and I think the fasciculus of sections beginning with 107 really applies to the position where you have not taken a statutory title; then you may call upon the person to redeem. When the statutory title has been taken I think it has been practically held by the Court in the first and second *Inverness* cases, 20 R. 551, 1909 S.C. 943, that there there and then emerges a right in the superior to compensation, and he is not barred by the fact that the promoters have been allowed access to the ground. I do not think it matters whether the dictum of the Lord President in the *Elgin* case, 11 R. 950, is or is not right, for it is at least settled by the second *Inverness* case.

The result of that would be that the date would be that which the Lord Ordinary has taken here, namely, that of the execution of the statutory title in 1875, and not as my Lord Johnston thinks when the claim was made. But as it happens there has been an award here, and the sum is precisely the same at whichever date you take it, and the result is the same as that at which Lord Johnston has arrived, for although the date is different, it is quite settled by the case of *Caledonian Railway Co.* v. *Sir William Carmichael*, 2 H.L. (Sc.) 56, that interest is not payable until the demand is made, and consequently interest is not payable here because the superior made no demand. The view of the House of Lords, further, is that interest can never be due unless a person is in some way in default of paying. The sum of course is that found by the arbiter. The £500 which was paid in October 1877 must be taken as a payment to account of the debt due but not demanded, and consequently the sum now payable under the decree will be the £885 minus £500, with interest upon the difference between these sums from the date of the demand in 1903.

LORD KINNEAR—I agree with the Lord President.

LORD SALVESEN was sitting in the Second Division.

The Court pronounced this interlocutor—

"Recal said interlocutor: Decern and ordain the defenders under the first petitory conclusion to make payment to the pursuers of the sum of £385, with interest thereon at 5 per centum per annum from the 25th day of February 1903; and further decern and ordain the defenders to make payment to the pursuers of the sum of £307, 6s. 1d. sterling, in terms of the second petitory conclusion of the summons: Find the pursuers entitled to expenses, and remit," &c.

Counsel for Pursuers (Respondents) — Solicitor-General (Hunter, K.C.) — Chree. Agents—Melville & Lindesay, W.S.

Counsel for Defenders (Reclaimers) — Clyde, K.C.—Blackburn, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Thursday, November 10.

FIRST DIVISION.

[Lord Cullen, Ordinary.

SMITH AND OTHERS *v.* OLIVER.

Proof—Contract—Innominate Contract—Writ or Oath—Promise—Mandate—Rei interventus—Agreement to Leave Money by Will.

The finance committee of a church, as trustees for behoof of it, raised an action against the executor-dative of a deceased lady for declarator that he was bound to pay them a sum of £6000 odds. They averred that the deceased, by representing that she would be responsible for the increase in cost, had induced them to give orders for the erection of a church on a more expensive scale than they had originally proposed; that she had given money from time to time towards the increased cost; that she had, however, been unable to give out of her capital owing to it being settled in England, and consequently had undertaken to leave the necessary money by her will.

Held that these averments did not amount to an averment of mandate, or of any onerous contract, but merely of a promise to pay or leave by will, and could only be proved by writ.

Millar v. *Tremamondo*, January 29, 1771, M. 12,395; and *Edmondston* v. *Bruce or Edmondston*, June 7, 1861, 23 D. 995, *followed*.

The Most Reverend James Augustine Smith, Roman Catholic Archbishop of St Andrews and Edinburgh, residing at 42 Greenhill Gardens, Edinburgh, and others, being the members of the Finance Committee of the Roman Catholic Church in the Archdiocese of St Andrews and Edinburgh, and, as such, trustees for behoof of the said church in the said Archdiocese, raised an action against James Henry Edward Anscombe, otherwise known as Edward Oliver, executor-dative of the deceased Mrs Julia Catherine Squance or Oliver, as such executor and as an individual.

The pursuers sought to have it found and declared that the sum of £7000, or such other sum as the Court might fix, was a true, just, and lawful debt resting-owing by the deceased Mrs Oliver to the pursuers, and that they were entitled to payment thereof out of her estate, and to have the defender ordained to make payment thereof.

