burden of their father's liferent. That being so, the interlocutor of the Lord Ordinary must be recalled. I agree also with your Lordship that the executor, whose duty it is to make up a title to and administer the deceased's estate must as an act of administration pay the husband the liferent of the whole estate, for that is just a debt due from the deceased's estate. It is said by the children that one-third of the estate should be at once handed over to them, and that they will pay their father the liferent of that portion. That proposition appears to me to be quite untenable. The father would have no security whatever, and the executor, I suppose, would incur the liability of having to make good any deficiency which might arise if the estate were lost in the hands of the children. Or suppose there were numerous children, would the father have to go to each and demand payment *pro tanto* from each of his liferent? That appears to me to be quite out of the question.

LORD M'LAREN concurred.

LORD KINNEAR — I also agree entirely with your Lordship. I think there can be no question as to the rights created by this antenuptial contract of marriage. The wife not only comes under obligation to the husband to give him an interest in the estate that may belong to her at her death, but she makes an actual and *de præsenti* disposition and assignation of all the property belonging to her, or which she should acquire in favour of her husband and herself in conjunct liferent for their liferent use allenarly, and to herself and her heirs and assignees in fee. The effect of that was to give the spouses a joint liferent in all the property belonging to the wife at the date of the marriage, and also in all the property that might come to her during the subsistence of the marriage, and to give to the husband at her death a continuing liferent of the whole. I am very clearly of opinion with your Lordships that there is nothing in the Act of 1881 which afterwards conferred a right of legitim upon the children to invalidate or in any way affect the right of the husband under the marriage-contract.

Therefore whatever claim the children may have to legitim from their mother's estate must be subject to the father's right of liferent. I agree that it does not follow that the children's claim to legitim is altogether excluded. I do not think it is, not because the marriage-contract does not provide any equivalent for the right of legitim (which it could hardly have done since the right was not known at the time of the contract), but because the wife's property is disposed of in such a way as to render it subject to the law affecting her moveable succession at the time of her death. While a right of liferent is given to the husband, the fee is given to her own heirs and assignees whomsoever, and their right as gratuitous assignees must be subject to any right created against their testator by the Act of 1881 before their claim emerged upon her death. I agree therefore entirely with the view your Lordships have taken.

The Court recalled the interlocutor of the Lord Ordinary in so far as it repelled the second plea-in-law for the defender; found that the Married Women's Property Act 1881 did not affect the right of John Duncanson Bell to the liferent of the estate, and that the pursuer was not entitled to a decree for payment until that right was satisfied, but that he was entitled to an accounting: *Quoad ultra* adhered.

Counsel for the Pursuer—Cooper—Welsh. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defender—Guthrie, Q.C. —A. M. Anderson. Agents—Lister Shand & Lindsay, S.S.C.

Tuesday, December 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAMBUSLANG WEST CHURCH COMMITTEE OF MANAGEMENT *v.* BRYCE.

Title to Sue—Church Committee of Management Suing for Subscription Promised to Minister—Promise of Subscription in Private Letter—Obligation.

The Committee of Management of a Chapel of Ease, with consent and concurrence of the minister, sued the defender for £100. They averred that proceedings had been initiated for the erection of the chapel into a *quoad sacra* church, that in order to provide an endowment fund subscriptions were invited by and on behalf of the management from persons disposed to further this object, that amongst others who promised to contribute was the defender, who, in a letter to the minister of the chapel, said, "I will give you £100 towards endowment should your subscriptions fall short," that the subscriptions had fallen short by £700, and that the defender, on application being made to him by the Committee, refused to implement his promise. The minister of the chapel was the defender's son-in-law, and the letter founded on was of a private character. *Held* (*diss.* Lord Young) that the Committee of Management had no title to sue upon the obligation in the letter, even assuming it to be binding in law.

Opinion by Lord Young that the letter imposed no legal obligation on the defender.

Opinions reserved by the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.

Process—Disclamation—Power of Quorum of Church Committee of Management to Raise Action in Name of Whole Committee.

The Committee of Management of a Chapel of Ease of the Church of Scotland consisted, in terms of the deed of constitution, of nine persons, three being trustees of the church, and on that account *ex officio* members of the committee, and six being elected by the congregation. Four of the committee formed a quorum, and their duties were to appoint officers to take charge of the chapel and keep it in repair, to superintend the seat-letting and collections, and generally to manage the secular affairs of the chapel.

