Counsel for Pursuer—J. Reid. Agents—Macpherson, & Mackay, W.S.

Counsel for Defender—Guthrie—Gunn. Agents—Whigham & Cowan, S.S.C.

Wednesday, December 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MALCOLM *v.* CAMPBELL.

Contract—Sale of Heritage—Written Agreement—Unilateral Obligation.

The proprietor of a house, in pursuance of a verbal agreement, wrote as follows—"I have agreed to sell my house at corner of High Street, Leven, for one hundred and fifty pounds to M." This document was duly attested, but was withdrawn by letter upon the same day. In an action by M for declarator that a valid contract of sale had been effected, *held* that although the owner of heritable property might by unilateral obligation bind himself to sell it, the document in question did not set out any such obligation, but formed one side of a bilateral obligation, and that as both parties were not thereby bound, there was no concluded contract of sale.

Miss Agnes Malcolm, a stationer in Leven, entered into a verbal arrangement with Mrs Campbell, the proprietrix of an adjoining house, for its purchase, and in pursuance of this arrangement Mrs Campbell signed the following document—"*Leven, 16th June* 1891.—I have agreed to sell my house at corner of High Street, Leven, for one hundred and fifty pounds to Miss A. C. Malcolm." This document was duly attested and was at once delivered to Miss Malcolm. On the same day Mrs Campbell's agents wrote to Miss Malcolm's agents—"Mrs Campbell instructs us to withdraw any offer to sell her property Miss Malcolm may have got from her to-day." Miss Malcolm thereupon raised an action for declarator that Mrs Campbell had sold her the property by a valid and effectual sale; and alternatively she sued for £250 in name of damages.

The defender pleaded—"(1) The action is irrelevant. (2) There being no concluded contract of sale between the parties, the defender should be assoilzied. (3) The defender having timeously resiled from the offer contained in the missive libelled on, is under no obligation to sell her house to the pursuer."

The Lord Ordinary (KINCAIRNEY) on 12th November 1891 sustained the first and second pleas-in-law for the defender and assoilzied her from the conclusions of the action.

"*Opinion.*—I am of opinion that the defender should be assoilzied.

"The pursuer's averment is that on 16th June 1891 the defender stated to the pursuer that she (the defender) desired to sell her property, and that both parties agreed on £150 as the price, and that the defender agreed to give immediate entry. The pursuer further avers that the parties having concluded the contract of sale the defender signed the following agreement—'*Leven, 16th June* 1891.—I have agreed to sell my house at corner of High Street, Leven, for £150, to Miss A. C. Malcolm.' This document was duly attested. It was not signed by the pursuer, and no corresponding agreement or missive was executed by her. I do not read this document as a disposition of the house or as a unilateral promise to dispone it, but as—what the pursuer herself calls it—a contract or agreement, and therefore mutual and bilateral.

"The defender, on the day on which this document was signed and delivered, withdrew her offer. It is not pretended that by that time there had been any *rei interventus*, and the question therefore is, whether the bargain was by that time beyond recall, or whether the defender had a *locus pœnitentiæ*? The defender maintained that she had, and referred to *Goldston* v. *Young*, December 8, 1868, 7 Macph. 1888.

"The pursuer maintained that that case did not apply, because there the contract in form and expression was mutual, and was embodied in two deeds—an offer and acceptance—and she maintained that this case fell under the proposition stated in Bell's Principles, sec. 889, that a promise in writing to dispone land if delivered is good without acceptance, and his counsel referred in support of that proposition to the following authorities—*Ferguson* v. *Paterson*, November 23, 1748, M. 8440; *Muirhead* v. *Chalmers*, August 10, 1759, M. 3414; *Fulton* v. *Johnstone*, February 26, 1761, M. 8446; and *Barron* v. *Rose*, July 23, 1794, M. 8463. Of these cases *Ferguson* v. *Paterson* seems to be most in the pursuer's favour, and it does indeed resemble this case somewhat closely, but it appears to be of doubtful authority. It was stated from the bench in *Barron* v. *Rose* to be special, to have been misunderstood, and to decide no general point. In *Muirhead* v. *Chalmers* there was ample *rei interventus* to warrant the judgment on that ground. In *Fulton* v. *Johnstone* the defender was assoilzied, although the ground of absolvitor may have been that the deed was not delivered. *Barron* v. *Rose*, in which the defender was assoilzied, is rather against the pursuer than for her. It is true that in that case there were two missives, the one probative and the latter improbative. But the judgment would, I think, have been the same had the latter missive not been executed, and if that had been so, the case would have been much the same as this. *Shedden* v. *Sproul Crawford*, July 6, 1768, M. 8456, seems in favour of the defender. In *Sproat* v. *Wilson and Wallace*, January 24, 1800, Hume, 920, a missive of lease signed by both parties and holograph of one was held not binding, and in *Sinclair* v. *Weddell*, December 8, 1868, 41 Scot. Jur. 121, a judgment was pronounced to a similar effect.

