proved or not, I think it is certain that the pilot alone cannot be held responsible for taking the ship out of the dock with such a list, because in the first place the owners and their master and crew are responsible for the trim of the vessel, and the pilot is not. It may be that if a pilot thinks that the vessel is not in such trim as to be navigable with safety it lies upon him to say so, but I do not think it is proved that a reasonably prudent and competent pilot must in the actual circumstances have refused to take the "Sunbeam" down the river: and if that is not proved there is no evidence of violation or neglect of duty on the part of the pilot in question. But if this were doubtful it is a sufficient ground of judgment that even supposing that the pilot was in fault it has not been proved that the master and crew were not in fault also, that is to say, that if the real cause of the ship's failure to answer her helm was the list created by the way in which the port bunkers were loaded, then that is a fault for which the owners were responsible, and therefore, if there was any fault on the part of the pilot at all, which I say again I am not persuaded there was, it is not shown that the accident was due to his fault solely. I therefore concur with your Lordship.

LORD DUNDAS—I think this case is a narrow one, and at the first impression a somewhat puzzling one, but after the fullest consideration that I have been able to give it I have arrived entirely at the conclusion which your Lordships have so fully expressed, and I do not desire to add anything on my own behalf.

LORD M'LAREN and LORD PEARSON were absent.

The Court pronounced this interlocutor:—

"Dismiss the appeal: Recal the findings in fact contained in the interlocutor of the Sheriff-Substitute dated 7th July 1906, and in lieu thereof find that on the afternoon of 13th September 1905 the tug 'Flying Wizard' was lying moored at Partick Wharf with her port-side to the wharf when the steamer 'Sunbeam,' which had come out of the Queen's Dock, passed to the south side of the river in charge of the tug 'Chieftain,' and she then proceeded on her starboard helm to the north side of the river, and ran into the 'Flying Wizard,' striking her on the starboard paddle-box: Find that Partick Wharf is a usual and proper place for tug boats to lie, and there is plenty of room left for the navigation of the river by other vessels: Find that the collision was due to the fault of those in charge of the 'Sunbeam,' and that there was no negligence on the part of the 'Flying Wizard:' Find that the 'Sunbeam' was in charge of a compulsory pilot, but that the defender has failed to prove that the collision was due to the negligence or incapacity of the said pilot: Find in terms of the finding in law in said interlocutor: Affirm the interlocutor of the Sheriff-Substitute dated 3rd September 1906, and of new decern in terms thereof: Find the defender liable in the expenses of the appeal, and remit," &c.

Counsel for the Pursuers (Respondents)—Scott Dickson, K.C.—Sandeman. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defender (Appellant)—Hunter, K.C. — C. D. Murray. Agents—Macpherson & Mackay, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LOWS *v.* GUTHRIE AND ANOTHER (LOW'S TRUSTEES).

Writ — Attestation — Witness Attesting — Evidence Subsequently Given by Witness that Signature neither Adhibited nor Acknowledged in His Presence—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.

"When a deed is *ex facie* perfectly regular and duly tested it cannot be set aside on the sole and unsupported statement of one of the witnesses that she did not really attest what her signature bears that she did attest. It can only be set aside on the clearest possible evidence. . . . [The case] must be determined on a comparison of her statement and the contrary testimony of other witnesses . . . and these conflicting statements must be weighed with reference to the circumstances and the probabilities of the case."

Circumstances in which *held* that a will was valid although one of the attesting witnesses denied that the testator's signature had been adhibited or acknowledged in her presence.

Opinion that section 39 of the Conveyancing (Scotland) Act 1874 does not affect the necessity for an attested signature being adhibited or acknowledged in the presence of the attesting witnesses. *Smyth* v. *Smyth*, March 9, 1876, 3 R. 573, 13 S.L.R. 356, *followed*; Lord Young's opinion in *Geddes* v. *Reid*, July 16, 1891, 18 R. 1186, 28 S.L.R. 879, *commented on.*

Agent and Client—Will—Undue Influence —Onus—Agent Benefitting under Will—Position of Agent not a Law Agent.

A country bank agent, who was not a law agent, prepared and saw executed the will of a testator. He was himself the residuary legatee. The testator's sons sought to have the will set aside.

Held, assuming the bank agent's position towards the testator fell to be treated as the same as that of a law agent, (1) that the rule that a person in a fiduciary relation cannot obtain a gift did not apply inasmuch as this was the case of a legacy and not a gift; and

(2) that there was no rigid rule of law against the agent, but merely a presumption of fact, and though the onus of supporting the will was on him, yet if he gave a clear and consistent account of his conduct which satisfied the Judge before whom he was examined of his perfect honesty, and if his own evidence, being credible in itself, was supported by the other evidence in the case, and if he was able to displace any inference of fact which might be *prima facie* unfavourable, there was no ground for holding that he must nevertheless be found to have failed in discharging the onus.

Query whether the bank agent's position fell to be treated as the same as that of a law agent.

Process—Evidence—Commission—Evidence Taken to Lie in retentis—Competency of Using Deposition, when Witness Subsequently Examined in Court, to Contradict (1) *Statements said to have been Made on a Former Occasion,* (2) *Testimony Given in Court—Evidence Act* 1852 (15 *and* 16 *Vict. cap.* 27), *sec.* 3—*A.S., 16th February* 1841, *sec.* 17.

A deposition taken provisionally to lie *in retentis* cannot, when the witness has subsequently been examined in Court, and proof closed, be afterwards used to contradict (1) statements said to have been made by him on a former occasion, or (2) his testimony given in Court.

The Evidence (Scotland) Act 1852 (15 and 16 Vict. cap. 27), section 3, enacts—"It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

The Act of Sederunt for regulating proceedings in jury causes, of date 16th February 1841, enacts—section 17—"*Commission to Examine Witnesses who cannot be Present at the Trial*— . . . The depositions taken on commission shall not be used if the witnesses so examined shall afterwards be brought forward at the trial."

The Act 1681, c. 5, provides that "no witness shall subscribe as witness to any partie's subscription unless he . . . saw him subscribe, . . . or that the parties did at the time of the witnesses subscribing acknowledge his subscription. . . ."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 39, enacts—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, . . . shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to. . . ."

On 14th November 1905 William Low or Forrest and David Low or Forrest, both residing in Massachusetts, U.S.A., raised an action of reduction and count, reckoning, and payment against, *inter alios*, James Guthrie, bank agent, Brechin, and David Spence, hairdresser and tobacconist there, as the trustees and executors of the late William Low, Montrose Street, Brechin. They sought reduction of Low's will on the grounds of (1) informality of execution, and (2) alleged fraud on the part of Mr Guthrie, and in any event a count, reckoning, and payment with a view to legitim.

A proof was taken.

The *facts* of the case and the import of the *evidence* are stated in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 12th May 1906 granted decree of reduction on the ground that the testator's signature had not been witnessed by or acknowledged in the presence of one of the attesting witnesses.

