A different question might have arisen if the persons called, failing the primary disponees, had not been their heirs-at-law, but their children simply. It is unnecessary to consider that case. Even then it would have required a careful consideration of the deed in order to see whether it was the intention of the granter to suspend vesting in the father in favour of the children, and, as it were, to run the life of the father against the lives of the children. But as things are, the question does not occur.

The object in postponing payment, whatever it might be in the case of other parties whose rights have now vanished by death, is not, as I think, in the case of the parties now before the Court, to postpone vesting. It can be held only to be to secure the annuitants by preserving the estate for their behoof in the hands of the trustees, so long as the annuities run. How this interest may be satisfied is not in the question put to us. To the question, as put, I think an affirmative answer is to be given.

The Court accordingly found and declared that the fee of the property had vested in the parties to the case of the second part, but reserving the question whether the trustees are entitled without consent of the annuitants to forestall the time of payment.

Agents for First Parties—G. & J. Binny, W.S.
Agents for Second Parties—Webster & Will, W.S.

Thursday, February 1.

SECOND DIVISION.

MACLAREN, ETC. *v.* ROBERTSON.

Agreement—Locus Pœnitentiæ.

An agreement as to land may be constituted by letters by one of the parties, and a draft agreement in similar terms being returned to the writers of the letters by the other party.

Holograph Writing.

Opinion that a holograph writing containing the name of the writer, though unsubscribed, is binding if delivered for the purpose of being acted on.

This was an action of declarator, &c. by Mrs Maclaren, Mrs Weir, and Miss Robertson, daughters of the late William Robertson, against their brother William Robertson and their sister Mrs Kilgour. Disputes arose among the parties as to their rights under their father's settlement, and an attempt was made to come to an arrangement. The only question was whether these negotiations had resulted in a binding arrangement. The defender alleged—"The pursuer Mrs Weir, in connection with such arrangement, wrote a letter in the following terms:—

'*Glasgow*, 91 *North Hanover Street*,
'*Dec.* 22, 1869.

'Dear Sisters,—I agree to give my brother £50 sterling from 16 Rose Street, combined with his share in No. 8 Rose Street, and any other claim that is contained in father's settlement, but stand firm to father's settlement being in any way altered or broken by selling of shares. This I appointedly object to shares being sold or bought in No. 8 Rose Street. 'MARIA G. WEIR'

"The pursuer Margaret Robertson also wrote a letter in almost the same terms, and to precisely the same effect. The other sisters also agreed to this arrangement. Said letters were delivered to the defender; and it was then further arranged that an agreement embodying and carrying out their terms should be entered into between the defender and his sisters; but on said agreement being prepared by the pursuers' agents, it was found, on its being sent for revisal to the defender's agent, that it deviated from the terms of said arrangement. It was therefore revised in accordance therewith, and returned for execution, but the pursuers have never executed the same."

The Lord Ordinary (JERVISWOODE), after a proof, found, "with reference to the averments in articles 16, 17, and 18 of the statement of facts for the defender William Robertson, as to which averments a proof was allowed to the defenders, that certain negotiations took place between him and his sisters, including the female pursuers, with a view to an arrangement of all questions as to the validity of the said testamentary writing, and his right, as heir-at-law of his father the said deceased William Robertson, to the house or flat in No. 16 Rose Street, Edinburgh, which belonged to his said father, and as to his rights under the disposition and settlement of his said father; that in the course of said negotiations the pursuers Margaret Robertson and Mrs Weir wrote to their sisters, and despatched to their sister Mrs Maclaren, for the purpose of being communicated to their brother the said William Robertson, defender, the letters referred to in article 17 of the said statement of facts, and that said letters were delivered to him by his said sister Mrs Maclaren; that the said letters were re-delivered to her by the said William Robertson, and that thereafter, with his sanction, a draft minute of agreement was prepared by the law agent of the pursuers, for the purpose of giving effect to the arrangement as proposed in said letters; that said draft minute of agreement, as so prepared, was approved of by the pursuers Mrs Weir and Margaret Robertson, and by their sisters, and was afterwards revised, on behalf of the defender, by his law agent; but that the said pursuers subsequently declined to execute the said agreement, and that it has not been executed by the parties."

His Lordship afterwards pronounced this finding:—"Finds as matter of law—(1) That the arrangement or agreement referred to in articles 16 and 17 of the statement of facts for the defender William Robertson, and which was entered into between him and his sisters, including the female pursuers Mrs Weir and Margaret Robertson, with a view to a settlement of the questions out of which the present action has arisen, was a concluded arrangement between the said parties, and that the pursuers have failed to establish facts relevant and sufficient to entitle them to resile from said arrangement, and to refuse to execute a formal deed of agreement embodying the terms thereof; therefore sustains the second plea in law for the defender William Robertson, assoilzies the said defender from the conclusions of the summons, and decerns."

The pursuers reclaimed.

WATSON and M'LAREN for them.

SCOTT and DUNDAS GRANT for respondents.