Held that the majority, being a quorum, were not entitled to raise an action in the names of the whole committee without having obtained the consent of the individual members.

The West Church of Cambuslang was built in 1889, and was thereafter regularly used as a place of worship in connection with the Church of Scotland. The Reverend John Elder was inducted to the West Church as a Chapel of Ease in 1887. The Committee of Management of the church consisted, in terms of the deed of constitution, of three of the trustees of the church, viz., Lieutenant James Gray-Buchanan of Eastfield, Francis Robertson Reid of Gallowflat, and Michael Rowland Gray Buchanan of Wellshot, and six persons elected by the congregation, viz., William Carr, M.B., Rosemount, Cambuslang, James Shedden Elder, L.R.C.S.E., 125 Greenhead Street, Glasgow, John Smith, gardener, John Thomson, foreman bricklayer, Cambuslang, Gavin Cullen, clerk, Cambuslang, and William Fleming, clerk, Cambuslang. The deed of constitution further provided—Third, ... Four shall be a quorum of the Committee of Management. . . . Sixth, The duties of the Committee of Management shall be to appoint a precentor, beadle, and doorkeeper, or other officials, and to fix the salaries to be paid to their officers; to take charge of the said chapel and appurtenances; to keep the same clean and in good order and repair; to superintend the seat-lettings and the collections, and generally to manage the secular affairs of the said chapel.

In 1891 proceedings were instituted for the erection of the church, with a suitable district attached, into a parish church and parish *quoad sacra* in connection with the Church of Scotland, to be called the West Church and Parish of Cambuslang. In order to provide a fund for the endowment of the minister, contributions or subscriptions were invited from persons disposed to further this object.

In a letter dated 30th March 1894 written by Andrew Stewart Bryce, Glenpark, Uddingston to the Rev. John Elder, his son-in-law, commencing, "My dear John," and dealing with private matters, Bryce said—"I will give you £100 towards endowment should your subscriptions fall short."

The sum required for endowment was £1940, but subscriptions, &c., fell short of this amount by £700, and on 3rd February 1897 William Carr, in name of the Committee of Management, wrote to Bryce asking him for an early payment of the foresaid amount of £100. Bryce replied to this on 6th February 1897—"It is not only true that I promised *by letter* to give £100 for the object you refer to, but it is also true that so eager was my desire to promote the interests of that object, that I sent the letter in question by special messenger to the recipient so as to make sure that he would receive it in time to make whatever use of it he might think proper at the meeting to be held same evening. Since then circumstances have arisen, so distressingly painful in their character, as to entirely exonerate me from implementing that promise."

Thereafter, in May 1897, an action was raised in the Sheriff Court at Hamilton in the name of the nine members, "the Committee of Management of the West Church at Cambuslang, with consent and concurrence of the Reverend John Elder, minister of said church, for his interest," against Bryce, to have the defender ordained to pay to the pursuers, "as the Committee of Management foresaid," £100.

The pursuers averred, *inter alia*— . . . "In order to provide or assist in providing a fund for the endowment of the minister of said church, contributions or subscriptions were, by or on behalf of the management, invited from persons disposed to further said object. The movement in connection with the endowment fund was begun about the year 1891. (Cond. 3) Amongst others who promised or undertook to contribute to said endowment was the defender, who, in a letter dated 30th March 1894, written to the said Reverend John Elder, minister of said church, said—'I will give you £100 towards endowment should your subscriptions fall short.'" . . .

The pursuers pleaded—"(1) The defender having promised or undertaken to contribute the principal sum concluded for towards the endowment of the minister of said church, and the condition attached to defender's promise having been purified by the subscriptions falling short, the pursuers, as the Committee of Management of said church, are entitled to decree therefor, with interest and expenses. (3) The terms of the defender's obligation and of the said letter by him to Dr Carr, and the circumstances that the Reverend John Elder—to whom the defender's letter of 30th March 1894, containing said obligation, was written—is a consenter to this action, bar the defender, *personali exceptione*, from objecting to the title of the pursuers."

The defenders pleaded—"(1) No title to sue. (2) The condition upon which the defender promised to subscribe the sum in question not having yet been purified, the present proceedings are premature, and the action falls to be dismissed, with expenses."

On 16th June 1897 the Sheriff-Substitute (DAVIDSON) sustained the first plea-in-law for the defender, and dismissed the action.