Opinion.—"The late William Low of 32 Montrose Street, Brechin, who died at Brechin on 9th March 1893, had been married on 13th October 1843 to Margaret Etherington, otherwise Hetherington. Of this marriage there were born three sons—William, James, and David, the latter born 12th January 1850. In 1851 William Low was committed to the General Prison at Perth to undergo a sentence of twelve months for a violent assault. While he was still in prison his wife, to avoid his return, sailed for America with her three children in company with a certain William Forrest, with whom she afterwards lived in America as his wife. Her children by William Low were brought up under the name of Forrest, and continued to reside in America in ignorance of their true parentage and rightful name, though William, the eldest son, was aware from a confidential communication by his mother that Forrest was not their father or her husband. The true state of matters was accidentally discovered by David Low when on a visit to Scotland in 1904, eleven years after William Low's death. Mrs Margaret Etherington or Low, otherwise Forrest, died on 30th April 1880, thus predeceasing her husband William Low. . . . [*His Lordship here repelled a plea to the pursuers' title to sue, holding that they were proved to be the testator's sons.*]

There are two grounds for reduction of William Low's settlement.

"*First*, that the settlement was not validly executed by reason that Mrs Lyall, one of the instrumentary witnesses, neither saw the testator sign nor had his signature acknowledged to her by him.

"*Second*, that the settlement was executed under essential error induced by Mr Guthrie, one of the residuary legatees, or

otherwise was impetrated by him from the testator when the latter was in a state of facility by fraud and circumvention.

"I shall deal separately with the first question, as it depends upon certain isolated facts which have no particular bearing upon the second and more circumstantial point.

"William Low's settlement bears to have been executed on 24th January 1893, about seven weeks before his death, before these witnesses Jane Lyall and Helen Pearson Eaton, now Strachan. Low was at the time suffering from malignant tumour of the liver, of which he died, and though the witnesses differ as to whether he was entirely confined to bed, he was certainly in bed at the time of the execution. The settlement was not prepared by a law agent, but by Mr James Guthrie, banker, Brechin, who took on him to act as agent and to see to its due execution. With the alleged execution there were only three persons concerned besides Low himself, viz., Mr Guthrie, Mrs Lyall, and Helen Eaton, and they do not by any means agree as to the *res gestæ*.

"Helen Eaton was the daughter of a friend of Low, who lived some way outside Brechin. She often called to inquire for and see Low. She had called on her way home, and was with Low on the 24th January 1893, when Mr Guthrie came in. She says that after a little conversation Mr Guthrie produced a deed and asked if Low would 'be able to sign it now,' which he said he would; that after Low signed, which he did raising himself in his bed, she signed next as a witness, and then Mr Guthrie suggested that they should get Mrs Lyall for the other witness. Mrs Lyall was a woman who lived with her husband, a labourer, on the same landing as Low, and during his illness principally attended to his wants. Accordingly, Helen Eaton says that she went for Mrs Lyall, but remained in Mrs Lyall's house till she came back. Helen Eaton, who was then twenty-six years of age, is clear that the will, for she knew it was a will, was not read over to Low before signature, but she states that after Mrs Lyall's return, and while in Mrs Lyall's house, she heard the sounds of reading issuing from Low's house, though the matter was not distinguishable, and she adds that there were pauses as if explanations were being given.

"Mrs Lyall's statement is precise and emphatic that on going into Low's room she was asked or told by Mr Guthrie to append her name to a document which was lying on a table beside Low's bed, and that she did as Mr Guthrie bade her. She says that Low was lying flat on his bed and taking no apparent interest in what was going on, and that he did not speak or do anything by word or otherwise to acknowledge his signature or to request her to witness it. She did not know what the document was. She is also clear that the document was not read to Low in her presence. Having signed her name and added the word witness, though the latter fact she did not remember, she says that she left the room and returned to her own house.

"On the other hand Mr Guthrie asserts that the will was read over by him to Low both before and after signing in presence of Helen Eaton, and that again parts of it were read over by him at the request of Low in presence of Mrs Lyall, and that he was most particular in making Low acknowledge his signature to Mrs Lyall before she signed as a witness.

"Mr Guthrie is thus contradicted by both the instrumentary witnesses as to the reading of the will, and I have only his word against Mrs Lyall's that he obtained Low's acknowledgment to Mrs Lyall of his signature. I find, however, Mr Guthrie contradicted again at a most important subsequent juncture by both Mr and Mrs Lyall, regarding his call on them to obtain Mrs Lyall's signature to the declaration [*a declaration dated 2nd May 1893 by Mrs Lyall, setting forth her knowledge of Low sending for Guthrie, through Spence, in December 1892, with the intention of disposing of his property, and of Guthrie coming on the 5th*], or to a document in similar terms, and on this point I believe their testimony as they substantially agree in all particulars, and I cannot understand its being a fabrication. And there are other points on which I think the general accuracy of Mr Guthrie's recollection is doubtful.

"It may be that Mr Guthrie, who is a man of education and versed in business, is right, but as I find Mr Guthrie's recollection not to be accurate in other matters, as is not surprising at this distance of time, I cannot on the faith of his sole evidence hold it proved against Mrs Lyall's clear and positive denial that Low acknowledged his signature to her. The most that can be said to be proved is that Low remained passive and did not take objection to her signing as witness to a document which he must have known was his will when she was asked to do so by Mr Guthrie. If consequently any miscarriage ensues it must be attributed to Mr Guthrie's injudicious employment of a witness of the class of Mrs Lyall to a will prepared under the peculiar circumstances which attended that of Mr Low.

"It remains to consider what is the effect in law.

"By the Act 1681, cap. 5, where an instrumentary witness does not see the granter of a deed adhibit his signature it is made essential that he shall 'at the time of the witness subscribing acknowledge his subscription.' It is not very easy to ascertain what precisely was determined in the case of *Duff* v. *Earl of Fife*, 2 W. & S. 167, where the subject was extensively canvassed, for I doubt whether the rubric where it uses the word 'heard' is justified by the judgment. But this much at least may be said, that the opinion of the Lord Chancellor, 2 W. & S. p. 211, clearly affirmed the necessity of an acknowledgment of the deed to the witness. But the matter was again considered in *Cumming* v. *Skeoch's Trustees*, 6 R. 963, and it was there determined that an express acknowledgment in words was not necessary to satisfy the statute, but that a clear and explicit though

indirect and inferential acknowledgment, either in words or by acts, would be accepted. There was such indirect acknowledgment in *Cumming's* case but there was none such here, if the view of the evidence which I have found myself obliged to take is correct. And accordingly under the Act 1681, cap. 5, Low's will was not validly executed.

"But that does not end the question, for the effect of the Conveyancing Act 1874, sec. 39, has to be considered. This statute was not pleaded in *Cumming's* case. But it is pleaded here, and by virtue of its provisions it is maintained that Mr Low's settlement, assuming its informality of execution, must receive effect according to its legal import, provided only that I am satisfied that it was *de facto* subscribed by the granter and the witnesses. I have carefully studied this statutory provision and the two authorities quoted which bear on its application, and I am unable to give effect to the above contention.