The pursuers' averments appear sufficiently from the opinion of the Lord Ordinary (Cullen), and are summarised in the opinion of the Lord President.

The pursuers pleaded — "(1) The said deceased Mrs Oliver having undertaken to make payment to the pursuers of the sum of £7000 upon condition that the pursuers erected a church in accordance with her desires, and the pursuers having erected

the church accordingly, and paid the cost thereof, and Mrs Oliver having failed to implement her said obligation, the said sum of £7000 is a debt due and resting-owing to the pursuers out of the estate and effects of the said Mrs Oliver, and the pursuers are entitled to decree of declarator as craved. (2) The pursuers having, as Mrs Oliver's mandatories, entered into the contracts and caused the church to be built as aforesaid, the defender, as executor or otherwise so far as *lucratus* by the succession, is liable to pay the amount sued for. (3) Mrs Oliver having agreed and bound herself to provide by will the cost of the said church to the extent of £7000, the pursuers are entitled to decree as concluded for. (4) The defender, as representing the said deceased Mrs Oliver, and intromitting with her estate and effects to the extent condescended on, being liable for the obligation incurred by her as aforesaid to at least the value of £7000, the pursuers are entitled to decree as craved, with expenses."

The defender pleaded, *inter alia*—"(1) The pursuers have no title to sue. (3) The pursuers' averments, so far as material, being unfounded in fact, the defender is entitled to absolvitor. (4) The alleged undertakings by the late Mrs Oliver having been enforceable, if ever, more than five years ago, and being in their own nature innominate contracts or *nuda pacta*, cannot be proved except by her writ or oath."

On 5th July 1910 the Lord Ordinary (CULLEN) pronounced this interlocutor—"... Repels the first and second pleas-in-law for the defender: Sustains the fourth plea-in-law for the defender, to the effect that the alleged obligations by Mrs Oliver can be proved only by her writ; and in connection therewith allows the pursuers a proof *in habili modo*, and to the defender a conjunct probation: *Quoad ultra* allows the parties a proof of their averments, and to the pursuers a conjunct probation. . . ."

Opinion.—"The pursuers of this action are described in the summons as the whole present members of the Finance Committee of the Roman Catholic Church in the Archdiocese of St Andrews and Edinburgh, and, as such, trustees for behoof of said church in said Archdiocese, and the said Finance Committee as such, and as trustees foresaid. The defender is the executor-dative of the deceased Mrs Julia Catherine Squance or Oliver, who resided in Midlothian, as such executor and as an individual.

"The subject-matter of the action is connected with the erection of a Roman Catholic church at Slateford, which was begun in 1890 and finished apparently in 1896. The priest in charge of the mission there was Father Forsyth. Mrs Oliver was a member of the congregation, and she made various contributions towards the cost of erection of the church. Over and above these contributions made during her life, the pursuers in the present action claim the sum of £7000 as payable to them out of the estate left by her at her death. She died on the 11th June 1908. The summons concludes for (1) declarator that the said sum of £7000, with interest from 11th June 1908, is a true, just, and lawful debt resting-owing by her to the pursuers, and that the pursuers are just and lawful creditors for the same, and are entitled to payment thereof out of her means and estate; and (2) decree for payment of said sum of £7000 and interest against the defender.

"The general nature of the case presented by the pursuers is that Mrs Oliver took a great interest in the erection of the church, that from time to time she intimated desires as to the manner in which it should be constructed and equipped in various particulars, and that she obliged herself to the pursuers to provide various sums amounting to £7000 towards the cost of it. No written obligation by Mrs Oliver for any part of the £7000 is condescended on. Mrs Oliver's alleged undertakings to provide the £7000 are said to have been communicated by her orally to Father Forsyth at various interviews she had with him between the years 1890 and 1896.

