There was at the debate only one argument stated which appeared to have any plausibility. The pursuer's counsel urged that the hospital doctor made a bargain with the pursuer under which the pursuer was to be received as a paying patient. The argument was based upon the view that the doctor, who was the official who saw her, arranged a bargain with her for the hospital. I am very clearly of opinion that this is a fallacious contention. It was quite natural that the pursuer and the doctor being brought into contact, he should give information as to the fixed tariff of the managers for the reception of paying patients. In doing so he was not making any bargain at all, but simply communicating the terms, as regards board and lodging, on which she could be received under the fixed rules of the establishment. The case was, I think, in that matter practically in the same position as if the facts had been that at the gate of the hospital the pursuer had been informed by the gatekeeper of the terms of board and lodging for paying patients.

Upon the general question I concur entirely with what your Lordship has said. I do not think that the law of the case could be better stated than in the words of the American Chief-Justice in *Glavin* v. *Rhode Island Hospital* (34 Amer. Rep. 675), words with which Farwell, L.J., expressed his concurrence in the case of *Hillyer* ([1909] 2 K.B. 820, at p. 825)—"Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A out of charity employs a physician to attend B, his sick neighbour, the physician does not become A's servant, and A if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognise the right of the corporation, while retaining them, to direct them in their treatment of patients."

This seems to me to be absolutely sound. What would be the case if the managers interfered with the surgeon in his work?—if they refused to allow him to proceed with an operation which he thought necessary? Is it not plain that the patient would have ground for complaint against the managers if they interfered, and the interference led to bad consequences? Again, if they insisted that the surgeon should obey them as to the conduct of an operation, would he not be entitled to refuse, and to decline to act as their employee any longer, and to complain of their conduct?

The matter is illustrated by the question whether in assisting at an operation, nurses though the servants of the managers in their ordinary work, must at the operation obey the doctor's directions absolutely. This view is very clearly brought out in the opinion of L. J. Farwell in the case of *Hillyer*.

On these grounds, and on those stated by your Lordship, I concur in adhering to the Lord Ordinary's interlocutor.

LORD SALVESEN concurred

LORD ARDWALL was absent.

The Court adhered.

Counsel for Pursuer and Reclaimer—Morison, K.C.—Jameson. Agent—Allan M'Neil, Solicitor.

Counsel for Defenders and Respondents—Wilson, K.C.—MacRobert. Agents—Cadell & Morton, W.S.

Thursday, November 9.

FIRST DIVISION.

CUMMING (SMART'S TRUSTEE) *v.* FORGAN AND ANOTHER (SMART'S TRUSTEES).

Succession — Testament — Public Burdens — "Liferent Use and Enjoyment" of House—Liferent or Right of Occupancy — Liability for Feu-duty, Proprietor's Taxes, and Landlord's Repairs.

A testator directed his trustees to give his sister "the liferent use and enjoyment" of his house, to realise the whole residue of his estate and divide it into seven equal shares, and to pay these over to seven persons, of whom the sister was one, and on the death of the sister to realise the house and divide the proceeds amongst the other six residuary legatees. On the death of the testator the trustee divided the residue, and the sister had possession of the dwelling-house until her death. During the period that she survived the testator she paid feu-duty, proprietor's taxes, fire insurance premium, and proprietor's repairs. After the sale of the house, and prior to the distribution of the proceeds, *held*, in a Special Case, that the said annual burdens ought to have been made a charge upon the general residue of the testator's trust estate, and that the sister's trustees were entitled to repayment of the amount thereof, with periodical interest thereon, to the extent of six-sevenths thereof, out of the funds in the hands of the testator's trustee.

Robert Cumming, S.S.C., Edinburgh, trustee of the deceased Robert Smart, acting under his trust-disposition and settlement (*first party*), and John Forgan, S.S.C., and another, trustees of the deceased Janet or Jessie Smart, acting under her trust-dis-

position and settlement, and codicils thereto (*second parties*), presented a Special Case for the opinion and judgment of the Court.

Robert Smart died unmarried on 10th March 1905, leaving a trust-disposition and settlement dated 8th April 1903. By his settlement Mr Smart gave, granted, assigned, disponed, conveyed, and made over to and in favour of Robert Cumming, S.S.C., Edinburgh (the first party), as trustee for the ends, uses, and purposes therein mentioned, all and sundry his whole means and estate, heritable and moveable, real and personal, and nominated and appointed the said Robert Cumming to be his sole executor. The first purpose of the trust was for payment of all the testator's just and lawful debts, sickbed and funeral expenses, and the expenses attending the execution of the trust.

