the grounds surrounding the same, and parts and pertinents." That is the understanding and conditions made by the company. Then you have the matter about the orchard brought in. I may just dispose of that at once by observing that it is perfectly clear that Mr Macpherson, who is said to have taken that lease, had no authority whatever

to interfere in that matter whatever he may have done. Now, in the letter of 25th March Mr Heiton's agents write—"When Mr Heiton was here the other day, on his way to Edinburgh, we advised him to call on you, and try and adjust in an interview the outstanding points, instead of prolonging a correspondence, and he writes us to-day that this has now been done." Thus there were admittedly outstanding points at that time, and it is for Mr Heiton to show that these were ever finally adjusted. The agents for the company say—"We have your letter. Mr Heiton has given no acceptance of the terms of sale as contained in our several letters to you, and perhaps it will be better that a written acceptance be sent." That implies that there must be writing before the bargain is concluded, for they say—"You can, however, go on with the preparation of the draft disposition by the company to Mr Heiton, and send it to us with the titles in order that we may prepare the draft disposition by you to the company. Of course, until there be a written acceptance there cannot be a concluded sale." It is clear that this proposal to go on with the preparation of the drafts was a mere tentative proceeding, and not a proceeding upon the footing of a completed sale, for they say distinctly —"Of course until there be a written acceptance there cannot be a concluded sale." Was there written acceptance given? It was not only not given, but it was declined, because we have that in the next letter from Mr Heiton's agents to the agents for the company, in which they say—"We do not send a written acceptance of the terms of sale as asked for in your letter of yesterday, as we are not at one evidently as to the clause regarding the obligation to plant clumps of trees, having understood from Mr Heiton's last letter that the stipulation was departed from, and that all that our client was to be taken bound to do was to keep the obliquely shaded portion in permanent grass. We have written him on this point to-day, and meantime you can be revising our disposition and drafting your own." Then you have Macpherson's letter about the orchard, which, as I have said, goes for nothing, he having no authority. Then the agents for the company send the drafts of the deeds, and say—"We return the whole titles and documents you sent us, and likewise draft disposition in favour of Mr Heiton and relative draft inventory, revised. We stipulate, however, that the Waverley Hydropathic Company (Limited) shall still have an opportunity to go over and consider the draft disposition now returned before being extended, in case that we may have overlooked conditions which should be inserted in it." Now, that is the way in which matters stood when we come to the meeting of the finance committee, which bears—"Mr Davie stated that trees had been planted in the Darnick fields, and that sheep had been grazing in them for several days, and considered that this use of the fields was illegal and without authority, because there was no concluded sale of them." And then—"The meeting consider that as the servitudes had not been finally arranged, and that there was no sale of the fields, and also in respect of the foresaid requisition, it would not be prudent to proceed further in the matter of the sale of the Darnick fields." They instruct their agents that the negotiations should not be further proceeded with, but they agree that an extraordinary general meeting of the shareholders should be called to consider the propriety of selling or not the Darnick fields, and to authorise certain proposed additions and alterations to be made upon the company's establishment at Skirmish Hill. That extraordinary general meeting was called accordingly, but before that meeting was held there is another letter from the company's agents to Mr Heiton's agents, in which they say—"With reference to the negotiations for the sale of these fields to Mr Heiton, we are instructed by a committee of the directors of the Waverley Hydropathic Company (Limited) to intimate, as we now do, that in the meantime these negotiations are suspended." And then they ask if the trees have been planted, &c., by Mr Heiton's orders, and so on. Then the agents for the company again write—"The essential parts of the proposed sale, viz., the conditions, servitudes, &c., have not been considered by the company, and are not finally adjusted. How you can say that the formal parts of the sale have only to be adjusted we do not understand." Then they say that the draft must be returned to them before it is extended on stamp in order that they may get the approval or disapproval of it by the company, or any alterations on it which the company may require. Then you have the result of this extraordinary general meeting, at which a motion is made "That this meeting disapprove of the whole proceedings of the directors as to the fields in question, and also disapprove of the proposed servitudes as being insufficient, and hereby cancel all apparent authority under which they—the directors—have been hitherto acting, and instruct them to cease from all further negotiation with Mr Heiton." And that is an end of the matter. Now, if according to the law of Scotland a concluded sale of heritable property can be spelled out of that, it is more than I can see or understand. I think it is perfectly clear that there was no concluded sale, and therefore that Mr Heiton cannot succeed in this action.