"The pursuers' statements on record as to the undertakings or promises made by Mrs Oliver, while they represent her as having assured the pursuers of her pecuniary support, to put the matter generally, exhibit considerable variation in expression. This is perhaps not unnatural, looking to the circumstances of the case. Mrs Oliver was a well-off member of the church to whose wishes Father Forsyth would be inclined to defer on receiving her assurances of pecuniary help, without taking the risk of estranging her interest and goodwill by insisting on getting from her more solemn or precise expressions of obligation than those which she colloquially resorted to. Mrs Oliver's affairs were in this position that her income was largely derived from trust funds of which the capital was not at her command during her lifetime, so that it was unsuitable that she should either make present payment of large sums of money, or undertake to pay them during her lifetime. The variation in the expression of the undertakings or promises ascribed to her on record, however, introduces a considerable difficulty into the pursuers' case.

"In article 8 the pursuers state that in December 1893 Mrs Oliver promised to give to Father Forsyth the annual sum of £150 upon a certain condition, 'and to make provision by will or otherwise that at her death the capital sum represented by this annual payment would be paid to the church.' The promise as to the annual payment of £150 was incorporated in writing and was duly fulfilled. The other part of the alleged promise was apparently matter of oral statement.

"Condescendence 9 sets forth that thereafter Mrs Oliver at an interview with Father Forsyth 'promised and undertook' that if certain plans were adopted and carried out 'she would be responsible for' £3750 of the cost. This alleged promise and undertaking apparently superseded the promise of a capital sum referred to in condescendence 8.

"Condescendence 11 refers to certain alterations on the plans of the church desired by Mrs Oliver, and says that at an interview with Father Forsyth in 1894 she explained to him that the sum 'which she had undertaken to leave to the church at her death' was greater than that for which he had given her credit, and should be, not £3750 but £4500, 'which was the sum she intended to leave to the church at her death, and she promised and undertook to contribute and pay this sum towards the cost and expense of the buildings if her views as to the plans were adopted.'

"Condescendence 12 sets forth that Mrs Oliver 'undertook to increase the sum to be set aside at her death' by £1000, making the total amount £5500 'to be paid by her' if her wishes were given effect to.

"Condescendence 15 sets forth that in the autumn of 1895, when the matter of the flooring of the church came up for consideration, Mrs Oliver desired that Minton tiles should be used, and that at a meeting with Father Forsyth in or about October 1895 she 'undertook to add £500 to the amount which she had undertaken to provide for the church, thus bringing out the total sum at £6000.'

"In condescendence 16 it is stated that Mrs Oliver thereafter insisted on the tiles being encaustic, and in writing expressed her willingness to supply the increased cost. The increased cost was £99, 10s. 3d. This sum is not sued for.

"Condescendence 20 sets forth that Mrs Oliver pressed for having a particular kind of heating apparatus installed in the church, saying that she would otherwise be debarred from entering it, and that 'she undertook that if the installation were made she would provide an additional £1000' to meet the cost of it and of certain other alterations, 'thus bringing the total amount which she had undertaken to provide up to £7000.'

"Condescendence 21 sets forth that Mrs Oliver on several occasions, and particularly during March 1897, endeavoured to obtain money from an English trust estate in which she had an interest, for the purpose of implementing her obligation to the pursuers during her lifetime, but that she did not succeed in doing so. In condescendence 22 it is stated that she informed the pursuers of this, 'and from time to time from 1893 onwards she stated that, failing her getting such cash in her lifetime—the difficulty being in large measure due to the settlements under which she received her income—she would by her will provide that the necessary funds should be provided at her death,' and that the 'pursuers implicitly relied on and acted on these statements.'

The pursuers then go on to state that in 1896 Mrs Oliver instructed her agent to prepare a codicil 'bequeathing a sum of £6000 to the pursuers;' that a draft codicil 'giving effect to Mrs Oliver's wish' was accordingly prepared and sent to her, and was by her submitted to Archbishop Macdonald; that about a year afterwards, in September 1897 (the codicil mentioned not having been signed) Mrs Oliver wrote to her agent that she thought it would be well not to delay any further the adjustment of the codicil, and thereafter stated to him that she considered herself bound for payment of not less than £6000 to meet the extra cost of the buildings incurred in deference to her wishes; that a second draft codicil was thereafter prepared bequeathing a sum of £6000 to the pursuers, together with an additional sum of £1000 to meet the payment of the wages of a sacristan; that this new draft codicil was sent to her, and that several minor alterations were made upon it giving effect to suggestions from Archbishop Macdonald and Mrs Oliver; that a further draft prepared on her instructions was sent to her, and was returned by her for extension, and was extended; that the extended document was sent to her for signature, but that she never signed it. The pursuers say that they were unaware until her death that she had never signed it.

