the consideration has to be fixed by arbitration, a purchase is completed past resiling on either side." In the First Division, as I read the opinions, the same view was taken on this matter, although a somewhat different result was arrived at. I think therefore in construing the Finance Act 1910 we are bound to do so with reference to the state of the law that had been fixed as at its date; and that a transfer of land under compulsory powers is a "transfer on sale"; and if the notice to acquire was sent after the date of the Act that the sale takes place in "pursuance of a contract" within the meaning of section 1 (*a*).

I have been greatly aided in reaching this result by section 38, sub-section (3), which is in these terms—"For the purposes of the Lands Clauses Act as incorporated with any special Act the amount, if any, payable by the transferor as increment value duty shall not be treated as part of the costs or expenses of a conveyance of land, and shall not be taken into account in assessing the compensation to be paid to the transferor." Now I think that section plainly contemplates that the owner of lands taken under compulsory powers may be assessed for increment value duty, as it makes careful provision for his paying such duty and having no recourse against the statutory purchaser in respect of it. I have therefore come to be of opinion that the appellants' leading contention fails.

The appellants' next contention was that the sum of £260 being allowed as compensation for disturbance in respect of the compulsory purchase did not form part of the consideration for the transfer of the land. The referee has negatived this contention, and I agree with him. The purchasers acquired nothing but the land, and it was for the land that the full price of £2900 was paid. The arbiter so states it in his award dated 9th December 1913. The case of the *Commissioners of Inland Revenue*, 14 R. (H.L.) 33, although cited by the appellants, appears to me to be conclusive against them on this point.

The appellants' third contention was that the sum of £260 must be regarded as part of the total value attributable to a matter personal to the owners in the sense of section 25 (4) (*d*) of the Finance Act, on the ground that it was really the price paid for the liberty of the owner to deal with his property as he chose. On this matter I refer to the opinion which I delivered in the case of *The Scottish Newspaper Publishing Company*, which explains my reasons for holding with the referee that it does not form a deduction within the meaning of that section. This sum no doubt entered into the consideration but not into the total value of the land which has to be ascertained by estimate.

Lastly, the appellants argued that the £260 should be treated as divisible proportionally between the site and the buildings to the effect of reducing the increment value to £111, 2s. If this matter were open there would be a great deal of force in the contention, but it appears to me to be foreclosed by the decision in *Lumsden's* case. I am therefore for affirming the decision of the referee on all points.

LORD CULLEN—I concur. Having in view the terms of section 38 (3) of the Act, I think it is clear enough that the transfer of land here in question falls to be regarded as a transfer on sale within the meaning of section 2 (2) (*a*). Further, I am of opinion that the deduction of £260 claimed by the appellants is not an allowable deduction, inasmuch as said sum forms part of the consideration paid for the land *per se*, and is not attributable to any matter personal to the owner within the meaning of section 25 (4) (*d*).

The Court found the award of the referee right.

Counsel for the Appellants — Hamilton. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Respondents—Blackburn, K.C. — Candlish Henderson. Agent — Sir Philip Hamilton Grierson, Solicitor of Inland Revenue.

COURT OF SESSION.

Tuesday, July 18.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

HENDRY'S TRUSTEES *v.* HENDRY.

Administration of Justice — Advocate — Mandate — Extra-Judicial Settlement of Action—Matters Ancillary.

A beneficiary under a trust brought an action of count, reckoning, and payment against the testamentary trustees. Negotiations for a settlement were entered into, and eventually an agreement for settlement was signed by senior and junior counsel for the parties, and a draft of an assignation and discharge, which was necessary to effectuate the settlement and was stipulated for in it, was prepared by the trustees. The beneficiary refused to sign the assignation on the ground that he had not authorised the settlement, and the trustees raised an action against him concluding for decree, ordaining him to implement the settlement and to sign the assignation and discharge. *Held* that the beneficiary, having granted a mandate to settle, was bound to implement the settlement signed by counsel, even though it contained other matter, such other matter being truly ancillary, and consequently was bound to execute the assignation and discharge.

William John Hendry, eldest son of Thomas Meldrum Hendry, flax spinner and merchant, Kirkcaldy, as testamentary trustee of his father and as an individual; Frederick Johnston and Horace Howard Hendry, youngest son of the said Thomas Meldrum Hendry, as trustees and executors of Mrs

Mary M'Glashan or Hendry, widow of the said Thomas Meldrum Hendry and one of his original trustees and executors; and the said Horace Howard Hendry as an individual, *pursuers*, brought an action against Alexander M'Glashan Hendry, second son of the said Thomas Meldrum Hendry, *defender*, concluding for decree "(*a*) that under and by virtue of an agreement for settlement signed by senior and junior counsel for the pursuers and defender respectively dated 27th January 1915, relative to an action of count, reckoning, and payment raised by the defender against the pursuers the said William John Hendry, as trustee of the said late Thomas Meldrum Hendry, acting under his said trust-disposition and settlement, and as an individual, and the said Frederick Johnston and Horace Howard Hendry as trustees and executors of the said late Mrs Mary M'Glashan or Hendry, widow of the said Thomas Meldrum Hendry, and one of his original trustees and executors, in the Court of Session on 11th November 1914, the said William John Hendry and Horace Howard Hendry as individuals acquired right to the defender's whole interest in the estates of his father the said Thomas Meldrum Hendry, his mother the said Mrs Mary M'Glashan or Hendry, and his brother Frank Hendry, whether under their trust settlements or competent to him at common law in respect of any legal claim of legitim or otherwise; and (*b*) that the defender, in implement of the obligations incumbent on him under the foresaid agreement for settlement, is bound to grant and deliver an assignation and discharge in terms of the draft deed herewith produced, or in such other terms as shall be approved, adjusted, or determined by the Court in the course of the process to follow hereon, and that within such time as the Court may appoint; and in the second place, in the event of the defender failing within the time appointed to grant, execute, and deliver an assignation and discharge as before mentioned, then our said Lords ought to grant warrant to and authorise the Clerk of Court to execute the said assignation and discharge in lieu and place of the defender, and to deliver the said assignation and discharge to the pursuers; and further, it ought and should be found and declared, by decree foresaid, that the said assignation and discharge so executed by the Clerk of Court and delivered to the pursuers shall be as valid and effectual in the whole clauses, articles, and contents thereof to all intents and purposes as if the same had been duly executed and delivered by the defender himself to and in favour of the pursuers and the said William John Hendry and the said Horace Howard Hendry as individuals."

