Lord Young—I am of the same opinion, and I have no doubt whatever about the case. It is true, I think, that the document before us is a proper will and no more. That which is commonly called a testament is not a conveyance of either heritage or moveable estate. It contains no words of conveyance. It has operation given to it, but that is in deference to the will of the deceased proprietor therein expressed. A will may contain a conveyance, and often does, but it is not necessary that it should do so. I speak of it without reference now to the changes in the law made by the 20th section of the Act of 1868. Before it was passed the proper purpose of a will or testament was to express the will and intention of the deceased with respect to the disposal of his personal estate, and the written instrument under his hand doing so was given effect to as the last will, or rather as the emphatic expression which disclosed the will in his mind at the last moments of his rational existence. If he had himself named a person to carry his express wishes into effect, the law armed that person with a title, and by naming and confirming him executor armed that person with a title, and then his duties were to execute the will of the deceased proprietor with respect to it; and even when he named no executor, but simply stated what his will was, the law appointed an executor to carry out that will, named and confirmed him, and vested him with a title to the property, his duty being to do with respect to it according to the mere wish of the testator.

That was the law of the land with respect to the will before the Act of 1868. The only other case was where the will contained an express conveyance of some specific subject; it then operated as a conveyance, and the party in whose favour it was made took independently of the executor altogether, and this distinction is explained by the text-writers and illustrated by decisions. But now since 1868, according to my own view of clause 20 of the Act of that year, heritage is placed in the same position as moveables, not with respect to a conveyance of it, but with respect to settlements of succession thereto. Formerly a proprietor, if he wished to sell his heritage, could not do so by declaring his will simply; the only mode of effecting his purpose was by making a *de præsenti* conveyance, and I think it has been expressly held that a conveyance in words to operate as a conveyance on death or six months after death is bad, because it is not a conveyance *de præsenti.* But under the Act of 1868 wills were made applicable to heritage as well as moveables, and since then you may affect the heritage as you may moveables by use of any words which will confer a right to moveables. Supposing a proprietor said, "I want £1000 to be divided amongst my three children," would the words be enough to confer on them a right to claim their share of the division of £1000? There can be only one answer. Well, the same words which would confer a right to moveables, will under the Act of 1868 confer a right to heritage if used with reference to heritage. I use them now with reference to heritage. The case, then, I think, is as clear as it can be. Again, let me give one more illustration. A list of legatees or persons entitled to take the estate of the deceased is quite good. If a proprietor directs that he wishes his estate to be divided so that A shall get £500, B a house, C a bit of land, and so on; and if he places opposite the surnames of some sums of money, and of others houses, the document which embodies these directions will be quite good to carry all, because whatever words give right to claim money will give right to claim land if land is mentioned. Therefore, as contrasted with a conveyance as the expression of the will of the deceased, I am of opinion that it is competent by the Act of 1868, as I read it, to give the will the same effect as regards heritage as regards moveables. The executor of the will is bound to give it execution with reference to both, following the testator's intention.

With regard to the second point, we decided the other day that under the 46th section of the 1874 Conveyancing Act a person in a position such as the heir-at-law here may complete his title under that section. And if we decide that the will is to have effect with respect to heritage, the heir-at-law can competently make up his title in terms of that section.

The Court answered the questions put to them in terms of these opinions.

Counsel for the Trustee and Beneficiaries—Kinnear — Mackintosh. Agent—Alex. Morison, S.S.C.

Counsel for the Representatives of the Deceased John Aim and the Heir-at-law—Solicitor-General (Balfour, Q.C.)—C. S. Dickson. Agents—J. & A. Hastie, S.S.C.

Thursday, December 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LANDLESS *v.* WILSON.

Recompense — Architect's Charges — Quantum meruit.

In unusual or innominate contracts conditions will not be easily implied. *Held,* in conformity with this rule, that where an employer alleged that architectural plans for private buildings had been furnished to him gratuitously, and that no payment was to be made therefor unless they were adopted by him after competition with other plans, the *onus* of proof lay upon the employer.