"There were certain solemnities, statutory and otherwise, necessary prior to 1874 to the probativeness of a deed or of a testamentary settlement. These solemnities were formal, and attention to them or the reverse was necessarily patent on the face of the deed. But the Act 1681, cap. 5, provided regarding one of them something which went beneath the matter of form, and into the essentials of the execution. If a deed bore *ex facie* to be witnessed in the ordinary way by two witnesses, it was probative. But the Statute 1681, cap. 5, made it essential that an attesting witness should see the granter of the deed subscribe, or alternatively that the granter should 'at the time of the witnesses subscribing acknowledge his subscription' to the witness. Accordingly, a witness who subscribes without either seeing the granter subscribe or receiving an acknowledgment of his signature is not truly an attesting witness; yet though he is not truly an attesting witness, nevertheless the execution is formal and the deed probative—that is, as I understand, must receive effect until the vice of its execution is proved and the deed itself cut down.

"The 38th section of the Conveyancing Act 1874 greatly reduces the solemnities of execution, but it does not touch that part of the Act of 1681, cap. 5, with which we are concerned. Accordingly it still remains the law, as stated by Lord Young in *Geddes* v. *Reid* (18 R. 1186), that 'in order to the regular execution of a deed the granter's subscription must be adhibited or acknowledged in the presence of the attesting witnesses.'

"But then the 39th section of the Conveyancing Act 1874 provides that no deed (1) *Subscribed* by the granter, and (2) bearing to be *attested* by two witnesses *subscribing*, shall be deemed invalid or denied effect according to its legal import because of any *informality* of execution, but the burden of proving that such deed so *attested* was *subscribed* by the granter and by the witnesses by whom such deed bears to be *attested* shall lie upon the party upholding the same. I have underlined certain words which appear to me to be essential to the scope of the enactment.

"Now it is maintained that this provision covers the present case and enables the settlement of Mr Low to be set up by proof of the mere fact of subscription by the granter and by the witnesses, and reference is specially made to the case of *Geddes* above quoted.

"My own opinion is that the objection to the validity of Mr Low's settlement is not one of the *formality* of the execution. There is no informality of execution. Everything is formally regular and regularly formal, and the deed is *ex facie* probative. The objection goes deeper and can only be disclosed on proof. I am confirmed in the view that the provisions of the 39th section were not intended to apply to any but patent informalities by the fact that the burden of proof in support of the deed is instantly put upon the party upholding it. It is assumed that it is *ex facie* informal and therefore improbative. Now, the contention of the defenders here, who are upholding the deed, involves that proof must be led before the alleged informality can be disclosed or the onus of proof be shifted on to their shoulders. It really comes to this, that in respect the deed in question bears to be attested by two witnesses subscribing, even assuming the pursuers to have proved that one of the witnesses neither saw the granter sign nor received an acknowledgment of his signature, it only follows that there is an informality of execution established, the consequence of which is that the onus is now placed upon them by the statute—but of proving what? *First*, that the deed so attested was subscribed by the granter, and *Second*, That the deed so attested was subscribed by the witnesses by whom it bears to be attested.

"The defenders contend that this opens the door to them proving the subscription of the granter *aliunde* by comparison of handwriting, evidence of those who are not instrumentary witnesses, and by facts and circumstances, and they say that if they do that it is immaterial that one of the instrumentary witnesses, and if one then both, really attested nothing by their subscription, provided the genuineness of their own subscriptions is proved. This appears to me to—in effect—abolish the instrumentary witness altogether, and not merely the provision of the Act 1681, cap. 5, regarding the essential requisites to his attestation. It also appears to me to stultify the legislative enactment for what would have been the intelligent meaning of confining this means of curing the informality to those cases where the deed *bore to be attested by two witnesses.* Any deed at any distance of time can be made *pro forma* to bear to be so attested. Why then trouble about *pro forma* instrumentary witnesses at all, and not go straight to the proof *aliunde* of the signature of the granter? The answer is plain, I think, that the argument ignores the true meaning of the word 'subscribed' in the statutory phrase writ short thus, 'that the burden of proving that such deed so attested was *subscribed* by the witnesses

by whom such deed bears to be attested shall be upon the party upholding the same.' Subscribed means, in my opinion, not merely manually signed, but subscribed in such circumstances as to make the subscription an attestation.

"I have found it necessary to go into this matter in some detail, because I find that Lord Young in the case of *Geddes* above quoted expresses himself, though briefly, to the contrary. After the quotation which I have already given, viz., 'the law still remains that in order to the regular execution of a deed the granter's subscription must be adhibited or acknowledged in the presence of attested witnesses,' his Lordship adds, 'If there is an omission of this formality it is not now fatal to the deed as formerly, but it puts upon the party using the deed and founding upon it the burden of proving the deed to be genuine.' Lord Young's opinion is concurred in without qualification by the two other judges present, of whom one was Lord Rutherfurd Clark. It is true that a finding to the effect stated by Lord Young was not necessary to the determination of the case for there was failure to prove even *aliunde* the granter's signature. But I am bound to say that the interlocutor of the Court proceeds on the footing of Lord Young's doctrine being accepted. I can hardly, therefore, treat it as *obiter* merely. But as it was not necessary for the case I am, I think, justified in assuming that there was no considered judgment on the point.

"But I do not find it necessary to proceed on my own view that the present case is not one of informality as expressed in the statute. It is enough that I accept Lord Gifford's statement in *Tener's Trustees* v. *Tener's Trustees*, 6 R. at page 1117. 'It is difficult,' his Lordship says, 'to overestimate the importance of this provision. No informality whatever, no informality of execution—the words are universal—is to invalidate a deed, provided only the deed is subscribed by the granter and bears to be attested by two witnesses subscribing, and provided two things are proved, and they may be proved apparently at any time. The two things are, first, that the deed was signed by the granter, and second, that it was signed by the attesting witnesses, that is, that the subscribing witnesses really attested its subscription by seeing the granter subscribe, or receiving his acknowledgment of subscription.' To the first part of this expression of Lord Gifford's opinion I should if necessary except. But the latter part, as I have already explained, I entirely adopt, and it is sufficient for my judgment. I shall therefore find that the settlement of the late William Low was invalid by reason that it was truly attested by only one witness.

"But as my opinion may not be accepted by the Inner House I think it proper to exhaust the cause so far as the evidence is concerned, particularly as much of the evidence requires consideration in order to give effect to the judgment that I am prepared to pronounce.

"The action is one for reduction of the settlement of the late William Low, and alternatively for an accounting with a view to payment of the pursuers' legitim.

"The settlement is a simple one. It nominates and appoints James Guthrie and David Spence sole trustees and executors and residuary legatees, and bequeathes to them the testator's whole means, but subject to the payment of legacies amounting in all to £190.