"On the whole, I think that while it may be true that a unilateral promise to convey land is binding on the granter if it imply no obligation on the grantee, yet the cases to which that rule is applicable must rarely occur, and that in this case what is averred by the pursuer is not a promise but a mutual contract which must bind both parties or neither, and that it is clear that it does not bind the pursuer."

The pursuer reclaimed, and argued—This was a unilateral obligation binding on delivery, and enforceable on an offer to pay the price—*Ferguson* v. *Paterson*, November 23, 1748, M. 8440; *Muirhead* v. *Chalmers*, August 10, 1759, M. 8444. In *Barron* v. *Rose*, January 23, 1794, M. 8463, the form of the deed was bilateral.

The respondent argued—There was here *locus pœnitentiæ* — *Goldston* v. *Young*, December 8, 1868, 7 Macph. 188. A mutual agreement was here intended, and as only one side was completed, it was not binding—*Sinclair* v. *M'Beath*, December 19, 1868, 41 Scot. Jur. 165; Brown on Sale, 55; Tait on Evidence, 219, and the other cases cited in the Lord Ordinary's opinion.

At advising—

LORD PRESIDENT—I do not think we need to trouble Mr Smith to reply, because the judgment of the Lord Ordinary appears to me to be very clearly right. That the owner of a house may become bound under his own hand to dispone it on payment of the price, although there is no writing under the hand of the proposed purchaser, does not need to be disputed, because cases which have been cited show that perfectly clearly. It stands to reason, indeed, that anyone can place in the hands of another a valid obligation to dispone a house upon payment of a certain price. But the question here is, whether the writing sets out an obligation to dispone on payment of the price, or whether it is not in truth a memorandum of a bilateral agreement. In his excellent speech to-day Mr Cullen referred to a passage in the late Lord President's opinion which precisely deals with these two classes of cases. In deciding the case of *Goldston* v. *Young*, where all these cases which were cited were referred to, his Lordship said—"In this case there was no mutual contract, but simply a unilateral obligation." Now, is this case one in which there was a mutual contract or merely a unilateral obligation. In the first place, on the face of the documents, it does not purport to be a case of an obligation at all. It is the record of an agreement. The words "I have agreed" is really a setting out in fact of the agreement, and the agreement is necessarily a mutual or bilateral arrangement. But the pursuer has certainly clinched this matter in the most decisive style, because I do not think Mr Cullen exaggerated when he said that the record rings and resounds with the word "contract." It is said that ultimately both parties agreed "on £150 as the price," "that parties having concluded the contract of sale of the said house as above mentioned, the defender thereafter signed in the presence of two subscribing witnesses the following agreement." Then it is said—"This agreement which accurately embodies the contract of sale between the parties;" and finally the plea-in-law expressly rests the case of the pursuer upon "a valid and effectual contract of sale" of the said subjects.

Now, Mr Dickson, I must do him the justice to say, with some hesitation, and not in very confident tones, has proposed to amend his record. How would an amendment of the record be effected? It would be effected by deleting these essential averments of fact upon which the case is rested, and substituting therefor a statement that there was not a contract of sale, but what is contrasted with that, a unilateral obligation; and that again would involve that in place of being, as set out in the original record, bound, he was free, because what he got was not a contract to which he was a party, but a unilateral obligation. To allow an amendment of that kind would be to press the power of amendment beyond all conscience. Therefore the case must be decided as it stands, and I cannot say that it presents any difficulty at all. This is a case in which it is proposed to establish a contract of sale by a memorandum of agreement. It seems to me clearly to fall within the decided cases, and therefore I think we should adhere to the interlocutor of the Lord Ordinary.

LORD ADAM—I am of the same opinion. I do not doubt that parties are able to bind and oblige themselves so long as the acts are not *contra bonos mores*. A person may bind himself by a single document to dispose of a house for a certain sum, but that humbly appears to me not to be the nature of the document here. It is not a unilateral obligation. It is a document which expresses one side of a contract for the sale of a house. It appears to me clear on the face of this document that it expresses the fact of a mutual agreement, and that being so, it appears to me that the interlocutor of the Lord Ordinary is perfectly sound.

