Stevenson had a good security upon his bill of lading to the extent of his advances. But I think the later law has settled that the question as to the effect of a bill of lading does not depend upon the arrival, or even the unloading of the ship, and that a bill of lading must be taken to be an effective document of title representing the goods until these have been actually delivered to the person in right of the bill.

There are some advantages, and there may also be disadvantages, in the rule as I have stated it, where the storage of the goods has extended over a considerable time; but since the case of *Barber* v. *Meyerstein* (and until that case has been further considered by higher authority) I think it must be taken as settled that although the goods are stored, the delivery of the bills of lading has effect in all respects, whether as a title of property, or whether as a security to the person to whom it has been endorsed or delivered, exactly as if the goods were on board the ship.

If that principle is once admitted, it again disposes of the next argument, which was founded upon the analogy of the delivery order. It is perfectly true that a delivery order is worthless as passing specific property until the goods have been ascertained, but that is exactly the distinction between the effect of a delivery order for goods on shore and a bill of lading. Bills of lading have been long in use, and as far back as we have any knowledge of their use they were held to be negotiable. Such bills, expressed to be for so many bags of flour or quarters of grain on board a particular ship, would pass by blank indorsation from hand to hand while the ship was at sea. How is it possible, consistently with such a state of the law, that the goods could be specifically ascertained, or that the various persons who took such bills of lading could examine and verify the goods while the ship was in mid-ocean? We know that bills of lading are granted for portions of cargo in bulk which cannot of course be ascertained; and when bills of lading are granted in these circumstances they must operate as a transfer of an unascertained quantity of goods on board the ship until delivery is made in terms of the obligation. Delivery had not been made here, and therefore Mr Stevenson's right to these undelivered goods was as effectual as if they were identified by marks and numbers.

The question as to Mr Stevenson's right to certain other bags of flour which had been delivered from the "Allan Line" and were held by the storekeeper was not pressed. But that question was argued on behalf of another competitor in this case, I think M'Connell. With regard to that point, I think it depends upon the law as laid down by the late Lord President M'Neill in *Hamilton* v. *Western Bank*, which has always been considered a leading case. The result of that decision is that where documents of title were taken in security of advances, the contract to be inferred was not strictly a contract of pledge, but the transference of a proprietary right under which the bank was held entitled to retain the goods until the advances were repaid. Under the Roman law of pledge there must be actual perception of the subject of the pledge; but then I think the Lord President puts the nature of the banker's right in terms which identify it in all substantial qualities with the right of a holder of a security over heritable property constituted by *ex facie* absolute disposition. There the documents of title transferred to the bank constituted a title in the bank against all the world, except the person who pledged the goods and who was entitled to have them restored upon repayment of the advances. But in order that this right may be effectually constituted it is necessary that the goods should be specifically ascertained and identified; and I agree with the Lord Ordinary that as the sacks of flour were neither numbered nor marked, nor put into receptacles, nor ascertained in such a way as to distinguish them from other flour in the warehouse, no effectual right of security was constituted by the delivery order. I am of opinion, therefore, that on both points the Lord Ordinary's judgment should be adhered to.

LORD KINNEAR—I am of the same opinion as your Lordship on both points.

LORD PEARSON—I also am of the same opinion.

The Court adhered.

Counsel for Claimant M'Lintock (Real Raiser and Respondent)—Solicitor-General (Ure, K.C.)—C. D. Murray. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Claimants M'Connell & Reid (Reclaimers) — Cullen, K.C. — MacRobert. Agents—Cadell, Wilson, & Morton, W.S.

Counsel for Claimant Stevenson (Respondent)—Dean of Faculty (Campbell, K.C.)—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for Claimants Moorhead, Watson, & Company (Respondents)—Hunter, K.C.—Scott Brown. Agents—Patrick & James, S.S.C.

Counsel for Claimant Stewart (Respondent)—Cullen, K.C.—MacRobert. Agents—Gardiner & Macfie, S.S.C.

Friday, May 31.

SECOND DIVISION.

[Sheriff Court at Glasgow.

GILCHRISTS *v.* WHYTE.