The pursuers appealed to the Sheriff (BERRY), who on 4th August adhered to the interlocutor appealed against, and ap-

pended to his judgment the following note:— . . . "The question to be determined is, whether the present pursuers, the Committee of Management, have a title to sue. I have come to be of opinion that they have not. No undertaking to pay to them was made by the defender. Such undertaking as was given was to the minister, and he appears in this case merely as consenting to or concurring with the bringing of the action by the pursuers. That does not put him in the position of pursuer so as to justify the action being maintained by the Committee of Management, who thus have no title. In *Hislop* v. *MacRitchie's Trustee*, 8 R (H. L.) 95, 105, Lord Watson said, 'But I know of no authority for holding that, according to the law or practice of Scotland, a person who has no right or title whatever can sue an action, provided he obtains the consent and concurrence of the party to whom alone such right or title belongs.'"

The pursuers appealed to the Court of Session.

On 25th November 1897, after the case had been put out in the Short Roll for hearing, Lieutenant-Colonel James Gray-Buchanan, Francis Robertson Reid, and Michael Brown Gray-Buchanan, lodged a minute of disclamation, in which they stated "that no notice was ever given them that they had been appointed members of the Committee of Management of the church in question, that no notice of any meetings of that committee had been sent them, that no notice of this action had been given them, that although the action had been brought in their names as pursuers they never authorised the said action nor gave any mandate and authority to anyone to raise it in their names, that they never knew or heard of the said action until about the end of September 1897, that they repudiated and disclaimed the appearance made for them in the said action, and protested that they should not be liable for any expenses already incurred or to be incurred in connection therewith."

On 1st December the six other pursuers lodged a minute in which they stated that they did not admit the statements in the minute of disclamation, that the three disclaiming pursuers were trustees of the church under the deed of constitution, and in terms thereof were three of the Committee of Management, that the dates and hours of the meetings of the Committee had been intimated from the pulpit, and that it had never been the custom to send a notice to each of the Committee summoning him to the meetings, that at these meetings the present minuters being a quorum had resolved to recover the subscription from the defender, and that so soon as they had heard of the three first pursuers' intention to disclaim they wrote offering undertakings on their behalf to free and relieve them from the whole of the expenses of and all liability for this action, and they thereby repeated the offer.

Argued for the three disclaiming pursuers—They should be set free from the action in the same way as the pursuer James Cowan junior in *Cowan* v. *Fairnie*, March 4, 1836, 14 S. 634. The action had been brought in their name without their authority and without any notice being given to them, and was therefore invalid so far as they were concerned—*Wyse* v. *Abbott*, July 19, 1881, 8 R. 982. The remaining pursuers being a majority and a quorum of the Committee of Management were entitled to bring the action in their own name—*M'Culloch* v. *Wallace*, November 12, 1846, 9 D. 32, opinion of Lord Jeffrey, 34; *Blisset's Trustees* v. *Hope's Trustees*, February 7, 1854, 16 D. 482, but they were not entitled to make others pursuers without their consent. Their names should be deleted from the process.

Argued for the six other pursuers—*On Minute of Disclamation*—The three first named pursuers were not entitled to withdraw their names. The cases quoted by them related to bodies of trustees and trust-administration. The pursuers were not a body of trustees, but a Committee constituted by statute to carry on the management of the affairs of the church and to perform statutory duties. In such a case, if the majority, being a quorum of the Committee, thought that an action should be raised in order that their duties might be rightly performed, they were entitled to raise it in the name of the whole Committee. If the three first pursuers were of opinion that the action should not be raised, they could resign their office as trustees, but were not entitled to remain trustees, and consequently members of the Committee, and yet withhold their names from the action. *On Title to Sue*—The Committee of Management were the proper persons to sue. The subscriptions were invited on behalf of the management, and although the promise by the defender to contribute to the emolument was made in a letter to the minister, the Committee of Management were the proper pursuers in an action to enforce the promise. Besides, the defender is, by means of his letter to Carr, and the fact that the minister was a consenter to the action, barred from objecting to the pursuers' title. *On Merits*—A gratuitous promise to pay money contained in a document becomes an obligation when the document is delivered to the donee—Bell's Principles, sec. 34; Erskine's Institutes, iii., secs. 3, 88, 90, 91; *Macfarlane* v. *Johnstone*, June 11, 1864, 2 Macph. 1210, opinion of Lord Justice-Clerk Inglis, 1213, and Lord Neaves, 1214; *Shaw* v. *Mure's Executrix*, July 13, 1892, 19 R. 997, opinion of Lord President Robertson, 1002. The letter in the present case contained a binding promise, and had been delivered to the minister as acting on behalf of the Committee of Management. The letter was a short bond, and that bond was actionable. It was a document of debt expressing an obligation to pay money for a particular object, and by the law of Scotland no consideration was necessary. If the latter part of the sentence quoted from the letter was taken as a condition, then they were entitled to a

proof to show that the condition had been purified.