Lord Mure—The only difficulty I have had in this case arose at one time upon the question of possession. It appeared to me, from the peculiar circumstances of the case—having regard to the minutes of meetings of the directors, and to the correspondence that followed upon that relative to what were to be the conditions of the contract—that the directors, so far as they were concerned, had come under an agreement to sell, but that the conditions under which the sale was to be made were not at first regularly fixed, and therefore that until those conditions were fixed, or there was some acceptance in writing on the part of Mr Heiton of the undertaking made to him in the resolution of the directors of 16th March, there could be no concluded sale. Now, I think that in the correspondence the most of those conditions were arranged. But, on the other hand, it is clear that at the end of March there were still some proposals outstanding as to which the parties were not at one, because those two letters referred to by Lord Deas—one from Messrs Watt & Anderson on the 26th March, and the other from Messrs Freer & Dunn on the 27th of the same month—each of them allude to the fact of there having been no written acceptance of the proposal of the directors.

Messrs Freer & Dunn give as a reason why they did not send a written acceptance that the parties were not at one as to some of the conditions. It was therefore maintained to us that ultimately they came to be substantially at one, and that the possession which had been had by Mr Heiton was sufficient to get the better of the want of a written acceptance.

Now, I am very clear upon the correspondence that there is here no written agreement of sale. There is a defect in there being no acceptance on the part of Mr Heiton of the proposal of the company. In his own evidence he says that subsequent to the 26th March he had some communications with Messrs Watt & Anderson, and made some proposals to accept the offer, but that these were not in fact carried out. If the matter had stood there, it was quite clear there was no concluded transaction.

The only difficulty, as I have said, which was raised, to my mind, was with reference to the question of possession—as to whether the possession could be held to be *rei interventus*, and the arrangement of parties showing that there had been a concluded contract could be made out in that way. But when one looks at the nature of this possession, and at the way in which it was taken by Mr Heiton—not given by the directors as a body—I do not think it is sufficient to validate the agreement. The directors of this board authorised the carrying out of the transaction on the 2d March. The finance committee, consisting of five gentlemen, were instructed to carry it out, as appears from the meetings of 2d March and 15th June. But three members of the committee never acted at all, and they never appear to have met together as a committee to consult as to what should be done in the matter. I think the import of the evidence as regards possession simply comes to this, that Mr Ferguson, one of the finance committee, but without the authority of that committee as a body, and without the authority of the directors as a body, seems to have arranged with Mr Macpherson, who had no power to do so, that he should take a lease of this orchard from Mr Heiton. I think that the possession and occupation so had by Mr Heiton of the fields cannot be held to have been possession given by the directors or given by the committee, so as to import that there was a concluded contract. I think the possession is in the defenders in every essential respect, and upon that ground I come to the same conclusion as Lord Deas.

Lord Shand—In answer to the contention on behalf of the reclaimer, that there was a concluded contract of sale, it has been maintained by the respondents that the directors had no power to conclude a sale, and, in the next place, that on the documents that passed between the parties there was no concluded sale. Upon the first of these points, viz., as to the power of the directors to conclude a sale, I have, as your Lordships have, no doubt.