Circumstances in which *held* that this *onus* had not been discharged, and that the employer having used the plans to increase the value of his property in the market was bound to pay for them.

In September 1876 the defender acquired a property at Wood Lane, Glasgow, upon which he determined to erect new buildings, and employed the pursuer to prepare plans for the purpose, and the plans were prepared and delivered to the defender early in December immediately following. The defender, however, did not proceed to build, but on 22d December 1876 sold the property. The pursuer was employed at the time on other matters for the defender, and on asking for a payment to account the defender objected to the item for preparing the plans in question.

As he ultimately refused to pay for the plans, the pursuer raised the present action in the Sheriff Court of Lanarkshire at Glasgow for payment of his whole account, amounting to £98, 0s. 6d., the chief item of which was a charge amounting to £87 for preparing the plans for the Wood Lane property, calculated at one per cent. upon the estimated cost of the buildings proposed. The pursuer averred that the defender had employed him to prepare the plans in question, and had sold the ground at a profit largely by exhibiting the plans to intending purchasers; that his charge was the ordinary professional one, and fair and reasonable in the circumstances. The defender averred that he had never employed nor authorised the employment of the pursuer, and that the latter having been allowed as a matter of favour, and on the intercession of a third party, to compete for the plans, was not entitled to charge for them, seeing that they were not adopted. The Sheriff-Substitute (Lees) allowed a proof, from which it appeared, *inter alia*, that the pursuer had been introduced to the defender by his agent Mr W. R. Buchan; that the defender had also employed another architect named Gordon, who had prepared sketches for the same building for which the defender afterwards paid £5; that the defender had bought the property for £12,500 and sold it for £16,700, and that he had shown the pursuer's plans to the Messrs Carrick, one of whom purchased the property for himself and brothers. These gentlemen also stated that they had been influenced to a considerable extent in concluding the purchase by seeing from the plans what could be made out of the property.

The Sheriff-Substitute found in favour of the pursuer, except in regard to three trifling items of the account, and remitted to the Auditor of the Institute of Architects in Glasgow to fix a fair remuneration for the pursuer's work in connection with the Wood Lane property. He added the following note:—

"*Note.*—The only item in regard to which I think it necessary to make any remarks is item No. 4, for which the pursuer claims £87, and the point raised by it is certainly one of some importance. It is not denied that the pursuer did the work for which he asks to be paid; but the defender says he gave his services on the express footing that he was to be paid only if his plans were used for the defender's projected buildings, and that another architect gave his services on the same footing. Competitive plans would seem not to be usual in regard to private buildings; but if such a bargain was made by the parties, no Court has any power to make a different one for them. It appears to me, on a consideration of the evidence adduced, that the weight of it is in favour of the view contended for by the defender; and I think that even the pursuer's own letter of 22d November 1877 supports this view. If I could hold that the defender had not established the point he maintains, the pursuer would of course be entitled to be paid for his services in ordinary form. But as I think the defender has succeeded in proving what he alleges on this point, the pursuer cannot claim payment if the bargain made between him and the defender was adhered to. But it was not adhered to, and it is an agreement that ought, I think, to be construed strictly. The pursuer gave his services on the faith, I must hold, that he was competing for employment by the defender. The latter however never appears to have taken a moment's use of the plans on the footing on which they had been prepared; but at once submitted them to a purchaser, who admits that he was influenced by the skilful manipulation of the ground by the pursuer, and resolved to buy the subjects. Now, the defender by what he did produced two results. Firstly, he voluntarily, and to suit his own purposes, defeated the possibility of the pursuer taking any benefit by the work he had done; and the instructive case of *Pirie* v. *Pirie*, 10th December 1872, 45 J. 134, shows the effect this may have on the rights of parties where it is done *mala fide.* But as I do not think anything amounting to *mala fides* is shown here, I proceed to the next point. In the second place, the defender took the beneficial use of pursuer's services for a purpose for which there had been no agreement that they should be given gratis. The state of circumstances that supervened was, then, taken out of the arrangement made by the parties; and the pursuer is in consequence entitled, in my opinion, to be paid for his services on the *quantum meruit* principle. I see no reason why he should not get the full and usual remuneration, whatever that may be. The defender bought the subjects at £12,500, and sold them in three months for £16,700. Out of this profit he could afford to pay the pursuer. As parties agreed to take a judgment on the question of liability, leaving the matter of amount, if any, to be settled by remit, no evidence was led as to the scale of payment, and I have remitted the account to the person who seems to me the proper one in the circumstances to deal with it."