The *agreement* referred to was in the following terms (the parties' positions as pursuer and defender being reversed):—"1. All allegations in the record inferring mal-administration shall be held as hereby withdrawn. 2. An assignation or other deed or deeds shall be granted by the pursuer and his assignee in favour of his brothers William John Hendry and Horace Howard Hendry of the pursuer's whole interests in his father, mother, and brother Frank's estates whether under their trust settlements or competent to him at common law in respect of any legal claim of legitim or otherwise, which assignation or other legal deeds shall embrace any further benefits or interests which can possibly accresce in any way to the pursuer from those trust settlements or estates, and in the option of the defenders a discharge in favour of the respective trustees and executors of any claims competent to the pursuer arising out of their actings, intromissions, and omissions in connection with their administration of the trust and executry estates. If desired by the defenders or any of them the deeds referred to shall include a withdrawal therein by the pursuer of all allegations made by him on record inferring mal-administration. The deeds referred to shall be prepared by the defenders at their own expense, and shall be revised on behalf of the pursuer and his assignee and executed by them at their own expense. 3. On payment or consignation in bank of the sum of £750, referred to in article 4 hereof, a joint-minute shall be lodged concurring in decree of absolvitor from the whole conclusions of the summons being pronounced in favour of the defenders, no expense being found due to or by either party, and recalling and discharging all arrestments and the inhibition used against the defenders, and containing appropriate consent and direction to mark the recal and discharge of such inhibition on the margin of the record upon a certified copy of the interlocutor of the Court. In the event of the procedure above described for the recal of the inhibition being found impracticable or incompetent, however, the pursuer and his assignee agree to grant the necessary discharge at defenders' expense. 4. The defenders William John Hendry and Horace Howard Hendry in exchange for said deed or deeds shall pay to the pursuer, or to Mr Robert White, S.S.C., Edinburgh, as his agent, the said sum of Seven hundred and fifty pounds in full satisfaction and settlement of all claims competent to the pursuer and his assignee against the defenders, including all further benefits or interests competent to him against his father, mother, and brother Frank's estates, and in full also of all claims which can possible accresce to the pursuer from those estates, which sum shall be paid on delivery of (*a*) the necessary deed or deeds signed by the pursuer and his assignee and (*b*) the joint-minute above mentioned. 5. The whole arrangement and settlement above expressed shall be conditional upon the Commercial Bank of Scotland (*a*) allowing the necessary sum of Seven hundred and fifty pounds to be drawn, and (*b*) discharging the obligations of the testator and his widow and freeing the trust estates from those obligations. 6. The pursuer or his assignee shall have no claim for his expenses against the defenders (*a*) in connection with the discharge of the inhibition, and (*b*) incidental to and in connection with the carrying out of the settlement, and the adjustment, completion, and signing of the necessary deed or deeds. 7. The parties

agree to carry through the settlement hereunder within three weeks."

The pursuers *pleaded*—"(3) The pursuers, the said William John Hendry and Horace Howard Hendry, having in virtue of said agreement for settlement acquired right to the defender's whole interests in his father, mother, and brother Frank's estates, decree ought to be granted in terms of the first conclusions of the summons. (4) Alternatively, in the event of the defender failing to grant, execute, and deliver the said assignation and discharge, decree of declarator ought to be granted in terms of the second conclusions of the summons."

The defenders pleaded—"(3) It not being competent for counsel without the consent of their client to enter into an extrajudicial agreement on his behalf, and no such consent having been given, the defender is not bound by the said agreement and is entitled to absolvitor. (4) The said extrajudicial agreement having been signed by a person not authorised for the purpose by the defender, and having no right, power, or authority otherwise to bind the defender in the premises, the defender is entitled to absolvitor."

The parties *averred*—"(Cond. 2) With reference to the statements in answer, it is denied that defender's counsel had no power to enter into a settlement, or to bind the defender by or to the terms thereof. *Quoad ultra* the averments in answer are not known and not admitted. If any communications such as the defender now avers passed between him and his advisers no information with regard thereto was conveyed to the counsel or agents for the pursuers either at or prior to the signing of said agreement for settlement. (Ans. 2) The alleged agreement is referred to for its terms. *Quoad ultra* denied. Explained that the pretended settlement under the said agreement was in any event an extrajudicial one, and was so described by the pursuers in the original condescendence annexed to the summons. Explained further that under the advice of London solicitors, who instructed and employed the Edinburgh agent acting on behalf of the defender in the action of accounting above referred to, the defender granted a written mandate authorising a settlement of that action for £750 with judicial expenses. He was subsequently pressed by his said agent and solicitors to agree to give up the condition as to costs, but he refused. He finally instructed his London solicitors to withdraw the written mandate above mentioned and to decline a settlement. The London solicitors, however, disobeyed these instructions. In the first place they advised the defender's said Edinburgh agent, and through him counsel, that the defender refused to go beyond the restricted terms of the foresaid mandate, and next, without the defender's knowledge or consent, they arranged with the Edinburgh agent that counsel should take the matter into their own hands. Counsel thereupon did so, and made the pretended settlement founded upon by the pursuers, although they were aware that the defender had refused to go beyond the terms of the written mandate. The defender believes that they did so in the erroneous belief that counsel in virtue of their common law mandate had right and power to bind a client in and to an extrajudicial settlement without any special mandate therefor, and/or even against his wish and instructions. The alleged settlement was in fact never authorised by the defender, and neither the defender's counsel nor his agents had any right, power, or authority to enter into it, or to bind the defender by or to the terms thereof, and the defender maintains that he is in no way bound thereby. The defender at once repudiated the pretended settlement when he was informed thereof, and recalled the agency or mandate of his said counsel and agents."

