country practitioner to be charged with gross ignorance of his profession, or want of reasonable skill, so as to make him answerable, when proceedings of this kind are found in reports of modern date, appears to me to be impossible. I am, therefore, of opinion that this is not a case to subject the agent to personal responsibility.

The Court therefore assoilzied the defender, with expenses.

Agent for Pursuer—D. Manson, S.S.C.
Agent for Defender—J. Thomson, S.S.C.

Saturday, November 28.

INCORPORATION OF BAKERS OF EDINBURGH *v.* HAY AND OTHERS.

Agreement—Concluded Contract—Sale of Heritable Subjects. Held, on a construction of letters passing between a proprietor of heritable subjects and an intending purchaser, that no concluded contract of sale was constituted by these letters.

The pursuers in this action sought declarator that a contract of sale was entered into and finally concluded between them and the deceased John Hay, whereby the pursuers agreed to sell, and Hay agreed to purchase, certain heritable subjects, the property of the pursuers, at the price of £5000, payable at Whitsunday 1868.

It appeared that on the 15th June 1867 the treasurer of the incorporation wrote to Mr Hay as follows:—

"Dear Sir,—I am authorised by the Bakers' Incorporation to sell to you, or to the party whom you represent, the mills and whole other property belonging to them at the Water of Leith, for the price of £5000. The whole conditions of the sale must be arranged to the satisfaction of our agent, Mr Ranken.

"This offer is only to be binding for one week from this date.—I am," &c.

Mr Hay replied on 22d June in these terms:—

"Dear Sir,—I am favoured with yours of the 15th instant, stating that you were authorised by the incorporation to sell to me the mills and whole other property belonging to them at the Water of Leith for £5000, and the whole other conditions of sale to be arranged to the satisfaction of your agent, Mr Ranken.

"I hereby accept your offer, upon the understanding that the incorporation shall give me a good title; and farther, that I am to stand in their shoes, and to become possessed of all their rights, as at the present date. I shall be ready to pay the price so soon as the titles can be completed.—I am," &c.

A correspondence, the material portions of which are given in the subjoined opinions of the Judges, ensued between the agents of the parties, and continued down to January 1868, on the 28th day of which month Mr Hay died. The question then arose whether there was a concluded contract of sale, binding on Hay's representatives.

The pursuer pleaded, *inter alia*—(1) by the writings above condescended on and referred to, or some of them, a final and concluded agreement and contract of purchase and sale of the subjects in question was entered into between the said deceased Mr Hay and the pursuers; (2) even assuming the said agreement to be incomplete in itself it was validated by the actings which followed upon it as aforesaid.

Judgment was asked on the first plea.

The Lord Ordinary (KINLOCH) pronounced this interlocutor:—"Finds that no concluded contract of sale of the subjects libelled passed between the pursuers and the deceased Mr Hay: Repels the first plea in law stated by the pursuers on the closed record; and appoints the cause to be enrolled, in order to be disposed of in accordance with this finding.

"*Note.*—By a letter from their treasurer, dated 15th June 1867, the pursuers, the Bakers' Incorporation, offered to the deceased Mr Hay 'the mills and whole other property belonging to them at the Water of Leith,' at the price of £5000. It was added, 'the whole of the conditions of sale must be arranged to the satisfaction of our agent, Mr Ranken.' By his answer of 22d June 1867, Mr Hay accepted the offer, repeating that the price was to be £5000, 'the whole other conditions of sale to be arranged to the satisfaction of your agent, Mr Ranken.'

"It is clear, and was not disputed, that this did not involve any reference to Mr Ranken as arbiter or umpire between the parties. He was the pursuers' law agent, and to act in that capacity; not otherwise. The matters requiring to be adjusted were, doubtless, mostly such as fell within a law agent's province. But whatever they were, it was agreed that they were such as to require adjustment; and the parties are found to start with the mutual consciousness that until an adjustment took place, the contract was not finally arranged.