On appeal the Sheriff (Clark) adhered, and the President of the Institute of Architects reported that in his opinion the pursuer was entitled to the charge of 1 per cent.

The defender appealed to the First Division of the Court of Session, and argued—The evidence does not disclose employment by the defender of the pursuer in the ordinary course of business; the work was done by him on speculation, and he was only to be paid if his plans were preferred and actually carried out; the defender was not bound to build, and was entitled to sell the subjects if he thought fit. The condition on which alone the pursuer was entitled to payment, viz., that his plans should be selected for building, and the work carried out, had not been fulfilled and that through no fault of the defender, for he was entitled to sell. Cases cited—*Moon* v. *Witney Union*, 1837, 3 Bing. U.C. 815; *Pritchett* v. *Badger*, 1857, 21 E. Jur. 66; *Inchbald*, 1864, 28 E. Jur. 1129; *Moffat* v. *Lawrie*, 24 L.J., C.P. 56, and 15 C.B. 583.

Replied for pursuer—Employment in the ordinary way is proved. It is not proved that there was any competition, or even if there was, that the pursuer knew of it; but even if there was, the defender had himself deprived the pursuer of any chance of success in it by selling the property, and he must take the consequences. At anyrate, it is proved the defender benefited largely by the pursuer's services, and he must pay for them on the principle of recompense or *quantum meruit.* Authorities—*Planche*, 8 Bing. Reps. 14; *Moon* (*supra*); Stair, i. 3, 8; Ersk. iii. 3, 85; *Smail* v. *Potts*, 1847, 9 D. 1043; *Pinkerton* v. *Addie*, 1864, 2 Macph. 1270.