Recompense—Heritable Loan—Expense of Preparing Bond Incurred by Proposed Lender through Belief that Borrower had Agreed to Clear Security Subjects of Obligations to the Superior—Action to Recover Expenses Dismissed.

The prospective lenders of money on the security of certain heritable subjects had stipulated that the owner thereof should free the security subjects

by implementing certain obligations to the superior as to formation of streets, pavement, &c. Regarding this the owner's agent had written "Under this head I anticipate no difficulty whatever." After protracted negotiations, during which a bond and disposition was prepared, the transaction fell through, the owner having failed to get the superior to discharge the obligations. The prospective lenders raised an action to recover (1) the difference in amount between deposit-receipt interest and the rate under the proposed bond from its proposed date till the date on which another bond was effected, and (2) the account incurred by them to their law agents for preparation of the bond. *Held* that the statement of the defender's agent did not amount to a representation upon the faith of which the subsequent expense of the negotiations must be held to have been incurred, and action *dismissed.*

Walker v. *Milne*, June 10, 1823, 2 S. 379; *Heddle* v. *Baikie*, January 14, 1846, 8 D. 376; *Dobie* v. *Lauder's Trustees*, June 24, 1873, 11 Macph. 749; *Hamilton* v. *Lochrane*, January 27, 1899, 1 F. 478, 36 S.L.R. 339, *distinguished.*

Jessie Herbert Gilchrist and Margaret Agnes Gilchrist, both residing in Melville Terrace, Stirling, raised an action in the Sheriff Court of Lanarkshire in Glasgow, against William M'Nicol Whyte, architect, Glasgow, for payment of £53, 10s. 3d.

The pursuers averred—"(Cond. 1) On or about 7th May 1904 the defender, through his agent, ... entered into negotiations with the pursuers through their law agents, ... for a loan of £2000 over certain heritable subjects in Marlborough Crescent, North, Crow Road, Partick, as the result of which the pursuers agreed to give the defender, and the defender agreed to accept from them, a loan of £1700, to be secured over the said subjects by a bond and disposition in security in the usual terms. In the course of the negotiations, which extended over several months, and for the details of which reference is made to the correspondence [*the material portions of which are quoted in the opinion of Lord Low*] herewith produced, the following additional conditions, *inter alia,* were agreed to, viz.—(1) The conditions set forth in article 2 of the condescendence. (2) That a valuation of the security subjects should be procured by the pursuers at the defender's expense; and (3) that as there had been considerable delay in settling the transaction, for which the lenders were not responsible, the interest on the sum in the bond should run as from 15th September 1904. According to the established practice in such transactions, it is incumbent on the borrower to relieve the lender of the expense incurred to the lender's law agent for professional charges and outlays. Acting on the arrangement made with the defender, and in accordance with the said practice, the pursuers, with the knowledge and consent of the defender, procured a valuation from James Barr, property valuator, Glasgow, and incurred expenses to their said law agents in carrying out the said transaction. . . . (Cond. 2) When the said loan was arranged, it was a condition of the arrangement that the defender should, prior to the settlement, procure and exhibit to them a discharge by the superior of certain real burdens on the said heritable subjects with reference to the formation of pavements and sewers; in terms of which the feuar was bound to form Marlborough Avenue, and such other streets as might be sanctioned by the superior, to form a pavement along Crow Road, and to pay interest at five per cent. per annum on £421, 8s. 8d., being half cost of formation of Broomhill Drive and Sewer. (Cond. 3) The bond and disposition in security by the defender in favour of the pursuers was prepared by the latter's law agents, revised by the defender's law agent, and afterwards signed by the defender. When the pursuers' agents attended on the agent of the defender to settle the said loan, they were informed by the latter that the defender declined to procure and exhibit the discharge by the superior before referred to, and as the pursuers declined to relieve him of his obligation on this point, the defender, on 2nd November 1904, finally refused to go on with the transaction. (Cond. 4) The pursuers thereupon, on 3rd November 1904, consigned the amount of the proposed loan on deposit-receipt, and endeavoured to get another investment for the money, but were unable to get a suitable investment until Whitsunday 1905. Had the said bond and disposition in security been duly delivered to the pursuers, in terms of the arrangement between the parties, the earliest date at which the pursuers would have been obliged to accept repayment of the loan was Whitsunday 1905. The said bond and disposition in security and the adjusted draft thereof are in the possession of the defender or his law agents, and he is called upon to produce them. During the period from 3rd November 1904 to 15th May 1905, the said sum of £1700 was only earning interest at deposit-receipt rates. (Cond. 5) In consequence of the defender's breach of contract the pursuers have sustained loss and damage to the extent of the sum sued for, which is made up as follows:—The interest on the said sum of £1700, at 4 per cent., from 15th September 1904 to 15th May 1905, amounts to the sum of £44, 12s. 4d., which, after deduction of £11, 18s. 5d., being the amount of deposit-receipt interest on the said sum, leaves a balance of £32, 13s. 11d. of a loss of revenue to the pursuers on the said sum. The pursuers also incurred an account to their law agents . . . . for the preparation of the said bond, amounting to £20, 16s. 4d. The said two sums of £32, 13s. 11d., and £20, 16s. 4d. make up the sum sued for. *Or otherwise, the pursuers, in reliance on the defender's representations that the said bond would be granted, and the said conditions specified in articles* 1 *and* 2 *of the condescendence implemented, incurred the said account to their law agents, and also lost the said sum of interest in consequence of their being*