"The grounds of reduction as stated in condescendence 8 are—(1) essential error induced by the defender Guthrie as to the import and effect of the settlement. The essential error alleged is that the testator believed he was executing a testamentary conveyance in trust merely to these gentlemen, and did not know that he was giving them, and never intended to give them, a beneficial interest as residuary legatees. And (2) facility and circumvention.

"In defence the plea of *mora* is stated, but I think it cannot be listened to in the circumstances. And here I take the opportunity of stating that I think the trustees were aware from the beginning, or at least were bound to have made themselves acquainted with what was a matter of common knowledge among the elder inhabitants of Brechin, that William Low had been married and had had children who had left the country with their mother, and that they, if they survived, would have interests antagonistic to the will.

"As regards the allegation of facility and circumvention, while it must be admitted that Mr Guthrie has placed himself unfortunately and indiscreetly, though I have no doubt perfectly honestly, in a most equivocal position, there is no evidence of facility. Mr Low was suffering from a painful and mortal disease, one of the effects of which was distressing sleeplessness. But it is proved, I think, that he retained his faculties until the end.

"But while I should be the last to throw any imputation on Mr Guthrie's honesty, and sympathise heartily with him in the unfortunate position into which his interference with matters, much better left to the lawyers, has brought him, I must take the facts as I find them, and draw the necessary deductions according to the rules which usually govern human conduct. And the first ground of reduction presents a question of very grave difficulty for Mr Guthrie to meet. Without being a lawyer he has placed himself in a very dubious position, by attempting to manipulate the matter of Mr Low's succession for him in an irregular and very incomprehensible way, and with a result which, on paper at least, produces a residuary benefit to himself.

"The facts are these. After Mr Low had been for some time ill Mr Guthrie appears to have been sent for. Mr Low was possessed of two deposit-receipts for £250 each in the Royal and Clydesdale Banks

respectively, and of a house, 32 Montrose Street, Brechin, valued for duty at £280, though probably not really worth quite so much. These receipts were cashed on 27th December 1892, and produced with interest £506. Mr Guthrie's explanation is that Mr Low wanted to have his settlement made, that, knowing himself to be dying, he was determined to give away without the publicity of a will a large portion of his means, partly because he would not have it known what friends he was favouring, and partly, I am persuaded, because he knew and did not conceal, that he had possible claimants on his succession to disappoint, and wished to disappoint them; part of his means he was, however, willing *pro forma* to put through the medium of a will, because destined to his relations and not merely to his friends in this country. Mr Guthrie states that Mr Low disposed of the proceeds of the deposit-receipts, all but £350, in a manner only known to himself, and as to which he made no communication to him, Mr Guthrie. The remaining £350, Mr Guthrie adds, was put by Mr Low's own hands in the beginning of January 1893 into a series of envelopes [*some produced*], which Mr Guthrie had been directed to bring down, and which Mr Guthrie addressed on his instructions and endorsed with the amounts they respectively contained; some at least, if not all, of the legacies contained in the will were included in the above enclosures. These envelopes were put aside and retained by Mr Low for a fortnight, and were then, according to Mr Guthrie's account, handed to him on the ground that it was not safe for Mr Low to have such a large sum of money by him in his small house. But though Mr Guthrie alleges that Mr Low was express and determined that he was irrevocably parting with the sums contained in the envelopes, there is no suggestion of any indication to Mr Guthrie that they were to be made over by him at once, or anything to show that they were not placed with Mr Guthrie for safe custody merely and to be treated at Mr Low's death as legacies, whether included in the will or not so included. And so in fact they were treated, for they were not parted with by Mr Guthrie on his own showing until a considerable time after Mr Low's death, and even then not all at once. Now, I am of opinion that Mr Low had complete control of this money until his death, and that Mr Guthrie knew that he had, and would not have ventured to part with any of the envelopes until that event.

"Then came the framing of the will, about the contents of which Mr Low showed considerable vacillation, and even in the act of signing, and after, so comported himself as to show that what he signed was not his will unless there were superinduced verbal communings attending it. . . . As for instance, the verbal indication that, after all, the instrumentary witness Helen Eaton was to get the house; and even taking Mr Guthrie's account of it, the incomprehensible transaction about Mr Spence and his interest. [*Guthrie, on the alleged instructions of the testator obtained a letter dated 11th February 1893 from Spence promising to assign the latter's interest in the estate on payment of £15 to himself and £5 to his son.*] As regards the residue, Mr Guthrie states that he and Mr Spence, and after the transaction above referred to as to Mr Spence's interest, he alone, was to get the residue, subject to any directions, verbal or otherwise, which Mr Low might subsequently give, though as Mr Low had calculated pretty closely in his division by envelopes and by will, there was, Mr Guthrie says, really nothing in it.

"I think this is substantially the *species facti* with which I have to deal, though the complexion of much of the details which I need not dwell on has had considerable effect with me. On consideration I have formed the opinion—1st, That the sums enclosed by Mr Low in envelopes and handed to Mr Guthrie, so far as not included in the will, were not effectual donations or bequests, but formed part of Mr Low's succession at his death, and that as Mr Guthrie has intromitted with them he is liable to account to Mr Low's representatives.

"2nd, That Mr Low's will so far as it bequeathes legacies to his relatives to the amount of £190, would have been valid and have received effect had the will itself been duly executed.

3rd, That the verbal statement that Helen Eaton was after all to get the house, which somehow Mr Guthrie has translated into a direction that she should get the liferent only, was invalid and ineffectual even if the will stands, unless Mr Guthrie is the beneficial residuary legatee. (*Hannah's Legatees* v. *Guthrie*, 1738, M. 3837, and *Forsyth's Trustees* v. *Maclean*, 16 D. 343.) [*The fee of the house had subsequently been conveyed on payment of £110, which Guthrie stated just covered what he was out of pocket.*]

"4th, That the residuary bequest to Mr Guthrie himself cannot stand, and that the will, *quoad* that part of it, had it been otherwise valid, must have been reduced *quoad* the residue clause. The case is the converse of *Rooney* v. *Cormack*, 22 R. 761. Without going into details, my opinion is based on the view that Mr Guthrie has not discharged the *onus* which lay upon him of showing that a beneficial residuary bequest to him was the intention of the testator and his free and uninfluenced act, deliberately entertained and carried through with an entire knowledge of its effect. (*Grieve* v. *Cunningham*, 8 Macph. 317.) I am not even satisfied that Mr Low knew that Mr Guthrie was appointed residuary legatee as well as trustee and executor, or if he did, that he understood that its effect was not merely to vest Mr Guthrie with a fiduciary title, but to confer on him a beneficial interest.

"5th, that if the residuary bequest to Mr Guthrie is cut down, the envelope enclosures, other than those which are included in the will as general legacies, and the verbal bequest of the house either in liferent or in fee to Helen Eaton, cannot be raised up as

verbal bequests imposed on the conscience of the executor to the detriment of the legal representatives of the deceased—*Forsyth's Trustees* v. *Maclean*, above quoted. . . ."