"In condescendence 24 the pursuers proceed to characterise their present claim as one arising *ex mandato*. They say—'Mrs Oliver having undertaken to provide a sum of £7000 on condition that a church was erected in accordance with her desires, all as aforesaid, and having regularly paid the sum of £150 per annum in name of interest upon a loan for the building of the church, the pursuers on their part, in reliance upon Mrs Oliver's said obligation, and as her mandatories and acting on her instructions, caused the church to be erected in accordance with her desires at a cost greatly exceeding that which they would otherwise have incurred. . . . In agreeing to the erection of the church in question at the said cost, and in making contracts for the work, the pursuers relied on the promises and undertakings and obligations by Mrs Oliver, and gave the necessary instructions and entered into the necessary contracts as her mandatories on the footing and in the belief that if the church was built as she desired (as was done) she would provide money to the extent of £7000 to defray the cost thereof, and Mrs Oliver instructed and authorised the pursuers to enter into said contracts and to undertake liability thereunder on the promise, undertaking, and obligation, that she would provide said £7000 either during her lifetime or by provisions in her testamentary writings.'

"The defender's first plea-in-law is that the pursuers have no title to sue. In support of it they contend that any obligations alleged to have been undertaken by Mrs Oliver were undertaken to Father Forsyth and not to the pursuers. I am not prepared to sustain this plea. It is averred (Cond. 3) that Father Forsyth throughout acted for and represented the pursuers, and also (Cond. 4) that in the whole communings between her and Father Forsyth Mrs Oliver knew that he was acting for and representing the pursuers. On these averments it appears to me that the pursuers have set out a sufficient title to sue for implement of any obligations which Mrs Oliver may have

given to Father Forsyth as the agent, and known by her to be the agent, of the pursuers. in connection with their undertaking of building the church on their land.

"The defender's second plea is that the pursuers' averments are irrelevant. In support of it he argues (1) that the pursuers' averments do not clearly show what was the precise nature of the obligations, if any, undertaken by Mrs Oliver, whether to pay the money during her life or to charge it on her succession at her death; and (2) that according to the averments any obligations originally undertaken by Mrs Oliver were, when she found herself unable to raise money to meet them during her life, cancelled with the pursuers' consent, and superseded by a mere expression of intention on her part, short of an obligation, to make them beneficiaries under her will to the extent of £7000, with which mere expression of intention the pursuers agreed to rest content.

"The defender concedes that obligations of the kind which the pursuers seek to ascribe to Mrs Oliver do not require writing for their constitution. The mode of proving such obligations is another matter, to which I shall advert in a moment. While I sympathise with the defender's view that the pursuers' averments as to the undertaking of the alleged obligations fall to be examined carefully, I think that the defender's characterisation of them as above stated does not quite do them justice. On fully considering them I think, although with difficulty, that fairly read they amount to this, that Mrs Oliver undertook obligation to the pursuers that she would by will provide payment to them of the sums sued for out of her succession at her death, This is an obligation of an unusual kind. A will is an inherently revocable instrument. To speak of an irrevocable obligation to make a will is not a happy use of words. An obligation by a husband in an antenuptial marriage-contract to provide by will his whole estate to the children of the marriage is a settlement on them of the free estate at his death, entitling them to claim it whether a will be actually made or not. And so a proved obligation to provide some person by will with a named sum of money will, I take it, constitute a claim in the obligee for that amount against the free succession of the granter, preferably to his heirs *ex lege* or testamentary legatees. In such cases the fact that a will is contemplated *ex figura verborum* may give rise to the question whether on a due construction of the language used by the alleged obligant it imports an actual obligation, or a mere expression of intention. In the present case it appears to me that the pursuers' averments sufficiently set forth an obligation undertaken by Mrs Oliver. Following the views above indicated the pursuers may not be entitled to a declarator in the terms sought by them. But they will be entitled to insist in the conclusion for payment if they prove their case.