unable to obtain another investment as condescended upon."

The pursuers pleaded—"(1) The pursuers having suffered loss and damage to the extent of the sum sued for, through the defender's breach of contract, decree should be granted as craved. (2) *The pursuers having incurred expense and sustained loss in consequence of their reliance on the defender's representations as condescended on are entitled to decree as concluded for.*"

The defender, *inter alia*, pleaded—"(1) The action is irrelevant."

[The portion at the end of condescendence 5 and the pursuers' second plea-in-law were added by way of amendment at the close of the debate in the Court of Session].

On 9th December 1905 the Sheriff-Substitute (FYFE) sustained the first plea-in-law of the defender and dismissed the action.

The pursuers appealed to the Sheriff (GUTHRIE), who on 13th June 1906 pronounced this interlocutor—"Recals the interlocutor of 9th December last: Finds that in May 1904 the defender opened a negotiation for a loan secured by bond and disposition in security of a house in Crow Road, Partick: Finds that it is instructed by the correspondence which is founded on and admitted by the parties that the pursuers agreed upon certain conditions to lend £1700; that a valuation was obtained by the pursuers and paid for by them, and expenses were incurred to their law agents: Finds that it was agreed that before settlement the defender should procure and exhibit a discharge by the superior of real burdens connected with the formation of certain roads and pavements and sewers, and that the defender represented that there would be no difficulty about this matter: Finds that the conditions of the bond and disposition in security were arranged between the parties' law agents, and the settlement fixed to take place on 21st October 1904, and the deed prepared and signed by the defender: Finds that when the parties' law agents met on that day the defender refused or failed to exhibit such a discharge: Finds that the pursuers relied on the representation made by the defender, or his agents on his behalf, and that the defender is liable to pay the expenses, if any, which the pursuers have incurred in consequence of their so relying."

Note.—"The petition and condescendence seem to be properly framed to raise the same kind of question which occurred in *Walker* v. *Milne*, and the class of cases which Lord Deas discusses in *Allan* v. *Gilchrist*. There are several cases in which the principle has been recognised, both before and after *Allan* v. *Gilchrist*. The letter from defender's agents on 6th July 1904 represents that there would be no difficulty whatever regarding the matter of discharge of obligations as to roads and sewers, and the treaty went on to the preparation of a bond and disposition in security and the fixing of a date for settlement upon the plain footing that this, among other conditions laid down by the pursuers at the very beginning, were to be carried out. I cannot, therefore, see that anything remains to be done beyond ascertaining whether the pursuers have really incurred the specific damage alleged. A general proof might no doubt be allowed, but parties have treated the correspondence as disclosing all negotiations, and as it may be unnecessary to go to probation, even as to the amount of the loss, I propose to hear parties as to this before remitting to the Sheriff-Substitute.