Argued for defender—*On Title to Sue*—The argument stated in the Sheriff's note was unsound. The minister was the proper person to sue if there was any obligation at all, and his merely consenting and concurring in the action did not make the title of the pursuers good—*Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95. The committee of management had no title to sue. *On Merits*—The pursuers took an extract from a private letter and called it an actionable bond. It was impossible to think that this was intended to be a document which raised up a legal obligation against the writer and was capable of being stamped. Even if the letter contained a promise, the promise was conditional and the condition had not been purified. The pursuers admitted on record that they were still £700 short of the amount required to complete the endowment. An additional £100 would not therefore complete the endowment, and the £100 was only promised if the subscriptions fell short by that sum of the amount necessary to complete the endowment.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the three gentlemen whose names appear as the first three pursuers of this action are entitled to have their names struck out of the summons, since it appears that they never authorised these proceedings, and got no notice that such an action was to be brought. That being done, I am willing to take the case on the footing that the Committee of Management are here suing, since a majority are pursuers and a majority is a quorum.

The Committee are suing on an alleged obligation contained in a letter addressed by the defender to his son-in-law, the Rev. John Elder, who is not a pursuer in the case. This letter begins "My dear John," and after discussing private matters, proceeds—"I will give you £100 towards endowment should your subscriptions fall short." I do not think that such a document addressed to a third party confers any title upon the Committee to sue this action.

Even if the pursuers' title was good, I do not think that they would have a good ground of action in the present circumstances. The defender promised in his letter to give £100 to make up the subscription if things fell short. That is to say, he promised to give a subscription of £100 to complete the endowment if the other subscriptions fell short of the total sum required by that sum. But the subscriptions at present fall short of the sum required by £700, so that the period contemplated in the letter has not yet been reached.

I am also very doubtful whether the letter confers on the recipient any right that can be made a ground of action, but it is unnecessary to decide this. On the two grounds above stated I am of opinion that this appeal should be dismissed.

LORD YOUNG—In my opinion this is not a document of debt at all. I agree that the first thing to do is to dispose of the motion on behalf of those gentlemen who have disclaimed the action. They have shown quite conclusively that they have given no authority for the use of their names, and I think that they are in consequence entitled to have their names struck out, and that the other pursuers should be found liable in the expense caused by the unwarrantable use of the names.

The next question is, whether there is a good title to sue. Now if there is anything to sue upon I should be disposed to think that the Committee of Management has a title to sue. The Sheriff-Substitute, who has dismissed the action on the plea of "No title to sue," has expressed his opinion that the proper persons to sue are the trustees of the church. I should think that doubtful. The Sheriff, who adhered, puts his judgment on the ground that the only person who has a title is the minister, he being the only person to whom the letter founded on is addressed. Now, if you take that as a document of debt capable of being sued on, the minister gets it as a trustee with a duty to hand it over to those who have charge of this endowment. He is bound, in my opinion, to hand it over to those who are charged with this matter. The idea of the minister getting the money and putting it into his own pocket is in my opinion out of the question. The Endowment Committee are the proper parties to enforce payment of this obligation, if it is an obligation enforceable in a court of law.

But my judgment proceeds on the ground that it is not a document of debt at all. It is a letter from a father-in-law to his son-in-law. It is not expressed in terms which indicate for a moment that the writer intended to come under an obligation. If it is a document of debt, the writer might have been rendered bankrupt on account of failure to pay it, or it might have been a foundation for a poinding. Now, I must say that I think that absolutely ridiculous on the face of the letter. People go about for subscriptions for every manner of thing; some of them expect the subscriptions to be given annually. A lady says, "I can't give you anything this year, but I will give you £5 next year," and she puts that into a family letter. The suggestion is that it is a document which when stamped may be used in an application for cessio, for example. The idea is to my mind ridiculously absurd. I asked if there was any example of such an action, or of anything suggesting such an action, in the books, and I was told that there was none.

