to which I have referred, that interlocutor is still subject to appeal. Moreover, the cause is still of the value of £28, because if we decided in favour of the appellant, his first motion would be for authority to uplift the £28 consigned. That clearly shows that even now there remains the value of £28 in the case before it can be taken out of Court.

There are other grounds upon which the competency of the appeal might be supported, which it is unnecessary to consider.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court repelled the objections to the competency of the appeal.

Counsel for the Pursuers—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Defender—J. Thomson. Agent—Wm. Balfour, Solicitor.

Tuesday, May 30.

FIRST DIVISION.

[Sheriff Court of the Lothians and Peebles.

LADY DENMAN AND ANOTHER, PETITIONERS.

Executor — Competition — Nomination of Executor--Claim of Next-of-kin.

A petition was presented by the next-of-kin of a deceased lady craving to be decerned her executrix-dative. Certain holograph testamentary writings had been left by the deceased. In the first of these, which contained no direct appointment of an executor, occurred the words "My executor Mr Torry to get £100." The second document, which constituted a general settlement, contained no direct appointment, and no reference to Mr Torry by name, but contained the words "My executor to have £100." A petition was presented by Mr Torry for confirmation as executor-nominate.

There was also presented a petition for the appointment of a judicial factor by certain of the residuary legatees and general disponees of the deceased. It contained averments to the effect that the next-of-kin was incapacitated by age and infirmities from properly administering the estate.

The Court *preferred* the claim of the next-of-kin of the testatrix.

Observed (*per* Lord Kinnear) that the question of the respective capacity of the claimants to administer an estate was not a relevant consideration.

Miss Helen Aitchison, Alderston, Haddington, died on 29th November 1898. She left certain holograph testamentary writings. The first of these, which was dated October 1897, contained various legacies to charitable institutions and to other beneficiaries, and the following words:—"My executor Mr Torry to get £100." The second document dated 1898 constituted a universal settlement. By it legacies were given to charitable institutions, and to others, and Lady Denman the sister of the testatrix was given a liferent of the residue of her estate. No reference was made to Mr Torry by name, but the document contained the words "My executor to have £100."

On 15th March 1899 a petition was presented by Lady Denman, the only surviving sister and next-of-kin of Miss Aitchison, in the Sheriff Court of the Lothians and Peebles craving for her appointment as executrix-dative of her sister.

Thereafter on 22nd March a petition was presented in the Bill Chamber by Mr Andrew Scott, C.A., Edinburgh, and others as representing the charitable institutions who were Miss Aitchison's residuary legatees and general disponees, craving the appointment of a judicial factor on Miss Aitchison's estate. The petition contained averments that Lady Denman was in her 74th year and an invalid, that she was unacquainted with business matters, and that by reason of her age she was unfit to be entrusted with the administration of the estate.

On 31st March a petition was presented by the last named petitioners in the Sheriff Court craving to be appointed as executors-dative.

On the same date the Sheriff-Substitute decerned the petitioner Lady Denman as executrix-dative *qua* next-of-kin.

The respondents appealed to the Sheriff.

A petition was presented on April 6th by Mr John Torry, law-agent, Edinburgh, craving for confirmation as executor-nominate on the ground that he had been appointed executor by Miss Aitchison's testamentary writings.

The Sheriff (RUTHERFURD) conjoined the petitions of Lady Denman and Mr Torry, and on 10th April 1899 pronounced this interlocutor:—"Finds (*Second*) That by her said holograph writings the said Miss Helen Aitchison nominated as her executor Mr Torry, meaning the petitioner John Torry, who for many years acted as her agent; (*Third*) That the said writings contain a valid and sufficient nomination of the said petitioner as executor of the deceased: Therefore recals the Sheriff-Substitute's interlocutor of 31st March 1899, in the petition at the instance of the said Baroness Denman; dismisses the same, and decerns; grants warrant to the Sheriff-Clerk of Haddingtonshire to issue confirmation in favour of the said John Torry as executor-nominate of the said deceased Miss Helen Aitchison on production of a duly stamped inventory and relative affidavits, and decerns," &c.

The petitioner Lady Denman appealed to the First Division.