"The next question is as to the mode of proof of the alleged obligation. The pursuers contend that it may be proved by parole evidence. As already stated, they (cond. 24) seek to characterise the relation between Mrs Oliver and them arising out of the course of actings alleged as having been that of principal and agent; and in accordance with this view they maintained at the hearing that the facts alleged infer that Mrs Oliver, as principal, could have insisted on the alterations which she desired in the construction of the church, and to defray which she promised the sums sued for, being carried out by the pursuers; and that she incurred liability to the tradesmen whom the pursuers as her agents employed to do the work. I do not think that the facts averred disclose such a relation of principal and agent. Nor do I think better founded the alternative view maintained at the hearing that these facts infer the existence of a contract of joint-adventure between the pursuers and Mrs Oliver.

"The averments do not appear to me to disclose a mutual contract of any kind. The obligations ascribed to Mrs Oliver were unilateral. There were no counter stipulations prestable against the pursuers. The alleged obligations were of the nature of conditional promises gratuitously undertaken by Mrs Oliver. I am of opinion that they can be proved only by her writ. The pursuers say that they have duly fulfilled the conditions attached to the promises, and they argue that, *esto* while matters were entire the promises were proveable only by writ, the fulfilment by them of the conditions operates, *rei interventu*, to set them free from this restriction and opens the door to parole evidence. No authority was cited in support of this view. I cannot see how the pursuers, by first proving certain facts as to the mode in which they built their church, and by asserting that these facts amount to a fulfilment of conditions upon which an unproved promise was given by Mrs Oliver, can release themselves from the rule of law which requires that the promise itself be proved by writ or oath."

The pursuers reclaimed. The defenders at the hearing intimated that they did not propose to argue quinquennial prescription referred to in plea 4.

Argued for the pursuers and reclaimers —This was not a case of a *nudum pactum* or mere promise to pay money or leave it by will. Mrs Oliver had, owing to her representations that she would pay the increased cost, instructed and induced the pursuers to make specific changes in the design and construction of the church. She was interested in the promotion of a common object, namely, the building of the church, and had an interest in what was to be the sort of church in which she was going to worship, and accordingly the obligation undertaken by her was not gratuitous— *Walker* v. *Milne and Others*, June 10, 1823, 2 Sh. 379; *Dobie* v. *Lauder's Trustees*, June 24, 1873, 11 Macph. 749, 10 S.L.R. 524; *Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39, *per* the Lord Justice-Clerk, at p. 41, 6 S.L.R. 81; *Hawick Heritable*

Investment Bank, Limited v. *Huggan*, October 31, 1902, 5 F. 75, *per* Lord Kyllachy at p. 78, 40 S.L.R. 33; *Paterson* v. *Paterson*, February 3, 1893, 20 R. 484, 30 S.L.R. 646, which was referred to with approval in *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, 1909 S.C. 472, 46 S.L.R. 217; Bell's Principles, sec. 8. The contract was of the nature of mandate, and even if it were not mandate but an innominate contract, it was not of an unusual nature, and accordingly the proof should not be confined to writ or oath—*Downie* v. *Black*, December 5, 1885, 13 R. 271, 23 S.L.R. 188, *per* Lord Shand, quoting Lord Deas in *Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672.

Argued for the defender and respondent—The pursuers' case resolved itself into either a promise to pay money or a promise to make a will. Such a promise could only be proved by writ—*Johnston* v. *Goodlet*, July 16, 1868, 6 Macph. 1067, at 1072; *Millar* v. *Tremamondo*, January 29, 1771, M. 12,395; Stair, i, 10, 4. As to the *Melville Monument* case—*Walker* v. *Milne and Others*, *cit. sup.*—they referred to *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, at 590, 12 S.L.R. 381.