I am therefore of opinion, not that there is no title to sue—for I think that the pursuers are the proper persons to sue if there is anything to sue on—but I am of opinion, and that very clearly, that there is no document of debt on which to sue, and that the defender is entitled to be assoilzied on that ground.

LORD TRAYNER—I think the three persons first named as pursuers in this case,

and who have appeared to disclaim the action, are entitled to have their names deleted from the instance of the petition, on the ground that they never authorised the present proceedings. I do not thereby mean to indicate that there may not be cases where the names of persons may be used as pursuers in a proceeding of which they do not approve. There may be cases where certain persons may be required to lend their names, in an action which they would not themselves be prepared to institute, provided they are secured against all personal liability on account of such proceedings. But I do not know of any case where the legal proceedings can be taken by one person in the name of another who has never been consulted on the subject, or informed that his name was to be used. That, I think, is the case here.

In the question raised, as between the remaining pursuers and the defender, I agree with the Sheriff. Whether the letter founded on imposes any obligation on the defender or not, is a question on which I give no opinion. If the letter imposes no obligation, the action is unfounded. If the letter does impose an obligation, then it is an obligation in favour of the person to whom it is addressed, and he is not a pursuer. Nor are the actual pursuers suing as in his right. In any view, therefore, of the letter, the present action cannot be maintained.

LORD MONCREIFF—I am for affirming the Sheriff's interlocutor. The promise on which the pursuers rely as obligatory on the defenders occurs in a private letter, dealing chiefly with other matters, written by the defender to the Reverend John Elder.

The promise, assuming it to be obligatory, bears to be a promise given to Mr Elder and not to the Committee or members of the Committee, and the connection in which it occurs makes it all the more necessary that there should be a specific statement relevant to infer that the obligation was undertaken to, and was intended by the defender to be enforceable by, the Committee of Management as a debt. I do not find any such statement in the record as it stands; and therefore, though the ground is narrow, I am not prepared to differ from the Sheriff.

I prefer to express no opinion as to whether such a promise is legally enforceable by the law of Scotland. The defender declined to state a plea that it is not.

With regard to the three first pursuers and appellants, I am of opinion that they are entitled to get their names deleted. If the record had disclosed a proper case of debt due to the Committee of Management, I think that the remaining pursuers, being a quorum majority of the Committee, would have been entitled to sue.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark dated 16th June and 4th August 1897: Sustains the minute of disclamation for James Gray-Buchanan, Francis Robertson Reid, and Michael Rowand Gray-Buchanan: Allow their names to be deleted from the process, and direct the Clerk of Court to delete such names accordingly: Find said three parties entitled to their expenses against the remaining pursuers, and remit same to the Auditor to tax and to report: Further, assoilzie the defender from the conclusions of the action, and decern: Find him entitled to expenses in this and the Inferior Court, and remit the same to the Auditor to tax and to report."

Counsel for the Three Disclaiming Pursuers—Kincaid Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for the Remaining Pursuers—Balfour, Q.C.—Lyon Mackenzie. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender—Sol.-Gen. Dickson, Q.C.—Guy. Agents—Graham, Johnstone, & Fleming, W.S.

Wednesday, December 15.

SECOND DIVISION.

CITY PROPERTY INVESTMENT TRUST CORPORATION, LIMITED *v.* THORBURN.

Company—Capital—Fixed or Circulating Capital—Preference Shareholder—Payment of Loss Caused by Depreciation of Investments out of Revenue.

A company was formed in 1890 with a capital divided into preferred and deferred shares. The preferred shares were entitled to a minimum dividend of 5 per cent. per annum, and were non-cumulative. Their holders were not entitled to participate in reserve funds or surplus assets. The objects of the company were to take, use, and develope heritable property, and also, *inter alia*, to invest the funds of the company in the purchase of bonds, shares, stocks, &c., and to sell, exchange, or otherwise dispose of any securities, investments, &c., of the company, and to vary the securities, investments, &c., from time to time.

From 1891 the company were in the habit of buying stocks and shares and selling them at favourable opportunities, and in ascertaining losses the company charged against revenue any losses which arose on such sales, and similarly credited revenue with any profits derived from such sales.

In 1895 the directors reported that certain securities had depreciated to the extent of £6000, and that this loss was likely to prove permanent, and they proposed to make good the loss by