At advising—

Lord President—This action was raised by Mr William Landless, an architect in Glasgow, to recover payment of an account from his employer, Mr Wilson, who was the proprietor of building-grounds in various parts of Glasgow. The sum sued for is £98, 0s. 6d., but the defence is now confined to one item of the account amounting to £87, for the preparation of plans for buildings to be erected on subjects situated at Wood Lane, Broomielaw, and relative attendances, &c. The amount of this charge is not a matter of dispute; it was settled by a remit to a person of skill, who decided that it was fairly charged at the ordinary rates. But the defence is that the pursuer undertook to prepare the plans gratuitously. Now, I need not say that that defence throws the whole *onus probandi* on the defender, to show that the pursuer did undertake to make them for nothing. The first thing to do is to look at the plans themselves; they are of a very elaborate nature, and are measured plans in this sense, not only that the whole space of ground belonging to the defender at Wood Lane is displayed and covered with buildings, but every separate tenement and room and passage and staircase is laid down according to a measured scale. In addition there was an elevation of the building, and the whole were carefully prepared and amended in reference to the probable profits, the rents likely to be obtained by the defender from his tenants. Now, *prima facie*, an undertaking to prepare such plans gratuitously is an exceedingly unlikely thing, and if it is to be proved, it must be by very distinct evidence. Now, what is the evidence in support of the averment here? The defender himself and his agent Mr Buchan say that the defender resolved to take plans from two architects in competition, the other architect being a Mr Gordon, and the arrangement made with him is distinctly enough proved. Mr Gordon himself, as well as the defender and his agent, says that he undertook to make his plans gratuitously, and such an undertaking was perhaps not surprising, as we see from the evidence that Mr Gordon's plans were rather in the nature of sketches, and not plans measured to scale. Now, an architect may very naturally offer to supply sketches gratuitously, especially to a former employer, even without any particular stipulation, and it was apparently stipulated that Mr Gordon's plan should be so made. The question is, Was this also the case with the pursuer's plans? Neither the defender nor his agent venture to say distinctly that it was proposed or assumed that Mr Landless was not to be paid for his work. There is not a word to that effect. They do say that he was told there was to be a competition of plans, and though Mr Landless denies that, I am willing to take it for granted that he was mistaken in this respect. There was room for a mistake, and I am willing to take it that he made the mistake, and ought to have understood that there was to be a competition. But is it implied in the so-called competition that the competitors were not to be paid? If so, we must know what kind of contract it is in which that condition exists. Conditions may be easily implied in well-known and nominate contracts, but in unusual and innominate contracts it is fixed law that nothing can be left to implication. It is here alleged by the defender that there was to be a competition of plans for these buildings, which were to be private buildings, and not public edifices such as a church or a town-hall, and that we are told by the pursuer and Mr Gordon (and they are uncontradicted) is quite unknown in practice. Mr Gordon says in his experience of 19 years he never heard of such a thing, and the pursuer's evidence is to the same effect. It would then have been an unusual, in fact an unprecedented, proposal to have competing plans for these private buildings, and there is no room for implication of such an arrangement. In the case of competing plans for public buildings, it seems to be usual to issue in writing the terms and conditions of the competition, and the competitors are generally paid in one way or the other, for besides the prospect of being the successful candidate there is often a provision for a prize to the second and even the third, but it is always a matter of stipulation in each case. It would be an extraordinary result in the case of plans for private buildings to hold that a competition was an implied condition. On that ground I think the defender has failed to establish his defence. But the other aspects and circumstances of the case go to confirm my impression. The defender, it seems, made up his mind that he could get the best and most available plans from the pursuer. There were none of those constant interviews between the defender and Mr Gordon which passed between him and the pursuer—these latter took place once a-week or oftener for the purpose of arranging first as to the ground plans, then as to the elevation, and then as to the probable rental to be derived from the scheme. In fact, both parties endeavoured to make the plans as attractive as possible, and having done that Mr Wilson seems to have made up his mind to sell the property and not build upon it at all. With this view he wished to impress intending purchasers with the idea that the ground was very available notwithstanding its apparently irregular form. That irregularity was got over in what I think a most ingenious manner by the pursuer's plan; and he so influenced very strongly the minds of the intending purchasers. Mr Carrick himself says it was so. Now, all that seems to confirm the pursuer's case—that he prepared the plans on the same footing as any other architect, and for the usual rate of remuneration. It is not possible to suppose, if he believed he was to get nothing for his plans, that all these repeated meetings with the view of bringing them to the greatest possible perfection would have taken place. The plans themselves speak loudly in that direction—they must have cost a great deal of money as well as labour.

On the whole matter, I have no doubt that the defender has entirely failed to prove that this work was intended to be done gratuitously, and I think the pursuer is entitled to receive the usual remuneration.

Lord Deas—In September 1876 the defender purchased certain property in Glasgow apparently with the intention of building on it. We all know that heritable property fit for building on was selling about that time for a ransom in Glasgow. He accordingly obtained these plans from Mr Landless, and quite complete and accurate plans they are to enable anyone to deal with the subjects. It is not now disputed that the charges

we have to deal with are proper and ordinary charges if Mr Landless is entitled to be paid at all. But it is said he undertook to do the work gratuitously. I think there is no proof of that, and it is a very incredible thing in itself. No doubt it is said that Mr Gordon also furnished plans, and that both sets of plans were given in on the footing of a competition, the architect only to be paid for his plans if they were accepted and acted on. But to this theory I think a fatal answer is that the sets of plans were in no sense competing. The one set was complete, with elevations and accurate scale measurements. But the things called plans by Mr Gordon were not of that description at all—they were mere sketches, and no builder could have set to work to build by them in that state. A mere sketching out of the basement is no plan at all. Mr Gordon's sketches are said to have been at one time in process, but they have unfortunately disappeared. If they had been here they could have been seen, but they certainly do not appear in the proof under the name of plans, and they have now disappeared. If Mr Gordon's agent had taken the trouble to recover them by diligence, he could have done so, and there might have been some sense in that.