At advising—

LORD PRESIDENT—The pursuers here are the members of the Finance Committee of the Roman Catholic Church in the Archdiocese of St Andrews and Edinburgh, and, as such, trustees for behoof of a certain church which has been erected in Dalry, a suburb of Edinburgh. The defender is the executor-dative of the deceased Mrs Oliver, who lived in Edinburgh, and who was a member of the congregation of the church. The object of the action is to have it declared that the defender is bound to pay a sum of, roughly speaking, £6000 to the pursuers. Briefly put, for the purpose of explanation, and not in the exact words used by the pursuers, the story is this—that the deceased Mrs Oliver was a very interested and zealous member of the congregation; that she was very interested in the building of a new church; that it was a poor neighbourhood, and the church was planned upon economical lines. But Mrs Oliver, who was a lady of means, not only interested herself in the building of the church, but helped with contributions, and it is said, in particular, that in many things connected with the structure and internal decoration and heating of the church she urged those who were responsible for the building, and especially the priest in charge of the church, to launch out into more expensive construction upon the assurance that she would make up the difference in cost entailed by such construction. She gave money from time to time, but although she was anxious and willing to give a capital sum she was not able to do so because her money was settled in such a way in England that she could not get hold of a capital sum for the purpose, and accordingly she said she would make that all right in her testamentary arrangements, as she could deal with her money by will although she could not give a sum during her lifetime. This is the story of the pursuers in ordinary language.

The Lord Ordinary has held that the outcome of the pursuers' averments is, that Mrs Oliver made a promise to leave a certain sum of money in her will; and that such a promise can be proved only by writ. A reclaiming note has been taken to your Lordships, and the argument before us was that such a promise could be proved by parole. The argument of the reclaimers was strenuously directed to attempting to make out that there was a contract here, and it was said that although there is a rule that innominate contracts of an unusual character can only be proved by writ, yet this was not a contract of such an unusual character as to exclude parole proof. Now I think the first objection to that argument is this, that look at the averments with all the indulgence that you like, the outcome will always be that there is in truth no contract at all averred here, but merely a promise to pay. And if that is so, I suppose that it is very well-settled law that a gratuitous promise to pay can be proved only by writ. It is vain to try and make out that this was a mutual contract, or that it was a contract of agency. The simple answer to all that is this, that, so far as agency is concerned, no one supposes that a tradesman could have had an action against the lady; that, so far as mandate is concerned, there was no mandate to do anything for the mandant; and that so far as mutual contract is concerned the lady was getting no benefit except in the sense in which anybody may be said to get something when anything is done in which he is interested. Now it is quite well settled by a series of cases that a party cannot turn what is in its nature a mere promise into a contract, so as to be allowed to prove it by parole, by simply averring that on the faith of the promise certain things were done by him — that is to say, he cannot turn a promise into a contract by *rei interventus*, so to speak. That was conclusively settled by an old case, which I think has been held to be law ever since. It is *Millar* v. *Tremamondo* in 1771, M. 12,395. Millar brought an action against Angelo Tremamondo for the performance of certain promises alleged to have been made by him in the view of Millar's marrying his daughter, and craved to be allowed a proof of them *prout de jure*. The defender maintained that the promises alleged being merely verbal and gratuitous were not proveable by witnesses. But Millar averred that on the faith of these promises he had married the defender's daughter, as he had, and there is a long argument given in Morison, but set forth in greater detail in Lord Hailes' Decisions at p. 409, from which it is evident that what was argued was that there was *rei interventus*, as the pursuer had married the defender's daughter. Now, as everyone knows, marriage is an onerous consideration, but nevertheless all that did not avail. The case was twice before the Court, and both times was decided in the

same way. The decision, although a narrow one, was in the end that by the law of Scotland the promises could be proved only by writ, and, with a gleam of humour which does not always appear in the reports, it is stated in Lord Hailes' report that the end of it was that "Millar did not reclaim. He told his counsel that he would not give the Court any further trouble; and at the same time declared that he would not put his father-in-law upon oath lest he should perjure himself."