"It is, perhaps, possible to regard the case in another way, viz., as founding on an agreement for a loan on heritable security instructed by writing. I have no doubt that such an agreement may be proved by an informal correspondence, as well as by such missives as are usual in agreements for sale of heritage. Perhaps in this case it might not even be necessary that the correspondence should be holograph; but as the case may be decided on the ground which the pursuers evidently intended in framing their petition, I need not discuss it further. It should be noticed that though the contract of loan can only be proved by writ, what is alleged here is not a contract of loan but an agreement to give a loan upon certain conditions, and it is at least arguable that the conditions and the consent of parties may be proved by informal writings or even by parole. The case of *South African Territories, Ltd.* v. *Wallington*, [1898] A.C. 309, cited by the pursuers' procurator, shows how the law of England has been in use to treat similar cases."

The defender appealed to the Court of Session, and argued—(1) The correspondence showed no consensus between the parties and no concluded agreement to lend. Moreover, the correspondence was neither holograph nor tested. Contracts relating to the sale of, or loan on, heritage must be holograph or tested—*Goldston v. Young*, December 8, 1868, 7 Macph. 188; *Scottish Lands and Buildings Company, Limited*, v. *Shaw*, May 13, 1880, 7 R. 756, 17 S.L.R. 543; *Woddrop* v. *Speirs*, July 24, 1906, 44 S.L.R. 22; *Mowat* v. *Caledonian Banking Company*, December 11, 1895, 33 S.L.R. 203; *Bryan* v. *Butters Brothers & Company*, February 23, 1892, 19 R. 490, Lord Kyllachy at p. 493, 29 S.L.R. 415; Dickson on Evidence, vol. i, secs. 549 and 550. Further, such contracts require to be stamped, and there was here no stamp. (2) There was here no representation of the defender on which the pursuers were entitled to rely, and relying on which they were entitled to incur expense for which the defender was liable. This was apparently the case on which the Sheriff had allowed a proof of damages, but no such case was made on record. [It was in consequence of this argument that the pursuers made the amendments printed above in italics.] The reply of defender's agent to the request that the obligations to the superior should be implemented, in which he stated, "Under this head I anticipate no difficulty whatever," was a mere expression of opinion, and this was sufficient to take the case out of the exceptional class of cases of which *Walker* v. *Milne* (*cit. infra*) was an instance.

Argued for the pursuers (respondents)—(1) The correspondence showed that all the essentials of the contract had been agreed on, including the amount of the loan, the rate of interest, and the date from which interest was to run. This was not affected by further correspondence having passed between the parties as to the details of the mode of execution—*Westren* v. *Millar*, November 8, 1879, 7 R. 173. The defender having failed to implement his agreement to lend was liable in damages—*South African Territories, Limited* v. *Wallington*, [1898] A.C. 309. The agreement to lend did not affect the lands, and such a contract did not require to be proved by formal missives—*Anderson* v. *Dick*, November 5, 1901, 4 F. 68, 39 S.L.R. 42. (2) In any case the defender was bound to recompense the pursuers for the expenses which they had incurred relying on his representations—*Walker* v. *Milne*, June 10, 1823, 2 S. 379, June 11, 1824, 3 S. 123; *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, 12 S.L.R. 380; *Heddle* v. *Baikie*, January 14, 1846, 8 D. 376; *Dobie* v. *Lauder's Trustees*, June 24, 1873, 11 Macph. 749, 10 S.L.R. 524; *Hamilton* v. *Lochrane*, January 27, 1899, 1 F. 478, 36 S.L.R. 339.

At advising—

LORD STORMONTH DARLING—This is an action of damages by two ladies who had money to lend on heritable security, and who say that all the essential terms of an agreement to lend £1700 over certain heritable subjects in Partick belonging to the defender had been arranged with him between May and November 1904, when he suddenly drew back and refused to go on with the transaction. The consequence is, according to the pursuers, that they have lost the sum of £53, 10s. 3d., made up (1) of £32, 13s. 11d., being the difference between deposit-receipt interest and interest at 4 per cent., which the loan was to have borne if the transaction had gone on, and (2) £20, 16s. 4d., being the account which they have incurred to their law agents for the preparation of the bond. The action was originally laid on breach of contract alone (though specific implement was never demanded), but since the appeal was brought the pursuers have amended their condescendence and pleas by founding alternatively on their having incurred expense and sustained loss by their reliance on the representations of the defenders. In other words, they rely alternatively on the class of cases of which *Walker* v. *Milne* (the Melville Monument case), 2 S. 379, is the best known example.