The *facts* are given in the opinion of the Lord Ordinary (ORMIDALE), who on 16th February 1916 pronounced this interlocutor—"Finds and declares in the first place in terms of the declaratory conclusion (*a*) of the summons: Finds and declares in terms of the conclusion (*b*) that the defender, in implement of the obligations incumbent on him under the agreement for settlement, is bound to grant and deliver an assignation and discharge in terms of the draft deed, and that within one month from this date, and decerns *ad interim*: Finds the pursuers entitled to expenses, allows an account thereof to be lodged, and remits the same to the Auditor to tax and report: Continues the cause *quoad* the remaining conclusions of the summons, and grants leave to reclaim."

Opinion.—"On 9th August 1879 Thomas Meldrum Hendry, flax spinner and merchant, Kirkcaldy, died, survived by his widow Mrs Mary M'Glashan or Hendry, and six children, all sons, of whom Alexander M'Glashan Hendry was the second eldest, and leaving a trust-disposition and settlement under which his widow accepted office as sole trustee and executrix. In 1893 she assumed as trustee the truster's eldest son, William John Hendry.

"Instructions were given by the truster to his trustees to carry on the business after his death. They were given power to sell it after all the children had attained majority. The youngest child, Horace Howard Hendry, attained majority in 1893. The truster expressed a wish in his settlement that the business should be carried on for behoof of his family, and the business was not sold but carried on by his trustees. The settlement provides for the division of the residue of the trust-estate among the children and the issue of children predeceasing the term of vesting, which was, in the case of the two eldest children, 25, and of the others, 21.

"In 1898 William John Hendry was appointed manager of the business, and later on his brother Horace Howard Hendry was associated with him in the management. William and Horace subsequently acquired the interests of their brothers Robert and Osmond in the trust-estate, and also the interests of these two brothers in the executry estate of another brother Frank, who

died in 1893, his mother being appointed his executrix-dative.

"On 15th March 1914 Mrs Mary M'Glashan or Hendry, the widow of the truster, died. Frederick Johnston and Horace Howard Hendry are her trustees and executors.

"In November 1914 Alexander M'Glashan Hendry (whom I shall afterwards refer to as Mr Hendry) raised an action of count, reckoning, and payment against William John Hendry, as trustee of his father and as an individual, and against Frederick Johnston and Horace Howard Hendry as trustees of Mrs Hendry, concluding (1) for an account of the intromissions of William John and Mrs Hendry as trustees of Thomas Meldrum Hendry, and for payment by William as a trustee of £6000; (2) for an order on the defender William as an individual, and the other defenders as trustees, to restore to the trust estate of Thomas £10,000; (3) for an account by the trustees of Mrs Hendry of her intromissions with the estate of her son Frank, and also an account of their intromissions as trustees with Mrs Hendry's estate, and for payment of £2000; and (4) for decree against all the defenders for payment of £6000 in name of damages.

"Claims were thus made by Mr Hendry against the estates of his father, his mother, and his brother Frank, together with a claim for damages against his brother William as an individual, and against his brother Horace as trustee and executor of his mother.

"Charges of maladministration are made in the action against all the defenders.

"On 5th January 1915 the case was sent to the procedure roll.

"On 27th January an agreement for settlement of the action was signed by senior and junior counsel for the respective parties.

"Mr Hendry having failed to implement the agreement, the present action was raised by William John Hendry as trustee under his father's settlement and as an individual, and Frederick Johnston and Horace Howard Hendry as trustees and executors of the father's widow, and Horace as an individual. These pursuers were the whole defenders in the first action, but in that action Horace was called only as a trustee and executor, and not as an individual.

"The conclusions of the present action are for declarator that by the agreement of 27th January the pursuers William and Horace Hendry, as individuals, acquired right to the defender's (Mr Hendry's) whole interests in the estates of his father and mother, whether under their trust settlements or competent to him at common law in respect of any legal claim of legitim or otherwise, and that Mr Hendry is bound to grant and execute in implement of his obligations under the agreement of 27th January an assignation and discharge in terms of a draft deed produced, and that in the event of his failing to do so the Clerk of Court should be authorised to execute the deed in lieu and place of Mr Hendry.

"I refer to condescendence 2 and answer 2. The statements in the answer 2 purport to set out Mr Hendry's case on the merits, and it is to be noted that beyond a reference to the agreement for its terms and a general denial that its terms were authorised, no special objection is taken to any particular item of it.

"So standing the averments of parties, I allowed a proof and appointed the defender to lead. It appeared to me that, as the agreement was in fact signed by Mr Hendry's counsel, the *onus* lay on Mr Hendry as in a question with the pursuers—who had transacted and were entitled to transact on the footing that Mr Hendry's counsel had authority to execute the settlement as they did—to prove that the settlement was not binding on him.

"Proof has now been led. It appears that claims were made by Mr Hendry against the estates of his father, mother, and brother some time prior to the action of accounting, and attempts to settle these claims by payment of sums varying from £100 to £600 had been made and rejected by Mr Hendry.

"The other members of the family were satisfied with the administration of the deceased Mr Thomas Hendry's trust, which, involving as it did from his death in 1879 the carrying on of a not inconsiderable flax-spinning business, was a difficult trust to execute, and there seems no reason to doubt that it has been well and carefully handled. Mr Hendry, however, according to the evidence, is a man of obstinate character, and at the same time animated with the most unfriendly feelings towards his brothers, and he thought, and still thinks, that he had not received fair treatment, and sought, by raising the action of accounting, to secure, in addition to large payments made to him from time to time by the trustees, a further payment out of his father's estate as well as out of his mother's and brother's estates. That action is still pending, and it is not proper or possible for the Court to form or express any opinion on Mr Hendry's chances of success. It is perfectly obvious, however, that from a very early date in the progress of the cause his own legal advisers, both in Edinburgh and in London, came to form a very poor, and I believe a perfectly *bona fide* and unprejudiced, opinion of the likelihood of Mr Hendry being able to make very much out of his claim. The question of settling the action, accordingly, was broached very soon after it was raised, and consideration of the case in the procedure roll was deferred because, as intimated at the bar, of proposals for a settlement.