Argued for petitioner Lady Denman—1. There was no appointment of Mr Torry as executor in the document of 1897. There was no case where the use of such words as "My executor Mr Torry," without any

executorial powers being conferred, had been held to constitute the appointment of an executor. But in point of fact the deed of 1898 was the only valid one, superseding all others, and it alone could be looked at. It was a universal settlement, and all the legacies in the 1897 deed were wiped out, including that to "my executor Mr Torry"—*Tod*, November 25, 1890, 18 R. 152; *Sibbald's Trustees* v. *Greig*, January 13, 1871, 9 Macph. 399. In the 1898 deed Miss Aitchison recognised that she must have an executor, and gave him £100, but had not made up her mind who he should be. The claim of Mr Torry was founded solely upon an implication from a revoked legacy.

Argued for Mr Torry—1. It was competent to read the deeds together, and the appointment of executor made in the first was in no way revoked by the directions in the second. Though the legacies in the first were wiped out, there was practically no distinction in those given by the second, and the existence of an executor is referred to. The words "My executor Mr Torry" were sufficient to constitute the appointment. He could not have claimed the legacy without acting as executor—*Low's Executor*, June 21, 1873, 11 Macph. 744. The case should not be treated as if there were a regular formal deed, but there did exist under the hand of the testatrix an indication of her intention that Mr Torry should be her executor.

Argued for Mr Scott and others—Failing the appointment of Mr Torry, they were entitled to be conjoined with Lady Denman as executors—*Webster* v. *Shiress*, October 25, 1878, 6 R. 102.

Lord President—Lady Denman is the admitted and undoubted next-of-kin of the deceased. Of Mr Torry it can only be said that there is a possible claim on his part that a certain writing referring to him as executor has the same effect as if it appointed him as such; but we have heard enough of the case to show that this is an uphill contention, and that he cannot present us with a clear nomination as executor. In these circumstances I think that Lady Denman is entitled to be appointed, and I need hardly say that the gentlemen who are the third competitors have no good title at all. Apparently they come forward rather for the purpose of supporting Mr Torry's application, and if that application is not successful, they have nothing to say to oust Lady Denman from her right.

Lord M'Laren—I am of the same opinion, and would only add that it is not out of place to notice as an element in the case that Lady Denman has the liferent of the residue of the estate, and accordingly has a large interest in it.

Lord Kinnear—I agree and have only to add that I do not think that in questions of this kind we have anything to do with the comparative capacity of the respective claimants to administer an estate. That is not a relevant consideration. Lady Denman is the next-of-kin, and is entitled to be confirmed as executrix, unless anyone having a prior title comes forward to defeat her claim. Whether she is incapacitated by age or infirmity for the permanent administration of an estate, is a different question.

Lord Adam concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff dated 10th April 1899 appealed against: Remit said conjoined petitions to the Sheriff to proceed in the petition at the instance of the said Baroness Denman, and to decern her executrix-dative *qua* next-of-kin in terms of the interlocutor of the Sheriff-Substitute dated 31st March 1899 in said petition, and to dismiss the petition of the said John Torry, and decern: Find the said John Torry, respondent, liable to the appellant Baroness Denman in expenses in this Court, and also in the Sheriff Court so far as caused by his appearance, and remit," &c.

Counsel for Lady Denman—H. Johnston, Q.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Mr Torry—Guthrie, Q.C.—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for Mr Scott and Others—Sir John Cheyne, Q.C.—Horne. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, May 30.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

M'LEAN *v.* CARSE & HOLMES.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 2 (1) *—Notice of Accident—Prejudice to Employer.*

In order to bar the claim of a workman who has failed to give notice of an accident to his employer in terms of section 2 (1) of the Workmen's Compensation Act 1897, it must be shown that the employer has been prejudiced by such want of notice.

In a case stated under the Act it appeared that the workman had not given notice till three weeks after leaving the employment in which he met with the accident, and that no satisfactory explanation of this delay was given It did not appear that any inquiry was made as to whether the employer had been prejudiced by this failure, the Sheriff having decided without inquiry that he must necessarily be prejudiced after such lapse of time, and *dismissed* the claim.

The Court *recalled* the dismissal of the claim, and remitted to the Sheriff to proceed.