LORD JUSTICE-CLERK—(*After stating the facts*)—I think there was here a concluded agreement, which was expressed in writing. If the letters of Margaret and Mrs Weir, on the one hand, and the

proposal of the 1st February on the other, are identical, I can have no doubt that when the first were delivered to Wm. Robertson, and the last was delivered to Mrs Maclaren, the agreement was concluded, and neither party could resile. But it seems to be substantially admitted that the two propositions are identical; and if so, the agreement must stand. The proposal of the 1st February was, although holograph, not subscribed. It is true that, as a general rule, a holograph writing unsubscribed is only to be considered as inchoate or incomplete. But if a holograph writing, especially if the granter's name is contained in the body of the writing, even though unsubscribed, be delivered for the purpose of being acted on, there can be no question that it is binding. But the transaction did not stop there, for Mrs Maclaren took the proposal to Mr Fyfe, who prepared a draft, and this was sent to the sisters, who returned it with a docquet holograph of Margaret approving of the written proposal and draft, and signed by them all. This was transmitted to William's agent, as an indication of their acceptance of William's proposal. I think after this it was too late to resile, and that the agreement was complete. The alterations on the draft by the defender's agent were entirely immaterial.

The other Judges concurred.

Agents for Pursuers—Fyfe, Miller, & Fyfe, S.S.C.
Agent for Defender—James Barton, S.S.C.

Saturday, February 3.

FIRST DIVISION.

RUSSELL *v.* MOLLESON.

Judicial Factor—Executor—Holograph—Interlineation—Insanity.

In the repositories of a deceased was found a document purporting to be a holograph testament. The name of the executor, who was also appointed universal "legator," was interlined over a deletion, of which there was no notice in the testing clause. On the petition of two of the next of kin, the Court appointed a judicial factor on the estate of the deceased, till the right of the person who claimed to be executor-nominate (which was the subject of judicial proceedings) should be finally determined, his title to the office being opposed on the alleged grounds (1), that the interlineation containing his nomination was not holograph of the testator; (2) that the alteration in question was made when the testator was not of sound mind.

This was a petition for the appointment of a judicial factor on the estate of the late William Russell, C.A., by Eliza Russell and Isabella Russell or Miller, two of the next of kin of the deceased.

The petition was opposed by James Alexander Molleson, C.A., who claimed to be executor-nominate under Mr Russell's last will and testament.

Mr Russell died at Edinburgh on 13th November 1871. On his repositories being opened after his funeral there was found a document purporting to be a holograph testament of the deceased. It contained numerous deletions, and, in particular, the deletion of the names of the two persons who were originally nominated in succession as sole executors, and the insertion by interlineation of the name of Mr Molleson, whom failing, of Mr Steel, Register House, Edinburgh. These deletions and interlineations are not noticed in the testing clause. The executor was also appointed universal legator (*sic*) under burden of the testator's debts and legacies.

Competing petitions for the office of executor were lodged in the Commissary Court of Edinburgh by Mr Molleson and the present petitioners. The latter denied that the interlineation of Mr Molleson's name was holograph of the deceased, and they also averred that the deletions and interlineations affecting the office of executor were made after 10th August 1871, from which date down to his death they averred Mr Russell was not of a sound disposing mind. The Commissary on 11th January 1872, without allowing proof, but after an inspection of the document, granted warrant to issue confirmation in favour of Mr Molleson. An appeal to the Court of Session was taken, which is still depending.

The Lord Ordinary (MACKENZIE), on 16th January 1872, appointed Mr G. A. Jamieson, C.A., to be judicial factor on Mr Russell's estates. His Lordship added the following note:—"The writs founded on by the respondent as constituting and appointing him to be the sole executor of the deceased Mr Russell contain numerous deletions, and, among others, the deletion of the names of the two persons who were originally nominated in succession as sole executor, and the insertion, by interlineation, of the name of the respondent, whom failing, of Mr Steele. These deletions and interlineations are not noticed in either of the testing-clauses, bearing to be dated 10th January 1865 and 6th February 1867. These testing-clauses afford, therefore, in the opinion of the Lord Ordinary, no presumption that the deletion of the names of the persons originally appointed as executors, and the insertion or interlineation of the names of the respondent and of Mr Steele, are holograph of Mr Russell.—*Robertson* v. *Ogilvie's Trs.*, Dec. 20, 1844, 7 D. 236.

"When the respondent applied to the Commissary of Edinburgh for confirmation, the commissary-clerk, very properly, in respect of the deletions and interlineations in the nomination of executors, refused to issue confirmation without the special authority of the Commissary. The respondent accordingly presented a petition for such authority, in which he averred that these deletions were made by Mr Russell; and that his nomination as executor was, as well as the remainder of the writ, holograph of Mr Russell. The present petitioners, who claim to be two of Mr Russell's next of kin, lodged answers to the respondent's petition, in which they denied that the interlineation containing the petitioner's name is holograph of Mr Russell, and averred that the deletions and interlineations affecting the nomination of an executor were not made before 10th August 1871, at which date, and from which date down to 13th November 1871, when he died, Mr Russell was not of sound disposing mind, so that the writ founded on by the respondent, as altered by deletions and interlineations, was not the last will of a free and capable testator. The petitioners also presented an application to the Commissary of Edinburgh to be decerned executors *qua* next of kin to Mr Russell. Without allowing any proof, the Commissary-Depute, on 11th January 1872, pronounced an interlocutor granting warrant to the commissary-clerk to issue confirmation in favour of the respondent; against