LORD M'LAREN—I agree that the question for our consideration is, whether the document to which the judgment relates was intended by the parties to be complete in itself—to be a complete expression of the matter about which they were transacting, or whether it is only one side of what is called in another part of the country an indenture—that is, a bilateral agreement. One must, in deference to the authorities, admit that a unilateral obligation to convey land for a price is a legal obligation, but I must say that to my mind it is not a very intelligible obligation, because one does not see how a contract of sale—for sale is a contract under all circumstances—one does not see how the contract is to be worked out. Apparently the suggestion is that a unilateral obligation is a document by which one party undertakes an obligation as seller without receiving any obligation which he can enforce in return, the purchaser being entitled to agree to the sale or not as he

pleases. Assuming that is a legal mode whereby an intending seller may oblige himself, it is certainly not a very probable arrangement, or, I think, a very business-like proceeding on his part, and the presumption must certainly be against such an interpretation of a business matter which parties are transacting. The view that parties have entered into a contract of sale is very much more consistent with what is usual in the business of life, and is in the absence of adverse circumstances, I think, a probable interpretation of the matter, especially when the word agreement is used, as it is in this case. I have no hesitation in coming to the conclusion that the thing which the parties had agreed upon was a sale. Now, if that be so, there not being the conjoint consent of seller and purchaser which the law holds to be necessary for a contract of sale, we have not here a complete expression of that contract in the form which the law requires. We have some evidence of consent, but that evidence is insufficient for the purpose of binding the parties according to the principles of our law to a sale of heritable property. I am therefore of opinion that the Lord Ordinary has taken the right view of the case.

The Court adhered.

Counsel for the Pursuer—C. S. Dickson—Salvesen. Agents—Macpherson & Mackay, W.S.

Counsel for the Defender—W. C. Smith—Cullen. Agent—T. Temple Muir, S.S.C.

REGISTRATION APPEAL COURT.

Monday, November 23.

(Before Lord Adam, Lord Trayner, and Lord Kincairney.)

FALCONER *v.* M'GUFFIE.

Election Law—Service Franchise.

A butler in the employment of a firm of drapers, who by virtue of his employment occupied for his exclusive use a bedroom in the firm's premises, was entered by the Assessor upon the roll. A voter on the roll objected to the entry, on the ground that the butler inhabited a dwelling-house in virtue of his employment which was also inhabited by a person under whom he served in this employment. The premises consisted of a tenement of several flats, the ground flat being the business premises, and the upper flats devoted to sitting-rooms and bedrooms for the firm's employees. A manager or buyer and shop-walker of the firm, who had general supervision of the domestic arrangements provided for the employees, occupied rooms on the second flat, the butler's room being on an upper flat. The flats were all reached by a common stair, but had each separate doors. Except the common stair there was no communication between the flat occupied by the manager and that occupied by the butler.

Held (1) that the dwelling-house occupied by the butler was not occupied by the manager; (2) by Lord Adam and Lord Trayner—Lord Kincairney expressing no opinion—that the manager was not the person under whom the butler served; and the objection *repelled.*

At a Registration Court for the burgh of Edinburgh, held at Edinburgh on the 10th day of October 1891, James Falconer, Writer to the Signet, residing at 42 Heriot Row, Edinburgh, a voter on the roll, objected to the entry on the voters' list of the name of James M'Guffie, residing at 8 South St David Street, Edinburgh.

The said James M'Guffie was entered by the Assessor on the voters' list for the burgh of Edinburgh, West Division, as tenant and occupant of a house No. 8 South St David Street.

Falconer objected that M'Guffie inhabited a dwelling-house in virtue of his employment, which dwelling-house was also inhabited by a person under whom M'Guffie served in this employment.

The Sheriff repelled the objection, and was required by Falconer to state a special case. The case set forth that it was proved that M'Guffie was a butler in the employment of Charles Jenner & Company, drapers, Princes Street and South St David Street, Edinburgh, and that in virtue of his employment he occupied and had occupied for his exclusive use a bedroom in one of the two upper flats of the tenement 8 South St David Street for the period of twelve months prior to 31st July 1891. That the tenement 8 and 12 South St David Street had originally consisted of several houses which had been altered to suit the business requirements of Jenner & Company. That the first or street and sunk flats were occupied as part of their shop or warehouse; that the second flat, being the flat above the street flat, contained a dining-hall for the assistants in the employment of the firm, the rooms consisting of a dining-room, sitting-room, bedroom, and bath-room allotted to Mr Cormack, a manager or buyer and shop-walker in the employment of the firm, a sitting-room for the female assistants, and another room; that the third flat contained kitchens, servants' rooms, and bedrooms for the female assistants; that the fourth flat contained a library or reading-room, smoking-room, and other rooms; and that the fifth and attic flats, being the two upper flats, were entirely occupied by bedrooms for the assistants or employees of the firm, of which bedrooms M'Guffie occupied one. That entrance was had to the whole tenement, including the shop flat, by the door 8 South St David Street, which gave access to a stair on which at each landing there was a door opening into the corresponding flat; that this stair was the only access to the fourth and fifth and attic flats; that when the door was