"That a settlement was desirable there can be no doubt. Any inquiry into the merits of the claim, whether well founded or ill founded, would have involved a great expenditure both of time and money.

"Mr Hendry, who is not in affluent circumstances and is resident in London, employed as his London solicitors the firm of H. A. Graham & Wigley, of which Mr Joshua Wigley is now the sole partner. Mr Wigley's managing clerk is Mr Thomson. Mr Hendry's Edinburgh agent was Mr Robert White, S.S.C.

"Mr Wigley, as the cost of vindicating Mr Hendry's claim were likely to be considerable, proposed to the latter that he should give him a charge over the interests he had in his father's and mother's estates. This Mr Hendry consented to do. In the original draft of the deed submitted to him there was a power of attorney authorising Mr Wigley to settle any action and to give a valid receipt. Mr Hendry objected to this, as it would give power to Mr Wigley to settle the action for his costs, and Mr Wigley did not insist on its being kept in, although at the proof he said he would have done so had he known the sort of gentleman Mr Hendry was. Mr Hendry, on the other hand, points to this incident as giving a clear note of warning to his solicitors that any question of settlement must be left to him.

"Mr Hendry's case on the facts is, that while he gave authority to settle the action for payment to him of £750 *plus* party and party costs, and signed a mandate to that effect, he gave no authority to settle for £750 in full. He further maintained that, assuming that it should be held that he gave authority to settle for £750 in full, the agreement for settlement goes far beyond that authority and is not therefore binding on him. The question raised by this contention is, to my mind, a difficult one.

"The question whether or not the defender consented to settle for £750 in full depends directly upon the view to be taken of the evidence relating to what passed during a certain telephone conversation which took place between Mr Hendry and Mr Thomson, Mr Wigley's managing clerk, on the 21st January.

"The incidents leading up to that conversation were as follows:—In November Mr Wigley had a long meeting with Mr Hendry, and went fully into the position with him and the difficulties of his case. The question of settlement appears to have been mooted, but no particular sum was mentioned or discussed. Further information was required by Mr Wigley, and this he asked his Edinburgh correspondent for. Sundry letters passed between Mr White and Mr Wigley, and in a letter of 13th January 1915 Mr White reports that after consideration of counsel he was of opinion that if an offer of £600 were made it should be accepted. On the 15th January Mr White writes that an offer of £750 would be made on the footing that the case was taken out of Court, no expenses being due to or by either party. In this letter Mr White states that, with regard to closing with the offer, 'Counsel in Scotland have of course full power to settle any action so long as their mandate in the case is not withdrawn.' The offer of £750 was communicated to Mr Hendry, who at a meeting between him and Mr Wigley on the 18th January, after the merits of the claim had again been fully discussed, was persuaded to consent to settle the action for £750, the other side paying his party and party costs. Mr Hendry granted a written manate to this effect. It is not disputed that Mr Hendry gave his consent with the greatest reluctance. The following day (19th January) he called again for Mr Wigley and, because of advice given by someone not named, intimated that £1000 and expenses were the lowest terms he would accept. By the end of the interview, however, Mr Wigley had persuaded him to stand by his former mandate.

"Letters and telegrams from Mr White, dated 19th and 20th January, were received by Mr Wigley which strongly urged a settlement for £750 in full, as that was the last word of the other side.

"A very important letter was then written by Mr Wigley to Mr Hendry dated 20th January 1915, which recites a telegram from Mr White in these terms—'Please see client at once and get his acceptance of offer £750 in full. There is a serious risk of offer being withdrawn.' There were also recited counsel's opinion urging the acceptance of the offer, and a copy of Mr Wigley's telegram to Mr White—'As matter presses we assume counsel will close with offer if he thinks desirable. Wire reply.'

"This letter was delivered by hand to Mr Hendry the same day. Mr Hendry was therefore on the 20th January well aware of the position, that the defenders would not offer more than £750, and that it had been left in counsel's hands to close with the offer if he thought fit.

"It occurs to one that if Mr Hendry had had any serious objection to make to the course followed by Mr Wigley he would have done so first thing the following morning before commencing his work for the day. Mr Hendry had no doubt some difficulty in making arrangements to call for Wigley. He was in employment as a postman, as I understand, and he had to go his rounds delivering letters. It was not easy for him to get someone to take his place. His evidence as to the hours of his service is confused and contradictory. In one passage he says his hours were at this date from 11 a.m. to 1 p.m.; from 6 p.m. to 11 p.m. In another he says he was actually on duty on the 21st January the whole forenoon from 11 and on to 3·30 p.m. or 4 p.m. He has not therefore made it clear that he could not have called for Mr Wigley, but assuming that he could not, he always had the telephone to resort to, and he used it frequently. Accordingly I repeat that if he had the lively objection to settle for £750 and to leave the matter in counsel's hands which he now professes, he should have so intimated to Mr Wigley on the morning of the 21st. He had ample time on his own showing to do this before going on duty, and I do not regard the explanation offered by him of why he did not do so as at all satisfactory. It was only in the afternoon when nearing the end of his rounds, about 3·30 p.m to 4 p.m., that, according to his story, he rang up Mr Wigley on the telephone at a Branch District Messenger Office, where a Mr Lavers was an assistant. He had not known Mr Lavers for long, but had taken him into his confidence respecting his prospects of getting large sums of money out of his father's estate. On the occasion in question he said to Mr Lavers, who had called up Mr Wigley for him and was therefore

in the telephone compartment or box—'Stay where you are, because you might as well hear what they have got to say about it.' The gist of the conversation, according to Mr Hendry, was that Mr Wigley informed him that the defenders in the action had absolutely refused to pay more than £750 in full. 'I then said—"The bare £750," and he said, "Yes." I then said—"They absolutely refuse. Good. Then we are back to where we originally stood."' In this account of it he is substantially confirmed by Mr Lavers, though the latter did not appear at first to remember just the whole of the one side of the conversation which he swears he heard. Mr Lavers, on Mr Hendry's suggestion, made a note of what he had heard.