"Mr Ranken, the pursuers' agent, very clearly expressed his conviction to this effect in his letter to Mr Hay of date 24th June 1867. He reminded Mr Hay that the offer by the pursuers 'was intended merely to indicate the price at which Mr Ramage was authorised to say the Water of Leith property would be sold. The conditions of sale will fall to be arranged with your agent or yourself and me: the nature of the title; the conditions under which the property is held; the term of entry, when you are to have right to the succeeding rents,' &c. Mr Ranken added, that so soon as they came to an understanding on these points, it would be proper to have a meeting of the pursuers' incorporation, 'for instructions to close with you.' Mr Ranken might be wrong in thinking that such a meeting was necessary, but his mode of expressing himself clearly shows how much he considered the conclusion of the contract to hang on the result of the communications. Mr Hay, on his side, intimated no dissent from Mr Ranken's view.

"A correspondence ensued between Mr Ranken and Messrs Adam & Sang, the agents of Mr Hay, in the course of which it was agreed on both sides that it would be proper to have a formal minute of sale, embracing all the conditions of the bargain, as these should be finally arranged, and on 15th October 1867 Messrs Adam & Sang sent Mr Ranken 'draft proposed minute of agreement between the Bankers' Incorporation and Mr Hay.' The fact of a minute of sale being thus contemplated on both sides is very important in the present discussion. It may be that a formal instrument of this sort was not absolutely indispensable to the completion of the bargain; and that if it was clearly established by the writings passing between the parties that the terms of the bargain had been finally settled, this might itself be enough, without a formal document being superadded. But it is

still of consequence that both parties looked forward to the execution of a minute of sale, because the circumstance tends all the more to throw a conscious character of incompleteness over the intervening communications.

"After some alterations on both sides, the draft minute was, on 8th November 1867, sent by Mr Ranken to Messrs Adam & Sang, marked 'Revised. —T. R.' on the back; and if nothing more had happened, this might have closed the transaction. But Messrs Adam & Sang, on the 13th November, returned the draft with some fresh alterations; and after waiting till the 30th November, gave Mr Ranken's memory a jog, by saying, 'We now think it would be desirable to get this transaction put into a more formal shape; and therefore we would be glad to hear at your earliest convenience in answer to our last letter and memorandum.'

"The terms of Mr Ranken's next letter, of 2d December, show that in the interval a meeting had taken place between the agents, leading to still another transition of the document betwixt them. On 2d December Mr Ranken writes to Messrs Adam & Sang, 'Referring to my interview with your Mr Adam to-day, I now return herewith, to be readjusted, the draft minute of sale, paper apart, page 1, inventory of titles, translation of charter in favour of the Bakers, 1735, and memorandum. Please return all these and the plan when you get it, and fix a time for our meeting to revise the minute.'

"The particulars of the interview here referred to do not anywhere appear. But it is beyond a doubt that the interview was such as led to what Mr Ranken calls a 'readjustment' of the draft minute. Mr Ranken's letter expressly so says. The draft and its accompanying documents were sent to Messrs Adam & Sang, and sent in the expectation that something would emerge requiring Mr Ranken's consideration, for he bids them please 'return them.' He adds 'and the plan when you get it,' showing that the plan proposed to be referred to in the disposition, and in which would mainly be comprised a description of the subjects conveyed had not been fully framed. Mr Ranken closes with these words: 'and fix a time for our meeting to revise the minute,' clearly importing that the draft was still to be the subject of joint revisal.

"On 21st January 1868, Mr Ranken again writes to Messrs Adam & Sang, saying, the minute of sale should now be immediately adjusted and executed.'

"On the 28th of the same month Mr Hay died; and the question now is stirred whether, anterior to his death, there was a concluded contract of sale, now binding on his representatives?

