the consideration for which the said shares were issued which is now extended, and forms No. 28 of process, as a proper memorandum to be filed in lieu of such contract: Direct said memorandum No. 28 of process to be filed with the Registrar of Joint Stock Companies within one month from the date hereof, and on such memorandum being filed, appoint that it shall, in relation to the shares therein mentioned, operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act 1867, and had been duly filed with the said Registrar before the issue of said shares; Find the said B. Smyth & Company, Limited, liable to the petitioner in the expenses of this application, of the procedure thereon, and the expenses incurred in connection with the preparation, execution, stamping, and filing of the said memorandum, and decern."

The memorandum in writing filed was in the following terms:—"Pursuant to an order of their Lordships of the First Division of the Court of Session, dated the 2nd day of November 1901, in a petition at the instance of Alexander Ferguson, distiller, 108 West Regent Street, Glasgow, for filing of contract or memorandum with reference to fully paid-up shares in B. Smyth & Company, Limited. The aftermentioned 1000 preference shares and 2000 ordinary shares of £10 each, all fully paid, were issued to the petitioner the said Alexander Ferguson in satisfaction of £30,000 sterling, being part of the consideration of £40,000 sterling agreed to be paid by B. Smyth & Company Limited, having its registered offices at 108 West Regent Street, Glasgow, to the said petitioner for the purchase of the business carried on under the title of B. Smyth & Company, wine merchants, Government contractors, army agents, tea estate agents, &c., at Calcutta and Bombay, together with the goodwill and assets thereof. The said issue of fully-paid shares was made in pursuance of (*First*) a provisional agreement in writing dated 25th May 1898, and made between the said petitioner of the one part and Herbert Methven Nairn, 108 West Regent Street, Glasgow, as trustee of and on behalf of the proposed company to be called B. Smyth & Company, Limited, of the other part; (*Second*) a resolution of the Board of Directors of said B. Smyth & Company, Limited, dated July 1898, adopting and carrying into effect said provisional agreement of 25th May 1898; and (*Third*) an adoptive agreement in writing dated 14th July 1898, and made between the said B. Smyth & Company, Limited, of the first part, the said petitioner of the second part, and the said Herbert Methven Nairn as trustee foresaid of the third part, which adoptive agreement expressly adopted said provisional agreement with certain modifications which did not affect the shares issued to the petitioner. The said agreement dated 25th May 1898 was filed with the Registrar of Joint Stock Companies before the issue of the said shares, but the adoptive agreement of 2nd July 1898 was not so filed. The said 1000 preference shares and 2000 ordinary shares are now held by the following persons as follows."

[*Here followed a schedule of the holders of the shares.*]

Counsel for the Petitioner — Lorimer — Laing. Agents—Laing & Harley, W.S.

Tuesday, November 5.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON *v.* DICK.

Compromise — Compromise of Action — Locus pœnitentiæ — Informal Writings —Settlement Confirmed by Letters Passing between Agents.

The defenders in an action with regard to heritage having been assoilzied in the Outer House, the pursuer reclaimed. Before the reclaiming-note was heard letters passed between the parties' agents confirming a verbal arrangement for the settlement of the action. Thereafter the parties differed as to the meaning of the arrangement embodied in these letters. One of the defenders presented a note praying the Court to refuse the reclaiming-note in respect that the action had been settled. The pursuer in answer maintained that the settlement was not binding in respect that no joint minute had been adjusted and no authority had been interponed, and that the letters which had passed being neither holograph nor tested could not constitute a binding agreement as to heritage.

Held that the settlement was binding upon the parties, and reclaiming-note *refused.*

In January 1894 William Hill, writer, Glasgow, by missives concluded a contract on behalf of James Anderson, 164 Buchanan Street, Glasgow, with Messrs M'Grigor, Donald, & Company, writers, Glasgow, as agents for the trustees of a certain Mrs Thomson, whereby the trustees agreed to feu to Anderson three lots of building ground.

Before the feu-contract was executed William Hill, it was alleged, without the knowledge of his client Anderson, suggested to William Riddell Dick, merchant, Glasgow, that he might buy one of the lots which had been purchased for Anderson, and Dick assented. Hill then instructed M'Grigor, Donald, & Company that the feu-contract for lot three was to be with Dick, and the feu-contracts for lots one and two with Anderson, and the feu-contracts were completed in accordance with these instructions.

The superiority created by the feu-contract between Anderson and M'Grigor, Donald, & Company's clients was disponed by these clients to Dick in 1897.

In April 1900 Anderson raised an action against Dick and Thomson's trustees, his authors, for reduction of the disposition of lot three above referred to, as having been granted in violation of his rights under the missives of January 1894.