The second purpose was—"That my trustee shall give to my sister, Miss Janet or Jessie Smart, residing with me, in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of the dwelling-house, No. 9 Denham Green Avenue, Trinity Road, Leith, recently purchased by me for my own occupation, together with the whole household furniture and plenishing belonging to me at the time of my death, including books, pictures, linen, china, plate, plated articles and others, without any obligation upon her to replace articles broken or perishing with the using, and after the death of my said sister the said dwelling-house, furniture, plenishing and others shall form part of the residue of my said means and estate, and be disposed of as after mentioned."

The fifth purpose was—"That my trustee shall realise and convert into money the whole residue and remainder of my means and estate, and divide the same into seven equal parts or shares, and shall pay and make over one of said parts or shares to each of the following persons, viz.—(*First*) My sister the said Miss Janet or Jessie Smart; (*Second*) my niece the said Miss Elizabeth Gibson; (*Third*) my nephew James Oswald, Solicitor Supreme Courts, Edinburgh; (*Fourth*) my nephew the Reverend Robert Oswald, minister of Saint Stephen's Parish, Perth; (*Fifth*) my niece the said Miss Jessie Oswald; (*Sixth*) my niece Mrs Christina Oswald or Macpherson, wife of A. T. Macpherson, Port Hopetoun, Lothian Road, Edinburgh; and (*Seventh*) my niece Mrs Catherine Helen Oswald or Wight, wife of Robert Wight, Bush House, Musselburgh; declaring that should any of my said residuary legatees predecease me leaving lawful issue, the share of my estate which would have fallen to them shall fall to such issue equally among them, and should any of them predecease me without leaving lawful issue, their share shall fall to the other residuary legatees and the lawful issue of such of them as may have predeceased leaving such issue, in equal shares *per stirpes*."

The sixth purpose was—"(*Sixth*) That on the death of my said sister Miss Janet or Jessie Smart, in the event of her surviving me, my trustee shall realise and convert into money the said dwelling-house No 9 Denham Green Avenue, and furniture, plenishing, and others liferented by her, and divide the same into six equal parts or shares, and pay and make over one of said shares to each of the said Miss Elizabeth Gibson, James Oswald, Robert Oswald, Jessie Oswald, Christina Oswald or Macpherson, and Catherine Helen Oswald or Wight; declaring that in the event of my said sister surviving me the shares of the proceeds of said dwelling-house and furniture shall not vest in the said residuary legatees until the period of payment thereof, and that should any of them predecease the period of payment leaving lawful issue, the share which would have fallen to them shall fall to such issue equally among them, and should any of them predecease the period of payment without leaving lawful issue, their share shall fall to the other residuary legatees and the lawful issue of such of them as may have predeceased the period of payment leaving such issue, in equal shares *per stirpes*."

The first party having given to Janet or Jessie Smart the liferent use and enjoyment of the said dwelling-house No 9 Denham Green Avenue and the testator's whole household furniture and plenishing, in terms of the second purpose of the trust-disposition and settlement, realised and divided the residue and remainder of the testator's means and estate in terms of the fifth purpose of the settlement. After her death the first party sold the said dwelling-house for the sum of £810 for settlement at Whitsunday 1910, and he also sold the furniture, the amount realised therefor being £58, 2s. At the date of this Special Case the first party had duly received payment of the prices of the said house and furniture, but he had not yet divided and paid over the same in terms of the sixth purpose of Mr Smart's trust-disposition and settlement. During the period that Janet or Jessie Smart survived her brother Robert Smart, she occupied the dwelling-house No. 9 Denham Green Avenue, and paid the feu-duty, taxes (landlord's and tenant's) payable in respect of said house, and also the fire insurance premiums and cost of repairs.

The second parties *maintained* that Janet or Jessie Smart paid the said feu-duty, taxes, insurance premiums, and cost of repairs in the belief that she was liable to do so, but that the said feu-duty, the said taxes in so far as they were proprietor's taxes, the said insurance premiums, and the costs of said repairs in so far as they were costs falling to be paid by a proprietor, were paid by her in error. They maintained that the said Janet or Jessie Smart had merely a personal right of occupancy of the said dwelling-house, and that she was therefore not liable to make the annual payments above mentioned, and that these were payable and ought to have been paid from time to time either out of the general residue and remainder of the said Robert Smart's trust estate, or by charging the same against the fee of the said house. They maintained that as the price of the said house was still in the hands of the first

party, and was divisible among and payable to the same persons as the general residue and remainder of Robert Smart's trust estate, except Janet or Jessie Smart herself, the amount of the said annual payments, with periodical interest thereon, ought to be repaid to them out of the price to the extent of the whole amount of said payments, or, alternatively, to the extent of six-sevenths thereof.