The defenders reclaimed, and argued—The evidence of one witness (Lyall) was not enough to reduce a deed which was *ex facie* probative and duly tested. Lyall's evidence was directly contradicted by that of Guthrie, and Guthrie's evidence was in accordance with the probabilities of the case and surrounding facts and circumstances. The fact that Lyall added the word "witness" to her signature inferred that she was actually a witness. Thirteen years had elapsed since the date of her signature, and the evidence showed that her memory was defective. A deed *ex facie* duly and properly executed would not be easily impugned on the ground of alleged informalities of execution, for *omnia præsumuntur rite acta*, and a mere *non memini* would not be sufficient—Bell's Prin., sec. 2229; *Frank* v. *Franks* (1795), M. 16,824, *aff.* 10th June 1809, 5 Pat. App. 278; *Douglas Heron & Company* v. *Clerk* (1787), M. 16,908; *Cleland* v. *Cleland*, December 15, 1838, 1 D. 254; *Morrison* v. *Maclean's Trustees*, February 27, 1862, 24 D. 625; *Cumming* v. *Skeoch's Trustees*, May 31, 1879, 6 R. 963, 16 S.L.R. 574. Under sec. 39 of the Conveyancing Act 1874 it was not essential that a witness should see the granter adhibit his signature or hear him acknowledge his signature. It was sufficient if proved that the granter actually signed—*Geddes* v. *Reid*, July 16, 1891, 18 R. 1186, 28 S.L.R. 879 (Lord Young's opinion). There was no case in the books where an *ex facie* duly executed will had been reduced on the sole testimony of one witness. The onus lay on the party impugning, not on the party supporting such a deed. The Lord Ordinary was wrong in holding that the onus lay on Guthrie. The onus lay on the pursuers, and they had not discharged it. The Lord Ordinary, in short, had looked at the case from the wrong standpoint. (2) The proof showed that the pursuers' averments as to fraud were baseless. Any benefit taken by Guthrie was trifling. Further, this was not a case of agent and client, and therefore the case of *Logan's Trustees* v. *Reid*, June 13, 1885, 12 R. 1094, 22 S.L.R. 744, relied on by the respondents, was not in point. The present case fell within the rules laid down in *Fulton* v. *Andrew* (1875), L.R., 7 Eng. and Ir. App. 448; *Grieve* v. *Cunningham*, December 17, 1869, 8 Macph. 317, 7 S.L.R. 196; and *Weir* v. *Grace*, November 28, 1899, 2 F. (H.L.) 30, 37 S.L.R. 626, to the effect that the drawer of a deed who was in a fiduciary position towards the testator was not barred from taking benefit under it provided he proved that he had acted honestly.

Argued for respondents—(1) The Lord Ordinary was right. The deed in question had not been duly executed. The Act of 1681, c. 5, was still binding, and therefore the informality here was fatal—*Duff* v. *Fife*, May 22, 1862, 2 W. & S. 166. Section 39 of the Act of 1874 (cited by the reclaimers) had not altered the rule. In using the word "witness" the Act meant witness in the proper sense of the term, *i.e*, one actually a witness. The Lord Ordinary was right in holding that in the circumstances of this case the onus of proving that the will was duly executed lay on Guthrie—*Fulton*, *ut supra*. This onus had not been discharged. The evidence of Lyall was corroborated by that of the witness Eaton, and both contradicted that of Guthrie. (2) The onus of proving absence of fraud also lay on Guthrie, seeing that he had really acted as the testator's law agent in preparing his will and had benefitted substantially under it—*Logan*, *ut supra*; *Grieve*, *ut supra*; *Weir*, *ut supra*. It was not necessary to prove fraud. If the testator had acted under essential error induced by Guthrie (as the respondents maintained) that was sufficient—*M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265, 13 S.L.R. 174. In any event, the deed fell to be reduced so far as Guthrie had actually benefitted under it—*Huguenin* v. *Baseley* (1807), W. and T.L.C. i., 247, 14 Vesey 273.

During the discussion on the question of execution, counsel for the reclaimers proposed to read the deposition of the witness Lyall, which had been taken on commission (granted by the Lord Ordinary) to lie *in retentis*. He also proposed to read the report of the commission on the point. Lyall had subsequently appeared in Court and been examined as a witness, and it was to contradict her evidence in Court (and also her statement on a previous occasion) that counsel now proposed to read the deposition. Neither the report of the commission nor the deposition had been put in evidence, and in the Outer House the Lord Ordinary had refused to allow the deposition to be read. In supporting the motion counsel cited the Evidence Act of 1852 (15 and 16 Vict. c. 27), sec. 3, and referred to *Emslie* v. *Alexander*, December 20, 1862, 1 Macph. 209.

Counsel for respondents objected to the course proposed as incompetent, and referred to A.S., 16th February 1841, sec. 17.

The Court in refusing the motion delivered the following opinions:—

LORD M'LAREN—I am not of opinion that this motion can be granted. Under the Evidence Act of 1852, of the working of which we have now had a long experience, it is made competent by sec. 3 to examine a witness "as to whether he has on any specified occasions made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding." Now I do not doubt that the questions put to this witness, as to the evidence which she gave when she was examined on commission, were within the latitude allowed by the Evidence Act. But the point we have now to consider arises under the second part of that section, which provides that "it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on

the occasion specified." Now the report of the commissioner may, in certain events and for certain purposes, become evidence, but it is not now evidence, and it is impossible that it ever can be made evidence *in causa*, for the witness herself has been examined in Court with regard to the same matter. I am unable to see how the report of the commissioner can be admitted as evidence that the witness has made a different statement on a previous occasion. How far it might be possible to cite the commissioner or to prove by the parole evidence of bystanders that the witness made a different statement when she was under examination before the commissioner, it is not necessary to consider. The proof has been closed, and no case has been made for opening up the proof and allowing further evidence. We are not even told that if we did so there are witnesses who could be brought to prove that the witness had varied in her statements. What we are asked to do is to allow the report of the commissioner to be read, and then to see whether it supports the contention that the witness had made a different statement on the former occasion. Now there is no authority for such a proceeding, the nearest case being that of *Emslie* v. *Alexander*, December 20, 1862, 1 Macph. 209, where the Court allowed a deposition to be recovered that it might be collated with the evidence that the witness might give in Court. But that is no authority for the proposition that the mere production of a deposition would be sufficient for the purpose for which it is proposed to use it. Great inconvenience might result from allowing depositions, which the law says are to be superseded if the witness eventually gives his testimony in Court, to be kept alive for the purpose of contradicting what that witness may say in Court. Also, in the long period that has elapsed since the passing of the Evidence Act, there is no record of any such proceeding having been permitted. I do not therefore consider that what we are asked to allow falls within the purpose or the terms of the Act to which we were referred.