In June 1900 Dick raised an action against Anderson for declarator of irritancy of his feu, on the ground that he had failed to implement certain conditions as to building, and for arrears of feu-duty.

In the former action, after a proof, the Lord Ordinary (KINCAIRNEY) assoilzied the defenders on 14th February 1901.

The pursuer Anderson reclaimed, and the case was sent to the roll on 8th March 1901.

On 26th June 1901, before the reclaiming-note was heard, the defender Dick lodged a note alleging that the action had been settled by letters passing between the local agents of the parties on 12th and 13th April 1901, the terms of the settlement being that the reclaiming-note should be refused and the Lord Ordinary's interlocutor acquiesced in; and praying the Court to refuse the reclaiming-note.

Anderson in answer lodged a minute, in which after referring to the action at Dick's instance, in which the Lord Ordinary had allowed a proof, he stated as follows—"At a meeting on 12th April 1901 the defender's agents Messrs A. Ferguson & J. T. T. Brown, writers, Glasgow, and the pursuer's agents Messrs Borland, King, & Shaw, writers, Glasgow, verbally arranged to make one settlement of the two actions on the footing that the minuter—(1) should withdraw the reclaiming-note in this action and acquiesce in the Lord Ordinary's judgment; and (2) consent to decree of irritancy of feu being pronounced against him in terms of the conclusions for irritancy in the other action, no expenses being found due to or by either party. No consent was asked or given to decree being pronounced against the minuter for payment of the sums of . . . arrears or alleged arrears of feu-duty of said feu, and the minuter's agents had no authority to agree to pay said sums; the pursuer, however, in said second action has presented a note to the Lord Ordinary in the cause craving decree for payment of the said sums, and alleging that the reclaimer, defender therein, had consented to such decree being pronounced. No joint-minutes have been adjusted, and no authority has been interponed to the said verbal arrangement. The letters founded on by the respondent are not holograph or tested. Further, the letter dated 12th April 1901 was not intended or understood at the time by either party as binding, and did not bind the minuter to consent to decree being pronounced against him for payment of any arrears of feu-duty."

The letters referred to were as follows:—

On 12th April 1901 Anderson's local agents wrote to Dick's local agents—"Messrs A. Ferguson & J. T. T. Brown, Writers. *Anderson* v. *Dick, et è contra.* Dear Sirs,—Referring to our meeting with you to-day, we now confirm the arrangement come to for settlement of this litigation. The appeal in the action at our client's instance is to be withdrawn, and the Lord Ordinary's judgment acquiesced in. Our client will consent to decree in the action of irritancy of the feu at your client's instance, but your client will not ask expenses in this action. The inhibition at your client's instance will be withdrawn or discharged as soon as matters can be brought to a settlement. Please confirm, and advise your Edinburgh correspondent, and we shall advise ours, to have the arrangement carried out as soon as possible. —Yours truly, BORLAND, KING, & SHAW."

On 13th April Dick's agents replied as follows—"Messrs Borland, King, & Shaw, Writers. *Anderson* v. *Dick, et è contra.* Dear Sirs,—We have your letter of yesterday's date, which we confirm as the arrangement come to for the settlement of this litigation. We have advised our Edinburgh correspondent.—Yours truly, A. FERGUSON & J. T. T. BROWN."

A correspondence between the parties' agents followed which revealed a difference of opinion between them as to the meaning of the arrangement so far as regarded the arrears of feu-duty sued for in the action at Dick's instance. Throughout the correspondence parties' agents continued to head their letters in a manner similar to the letters quoted, as bearing reference to both actions.

At the hearing on the note, argued for the respondent Dick—In the letters of 12th and 13th April and in the correspondence which followed thereon a complete settlement was clearly contemplated and had been agreed on, and it was binding although the authority of the Court had not been interponed and although parties differed as to the meaning of their agreement. *Gow* v. *Henry*, October 27, 1899, 2 F, 48. 37 S.L.R. 40; *Christie* v. *Fife Coal Company*, November 28, 1899, 2 F. 192, 37 S.L.R. 134. The question whether Anderson's agent had authority to agree to payment of arrears of feu-duty did not arise; the question was as to the meaning of the arrangement which had been come to, and though that arrangement had been embodied in writings which were neither holograph nor tested, neither party was entitled to resile—*Dewar* v. *Ainslie* December 14, 1892, 20 R. 203, 30 S.L.R. 212; *Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39, 6 S.L.R. 81; *Love* v. *Marshall*, June 12, 1872, 10 Macph. 795, 9 S.L.R. 502. The case of *Paterson* v. *Magistrates of St Andrews, ut infra*, relied on by the reclaimer was special; there a town-council was allowed to withdraw from an arrangement which had been come to on a vote irregularly taken. There was no ambiguity in the correspondence, in which each of the parties' agents referred to *Anderson* v. *Dick et e contra.* Both actions were intended to be settled simultaneously.