The argument for the respondents finally came to this, that although it was part of the constitution of this company, as finally fixed by the resolution at the meeting of the 25th March 1874, and approved of at the meeting of 9th April 1874, that the directors might with consent of the shareholders "sell, dispone, and convey the heritable property of the company," and although it was conceded that the consent of the shareholders was given at the same meeting at which this power was made a part of the constitution of the company, yet the sale could not be carried through, because in the notices calling the meeting at which the power was given there was no intimation given to the shareholders that such a sale was to be the subject of consideration. I am clearly of opinion that that is not a good ground for challenging this sale if it was made. The directors, with the consent of the shareholders, had the power to sell. The shareholders had given their consent, and the objection taken amounts to this, that a party dealing with a joint-stock company of this kind is bound not only to look at the constitution of the company, and at the resolution which the company may have come to, but to investigate all the details with reference to the calling of the meeting at which the resolution was arrived at, and to see whether due notices have been given and circulars sent to the proper parties. I think that persons dealing with companies of this kind are entitled to assume that in matters of this description everything has been properly done. It would be a very serious thing if in regard to a company such as this the law were otherwise. I do not say it would lead to the disability of such companies to contract; but if persons dealing with them were bound to examine into all these minute matters of detail before they could be satisfied that they had made a binding contract, it would be almost impossible to deal with such companies in safety; and it would be the worst result possible for such companies themselves, and a great hardship to them, that the law should be declared in terms of the argument which we had at such great length from the respondents in this case. I have no doubt that there was power on the part of the directors to conclude a sale of those fields, but I agree with your Lordships in holding that there was here no concluded contract.

It is settled by the case of *Colquhoun* v. *Wilson's Trustees*, March 20, 1860, 22 D. 1048, on principles of reason and expediency, that where you have open possession followed, as in that case the possession was, by a number of actings of the parties, the person who has taken possession must be held to have passed from minor stipulations that he had made in the course of the negotiations for the contract, but which had been left open. But here the case is quite otherwise. We have to look at the correspondence, and I think also at the drafts of the deeds which passed between the parties, in order to see what was the state of the negotiation between them. I quite agree with what has been said by Lord Deas that the drafts themselves, even though they come nearly up to a concluded contract, cannot be taken as finally closing it; but, on the other hand, they may be looked at to see how far the parties were at one, and how far they differed from each other. In this case I think the drafts are useful, and they show that the parties had never come to one.

I do not mean to go into detail on points which have been already so fully gone over, but I may say that I am satisfied from the correspondence, in the first place, that the proposed sellers, through their agents, made it a condition of any

sale that there should be a formal written acceptance of the offer made. The pursuer's agents were made fully aware of this, and in one of their letters to the defenders' agents they say that they cannot send such a written acceptance because they were not agreed as to one of the stipulations. I think it would be extremely difficult to hold that the bargain had been concluded without such a written acceptance. But, in the next place, I think the documents show that upon a matter which was of vital consequence to this company—I mean the servitudes which were to be made burdens upon the ground to be sold—there was great difference between the parties. I refer particularly to that piece of ground delineated upon the plan, upon which the pursuer was to be at liberty to put up buildings subject to restrictions. It appears to me that down to the last moment parties were directly at variance—the defenders holding that any contract which was to be entered into must contain a stipulation that the villas to be put upon that ground must be according to plans which they should approve of, while the pursuer, on the other hand, maintained that he should be entitled to put down villas without either having plans submitted to or approved of by the defenders. I therefore take it that upon these two points, if there was nothing else — the absence of the acceptance stipulated for, and the non-agreement with reference to the servitudes—there was no concluded bargain. I may further say that I entirely adopt the views stated by Lord Deas as to the alleged possession. I do not think there was here such possession given by the Company and taken by Mr Heiton as could make any contract between the parties on the footing that Mr Heiton abandoned all points on which he had differed in the negotiations.