LORD KINNEAR—I am of the same opinion. The motion made to us really amounts to this, that a deposition which was provisionally taken to lie *in retentis* should now be put in evidence with the view of contradicting the testimony which the witness subsequently gave in Court. The deposition itself cannot be used as evidence, and if it cannot, the report of the Commission is not evidence at all. The case of *Emslie*, which was cited to us, appears to me to have no bearing on the point, for the question in that case did not relate to a provisional deposition taken to lie *in retentis*, but to a deposition by a bankrupt in the course of his statutory examination. That such a deposition may be used is perfectly clear, for it is the authentic statutory record of an examination to which the Act of Parliament requires that the bankrupt shall submit. I cannot see any analogy between that case and this, which is a claim to read a deposition taken provisionally, to lie *in retentis*, and not to be used at all if the witness subsequently appears and gives evidence in Court.

LORD PEARSON—I am of the same opinion. I think your Lordship's decision is entirely in accordance with practice.

The LORD PRESIDENT was absent.

At advising on the merits:—

LORD KINNEAR—This is an action at the instance of two of the sons of a person called William Low, who died at Brechin in 1893, for the reduction of his will.

The Lord Ordinary has found that the pursuers are two of the lawful children of the testator the late William Low, and accordingly has repelled a plea to title which is founded, as I understand, upon a denial of that fact. We must take it now, therefore, that the pursuers have a perfectly good title to sue, and the only question for us is whether they have made good their alleged grounds of reduction. The will under reduction is a perfectly simple one. It appears that the testator had a sum of money on deposit-receipt, and that he had a house in Brechin of the value, I think, of about £250 or £280. The will leaves his whole estate, heritable and moveable, to James Guthrie and David Spence, whom he appoints executors and residuary legatees, subject to the payment of certain legacies which do not amount altogether to a very large sum. The whole estate is a small one and the legacies do not exhaust it. But it appears that in addition to these legacies the testator had set apart certain sums of money to be given to persons whom he desired to favour, but without naming them as legatees in his will, and that the defender Mr Guthrie was entrusted with the duty of carrying out this intention. These are the facts to be kept in view in considering the grounds of reduction.

The action of reduction is based on two grounds. In the first place, it is said that the will was not duly executed because the testator's signature was not witnessed nor acknowledged in the presence of one of the testamentary witnesses; and, in the second place, the will is said to be reducible because it was obtained by the fraud of the executor and residuary legatee Mr Guthrie.

As to the first point—the due execution of the will—I agree with the Lord Ordinary that this question depends entirely on the Act of 1681, cap. 5, and the law and practice following on that Act prior to the passing of the Conveyancing Act 1874, and that it is not affected in any way by the 48th section of the Conveyancing Act. It was decided in the case of *Smyth* v. *Smyth*, 3 R. 573, that that enactment does not dispense with the presence of witnesses as a solemnity of the execution of deeds, and that it does not repeal the Act 1681, cap. 5, which requires the signature of the granter of a deed to be adhibited or acknowledged in the presence of the witnesses. The

judgment rested on the perfectly plain and obvious ground—which I think was suggested by one of your Lordships in the course of the argument, though the decision itself was not brought before us—that when the Conveyancing Act speaks of "witnesses" it means persons who had in fact witnessed the things which they are supposed to attest. I think that decision is conclusive of the question that was raised on this first point, and I am therefore relieved of the difficulty which the Lord Ordinary appears to have experienced from an opinion ascribed to Lord Young in the case of *Geddes* v. *Reid*, 18 R. 1186. I am not satisfied that the rubric in that case, in so far as it ascribes to Lord Young the opinion to which the Lord Ordinary refers, is really borne out by the terms of his Lordship's judgment, but if that is the true import of what Lord Young says it is at the utmost *obiter dictum* and cannot stand against the formal and direct decision of the Court in *Smyth* v. *Smyth*.

But then the question is, whether the allegation that one of the witnesses did not see the testator's subscription or receive from him any acknowledgment of his subscription has been made out, and on that point I cannot agree with the Lord Ordinary. The Lord Ordinary thinks the pursuers' contention proved, because Mrs Lyall, the witness, says when examined in the box that she did not hear the testator say that the signature witnessed was his; and while she is perfectly certain as to this, she proves nothing else that is material to the question of due execution except the fact that she signed her own name. Now I think upon the former law, as it stands upon a long series of decisions, it is quite certain that this evidence, even if it had been competent, would have been held to have been perfectly insufficient to set aside a deed *ex facie* probative. I do not think we can accept all the former decisions as still binding, because the views that now prevail both as to the competency and effect of parole testimony are widely different from those which govern the decisions in question, but I think the law still remains that when a deed is *ex facie* perfectly regular and duly tested it cannot be set aside on the sole and unsupported statement of one of the witnesses that she did not really attest what her signature bears that she did attest. It can only be set aside on the clearest possible evidence, and I think the evidence of Mrs Lyall in this case is by no means sufficient. It is true that she is positive in assertion, but I cannot assent to the view that the case must be determined on her statement alone. It must be determined on a comparison of her statement and the contrary testimony of other witnesses, especially of Mr Guthrie the defender, and these conflicting statements must be weighed with reference to the circumstances and the probabilities of the case. The witness herself is an old woman. She is examined as to this incident thirteen years after the date when it took place. It appears plainly enough on her own evidence that her memory is not perfect, and her statement that the deed was not acknowledged in her presence is contradicted by the direct and perfectly clear evidence of Mr Guthrie. And in so far as the question depends on probabilities it appears to me in the highest degree improbable that Mrs Lyall's account of the matter should be accurate, because the undoubted facts are that Mr Guthrie, having obtained the signature of the testator to the will in presence of one witness, sent for this other witness, who lived in a house in the same flat, that she might be brought into the room and witness the testator's signature. The evidence is that she was brought for that purpose, and Mr Guthrie says he certainly did call on the testator to acknowledge in her presence that the signature which she was asked to attest was his signature, and that he did so. Now it does appear to me in the highest degree improbable that if Mr Guthrie had intended to be content with the subscription of one witness only he should have sent for another and have her brought into the testator's presence for the very purpose of attesting the deed, and then that he should have been satisfied to take her signature without enabling her to attest it. On the whole matter I think we must take the evidence of Mr Guthrie, supported as it is to a certain extent by the evidence of the other instrumentary witness, and by the undoubted facts of the case, and hold that the pursuers have failed to prove their allegations that the will was not duly executed. It must be remembered that on this point the burden is entirely on the pursuers, and if the matter were left in doubt by reason of a conflict of testimony it must be held that the pursuers have not proved their case.