"The Lord Ordinary is of opinion in the negative. He is not prepared, however, to rest his judgment on the ground urged to him, amongst others, that a formal minute of sale was so made a condition of the completed contract that, until that minute was executed, no bargain had taken place, however much the terms were agreed on. The ground of the Lord Ordinary's decision is, that the parties had not fully settled and arranged the terms of the contract. It may be that the points remaining unadjusted were of secondary and subordinate importance. It is not the less true that something of sufficient consequence to prevent the parties being entirely at one still remained to be settled. It would be dangerous for a Court to rest its judgment as to the finality of a contract on the estimate it may itself form of the importance of the points of difference, as to which there may be as many opinions as there are men. In the present case, there was something sufficiently serious to require the separate consideration of the agents, and an after meeting to adjust it. Pending this proposed adjustment, the Lord Ordinary thinks that neither party could hold the other bound. Mr Ranken could not be held bound in the face of his demand for farther adjustment, and his request that the draft might be sent back for his consideration, and that there should be a meeting for revisal. Messrs Adam & Sang (or their clients) could as little be held bound when having the minute sent to them for readjustment, and told, as they were in substance told, that they should have still another meeting to think further on the subject. But this consideration seems to the Lord Ordinary conclusive. In a question of completed contract, the maxim prevails universally that both parties must be bound or neither."

The pursuers reclaimed.

BALFOUR for reclaimers.

PATTISON for respondents.

At advising—

LORD PRESIDENT—The first plea in law stated for the pursuers is, that by the writings above condescended on and referred to, or some of them, a final and concluded agreement and contract of purchase and sale of the subjects in question was entered into between the said deceased Mr Hay and the pursuer. Now, the writings which are mentioned in this plea are all before us in an appendix, and I am of opinion, without any hesitation, that these writings do not make a concluded contract between the parties. Some views of these writings would even go beyond the ground of judgment of the Lord Ordinary, but I am content with that which he has stated. The matter never got beyond negotiation. No doubt it got very near the completion of a contract, but it did not reach it. If the two first letters of 15th and 22d June were enough to constitute a sale, there would be no difficulty, but it is clear that they do not make, and that the parties did not intend them to make, the contract. The statement by the Incorporation of Bakers is that they were willing to sell for £5000, but the whole conditions of that contract are left for after arrangement. The answer by Hay adopts this view of the transaction; and while he suggests his willingness to buy, he submits to the condition that his whole arrangements shall be afterwards adjusted. It is unnecessary to go over the correspondence after this. The way in which the correspondence opens shows very clearly what the parties thought was done. Merely the amount of the price was fixed, but the correspondence had made little way, when this view as to the nature of the transaction is confirmed by Ranken suggesting that a minute of sale should be framed for the purpose of putting in writing all the conditions not expressed in the first two letters. It seems to me that when that was acceded to by Adam & Sang, when the parties put themselves into the position of making a formal contract, they cannot be bound until that formal contract is executed. But it is not necessary to adopt so strict a view, for it is plain, from the correspondence down to 21st January 1868, that there had been no completed contract, even assuming that it could be made by correspondence and not by minute; for Mr Ranken says, "the minute of sale should now be immediately adjusted and executed." It was, therefore, on 21st January, un-

adjusted, and that being so, it is impossible to say that the contract was complete.

Lord Deas—I am clearly of the same opinion. The two first letters, which fix the price, could only be thought to conclude the contract of sale on the footing of it being agreed that Ranken should fix everything else. It is plain from Ranken's letter of the 24th June 1867, that he on the part of the incorporation did not agree to that being the interpretation of these two letters. I think he was right. He probably did not wish to take on himself the fixing of everything but the price, for he says, "the conditions of a sale will fall to be arranged with your agent or yourself and me, the nature of the title, the conditions under which the property is held, the term of entry when you are to have right to the succeeding rents, &c., being all first explained, and made matter of distinct agreement. So soon as we come to an understanding on these points, I shall call a meeting of the incorporation for instructions to close with you," &c.

It is clear from that that there was no concluded contract. I have read all the subsequent letters to see if there was any point of time when there was a final contract, and I can find none. When you come to consider the writings of 30th November 1867, you find Adam & Sang saying, "We now think it would be desirable to get this transaction put into a more formal shape, and therefore we would be glad to hear from you at your earliest convenience in answer to our last letter and memorandum."

Ranken's answer to that is in his letter of 2d December 1867, where he says, "Mr Allan declines to remove at Whitsunday. From the terms of the proposed agreement between the Bakers' Incorporation and Mr Hay, this seems a matter that more concerns him than them, as he takes the responsibility of any of the tenants maintaining possession, notwithstanding the efforts of my clients to remove them." And then, in his last letter of 21st January 1868, he says, "The minute of sale should now be immediately adjusted and executed."