The Sheriff-Substitute (Fyfe), dealing with the case as it then stood, sustained the plea of irrelevancy and dismissed the action. The Sheriff recalled this interlocutor, pronounced certain findings as to the effect of the admitted correspondence between the agents of the parties, including a finding that the pursuers had relied on the representations made by the defender, and that the defender was liable to pay the expenses, if any, which the pursuers had incurred in consequence of their so relying, and the learned Sheriff concluded with allowing a proof of the specific damages alleged, which proof, by a subsequent interlocutor, he remitted to the Sheriff-Substitute to take. It is obvious, both from the Sheriff's findings and still more plainly from his note, that in his view the real case for the pursuer is founded on the Melville Monument case—that view is, by the amendment which we have allowed, now formulated by the pursuers themselves.

It still has to be considered, however, whether the pursuers have succeeded in making a relevant case even on this ground. Now, the whole point of a claim of this kind is that the pursuer, despairing of making out a contract of which he can demand implement, falls back on a claim of indemnification for any actual loss or damage which he may have sustained "through the representations and inducements recklessly and unwarrantably held out to him by the other party." I take these words from the opinion of Lord Deas in *Allan* v. *Gilchrist*, 2 R., at p. 590, where he analyses all the cases on this exceptional branch of the law from *Walker* v. *Milne* downwards.

Where, I ask, is the averment of any such representations and inducements? Not certainly by merely saying that "according to the established practice in such transactions it is incumbent on the borrower to relieve the lender of the expense incurred to the lender's law agent for professional charges and outlays"—which is one head of the claim in this case—or by merely saying that on a particular date "the pursuers consigned the amount of the proposed loan on deposit-receipt, and endeavoured to get another investment for the money, but were unable to get a suitable investment until Whitsunday 1905"—which is the other head of claim. Neither of these averments is an averment of representations and inducements held out by the defender to the effect that, whether the proposed transactions went on or not, the defender would reimburse the pursuers. The first of these averments is simply an averment of the pursuers' understanding of the alleged practice, not an averment of any representation made by the defender; and unless it can be maintained that in every negotiation for a loan on heritable security the proposed lender is entitled to run up an account with his own law agent at the expense of the borrower, I fail to apprehend the relevancy of the averment. Similarly, with regard to the second averment, can it be said that the moment the borrower thinks proper to consign the money he is entitled to charge against the proposed borrower the difference between deposit-receipt rates and the rate of interest on the loan without any special stipulation to that effect? I agree with the Sheriff-Substitute that possible borrowers would be rather startled by the suggestion.

On the whole matter I have come to the conclusion that, waiving all questions as to the mode of proof in a case raising purely the question whether there had

been an agreement to make a loan on certain conditions, there is here no relevant averment either of breach of contract or of right to reimbursement of actual outlay incurred on the faith of representations made by the defender. I am therefore of opinion, with all respect to the Sheriff, that we should find that the pursuers have not stated a relevant case in support of either of their pleas-in-law, and dismiss the action.

LORD LOW—The defender was proprietor of two tenements at Broomhill, near Partick, over each of which he was desirous of borrowing. The pursuers were willing to lend a sum not exceeding £1800 upon the security of one of the tenements, and the defender was willing to accept a loan of that amount. Ultimately the precise amount of the proposed loan was fixed at £1700.

It appears that the tenements were not quite completed when the negotiations commenced, and further, the ground on which they were built appears to have been part of a larger area, the whole of which was subject to certain conditions and obligations in regard to the erection of buildings, the formation of pavements, and the repayment to the superior of the cost of making certain roads and sewers. These conditions and obligations had only been partially fulfilled, and accordingly the pursuers' agents very properly insisted that arrangements should be made which would free their clients from the risk of the security subjects being liable to claims at the instance of the superior of an unascertained amount. In such circumstances it is not surprising that the negotiations should have been both complicated and prolonged.