"On the other hand Mr Thomson, who—and not Mr Wigley—had the conversation with Mr Hendry between 5 and 6 p.m., and not between 3.30 p.m. and 4 p.m., is quite clear that the words I have quoted did not pass, and that Mr Hendry agreed to the matter being left in counsel's hands and withdrew his claim to party and party costs.

"One or other of these stories must be false. In my opinion that told by Mr Hendry is false, and I accept the account given by Mr Thomson. There is a general air of unlikelihood about the tale told by Mr Hendry. According to him he was informed by Mr Thomson, as if it were something new, that the defenders absolutely refused to pay more than £750 in full. That was no news to him at all. He had the information—and it was all the information Mr Thomson had—in the letter of 20th January, which was in his pocket. Mr Thomson had in fact nothing new to report.

"On the other hand Mr Thomson's account of what happened discloses a perfectly natural development of what was presented in the letter, viz., the ultimatum of the defenders and the action taken in consequence of it by Mr Wigley. Mr Hendry was in effect told that he had either to face the withdrawal of the offer of £750 or concede the costs and leave the matter in counsel's hands. I have no doubt that he made the concession, as Mr Thomson swears he did.

"There is nothing in their evidence, and there was nothing in their demeanour in the witness-box, to suggest that Mr Wigley and Mr Thomson were in the least likely to conspire to tell a false story of a consent which was never given. The entries in their various business books made at the time in ordinary course confirm the evidence of Mr Thomson. He is also corroborated by Mr Hill and Miss Spurgin, and I much prefer the evidence of these two witnesses to that of Mr Lavers. Miss Spurgin's evidence does not perhaps carry one very far, but I see no reason for discrediting her testimony. Mr Hill struck me as a frank and candid witness. On the other hand there is much to suggest that after the 21st Mr Hendry was well aware, not perhaps just at first, that a settlement of the action had in fact been effected, but that the one obstacle to its completion, namely, the payment of party and party costs, had been withdrawn. I refer especially to the letters from Graham & Wigley to him of 21st and 25th January and of 11th March. He was unable to give them any meaning consistent with his account of what passed on the 21st January. After all there was not much in money between £750 with party and party costs and without—only about £50, as had been explained to Mr Hendry.

"For some reason not very patent Mr Hendry appears to have avoided a meeting with Mr Wigley. Time and again he promised by telephone to call, and time and again he failed to do so. As I have said his duties as a postman may have made it difficult for him to find time or opportunity, but his evidence does not satisfy me that it was at all impossible, and he could always have written a letter demanding an explanation. It was only on the 25th March that he attended at Mr Wigley's chambers, and although he professes then to have learned for the first time that Mr Wigley had acted on the faith of the withdrawal by him of his stipulation for party and party costs I do not believe him. I see no reason to doubt that the entries in Mr Wigley's books spoken to by him and Mr Thomson give a true account of what passed. I think Mr Hendry may have honestly believed that the sum he had agreed to accept was smaller than what he was entitled to, and, having received notice on the 14th March of the death of an uncle, was in hopes of being able with what might come to him from his uncle's estate to provide the necessary funds for continuing his litigation. He was anxious therefore to reopen the settlement. He entertained very unfriendly feelings towards his brothers, and would, no doubt, have been sincerely glad to get the better of them in the action on that account. But even allowing for the fact that he was very much dependent on Mr Wigley's good offices and help—for he was financing his litigation for him—his whole conduct at this time is inconsistent with the idea that the settlement of the action for £750 was entirely without his authority. He did nothing to repudiate it. On the contrary, his only anxiety was to know how much he would get out of it, and hence he called for a statement of the expenses incurred to Mr Wigley and Mr White. Further, he continued down to the following June to employ Mr Wigley as his solicitor, although invited by Mr Wigley on 3rd May to place his business in the hands of another adviser. His averment on record that he at once repudiated the pretended settlement when he was informed thereof—and he knew the whole terms of it on 25th March—and recalled the agency or mandate of his counsel and agents, is absolutely unfounded. It is to be regretted that Mr Wigley or Mr Thomson did not confirm by letter the conversation had with Mr Hendry on the 21st January. They admit that it would have been the proper practice, and in accordance with their own practice so to do. In the circumstances I accept as sufficient the explanation that the failure to do so was a mere oversight. Further, they were entitled to expect that Mr Hendry on their repeated invitation and according to his repeated promise would call

at the office, when everything would have been detailed to him, just as it was on 25th March when he did call. There is no room whatever, to my mind, for suggesting that Mr Wigley was trying to conceal from Mr Hendry the terms of the settlement.

"On the evidence I come to the conclusion that Mr Hendry did in fact authorise his solicitors, and through them his counsel, to settle the action for payment by the defenders of £750 in full.

"The question remains—and as I have already said it is a difficult question—whether the authority to settle for £750 in full was an authority to settle on the terms disclosed in the agreement.