Now, if the will be duly executed the next and most important question is whether it has been proved that it was not the true deed of the testator, but was obtained by undue influence or fraud. Now, upon that question the Lord Ordinary has repelled the plea that the will should be reduced in respect that "at the time of the making of the said will the said William Low was weak and facile and the defender obtained the said will by fraud and circumvention and by taking advantage of the said weakness and facility of the said William Low to his prejudice"; and in his note his Lordship expresses the clear opinion—first, that although Mr Low was suffering from painful and mortal disease, it is proved that he retained his faculties till the end; and second, that while Mr Guthrie acted indiscreetly in preparing the will, which was partly in his own favour, there is no doubt that he acted with perfect honesty; and his Lordship adds—"I should be the last to throw any imputation on Mr Guthrie's honesty, and sympathise heartily with him in the unfortunate position into which his interference with matters much better left to the lawyers has brought him." The determining facts being thus found in the defenders' favour, I should have thought it followed that they must be assoilzied, because if the testator was of disposing

mind and his instructions were honestly carried out by the person who made his will, there seems to be no reason why the will should not stand. The Lord Ordinary however has taken a different view. He does not repel the fourth plea-in-law for the pursuers, which is, "That the will having been executed by the deceased while under error induced by the defender Guthrie as to its import and effect is void and null and ought to be reduced," but he does not sustain it. I must say I should have thought that plea failed as a necessary consequence of the judgment to the effect that the second plea must be repelled, read along with the opinion which I have just cited from his Lordship's note. While he has given no formal judgment in support of any other ground of reduction than that based on the Act of 1681, he has, however, expressed an opinion that the residuary bequest to Mr Guthrie himself cannot stand, and that "the will *quoad* that part, had it been otherwise valid, must be reduced *quoad* the residue clause." If this opinion had been on distrust of Mr Guthrie's honesty, I should have had great hesitation in setting my own opinion on such a point against that of the Judge who had seen the witness in the box; but, as I have already pointed out, Mr Guthrie has the benefit of the Lord Ordinary's opinion in his favour, and if he was, as his Lordship thinks, perfectly honest, and if the testator understood what he was doing, there seems to be no reason why he should not retain any benefit that the testator meant him to take. It was maintained that the question must be governed by the rule said to be laid down in the case of *Huguenin* v. *Baseley*, 14 Ves. 273, that voluntary donations obtained by persons in a fiduciary relation to the donor, such as that of guardian to a ward or law agent to a client, cannot be retained; and it was urged that though Mr Guthrie was not a law agent he had placed himself in exactly the same position by undertaking the duty of preparing the testator's will, and was therefore under the same disabilities as a law agent would have been when he—even in obedience to the testator's instructions—consented to his own name being inserted in the will as a residuary legatee. But, assuming Mr Guthrie's position to be the same as an ordinary legal adviser of the testator, it has been decided both in England and in Scotland that there is a very material difference in this respect between a gift to an agent *inter vivos* and a benefit under a will. The law is so stated by L.J. Knight Bruce in *Hindson* v. *Weatherell*, 5 De G. M. & G. 381, and by Lord Barcaple in *Grieve* v. *Cunningham*, 8 Macph. 317, and it rests on a very obvious distinction, because the rule in question is that a person is not allowed to obtain an advantage over another whose interests, by reason of the fiduciary position he holds towards him, he is bound to protect. But in the case of a will there is no such conflict of interest and duty as there is in the case of a bargain, because there is no kind of bargain between the testator and the legatee; and accordingly Lord Cranworth in the case of *Boyce* v. *Rossborough* (1856, 6 Clark's H.L. Cases 2), decided that a person who stood in such a fiduciary position towards the testator that he could not bargain with him during his life might yet be instituted in his will as a legatee.

The Lord Ordinary goes, I think, on a safer ground which he finds laid down by Lord Barcaple and also by the Lord President in the case of *Grieve* v. *Cunningham*. It is laid down by these learned Judges, and I do not imagine that any of your Lordships doubt it, that when a law agent makes a will in his own favour the onus of supporting it lies on him and he is not in the same position as any beneficiary who has not been concerned in the execution of the will and who is therefore entitled to say that the deed was duly executed by a person of sufficient understanding and that it is for those who are disputing it to prove that there is ground for setting it aside. I am not satisfied that Mr Guthrie even in this respect stands exactly in the same position as an ordinary legal adviser, because there is the high authority of Lord Brougham in the case of *Hunter* v. *Atkins* (1834), 3 My. & K. 113, to the contrary. In that case Lord Brougham states the rule thus—"There are certain relations known to the law as attorney, guardian, trustee; if a person standing in these relations to the client, ward, or *cestui que* trust, takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, etc., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew . . . but where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished." The confidential adviser employed specially to perform a particular business or write a particular instrument does not, in this view, lie under the same suspicion as an attorney, or one having a general management. I do not propose to your Lordships that we should rest our judgment upon that distinction, but I refer to Lord Brougham's opinion for the purpose of showing that what we have to consider in a case of this kind is not a fixed and rigid rule of law but a presumption of fact the force of which must vary with the circumstances of the case.

The question therefore comes to be, Is there on the whole evidence before us sufficient ground for holding that the will was obtained by undue influence exercised by Mr Guthrie? Now, although there is an onus on the law-agent in these circumstances, that does not imply that he may be required to prove a negative, or to exclude indefinite possibilities for which no foundation has been laid in evidence. If he gives a clear and consistent account of his conduct which satisfies the judge before whom he is examined of his perfect honesty, if his own evidence, being credible in itself, is supported by the other evidence in the case, and if he is able to displace any inference of fact which may be *prima facie*

unfavourable, I see no good ground for holding that he must nevertheless be found to have failed in discharging the onus incumbent upon him. The meaning of obtaining a will by undue influence has been the subject of decision, and in two of the most important cases on the subject in the House of Lords it has been laid down with authority that a will said to have been obtained by undue influence must be proved to have been obtained by fraud, because in the case to which I have already referred of *Boyce* v. *Rossborough*, Lord Cranworth, after examining the grounds upon which undue influence may be sustained to set aside a will, goes on to lay down the general ground in this way. He said—"In order therefore to have something to guide us in our inquiries on this difficult subject, I am prepared to say that influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by coercion or by fraud;" and Lord Halsbury in the recent case of *Weir* v. *Grace*, 2 F. (H.L.) 30, cites *Boyce* v. *Rossborough* and quotes Lord Cranworth's opinion as a sound exposition of the law on the subject, and therefore we have to consider whether there is any evidence, taking the whole circumstances of the case before us into consideration, to suggest that Mr Low was under any misapprehension in making the will which he is said to have made, and, if he was, whether that was due to the undue influence, or, in other words, the fraud of Mr Guthrie. Now upon the whole evidence in the case I must say I am unable to see any shadow of evidence for charging Mr Guthrie with undue influence, or, in other words, with fraud.