Lord President—We had a very elaborate and earnest argument on the part of the defenders in support of their third plea in law, which is that "the resolution with reference to the fields in question, adopted at the meeting of the Company on 25th March 1874, having been passed in violation of the provision of the statute and the articles of the association, anything done under the remit contained therein was *ultra vires* of the directors and committee of directors, and is not binding on the company." Now, although I agree with all your Lordships in holding that that plea is unfounded, I think it is necessary to take some notice of it in giving our judgment, because if the doctrine embodied in that plea were held to be sound or received any countenance, even by the appearance of its not being distinctly rejected by the Court, I think it might lead to very inconvenient and dangerous consequences. The fundamental doctrine of the law of partnership in the case of ordinary mercantile companies is, that every individual partner of the company may bind the company in all ordinary transactions, and that each partner has an implied mandate to that effect. But in the case of a joint-stock company, whether depending upon the common law or upon statute law, and whether limited or unlimited, there is no room for such a presumption as that, because the very nature of the association renders it indispensable that there should be a directorial body to carry on the business of the Company, and the constitution of the body of directors of course takes away at once the power of any individual member of the company to bind the company. But it does more than that, for it creates a presumption of a different kind—a presumption that the whole of the business of the company is to be done by the directors and by nobody else, and in no other way; and the public are entitled to expect that everything that the directors do shall be valid and binding upon the company. No doubt, in the case of statutory companies in particular, this presumption must yield to fact, and it may be made a fundamental condition of the company's contract of settlement, and a part of its constitution, that the directors shall have certain powers, and shall not have certain other powers, either by themselves or with the consent of a general meeting of the shareholders of the company. And there can be no doubt that it is right that a third party dealing with such a company is bound to make himself acquainted with the conditions of the contract of that company in so far as they are made public; and under the Companies Act 1862 a third party dealing with such a company is bound to make himself master, not only of the statute under which the company is incorporated, but of its articles of association, which are registered for the very purpose of being made public. If, therefore, he finds in these articles of association that the directors have not the power to contract, he is given notice of that, and will contract at his own risk.

Now, how does this matter stand in regard to the company in question. In the first place, it is provided by the articles of association that the directors may do everything in conducting the affairs of the company that the company itself could do at a general meeting, unless it be such things as are specially reserved to be done by the incorporation. That is the leading provision. But then it is said there is an exception to this in the case of a sale of heritable property, and an article of association is referred to in which the directors are given power to borrow and re-borrow within certain limits; and then these words follow —"and with the consent of the shareholders at a general meeting they may also sell, dispone, and convey the heritable property of the company, or any part thereof." I think it is very doubtful whether that regulation was in operation at the time when this sale was made, or at least when the authority was given for it. But assuming that it was so, the question comes to be whether the directors had not such authority; and when we come to the minutes of the extraordinary general meeting of shareholders, on 25th March 1874, we find that that meeting expressly and unanimously empowered the directors to sell this ground at such a price and on such terms and conditions as they should deem advisable. The directors proceeded at their next meeting to take this matter into consideration. They fixed the price at which they were to sell, and they appointed a finance committee to meet and advise with the law agents in the carrying out of the same. Now, the directors were entitled to act by a committee in carrying out the details of a transaction of this kind, having thus resolved to sell, and I think this remit empowered the finance committee to proceed with the adjustment of details.

But it is said the whole of this rests upon an unsound basis, because the extraordinary general meeting of the shareholders was not duly summoned, and, in particular, that the notices calling the meeting did not specify that this business was to be taken up by the meeting. Now, that is no doubt in violation of one of the regulations of the company, and one of the regulations which forms an article of association, and which is published to the world. But although third parties know that an extraordinary general meeting of the company must be summoned in that particular way, the question remains whether they are bound to inquire and to satisfy themselves whether a particular general meeting, and the resolution under which the directors are acting, was so summoned. I hold it to be perfectly clear law that they are not bound so to inquire, but, on the contrary, that they are entitled to presume that everything has been regularly done in the summoning of the meeting of the company at which such resolution is passed. I think any other conclusion upon such a question as that would be attended with the most monstrous and inexpedient results. Therefore I am very clearly of opinion that the defence founded upon the want of due summoning of the extraordinary general meeting is entirely without foundation.