Shortly after the commencement of the negotiations, namely, on 18th May 1904, the pursuers' agents wrote to the defender's agent specifying a number of points which a perusal of the titles had suggested. One of these had regard to the conditions and obligations to which I have already referred. In reference to these the pursuers' agents wrote—"The feuar is bound to form Marlborough Avenue, to form a pavement along Crow Road, to pay interest at five per cent. on £421, 8s. 8d., being half cost of formation of Broomhill Drive and sewer, and on completion of each tenement in Broomhill Drive to repay the capital sum applicable thereto. As these conditions are real burdens on the whole ground, non-fulfilment of which may result in forfeiture of the whole ground, it is necessary that the superior should free the two tenements of these obligations."

In reply, the defender's agent simply stated the position in which matters stood, which amounted to this, that the conditions referred to were, in so far as not already implemented, in course of being implemented.

After some further correspondence, to which it is unnecessary to refer, the pursuers' agents again wrote to the defender's agent, on 1st July 1904, saying, *inter alia*—"The obligations to the superior regarding the formation of streets, the formation of foot pavements, &c., should be implemented before settlement of the bond, so that the security subjects may be cleared of any claim by the superior for these matters or for interest relating thereto."

In answer to that part of the letter the defender's agent wrote—"Under this head I anticipate no difficulty whatever."

The pursuers' agents evidently regarded that answer as satisfactory, because they proceeded with the negotiations, and a bond and disposition in security was prepared, and apparently was actually executed by the defender. When, however, the time for settlement arrived, the conditions in regard to the formation of streets, &c., had not been completely implemented, and the pursuers' agents were not satisfied that the security subjects were free from the possibility of claims on the part of the superior. In these circumstances various proposals were made upon the one side and the other with the view of getting over the difficulty, but no agreement was come to—the pursuers' agents regarding the proposals of the defender's agent as inadequate, and the latter regarding the demands of the former as excessive. Negotiations were accordingly broken off, and thereafter the pursuers brought the present action, in which they demand payment from the defender of the sum of £53, 10s. 3d., being the amount (£20, 16s. 4d.) of the account which they have incurred to their law agents, and £32, 13s. 11d., being the difference between the amount of interest which they would have received if the transaction had been completed, and deposit-receipt interest, which was all that they actually received until another investment for the capital sum was obtained.

As the action was originally laid, the pursuers' claim was based entirely upon alleged breach of contract, that is to say, upon breach of a contract for the loan of money by the pursuers to the defender upon the security of heritable property belonging to the latter. It is plain that no such contract was ever completed, negotiations being broken off because the pursuers' law agents were not satisfied with the state of the title. Accordingly the original ground of action fails.

The pursuers have, however, amended the record to the effect of adding another ground of claim, which they state thus—"The pursuers, in reliance on the defender's representations that the said bond would be granted and the said conditions specified in articles 1 and 2 of the condescendence implemented, incurred the said account to their law agents and also lost the said sum of interest."

Now, I do not know what is meant by the statement that the defender represented that the bond would be granted; but the fact was that the defender was all along willing to grant the bond, and would have granted it, if the pursuers would have accepted it in exchange for the money.

In regard to the conditions which it is averred that the defender represented would be implemented, those which are

specified in articles 1 and 2 of the condescendence, and to which it is averred that the defender agreed, are three in number. There is, first, the condition made by the pursuers' agents in their letter of 18th May 1904, that it was "necessary that the superior should free the tenements" of the obligations in regard to the formation of streets, sewers, and so forth, or, as they put it in their letter of 1st July, that the obligations should be "implemented before settlement of the bond, so that the security subjects may be cleared of any claim by the superior for these matters, or for interest relating thereto."

I have already pointed out that in answer to the first of these letters the defenders' agent merely stated how matters stood, and that in answer to the second letter he wrote—"Under this head I anticipate no difficulty whatever."