Argued for the reclaimer Anderson—This case was distinguished from the cases quoted. Here there was a verbal arrangement in two actions, one of which was not before the Court, and in the other the compromise was between the pursuer and only one of the defenders, the other defenders not having become parties to the com-

promise. This case further differed from the cases quoted in so far as the agreement referred to heritage and therefore could not be proved by parole, or by letters which were neither holograph nor tested. The letters of 12th and 13th April were incomplete until the authority of the Court was interponed to a joint minute embodying the arrangement proposed. Without authority so interponed a party could not resile from the contract of litiscontestation after the record was closed—*Gow* v. *Henry*, *ut supra*, Lord Young, p. 52. In that case Lord Young dissented, and in *Christie* v. *Fife Coal Company*, *ut supra*, his Lordship was absent; and against these decisions it was necessary to place the unanimous decision in *Paterson* v. *Magistrates of St Andrews*, March 10, 1880, 7 R. 712, 17 S.L.R. 125, in which the defenders were allowed to resile from a withdrawal of defences. Even if it were competent to prove an agreement with regard to heritage from the letters of 12th and 13th April, they were insufficient in themselves; there was a material dispute between the parties as to what the agreement was, and the Court would order inquiry and afford each party an opportunity of proving the true nature of the agreement, which they might do by proof *pro ut de jure*—*Jaffray* v. *Simpson*, July 1, 1835, 13 S. 1122.

Counsel for the defenders Thomson's Trustees intimated that he had no argument to present, and was merely watching the disposal of the note.

At advising—

LORD M'LAREN—The case came into the rolls of this Division of the Court on a reclaiming-note for the pursuer Anderson, but before the case was put out for hearing a note was presented for the defender Dick stating that the case had been compromised by letters passing between the parties' agents, and praying the Court to refuse the reclaiming-note.

The pursuer, by a minute in answer, after narrating the circumstances, alleges that no joint-minutes have been adjusted, and that no authority has been interponed to the verbal arrangement referred to in the agents' letters, and that the letters in question are neither holograph nor tested. He adds that the parties are not agreed as to the effect of the letters, and that he is willing and offers to adjust joint-minutes giving effect to the verbal agreement.

The letters in question are printed in an appendix to the note for the defenders. If the letters had provided that the arrangement was to be carried out by a joint-minute signed by counsel, the question would have arisen, whether there was *locus pœnitentiæ* until the joint-minute should be executed. But the letters do not contemplate that any further writing is necessary to the completion of the agreement for a compromise. On the contrary, they bear to be complete in themselves. In particular, Messrs Borland, King, & Shaw's letter begins—"Referring to our meeting with you to-day, we now confirm the arrangement come to for settlement of this litigation;" and Messrs Ferguson & Brown's answer begins—"We have your letter of yesterday's date, which we confirm as the arrangement come to for settlement of this litigation."

Now, when each party writes that he confirms a previous verbal arrangement I think it must be taken that it is their intention to make a firm agreement; and the only question is, whether a firm agreement for a compromise of actions can be made by letters which are neither holograph nor tested, but which are signed by the agents of the parties duly authorised.

I am of opinion that there is sufficient authority for the proposition that an action may be compromised by informal writings. The case of *Jaffray*, 13 S. 1122, is a very important authority to that effect. One of the parties alleged that an action of reduction had been compromised in the course of the trial, but that as a term of the compromise the trial was allowed to proceed until the evidence on both sides was before the Court when the pursuer abandoned his case, and consented to the jury returning a verdict for the defender. The compromise was said to be effected partly by informal writings and partly by an authority subsequently given. The Court sent an issue to a jury to determine whether as a matter of fact the previous action had been compromised. By this proceeding it was clearly implied that an action may be compromised without the necessity of holograph or tested writings, or a minute signed by counsel, because there was no formal writing in the case, and if formal writing had been necessary the action to enforce the compromise would have been dismissed.

There are later decisions to the same effect, amongst which I shall only mention *Thomson* v. *Fraser*, 7 Macph. 39; *Love* v. *Marshall*, 10 Macph. 795, and *Gow* v. *Hendry*, 2 F. 48.

I come then without difficulty to the conclusion that the letters of 12th and 13th April 1901 constitute a binding agreement for the compromise of this action and a relative action of declarator of irritancy between the same parties. It is no objection to the validity of the agreement that the parties are not at one as to its meaning. In that case the agreement, like any other writing as to which parties differ, must be interpreted by the Court.