The first party maintained that Janet or Jessie Smart was liferentrix of the said dwelling-house, and was as such liable in payment of the said annual burdens.

The *questions of law* were—"(1) Was the said Janet or Jessie Smart entitled to the liferent use and enjoyment of the said dwelling-house free of feu-duty, proprietor's taxes, fire insurance premiums, and cost of proprietor's repairs, and, if so (*a*) ought the said annual burdens to have been made a charge upon the general residue and remainder of the testator's trust estate, and are the second parties therefore entitled now to get repayment of the amount thereof, with periodical interest thereon, to the extent of six-sevenths thereof, out of the funds still remaining in the hands of the first party; or (*b*) ought the said annual burdens to have been charged upon the fee of the said house, and are the second parties therefore entitled now to get repayment of the whole amount thereof, with periodical interest thereon, out of the funds still remaining in the hands of the first party? or (2) Were the said annual burdens payable by the said Janet or Jessie Smart herself?"

Argued for the second parties—The case was ruled by the following authorities—*Clark and Others*, January 19, 1871, 9 Macph. 435, 8 S.L.R. 314; *Rodger's Trustees* v. *Rodger*, January 9, 1875, 2 R. 294, 12 S.L.R. 204; *Bayne's Trustees* v. *Bayne*, November 3, 1894, 22 R. 26, 32 S.L.R. 31; *Cathcart's Trustees* v. *Allardyce*, December 21, 1899, 2 F. 326, 37 S.L.R. 252; *Johnstone* v. *Mackenzie's Trustees*, 1911, S.C. 321, 48 S.L.R. 256.

Argued for the first party—There was intended here to be a clean division, leaving nothing to pay the feu-duties, &c. Of course the trustees were bound to retain something for the expenses of the trust, but feu-duties, &c., were in a different position. In *Clark* (*cit. sup.*) the expression was merely "use," and the dictum of Lord President Inglis indicated that the result would have been different had the expression been "liferent use." In *Rodger* it was expressly stated that the liferent use and enjoyment was to be free of feu-duty, &c. They referred to *Betty* v. *Attorney-General*, [1899] 1 Ch. 821, at 824.

LORD PRESIDENT — I think this is a matter which is entirely settled by authority. The second purpose of the settlement of the late Robert Smart was that his trustees should give to his sister Miss Jessie Smart, residing with him, in the event of her surviving him, during all the days of her life, "the liferent use and enjoyment" of the dwelling-house No. 9 Denham Green Avenue, Trinity Road, Leith, recently purchased by him for his own occupation. Then after payment of expenses there was a distribution of the residue into seven shares, and then there is another provision that after the death of Miss Smart the dwelling-house and furniture is then to be divided among the other six residuary legatees. Now it is settled by a series of cases that a provision in this form gives a right of occupancy to a beneficiary but not a proper liferent. It was first of all held in the case of *Clark*, where the expression was "to give her (the testator's wife) the use of my house No. 36 Drummond Place, with the whole furniture and effects contained therein," so long as she remained a widow. Then in the case of *Rodger* it was "the liferent use and enjoyment of the house," though the case of *Rodger* is not of so much value as *Clark*, because there was a special clause superadded "free of all feu-duty, ground-annual, taxes, and all other deductions." But in *Bayne* there was a direction that the house was to be given "during all the days of her natural life." In *Cathcart* the expression was "the liferent use of any one house" the testator might die possessed of; and the final case was *Johnstone* v. *Mackenzie's Trustees*, where there was given "the liferent use and enjoyment."

Counsel for the first party wished to draw a distinction between the cases where the expression "liferent" was used and the cases where "liferent" was not used. He said that Lord President Inglis decided *Clark* in the way he did because there was an absence of the word "liferent"; and he draws the conclusion that Lord President Inglis would have decided *Rodger* the other way if it had not been for the special words "free of all feu-duty, ground-annual, and taxes." I do not myself quite think so. But this is quite certain, that if that is the true view of the two cases, both *Bayne* and *Cathcart* were wrongly decided. "Liferent" is not a word which had to be used like the word "dispone" in a disposition. At any rate, *Bayne* and *Cathcart* certainly bind us much more than the consideration of what Lord President Inglis might have decided in *Rodger*.