"I have not hitherto referred to the evidence of Mr Wilton. I accept it of course as in every way a perfectly candid and accurate narrative of his connection with the settlement. He holds the view that as counsel, so long as his general mandate as Mr Hendry's counsel was not withdrawn, he was entitled at his own hand and without express authority from his client to take the matter into his own hands and settle the action for £750 if he thought fit. The fact that he was informed that his client had only given his consent to a settlement for £750 with party and party costs did not in Mr Wilton's opinion affect in any way his power in the matter. At the same time he was anxious to take his client along with him and to keep him fully advised of how the negotiations were proceeding, and before concluding the agreement of 27th January there had been placed before him the telegram from the London solicitors leaving the matter in counsel's hands, and the later telegram stating that Mr Hendry had confirmed the agreement to settle at £750 in full. Counsel had accordingly the direct authority of his client to settle the action for £750 in full, and if a joint-minute had then been lodged by the parties concurring in decree of absolvitor being pronounced in respect of the defenders having paid or consigned in bank the sum of £750 in full of Mr Hendry's claims in the action there would have been an end of the matter.

"But the agreement for settlement actually concluded by counsel is a somewhat elaborate deed, and requires the implement of several conditions before a final order of absolvitor can be moved for in the action of which it purports to be a settlement. That action has meanwhile gone to sleep.

"Now I have no doubt that counsel in the ordinary course and conduct of a litigation may, in virtue of his general mandate, proceed in all the steps he takes without the express authority of his client, and even against the wishes of his client. He is entitled to act according to his own discretion and judgment, and his client will be bound by what he does. As the Lord President (Inglis) says in *Duncan* v. *Salmond*, 1874, 1 R. 329, at p. 334, 11 S.L.R. 169—'Whatever is done by a counsel within his proper province in this Court must be held to have been done by his client.' In that case counsel abandoned his client's claim in a multiplepoinding. Other illustrations of counsel's power to bind his client are to be found in the cases cited by Mr Morton, including *Batchelor* v. *Pattison & Mackersy*, 1876, 3 R. 914, 13 S.L.R. 589; *Currie* v. *Glen*, 1846, 9 D. 308; *Mackintosh* v. *Fraser*, 1860, 22 D. 421. In all these cases it appears that the step taken by the counsel was in the ordinary conduct of the case. Whether the settlement of an action can be so described is a question of circumstances. To withdraw a claim in a multiplepoinding, or to throw up a case after it has gone to trial before a jury, are both bringing the action to an end and in that sense settling it. But in cases of settlement by agreement between counsel I know of no authority for the general proposition that counsel may, against the express wishes and instructions of his client, bind his client by signing a minute or agreement even as in a question with the opposite party. If the client has intimated that he will only agree to a settlement on certain conditions, then counsel, if he does not see his way to accept this limitation of his power, is entitled to return his papers, but not to conclude a settlement which does not give effect to the conditions. That I take to be one of the recognised limitations of the power of a counsel—*Neale* v. *Gordon Lennox*, [1902] A.C. 465. *cf.* *Paterson* v. *Magistrates of St Andrews*, 1879, 7 R. 712, 17 S.L.R. 225, *aff.* 1881, 8 R. (H.L.) 117, 18 S.L.R. 728; *Clyne's Trustees*, 1835, 2 S. & M'L. 243, footnote at p. 263.

"Another limitation arises in connection with the scope of the settlement—*Swinfen* v. *Swinfen*, 1856, 25 L.J., C.P. 303, 26 L.J., C.P. 97, and 27 L.J., Ch. 35, 491, and *Swinfen* v. *Lord Chelmsford*, 1860, 29 L.J. Exch. 382. In commenting on that case Lord Giffard in *Duncan* v. *Salmond*, at p. 332, says—'The principle seems to be that while a counsel may act for and bind his client by every judicial and forensic act in the conduct of the cause, he has no power to make a compromise involving matters collateral to or outwith the subject-matter of the action.'

"In considering the extent of counsel's authority in the light afforded by the settlement itself the distinction so strongly and so rightly insisted in by Mr Gentles between a judicial settlement and an extra-judicial settlement must be observed, for counsel in concluding an extra-judicial settlement is not acting 'within his proper province in this Court,' as I read the dictum of the Lord President in *Duncan* v *Salmond*. I find that Lord Kyllachy in the unreported case of *Sutherland* v. *Mackenzie*, August 2, 1897, thus refers to the distinction—'It was not ultimately maintained that the defender's counsel had power without special authority to effect an extra-judicial settlement. A settlement by counsel made at the Bar and communicated to the Court by joint-minute or otherwise (in other words, a *judicial* settlement) is, the Lord Ordinary has no doubt, at least in general, covered by the mandate constituted by counsel's gown. But the Lord Ordinary knows of no authority for the proposition that a counsel transacting outside the Court has any higher authority than any other mandatory, the more especially when, as in the present case, the counsel has not been instructed except

for consultation. The question therefore depends on whether it is proved that the defender's counsel had an absolutely unqualified mandate to settle.'

"If that be so, then I have to determine first of all whether the agreement for settlement of 27th January is a judicial or extra-judicial settlement. In my opinion it is an extra-judicial settlement of the matter in dispute between the parties in the action, and not therefore within the general mandate of counsel to execute. But then Mr Wilton had an express mandate from his client to settle the action. Now that mandate was in my judgment an unqualified mandate in the sense that Mr Hendry, who had been from the first consulted, withdrew a limited mandate which he had given and left the settlement of the action in counsel's hands without an expressed limitation of any sort. But Mr Gentles further argued, and with much force, that such a mandate did not cover the agreement for settlement in question, that it was not truly and only a settlement of the action, but involved parties who were not parties to the action, and matters collateral and altogether foreign to the subject-matter of the action. If that argument were well founded the agreement for settlement would not in my judgment be binding on Mr Hendry. In this matter, in a question with the present pursuers, the *onus* is on Mr Hendry, and in my opinion he has failed to discharge it. While the settlement in question with its seven articles at first sight appears to embrace topics which are not within the ambit of the action, and to concern persons who are not parties to it, I have come to the opinion that on examination that is not really so, that the subject-matter of the settlement is truly the subject-matter of the action, and that the parties involved in the settlement are in effect the parties to the action.

"To say that the withdrawal of the charges of mal-administration was so foreign to the settlement of the action as to vitiate it is idle. They went to the very root of the action. Mr Hendry, however vindictive, could not fairly expect a settlement without his consenting to their withdrawal.