A question of this kind must of course be considered with reference to the particular character of the will, and there are only two points to which the Lord Ordinary adverts to which it is necessary to refer. In the first place the will disinherits the children of the testator, and the question is whether that supplies any ground for disputing that it expresses the unbiassed intention of the testator himself. There are cases in which a disinheritance of that kind would raise an unfavourable presumption, because the mere fact that a will disappoints just expectations is in itself a note of suspicion. But in this case it appears to me to be clear on the evidence that what the testator did in disinheriting his children was exactly what he might have been expected to do. It appears that he and his wife were living together in Brechin in 1851, and in that year she deserted him. She emigrated to America with another man, taking the three children with her, and she lived there thereafter with that other man as his wife, and the testator's children were brought up in America as his children. From that time till the date of his death Mr Low, the testator, heard nothing from them. He considered that he owed them no duty of support, and the evidence shows that the last thing he desired was that his estate should go to his children, who with their mother had deserted him under circumstances which certainly were sufficient to estrange his affections from them altogether. Therefore I do not think his disinheriting them a circumstance which tells against the will. The other circumstance to which the Lord Ordinary refers is of a very different kind, and does not appear to me to have any direct bearing on the question whether the will was the true will of the deceased man or not. It appears from the evidence that he desired to make certain gifts in view of his death to persons who were not his relations, but did not desire that their names should appear as legatees in the will. I do not think it at all material to consider his reasons for transacting the business in this way, but what he did was, he drew a certain amount of money he had on deposit-receipt and put sums into envelopes on which he marked the names of certain donees, and these sums were put into the hands of Mr Guthrie, the executor and residuary legatee, in order that he might hand them to the donees. There appears to have been some doubt in the mind of the executor as to whether Mr Low had made complete and effective gifts during his lifetime by having set them aside in the way I have described. I agree with the Lord Ordinary that these were not gifts completely carried out so as to divest the testator, and that in a question between the persons whom they were intended to benefit and executors or residuary legatees, who knew nothing of the testator's intention, they would not be good and effective gifts at all. But then, on the other hand, they were perfectly good against Mr Guthrie, for the money was put into his hands, as he says, for the purpose of his making it over to the donees, and he could not, I think, have set up his right as residuary legatee against their claims, not merely because, as the Lord Ordinary suggests, it would have been a duty on his conscience to carry out what he knew to be the testator's intentions, but because the donees would have good claims against him which they could establish by reference to his oath.

But all that does not tend to throw any doubt on the will so far as I can see. On the contrary, it appears to me to be in favour of and not contrary to the opinion of Mr Guthrie's truthfulness which the Lord Ordinary entertains, and in which, so far as I can judge from the printed evidence, I agree with him. There is no suggestion, so far as I can find, in any of the circumstances of the case that Mr Guthrie made any kind of misrepresentation to the testator which could mislead him, or that he used any influence which could have coerced the testator into acting as an instrument of Mr Guthrie instead of as a free agent making his own will. So far as it goes, the evidence as to Mr Guthrie's influence is all to the contrary, because the pursuers brought a good many witnesses to show that the testator had spoken of him with considerable disrespect and indicated by his manner that he was not a person under whose influence he was likely

to have acted. Accordingly, I am of opinion on the whole matter that this ground of reduction completely fails.

The benefit of the will to Mr Guthrie is however a material fact to be taken into account in coming to a conclusion, and I think it is right to observe that, at the best, the benefit he could procure under the will would be extremely small. I do not desire to go into exact figures on these questions, because there has as yet been no accounting and we have no sufficient evidence to enable us to determine the precise amount Mr Guthrie would have to account for if he were ordered to account under this action, but the evidence, so far as it goes, seems to indicate that after paying the legacies and after making good the *mortis causa* gifts—if one may so describe them—which he had been entrusted to give, and deducting certain expenses, which from his evidence may have been considerable, he would have derived but small benefit from the residuary bequest in his favour. But then I am afraid that even that small benefit must be very greatly reduced, because the pursuers have brought this action to enforce, as an alternative claim—failing their right to obtain an accounting for the whole estate—their right to legitim, and I do not find on record any plea against the validity of that claim. Accordingly, it does appear to me very doubtful whether, if the defender has to account for the portion of the estate which goes in legitim to the children, there will be any material residue left for him. That, however, is a question with which we are not concerned at present.

I think on the whole matter the defenders must be assoilzied from the reductive conclusions, and that the case must be remitted to the Lord Ordinary to proceed as shall be just to dispose of the conclusions for legitim. I think I need hardly say that in the observations I have made on these conclusions I am not expressing any opinion on the question—which has not been argued to us—whether the claim for legitim can be made good or not, but there is no plea on record against the claim, and if there is any doubt about it the parties will have an opportunity for discussing it before the Lord Ordinary when the case goes back to him for further procedure.

LORD PEARSON—I concur in the opinion just delivered.

LORD M'LAREN—I also concur in the opinion of Lord Kinnear.

The LORD PRESIDENT was absent.

The Court recalled the Lord Ordinary's interlocutor, assoilzied the defenders from the reductive conclusions of the summons, and remitted to the Lord Ordinary to dispose of the conclusion for payment of legitim.

Counsel for Pursuers (Respondents)—Wilson, K.C.—Mitchell. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders (Reclaimers)—Hunter, K.C.—A. M. Hamilton. Agents—Sharpe & Young, W.S.

Thursday, July 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'FADZEAN'S EXECUTOR *v.* M'ALPINE & SONS.

Proof — Contract—Innominate Contract—Workmen's Compensation Acts—Agreement to Give up All Claims Arising out of an Accident on Receipt of a Sum of Money—Proof by Writ or Oath, and Prout de jure.

The executor of a deceased workman, who had been in receipt of weekly payments of compensation under a recorded agreement under the Workmen's Compensation Acts, brought an action against the employers to recover £40 on the following averment:—"(Cond. 3) On or about 16th December 1905, after sundry negotiations, the said deceased, through his law agent, offered to accept £40 in full settlement of all his claims, whether under the statutes or at common law, against the defenders, and on or about 29th December 1905 the defenders, through their law agent, accepted said offer. A binding contract was thereby completed between the parties for payment to the deceased by the defenders of the sum of £40."

Held that the averment, read as meaning that the one party had promised to pay £40, and the second party had departed from all other claims, there and then constituting a concluded bargain and making the £40 immediately exigible, was relevant and must be remitted for probation, but that the proof being of an innominate contract of a peculiar character, must be, oath being impossible, by writ.

Question—If, or how far, parole proof is competent to prove an innominate contract? *Downie* v. *Black*, December 5, 1885, 13 R. 271, 23 S.L.R. 188, *questioned.*

Opinion that no obligation to pay money not incidental to one of the well-known ordinary consensual contracts is provable by the law of Scotland otherwise than by writ or oath.

On July 3rd 1906 Thomas M'Fadzean, labourer, Germiston, Glasgow, *qua* executor-dative of the deceased Malcolm M'Fadzean, labourer, brought an action in the Sheriff Court at Glasgow to recover, *inter alia*, £40, against Robert M'Alpine & Sons, contractors, 188 St Vincent Street, Glasgow.

The following narrative is taken from the opinion of the Lord President:—"The pursuer here, Thomas M'Fadzean, is the executor of Malcolm M'Fadzean, a labourer who was engaged in the service of the defenders at Provanmill Gasworks, Glasgow. While engaged in such service he met with an injury, and he made a claim under the Workmen's Compensation Act. The parties seem to have come to an agreement without resorting to arbitration, and com-