Then we come to *Johnstone* v. *Mackenzie's Trustees*. In that case Lord Guthrie decided the other way. He had drawn a distinction out of the fact that in all the earlier cases there was always a continuing fund in the hands of the trustees, and therefore there was something out of which the trustees might meet necessary outgoings upon the property in respect of the widow's occupancy of the house; whereas in *Johnstone* v. *Mackenzie's Trustees* there was a direction, as here, to divide the residue of the estate after the testator's death. Mr Mercer said that the only thing that made the Second Division reverse Lord Guthrie's judgment was that in that case there was a very ample sum

to meet the annuity, and that there was enough out of the surplus revenue to meet the outgoings.

I cannot say that I put anything upon that fact. In the first place, so far as Lord Ardwall is concerned, he says that the moment you construe the clause in that way the trustees would have had a perfect right to keep back a certain sum before dividing residue. No doubt it is true that Lord Dundas says that he does not think that this could have been met out of residue, and the Lord Justice-Clerk concurred with Lord Dundas and intimated that Lord Salvesen also concurred. It is a little unsafe to take the opinion of a concurring judge as adopting in so many words each and every proposition which another judge has said where that proposition is not necessary for reaching the judgment. So far as I am concerned, I am bound to say I cannot agree with Lord Dundas. I agree with Lord Ardwall. It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. Whether trustees as a matter of fact should retain part of the residue in order to meet these burdens is a question for themselves and a question of circumstances. I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a direction that you are to give a certain person one thing or another. As a result I think Miss Smart's testamentary trustees are entitled to repayment of six-sevenths of the feu-duty and proprietor's taxes which she paid.

LORD JOHNSTON—I entirely agree.

LORD CULLEN—I agree.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court answered branch (*a*) of question 1 in the affirmative.

Counsel for the First Party—Mercer. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Maclaren. Agent—John Forgan, S.S.C.

HOUSE OF LORDS.

Monday, November 13.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

MORGAN *v.* WILLIAM DIXON, LIMITED.

(In the Court of Session, December 24, 1910, 48 S.L.R. 296, and 1911 S C. 403.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Sched.* (4)—*Medical Examination of Workman on Behalf of Employer—Workman's Demand for Presence of his Own Doctor.*

It is not a matter of law but is a question of fact for the decision of the arbiter whether the demand of a workman, who is to be medically examined on the employer's behalf, under section 4 of the First Schedule of the Workmen's Compensation Act 1906, that his own doctor shall also be present at the examination, is reasonable (*diss.* Lord Shaw).

This case is reported *ante ut supra.*

Morgan, the workman, appellant in the Court below, appealed to the House of Lords.

At the conclusion of the arguments—

LORD CHANCELLOR—The question which is raised in this case is stated by the arbiter in a way which may be a little embarrassing, but we must deal with the case as it is stated.

The fourth clause of the First Schedule of the Workmen's Compensation Act confers upon the employer a right to have a workman who has given notice of an accident examined medically, and there is a duty on the part of the workman to submit himself to examination; but the statute is silent and the rules are partially, and I may say mainly, silent as to the time, the place, and the conditions of this examination. Under these circumstances practically the common rule of law applies and imposes upon both parties the duty of acting reasonably in obeying the statute.

Now it seems to me that the question whether or not one side or the other has acted reasonably in a particular case is a question of fact in that particular case. If I were an arbiter I should say as a question of fact that in most cases—perhaps in nearly every case—it is quite reasonable on the part of the workman to desire the presence of his own doctor. That may be sometimes unreasonable because of inconvenience or expense or for other reasons which can be established and which one cannot forecast. I should have been disposed to say if there were no special circumstances, if there were no proof of inconvenience or expense, why should not the doctor of the workman be present? I see no harm that he can do; and I can conceive that he might be very useful. But it is not the function of a court of law, or of this House as a court of law, to take upon itself the decision of questions of fact which by the statute are left to the arbitrator or to the Sheriff or County Court Judge as the case may be. It is a matter for the arbitrator to decide who has been entrusted with the duty by law, and not for me to decide, who have not been entrusted with the duty of finding facts.

Now that being so, what are the questions of law which we are asked to determine? The first is whether, apart from special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employer. This question was raised by the appellant's own argument; it was the only contention which they did put