"The assignation of his claims against the three several estates to his two brothers suggests a more formidable difficulty, but, after all, Mr Hendry did not suggest what, if any, interest he had to take exception to it. The action was brought against William J. Hendry not only as a trustee but also as an individual. Although Horace H. Hendry was called only in his capacity as a trustee and executor of his mother, still he was a party to the action. If he and his brother had agreed as individuals with themselves as trustees that they should find the money and thus acquire right to Mr Hendry's interests, they were only repeating what had been done in connection with the interests of Mr Hendry's other brothers, as Mr Hendry himself avers. The direct assignation was therefore merely an economy in conveyancing. Further, I am satisfied that the proposal to obtain such an assignation was brought to Mr Hendry's notice in 1914, prior to the raising of this action, as one of the conditions which would be required in the event of a settlement of his claims being arrived at, and he took no exception to it.

"As regards the introduction of Mr Wigley, the necessity for that arose because of Mr Hendry's having already assigned his interests in the estates to Mr Wigley. That he required to be a party in some form to any settlement affecting Mr Hendry's claims arose directly therefore from Mr Hendry's own actings, and Mr Hendry in leaving the settlement in counsel's hands must be taken to have known that Mr Wigley must be brought in somehow. The assignee, moreover (Mr Wigley), was Mr Hendry's own agent, who revised the deed on his behalf, and it is not suggested on record or anywhere in the proof that he has made or will make any difficulty about executing the deed.

"Article 5, having in view the intimate connection of the bank, well known to Mr Hendry and his advisers, with the business, was a perfectly natural condition to introduce, and it was in Mr Hendry's interest, quite as much as in the interest of the other parties to the settlement, to introduce it.

"Then the reference to accruing interests adds nothing to what has already been surrendered by the deed; nor did the discharge of any right to legitim. *Ex figura verborum* it was not embraced in the conclusions of the action; in substance I think it was. For counsel to allow it to be included in the deed at the request of the other side, *ob majorem cautelam*, was a reasonable and relevant concession.

"It is well to keep in view what is Mr Hendry's own mind as regards the articles of the agreement other than that dealing with the payment of £750.

"The actual agreement was seen by Mr Hendry on 25th March 1915. When it was explained to him he took no exception to any of its terms. He grumbled at it, and still maintained that the sum payable should have been £750 plus costs, but that was all. At the proof he was unable to state for himself any article which he was prepared to challenge. He said that he did not know the terms of the agreement which he was challenging. That I take to be an absolutely untrue statement—Mr Hendry, though lacking in candour, was a perfectly intelligent witness—and is a somewhat striking commentary on the evidence given by him on this topic in answer to leading questions put to him by his counsel.

"In my judgment it is a fair inference from Mr Hendry's evidence that, having had the terms of the settlement explained to him, he found nothing in them to object to except the surrender of costs. In a settlement of the action he thought them not out of place. For example—'(Q) Is it not the case that the short and the long of it is that you would not have objected to sign any document put before you on 25th March if the £750 with costs had been given?—(A) I was grudging it, but I could not have helped myself, because the mandate was signed. (Q) You were grudging it because you had not got more money?—(A) I con-

sidered I was not getting sufficient even with the costs. *By the Court*—At this meeting I saw the agreement that was signed by the Counsel. (Q) What article in the agreement did you take exception or objection to at this meeting?—(A) I forget what was on it. (Q) Do you know what is in the agreement now?—(A) They showed me the papers in connection with it. (Q) Do you know now what the agreement signed by counsel contained?—(A) No, I do not know even now. (Q) You do not know the terms of agreement that you are challenging?—(A) No. *Cross continued*—(Q) All you are interested in is that you have not got your costs?—(A) Well I saw some papers, but I cannot remember what they were. (Q) All that you are interested in in this action is that you have not got your costs?—(A) Yes. (Q) That is all you complain of on record against the settlement?—(A) Yes. (Q) And that is all you complain of now?—(A) Yes. If I had got the £750 and costs I would have signed all the deeds that were presented to me on 25th March; I would have been bound to sign them even although, as was the case, I was doing it with a grudge. The grudge was because I had not got more money. I would have known that I should have got more, but if I had got £750 and party and party costs I would have been bound to sign.' That is a very positive affirmation of an assent to all the terms of the settlement, and a complete justification of the assumption—if it can be so described—on counsel's part that the terms were such as were covered by his mandate. An attempt was made by Mr Hendry's counsel to qualify the absolute statement he had made in cross. '(Q) My friend put this question—that if your condition as to costs had been acceded to, would you have signed the deeds that had been put before you? and you said, "I would have been bound to have signed the deeds if I had got the costs"—(A) If I had got the costs I would have signed the deeds. (Q) Would you have considered the terms that were contained in those deeds?—(A) No, I did not know there were any terms contained in them. (Q) You knew there must be some terms contained in them?—(A) No, I would not have considered much about the terms if I had got the cash. In point of fact I had not considered the terms. If there had been terms which I objected to I should have wanted to peruse the terms anyhow. (Q) I want to know what you meant when you said to my learned friend, "I would have been bound to have signed the deeds if I had got the costs." Do you want to qualify that in any way?—(A) Yes, I should have wanted to know that there were no deleterious terms in the settlement; there might have been something in relation to any future moneys. *By the Court*—I mean that it might have been covering all money that might come to me through that estate. Other brothers who are interested in that estate might predecease me, or anything, and I might still be in the estate, but be debarred from it.'

"These explanations do not modify the substance of his earlier evidence. Mr Hendry's statements in answer, and pleas-in-law, are in complete accord with his evidence.

"Accordingly, being greatly aided by Mr Hendry's evidence, I come to the conclusion that read fairly the various articles of the agreement are truly ancillary to a reasonable and proper settlement of the action, and are within the mandate which counsel had from their client.