So far as this action is concerned there is no ambiguity, because Messrs Borland, King, & Shaw's letter of 12th April says—"The appeal in the action at our clients' instance is to be withdrawn and the Lord Ordinary's judgment acquiesced in," and this is assented to in Messrs Ferguson & Brown's answer. It follows in my opinion that the reclaiming-note should now be refused. As the action of irritancy is not before us I offer no opinion as to the terms on which it is to be taken out of Court.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming-note for the pursuers against the interlocutor of Lord Kincairney dated 14th February 1901, together with the note for the respondent (defender) William Riddell Dick, and the minute (answers) for the reclaimer, and heard counsel for the parties, Refuse the reclaiming-note, and decern."

Counsel for the Pursuer and Reclaimer—Kennedy. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Respondent, W. R. Dick — Craigie. Agent—D. Hill Murray, S.S.C.

Counsel for the Defenders and Respondents, Mrs Thomson's Trustees—Fleming. Agents—Forrester & Davidson, W.S.

Saturday, November 9.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

M'NEILL *v.* M'GREGOR.

Title to Sue — Parent and Child — Action by Father for Death of Child Born Illegitimate and Dead before Marriage with Mother — Reparation — Bastard — Legitimation per subsequens matrimonium.

A father raised an action of damages against the proprietors of a tenement of houses in respect of the death of his pupil child, aged 3½ years, who had been killed in consequence of having fallen through a window in the common stair of the tenement. The child was born illegitimate, but about four months after its death the father and mother were married. The pursuer contended that the child was legitimated by the subsequent marriage of its parents, and that he was entitled to sue on account of its death as if the child had been born in wedlock.

Held that the pursuer had no title to sue.

Thomas Chalmers M'Neill, mason, Edinburgh, raised an action in the Sheriff Court there, against William Daniel M'Gregor, James Walker, and Mrs Annie Cairns, the proprietors of the various dwelling-houses of a tenement at 2 South Foulis Close, High Street, Edinburgh. The pursuer prayed the Court to grant decree ordaining the defenders jointly and severally or severally to pay to the pursuer £250 as reparation for the death of his pupil child Annie Swan M'Neill, aged 3½ years, who had died on 22nd August 1900 in consequence of having fallen through a window in the common stair of the said tenement.

The pursuer produced (1) a certificate of the birth of the child, which showed that she had been born on 17th May 1897, and had been registered in the Registry of Births as the illegitimate child of the pursuer and Jemima Barclay, and (2) a certificate of marriage, which showed that the pursuer had been married to Jemima Barclay on 14th December 1900, nearly four months after the death of the child.

The pursuer pleaded—"The pursuer having suffered loss, injury, and damage by the fault or negligence of the defenders, or of one or other of them as condescended on, he is entitled to decree as craved.

The defenders pleaded, *inter alia*—"(2) No title to sue."

On 27th February 1901 the Sheriff-Substitute (MACONOCHIE) sustained the second plea-in-law for the defenders and dismissed the action.

The pursuer appealed, and argued—The second plea for the defenders should be repelled. Where the parents of a child were capable of contracting marriage at the conception of the child, and where thereafter they were lawfully married, the child must be held to be legitimate from the date of its birth. In such circumstances the law of Scotland assumed that the parents were married before the conception of the child—Bankton's Institutes, i., 5, 58; *Crawford's Trustees* v. *Hart's Relict*, January 20, 1802, M. 12,698; opinion of Lord Meadowbank in *Rose* v. *Ross*, July 16, 1830, 5 S. 634; opinion of Lord Chancellor (Cottenham) in *Munro* v. *Munro*, August 10, 1840, 1 Rob. Ap. 601; More's Notes on Stair, i., p. 33 of Appendix. The rights of parties were in exactly the same position as if the child had been born legitimate. The opinions of the majority of the judges in *Kerr* v. *Martin*, March 6, 1840, 2 D. 752, were not antagonistic to this view of the law. They indeed recognised it as a general rule, and made only one exception to it, namely, that if there was an intervening marriage between the birth of the illegitimate child and the subsequent marriage of its parents, the rights of the children of the intervening marriage would not be affected by the subsequent marriage. But this exception was the only one. In all other respects by the subsequent marriage of the parents of an illegitimate child parties had the same rights and obligations as if the parents had been married at the date of its conception. The defenders were attempting to make a new exception to a rule which was founded on justice and expediency. If the accident had not occurred the pursuer would have had a legitimate daughter. He was therefore entitled to solatium for her death.

Argued for defenders—The pursuer had no title to sue. In a question of legitimacy as it affected third parties it was not the date of the birth but the date of the marriage that was to be looked at. All that the institutional writers meant was that the legal rights of a bastard who died before the marriage of his parents accrue to his descendants. And questions between the mother of the bastard and the representatives of the father, whom she married after its death, might probably be dealt with as if the legitimation dated from the date of the birth. But in questions with third parties the fiction of inchoate marriage as at the date of conception had no effect. Thus