A great many things had been proposed in addition to the original draft minute. The only thing to fix these was the minute of sale. Even after the death of Hay, on 10th February 1868, he says, "You have taken part yourselves, I think, in all the subsequent correspondence and negotiation, and will therefore be able, from your own knowledge, to inform Mr Hay's representatives how the negotiation between him and the Bakers stood at his death."

We are not to go into the question of the relative importance of things as to which the parties are not agreed. It is clear that these remain open —very much from Ranken's zeal for the interest of his client. He wished, very properly, not to commit his client. The result is that he is free at a time when he might wish to be bound.

Lord Ardmillan and Lord Kinloch concurred.

Agent for Pursuer—Thomas Ranken, S.S.C.

Agents for Defenders—Adam & Sang, S.S.C.

Saturday, November 28.

HUTTON'S TRUSTEES *v.* COATES AND OTHERS.

Trust — Annuitant — Vesting — Postponed Payment. Terms of trust-deed on which *held* that a share of residue did not vest in a residuary legatee who survived the testator but predeceased the last of several annuitants, but became intestate succession, falling to the next of kin of the testator as at the date of his death.

Dr Hutton of Calderbank died in the year 1837, leaving a widow but no children. By his trust-disposition and settlement he directed his trustees to pay an annuity to his widow, and also an annuity to each of his two sisters Catherine and Ann Hutton. He farther directed payment of two specific legacies, after which he appointed his trustees, "after the payment of the foresaid annuities to the said Mrs Ann Eliza Youlle or Hutton, and my sisters before named, to accumulate whatever balance or surplus may remain of the annual produce or proceeds of my estate into a capital or principal sum, to be divided with the residue of my estate, among the parties after named, after the decease of my said wife and sisters, and the survivor of them; upon the occurrence of which event, but not till then, I appoint my said trustees or trustee to collect, realise, and convert into money my whole outstanding means and estate of every description hereby conveyed or accumulated by them, my lands and others before mentioned excepted, and to distribute and divide the prices and proceeds of the same to and among the parties after named, in the following shares and proportions, viz., to each of the foresaid Major James Watkins and John Watkins, two-eighth parts or shares of the said residue and reversion of my means and estate; to each of my nieces, Mary Ann Watkins or Wilson, spouse of the foresaid James Wilson, sheriff-clerk of the county of Edinburgh, Christian Watkins, wife of William Watkins, son of Watkins of Shotton, in the county of Salop, and Jean Watkins or Howison, wife of the foresaid James Howison, residing at or near Douglas, one-eighth part or share of the residue or reversion of my said means and estate, and to my grand-niece Mary Ann Watkins, daughter of my nephew the late Hutton Watkins, sometime in the service of the Honourable the East India Company, another one-eighth part or share of the residue or reversion of my said means and estate: Declaring always, as it is hereby specially provided and declared, that in the event of any of the parties before named, who shall be entitled to a share of the residue or reversion of my estate, predeceasing the period when the same shall be made, but leaving issue of his or her body lawfully procreated, such issue shall be entitled to the portion or share which their father or mother would have been entitled to had he or she been alive; and the share accruing to such issue, in the event of there being more than one child left, shall be divisible equally among them share and share alike, it being my desire that the residue of my means and estate provided to the parties before named, or their heirs, be payable or divisible among them *per stirpes* and not *per capita*; and which said division of my means and estate I direct and appoint my said trustees or trustee to make accordingly, so soon as can be done by them conveniently after the decease of the whole of my said wife and sisters before named."

Ann Hutton died in 1851; Catherine Hutton in 1857, and the widow, the last liferentrix, in 1864.

Christian Watkins, one of the residuary legatees, died in 1852 intestate and leaving no issue, and a question now arose as to the share of residue which was destined to her *nominatim*, and which formed the fund *in medio* in the present action.

The trustee under the mutual settlement of Catherine and Ann Hutton claimed the whole of the