I do not doubt that the latter answer influenced the pursuers' agents in continuing the negotiations, because if the defender's agent had said that there was no chance of the conditions being implemented, or of the security subjects being otherwise freed of possible claims on the part of the superior when settlement of the loan came to be made, I think that very probably the pursuers' agents would have declined to go on. I am of opinion, however, that the statement of the defender's agent did not amount to a representation upon the faith of which the subsequent expense of the negotiations must be held to have been incurred. Indeed, the statement was not a representation at all, but an expression of opinion (and I do not doubt of a perfectly honest opinion), and the pursuers' agents took the risk of that opinion not being confirmed by the event. I am therefore of opinion that, so far as the condition with which I have been dealing is concerned, this is not one of those cases in which a party who has incurred expense or performed operations in reliance upon representations made by another is entitled to be indemnified by that other, although there has been no actual contract between them.

The next condition founded on in the condescendence is "that a valuation of the security subjects should be procured by the pursuers at the defender's expense." Now, the defender did agree that a valuation of the subjects should be "instructed by the pursuers in the usual way." My impression is that it is a matter of common occurrence for an agreement to be made that the proposed lender shall obtain a valuation of the security subjects at the expense of the proposed borrower, whether the loan is ultimately given or not. I think, therefore, that there would have been a great deal to be said for the view that the words "in the usual way" meant that the defender should in any event bear the cost of the valuation. No such argument, however, was stated for the pursuers, and it cannot be assumed that if it had been stated the defender would not have had a good answer. At all events he was entitled to be heard.

The third condition founded upon is that interest should run from 15th September 1904. It is true that the defender agreed to pay interest from that date, but that was only in the event of the transaction being completed. He never agreed to pay, or represented that he would pay, interest if the money was not in fact lent to him.

I am therefore of opinion that the defender is entitled to absolvitor. I am not surprised that the pursuers should feel aggrieved that they should have sustained so considerable a loss without any corresponding benefit; but, with the exception perhaps of the cost of the valuation, the pursuers' losses are of a kind which a person negotiating a loan of money upon heritable security has always, in a greater or less degree, to face, and the fact that the loss has been perhaps unusually heavy in this case is simply due to the peculiar circumstances to which I have alluded.

LORD ARDWALL—I agree with what has been said by Lord Stormonth Darling and Lord Low as to the history and facts of this case, and it is unnecessary for me to go over them in detail.

The ground on which the action proceeded, as first brought into Court, was breach of contract, but it is clear that as concerns that ground, the action is irrelevant, and that there was no completed contract of loan over heritage between the parties. But a plea was subsequently added to the effect that the pursuers, having incurred expense and sustained loss in consequence of their reliance on the defenders' representations as condescended on with regard to a proposed loan, are entitled to decree as concluded for; in other words, damages are sought for expenses incurred in connection with an inchoate contract which has never been completed. I think that as such an action does not proceed on contract, it must proceed on one of two grounds, either on wrongdoing more or less flagrant, or on the ground which is expressed in the brocard *nemo debet ex alieno damno lucrari*.

The decided cases in which an action has been sustained in respect of damage caused by one of the parties to an inchoate contract not carrying it out are few in number and peculiar in their circumstances. All the cases up to March 1875 are ably analysed and reviewed by Lord Deas in the case of *Allan* v. *Gilchrist*, 2 R. 587. He points out that in the case of *Walker* v. *Milne*, 2 Shaw, 338, the relevancy of the items of the alleged loss did not appear to have been settled or the case brought to any judicial conclusion. In the case of *Heddle* v. *Baikie*, 8 D. 376, the circumstances were very special, and the damage which the pursuer was found entitled to was not for breach of contract but for loss sustained after possession of a farm had been ceded to him, and while certain grossly illegal and oppressive proceedings had been going on; or in other words, it was for actual loss sustained in consequence of the unjustifiable representations and inducements made and held out by the one party to the other contrary