Mr Wilson at first intended, as I said, to build and sell houses on his land. But he did not do so; but sold the ground to Mr Carrick. He bought it originally for £13,000, and sold it to Mr Carrick for £16,000. How can anyone doubt that he got this price mainly by exhibiting the pursuer's plans. I think the use made of Mr Landless' plans is most important, and may be said to have contributed very largely to the defender having got a sum of £3000. It is therefore out of the question that he should not be paid anything for them; and without going further into detail I may say that I think these facts are conclusive against the defence maintained by Mr Wilson, and that the pursuer is entitled to his decree.

Lord Mure—I think the Sheriff is quite right. This is an action to recover professional charges for work done by the pursuer; the charges are admittedly not above the ordinary and proper rates, and he is therefore entitled to recover, unless it can be shown that he agreed to do the work on some other terms. The *onus* of proving such agreement lies clearly on the defender, and the evidence as to it being contradictory, I am not able to arrive at the conclusion that this defence has been proved. The pursuer and the defender and his agent are not at one in regard to it, and I think it a great pity that the terms of the original undertaking or agreement were not shortly put in writing at the time. The pursuer certainly did not understand that he was to furnish these plans gratuitously; and they are complete plans—quite different from the sketches by Mr Gordon, who admits that he undertook to do his work without the ordinary remuneration. And after the pursuer's plans were done, a special application was made to him in December for an elevation plan, to use for showing to the buyer. This Mr Gordon says is not usual in cases of ordinary competition. On the whole case I agree with your Lordships, and I think that even if the evidence had been in favour of there having been a competition, the taking and using of the pursuer's plans to the extent the defender did would form a good ground for Mr Landless' present claim.

Lord Shand—There is a conflict of evidence here as to the terms of the contract between the parties, but the *onus* of proof being clearly with the defender, who alleges an extraordinary and peculiar agreement, I agree in thinking that he has failed entirely to discharge it. The pursuer is quite distinct that he never heard anything of a competition, and that his work was done on the ordinary footing, and the plans themselves go strongly to support that view. On the other hand we have the defender and his agent Buchan; but I cannot reckon them as two witnesses, for an agent who comes into the witness-box in circumstances like these must not be surprised if he is identified to this extent with his client. On that state of the evidence I agree in thinking that the defender is bound to prove the special agreement he founds on; and that even if the original footing was really a competition of plans between the two architects, and the defender afterwards thought fit to change his mind, it would be impossible to hold that he was entitled to say to each of them, "For all your plans and your labour you shall have nothing." But I am very clearly of opinion that when these plans had been prepared (say, on the footing of a competition which was afterwards frustrated by the defender's change of mind), and the defender had made use of them to obtain an advantageous bargain with a purchaser, he was bound to pay for the services which were thus beneficial to him. It does not seem to make any difference that the plans should be used for the purpose of enhancing the value of the ground in the eyes of a purchaser, and not, as originally intended, for the erection of Mr Wilson's buildings upon it. I am not nice to inquire whether the legal principle underlying this case is that of recompense or implied contract or obligation; but I hold that the services were rendered, and must be paid for by a fair and adequate return. On any view of the case I think the pursuer is entitled to succeed.

Their Lordships dismissed the appeal, and found the appellant liable in additional expenses.

Counsel for Pursuer and Respondent—Asher—Geo. Burnet. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender and Appellant—Kinnear—Rhind. Agent—R. P. Stevenson, S.S.C.

Friday, December 17.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

KIRKPATRICK *v.* THE ALLANSHAW COAL COMPANY.

*Lease—Verbal Agreement Modifying Clause of Lease—Acquiescence—*Rei interventus*—Proof—Competency.*

Averments of *rei interventus* and acquiescence will not warrant the admission of proof *prout de jure* as to an alleged verbal agreement to alter the terms of a written lease,