"I note the points taken by Mr Gentles on the form of the summons, and the order I am asked to make. There is no averment on record of any difficulty about getting Mr Wigley to execute the assignation. The only refusal to execute it so far has been by Mr Hendry. No difficulty should arise because of the money being consigned in bank and not in Court.

"I shall repel the pleas for the defender and pronounce an order for the execution by the defender of the assignation and discharge."

The defender reclaimed, and argued that no authority had been given by the defender for settlement in terms of the agreement.

Counsel for the pursuers were not called on.

LORD PRESIDENT—The sole question in this case, as presented to us in argument on the reclaiming note, is this—Did the defender in the action give authority to his legal advisers, on 21st January 1915, to settle a certain action of count and reckoning in this Court for a sum of £750 in full of the conclusions of the summons?

Now if the evidence of the defender and the gentleman who was present with him at the time when the instruction is said to have been given is accepted, unquestionably one must come to the conclusion that the defender did not give instructions to settle for £750 in full, and that the former offer of £750 and costs having been departed from, that his legal advisers had no authority whatever to settle the case. But on the other hand if the evidence of the witness Thompson, who was the representative of the defender's legal adviser, and the witness Hill, who was present with him at the time, be accepted, then unquestionably the defender did on that occasion give authority to his legal advisers to settle the case for £750 in full.

A pure question of credibility therefore is raised. The Lord Ordinary has, for reasons which he has set out in very careful detail in his opinion, accepted the evidence of Thompson and Hill, who each made a careful record at the time setting out what took place on the occasion in question. Of course we must accept the Lord Ordinary's view on the question of credibility. If so, there can be no question whatever that this defender did give authority to his agents to settle on the terms ultimately embodied in a joint minute signed by counsel for both parties. Accordingly the pursuers are entitled to decree in terms of the conclusions of the summons.

I think it right to say that upon the subsidiary questions adverted to in the Lord Ordinary's opinion, no argument was

presented to us by counsel, and I see no reason from differing from the conclusions reached by his Lordship. I am for adhering to the interlocutor reclaimed against.

LORD MACKENZIE—I am of the same opinion. The only question argued to us was one which depends upon the credibility of witnesses, and upon that point I see no reason for differing from the Lord Ordinary.

LORD SKERRINGTON—I agree with your Lordship.

LORD JOHNSTON did not hear the case, and delivered no opinion.

The Court adhered.

Counsel for the Pursuers (Respondents)—Morton. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defender (Reclaimer)—Gentles—R. Macgregor Mitchell. Agent—John S. Morton, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, July 20.

(Before the Lord Justice General, Lord Mackenzie, and Lord Skerrington.)

MACKINTOSH *v.* GRANATA.

Justiciary Cases—Statutory Offences—Betting—Penny-in-the-Slot Machine Requiring Player to Catch in a Cup a Ball Rolling Down between Irregularly Placed Pins, Kept in an Ice-Cream Shop—Betting Act 1853 (16 *and* 17 *Vict. cap.* 119), *sec.* 1—*Betting Act* 1874 (37 *and* 38 *Vict. cap.* 15), *sec.* 4.

A confectioner and ice-cream dealer kept in his premises a machine called the "Clown," or the "Clown Pickwick," for the use of his customers. On insertion of a penny in a slot and pressure of a lever a ball was released at the top of the machine. The ball then descended through rows of irregularly placed pins, between which it was free to pass. Below the lowest row of pins was placed a sliding bar having a cup. The bar and cup were moveable along the whole length of the row of pins. If the operator of the machine caught the ball in the cup a metal check was released entitling him to goods of the value of 2d. or 4d., and to operate the machine again without further charge. *Held* that the shopkeeper in keeping and using such a machine in his shop had not contravened the Betting Act 1853, section 1, as extended to Scotland by the Betting Act 1874, sec. 4.

Peers v. *Caldwell*, [1916] 1 K.B. 371, *disapproved.*

The Betting Act 1853 (16 and 17 Vict. cap. 119) enacts—Section 1—"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . . ."

The Betting Act 1874 (37 and 38 Vict. cap. 15), sec. 4, extends the Betting Act 1853 to Scotland.

Fortunata Granata, *appellant*, was charged in the Sheriff Court at Dundee at the instance of William Fyfe Mackintosh, Procurator-Fiscal of Forfarshire at Dundee, *respondent*, by summary complaint in the following terms:—"Fortunata Granata, confectioner and ice-cream dealer, 128 High Street, Lochee, Dundee, you are charged at the instance of the complainer that you, being the occupier of the shop, rooms, or place at 128 High Street, Lochee, Dundee, did on 1st, 8th, and 24th, all days of January 1916, open, keep, or use said shop, rooms, or place for the purpose of money being received by you or on your behalf as the consideration for an undertaking to give thereafter a valuable thing, viz., a check entitling the holder thereof to obtain goods from you to the value of twopence, on a contingency relating to a game known as 'The Clown' or 'The Clown Pickwick;' or a check entitling the holder thereof to obtain goods from you to the value of fourpence, on a contingency relating to a game known as 'The Clown' or 'The Clown Pickwick;' contrary to the Betting Act 1853, sections 1 and 3, as extended to Scotland by the Betting Act 1874; whereby you are liable to a penalty not exceeding £100, together with costs, and in default of payment to imprisonment for a period not exceeding three months, or, without the option of a fine, to imprisonment for a period not exceeding six months, with or without hard labour."

The appellant pleaded not guilty, and after a proof the Sheriff-Substitute (NEISH) found him guilty as libelled, fined him £1, and at the request of the appellant stated a Case for appeal.

The Case stated—"I found the following *facts* proved:—1. The appellant is a confectioner and ice-cream dealer. He is the tenant and occupier of premises at 128 High Street, Lochee. 2. The premises consist of shop, with counter for the sale of sweets and refreshments facing the street; stalls, with partitions about 3 feet high, for customers sitting down at the back of the shop proper; and to the back of these stalls