That case was followed by the case of *Edmondston* (23 D. 995), which, so far as a promise is concerned, is very like the present case. There the promise was to leave money by will, and the consideration upon the other side was that the other person, who was a medical man, should settle himself in practice in the district. The decision there was to the same effect as in *Millar's* case. These cases settle the law, and settle it quite conclusively. I have no doubt, of course, that it is perfectly possible for one to bind himself in his lifetime to leave something in his will. I think that was also settled by a series of cases of which the most recent is *Paterson* (20 R. 484), and this is recognised in the case of *Mackenzie* (1909 S.C. 472). But although it is quite possible for one to so bind himself, I do not think it has ever been suggested that proof of his doing so could be by anything except writ, and—although this is not perhaps entirely conclusive—it would certainly be a most extraordinary result if at one and the same moment the law was that a nuncupative will for more than one hundred pounds Scots was not good, but that nevertheless it was possible to prove by parole a promise to make a will. The rule may in individual cases cause hardship, but it is a salutary rule on the whole, because if it was allowable to prove by parole that a person had promised to leave a sum by will, there might be no end to the imposture which might be practised on the Court. In this particular case one feels sure there is no imposture, and one's sympathies are very naturally with the people who spent money on the faith of this promise, and so far as the deceased lady is concerned I think it is quite evident she meant to carry it out in her codicil. Unfortunately she did not sign her codicil, and when a person does not sign a codicil the law will not go into the motives but will presume that she changed her mind.

Accordingly I think that the interlocutor of the Lord Ordinary is right, and should be adhered to.

LORD KINNEAR—I am entirely of the same opinion.

LORD SALVESEN—I concur. I think the case is ruled by the two decisions to which your Lordship has referred.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Dean of Faculty (Dickson, K.C.) — Howden. Agent—William Considine, S.S.C.

Counsel for Defender (Respondent) — Murray, K.C—Pringle. Agents — Pringle & Clay, W.S.

Tuesday, November 22.

SECOND DIVISION.

DAMPSKIBSELSKABET "NORDSOEN" *v.* MACKIE, KOTH, & COMPANY.

Arrestment—Recall—Freight—Petition for Recall by Third Party on Averment that Freight Arrested Belonged to Him—Competency.

A brought an action against B, a foreign shipowner, and to found jurisdiction, and on the dependence of the action, used arrestments in the hands of C. D brought a petition for their recall, averring that certain freight arrested belonged to him, and that B, the defender in the action, had no right or title thereto. He moved for a proof of his averments.

The Court *dismissed* the petition, holding that the ownership of the money said to have been attached could only be determined in a process to which all the competing parties were convened.

In October 1910 Mackie, Koth, & Company, coal exporters and shipping agents, Leith, raised an action in the Court of Session against Alfred Christensen, shipowner, Copenhagen, as managing owner of the s.s. "Sirius" of Copenhagen, and as an individual. To found jurisdiction against him, and on the dependence of the action, they arrested in the hands of Macpherson & M'Laren, Limited, Grangemouth, two sums of money amounting in all to £600, "due and addebted by them" to the defender.

Dampskibselskabet "Nordsoen" brought a petition for recall of the arrestments, averring, *inter alia*, "that the said Alfred Christensen is now managing director of the petitioning company. That the petitioners were not owners of the s.s. 'Sirius' at the time when the debt alleged to be due by the said Alfred Christensen, as managing owner thereof or as an individual, was contracted, and never have owned that vessel. The petitioners understand that the 'Sirius' belonged to the Dampskibselskabet 'Urania.' . . . . . That the petitioners are the registered owners of the s.s. 'Kronprins Frederick,' and that that vessel arrived at Grangemouth on 22nd October 1910, and there discharged her cargo, the consignees entitled thereto taking delivery thereof. The whole freight due in respect of said cargo belongs to the petitioners, and the said Alfred Christensen has no right or title thereto. That on 25th October 1910 the said Mackie, Koth, & Company, to found jurisdiction, and on the dependence of the said action against the said Alfred Christensen, used arrestments in the hands of Macpherson & M'Laren,