to all good faith, and his unjustifiable conduct throughout the whole transaction. The case of *Bell* v. *Bell*, 3 D. 1201, rested on the second ground I have above alluded to, the damage claimed being for the loss caused by building a house on a piece of ground on the faith of a promise that it would be conveyed to the pursuer, and in respect that the defender had *mala fide* or fraudulently induced the pursuer to build, but the damages were limited to the specific amount expended on the house. Subsequent to the case of *Allan* v. *Gilchrist*, the case of *Dobie* v. *Lauder's Trustees*, 11 Macph. 749, occurred, in which the pursuer averred that the defenders arranged to board certain children with her, and that both parties having contemplated that the arrangement should endure for a term of years she had incurred certain expenditure which she lost by the guardians suddenly and without any reasonable excuse bringing the arrangement to a close. There it was held that the pursuer was entitled to be reimbursed for actual loss, Lord Neaves puting the liability on the ground that when parties are engaged mutually in promoting an object of common interest, and the expenses of furthering that object are thrown on one of the parties, that when the expenditure fails in the end aimed at, the party-disburser must be reimbursed as being the disburser for a common object. But it may I think with equal truth be said that this was an action founded upon a wrong which consisted in the defenders leading the pursuer by certain representations to incur serious outlay and then disappointing these expectations without any reason.

Again, in the case of *Hamilton* v. *Lochrane*, 1 F. 478, a proof was allowed of the pursuer's averments where a sum of £150 was claimed as the cost of certain alterations made by the pursuer on a villa that he was in course of erecting on the request of the defender who had an option of purchasing the house down to a certain date. This was in my opinion a very narrow case, and all that was decided was to allow a proof before answer, and the decision, such as it was, was a reversal of the decisions of a Sheriff and a Sheriff-Substitute, and the soundness of that reversal was strongly doubted by Lord Moncreiff.

From these authorities I think it may be inferred that an action of damages founded on the ground of recompense for loss caused through failure to complete or carry out a contract, but where there has been no breach of contract, will only be entertained by the Court in very special circumstances indeed, and for the most part only in cases where (1) loss has been wrongfully caused by one of the parties to the other, excluding, however, loss or expense incurred as part of the abortive negotiations between the parties, (2) where the wrong has been done without any excuse, and (3) where the losing party is in no way to blame for the loss.

But it need hardly be pointed out how inconvenient and ridiculous it would be if in any case where a person has been put to expense and trouble in the hope or expectation or anticipation of a contract being concluded, and after all no contract is concluded, he should be entitled to ask a court of law to entertain and investigate a claim of damages against the party who withdrew from the negotiations, it being in law the right of everyone to resile from a contract before final consents have been exchanged, or, in the case of heritage, before it has been concluded *habili modo* by writing or otherwise. If such actions were to be allowed it would necessitate an inquiry in every case of the kind into nice and difficult questions as to which of the parties had behaved reasonably or unreasonably in order to determine the question of who was to blame for the contract not being proceeded with. Such actions accordingly will not as a rule be entertained by courts of law.

Applying these remarks to the present case, I am of opinion that the pursuer has presented no relevant case, for I entirely agree with what has been said by your Lordships as to there being no blame on the part of the defenders leading to loss of such description as the Court will take cognisance. My impression is that the pursuers were unnecessarily anxious and troublesome regarding the settlement of a transaction in which it was the defender's interest as well as their own that there should be no forfeiture of the feu, and where, as far as I can see, there were no important practical difficulties in the way of the loan being concluded, except those raised by the pursuers themselves.

The LORD JUSTICE-CLERK concurred.

The Court sustained the appeal, recalled the interlocutor appealed against, affirmed the interlocutor of the Sheriff-Substitute of 9th December 1905, and dismissed the action, and decerned.

Counsel for the Pursuers (Respondents)—Macmillan—Maitland. Agent—J. Gordon Mason, S.S.C.

Counsel for the Defender (Appellant)—W. Thomson—Morton. Agent—Norman Macpherson, S.S.C.

Saturday, May 25.

FIRST DIVISION.

[Lord Low, Ordinary.

BOYD *v.* HAMILTON.

Property—Servitude—Feu-Contract—Access—Lane—Implied Grant of Access by Lane—Interpretation of Terms of Grant by Circumstances and Use.

In a feu-contract the piece of ground disponed was described as being bounded "on the north-west by west by the central line of an intended street," and "on the south-east by east by an intended lane." The feu-contract provided that no water or refuse should be removed by the front door of the house and that