Upon the other question, whether there was a concluded contract made by the parties so empowered to contract, I entirely agree with all your Lordships. I think, in the first place, that the correspondence and the minutes do not in themselves make a concluded written contract of sale, because some of the conditions subject to which that sale was to be made were not finally agreed to on both sides. I think, in the second place, with Lord Deas, and I understand with all your Lordships, that the mere attempt to adjust a draft-disposition which was never finally approved of by both could not have any such effect. I think, in the third place, that no possession of the ground was ever given by the company, and that even such kind of possession as the pursuer took without the assent of the company, or anybody authorised by the company, was of far too equivocal a character to get the better of the imperfection of the written contract, even if it had been given by the company to the pursuer.

I am therefore for adhering to the interlocutor of the Lord Ordinary, but I think it right to suggest that there is one finding in the interlocutor, viz. the first, which is quite unnecessary for the judgment, and with regard to which I confess I entertain some little doubt—in which his Lordship finds that the statements of the pursuer are not relevant. There may be a doubt about that, but it is not in the least degree necessary for the judgment. I think, therefore, we had better recal that part of the finding and assoilzie.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Lord Advocate (Watson)—Guthrie Smith—Asher. Agent—A. Morison, S.S.C.

Counsel for Defenders (Respondents)—Fraser—Balfour—Strachan. Agents—Watt & Anderson, S.S.C.

Thursday, June 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

HOGG *v.* HAMILTON AND OTHERS.

Heritable or Moveable—Conversion—Power of Sale.

A truster left heritable and moveable property to trustees, giving them a power of sale, and directing them to "divide" the whole free residue among his unmarried sisters. *Held (dub.* Lord Shand) that the direction to divide did not necessarily operate conversion of the heritage.

Opinion (*per* Lord Shand) that in a question whether conversion has taken place or not, arising sometime after the trust-deed has come into operation, it is necessary to look at—(1) the intention of the truster as expressed in his deed; (2) the actings of the parties taking benefit by it, which may stamp the trust property with one character or the other.

Actings of parties *held* (*per* Lord Mure and Lord Shand) sufficient to stamp an heritable estate, which trustees were empowered to sell and were directed to divide among them, with the character of heritage.

William Jamieson, who died in 1858, left a trust-disposition and settlement conveying to his sister Margaret, in the event of her surviving him and remaining unmarried, and failing her to his other unmarried sisters in succession, and William Neilson and John Webster as trustees, all his property, moveable and heritable, to be divided, after payment of his debts and a small legacy, among his unmarried sisters equally. He gave his trustees a power to sell his heritable property (consisting of a villa and garden and a small tenement of workmen's houses, under £2000 value in all) by public roup, private bargain, or on a valuation, to the eldest of his sisters that might desire it. The clauses of the deed are quoted at length in the Lord President's opinion.

The truster was survived by four unmarried sisters; Margaret alone of the trustees accepted. The moveable estate was divided among the sisters, and they continued to live together, dividing the rents of the property, which were drawn by Margaret. In 1860 Jane was married, and her sisters having obtained a valuation of the heritable property, paid her £500 as her share thereof, and took an assignation of her right to it by a deed dated 25th and 27th August of that year.

Of the three remaining sisters, one, Jessie, died in 1861, another, Margaret, in 1866, and the third Maria, in 1873. The pursuer in this case was the husband of Maria, and claimed as the heir in heritage of his wife's sister Jessie, her (Jessie's) share of the property in question. The defenders were Jessie's next-of-kin. The question between the parties therefore was, Whether the estate in question was heritable or moveable?

The pursuer, *inter alia*, pleaded—"The defences are untenable in law, and should be repelled, in respect that (1) on a sound construction of the trust settlement of the said William Jamieson, Jessie Jamieson's interest in the heritable subjects therein disponed was heritable, and on her death