what is the effect of the clause in the original letter of guarantee, under which it was expressly agreed that the Bank might at their discretion grant to the principal debtor any time or other indulgence without discharging the liability of any of the cautioners. It was argued on behalf of the appellant that so soon as he revoked the guarantee this condition became inoperative. I was at first much impressed with the argument presented on this subject, and I think that circumstances may easily be figured where, if the creditor, notwithstanding the protest of a particular cautioner who had revoked the guarantee, disabled himself from suing the debtor, he could not plead the clause in the original letter of guarantee as entitling him to hold the cautioner still bound. But there is nothing of the kind in the present case, and the so-called revocation by itself primarily operates so as to stop further advances to the principal debtor on the credit of the revoking cautioner. In these circumstances, I am of opinion that the conditions on which the original guarantee was granted remained operative, and if the Bank in good faith granted time to the debtor their so doing would not necessarily free the cautioner from his liability.

[*His Lordship then dealt with another question with which this report is not concerned.*]

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

The Court adhered.

Counsel for the Appellant — Morison, K.C.—Crurie Stewart. Agents — Mackay & Young, W.S.

Counsel for the Respondents — Clyde, K.C. — C. H. Brown. Agents — Tods, Murray, & Jamieson, W.S.

Friday, March 7.

FIRST DIVISION.

SCOTTISH INSURANCE COMMISSIONERS *v.* ROYAL INFIRMARY OF EDINBURGH.

Master and Servant — Insurance — Health Insurance — "Employed Contributors" — "Contract of Service" — Medical Staff of Public Infirmary — National Insurance Act 1911 (1 *and* 2 *Geo. V, cap.* 55), *secs.* 1 (1) *and* (2), *and First Schedule, Part I* (*a*).

The National Insurance Act 1911, section 1, enacts—"(1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this part of this Act shall be . . . insured in manner provided in this part of this Act. . . . (2) The persons employed within the meaning of this part of this Act (in this Act referred to as 'employed contributors') shall include all persons . . . who are engaged in any of the employments specified in Part I of the First Schedule to this Act."

First Schedule, Part I — "*Employments within the Meaning of Part I of this Act relating to Health Insurance.*—(*a*) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship without any money payment."

In a petition by the Scottish Insurance Commissioners to have it determined whether the employment of certain classes of members of the medical staff of a public infirmary, viz., (*a*) resident physicians and resident surgeons, (*b*) non-resident house physicians, non-resident house surgeons, and clinical assistants, and (*c*) supervisors of the administration of anæsthetics, was employment within the meaning of Part I of the Act—*held* that the managers of the Infirmary having no control over the medical staff in their treatment of the patients, the employment in question was not employment under a contract of service, and consequently was not employment within the meaning of Part I.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), secs. 1 (1) and (2), and First Sched., Part I (*a*), are quoted *supra in rubric.*

The Scottish Insurance Commissioners, *petitioners*, presented a petition under section 66 (iii) of the Act in which they prayed the Court "to decide whether the various classes of employment hereinafter mentioned, or any or which of them, are or are not employments within the meaning of Part I of the said Act, namely, (*a*) employment of resident physicians and resident surgeons, (*b*) employment of non-resident house physicians, non-resident house surgeons, and clinical assistants, and (*c*) employment of supervisors of the administration of anæsthetics, all at the Royal Infirmary of Edinburgh."

The Royal Infirmary of Edinburgh, *respondents*, lodged answers maintaining that the members of the medical staff in question were not employed within the meaning of Part I of the Act.

The *facts* as to the employment of the various classes were admitted to be as follows:—

"(*a*) *Resident Physicians and Resident Surgeons.*

"Resident physicians and resident surgeons at the Royal Infirmary of Edinburgh are appointed by the Board of Managers on the recommendation of the respective members of the honorary medical and surgical staff to whom they are to be attached. They reside within the Infirmary, and the duties which they are

appointed to perform are the care and treatment of patients in the institution. No one is eligible for appointment who is not a duly registered practitioner. Each resident physician and resident surgeon is responsible to the physician or surgeon under whom he acts for the treatment and professional care of all patients under his charge, and is subject to his control in these matters. He is responsible to the Superintendent of the Infirmary for the discipline and general conduct of the wards. He exercises supervision over the conduct of the nurses attached to his wards. The appointments run for periods of six months from 1st October in one year to 31st March in the next, and from 1st April to 30th September in the same year.

"The resident physicians and resident surgeons are bound to observe the regulations prescribed by the managers. Every applicant for appointment as a resident physician and resident surgeon is required to fill up a printed form of application, which is in the following terms:—

'The Royal Infirmary,
'Edinburgh, 19 .

'The Right Honourable and Honourable
'the Managers of the Royal Infirmary.

'My Lords, Ladies, and Gentlemen,—I beg to apply for the appointment of , to the under the charge of , for six months from , and undertake, in the event of your granting my application, not to relinquish my duties prior to the expiry of that period unless I shall previously have obtained your sanction to my so doing.—I am, my Lords, Ladies, and Gentlemen, your obedient Servant,

(*State qualifications here*).'

"There is no salary attached to the office. Each resident receives board and lodging free, and an allowance of £2, 10s. in lieu of laundry for the period of his engagement. The value of the board and lodging, taken along with the said allowance, does not exceed £160 per year.

"(*b*) *Non-Resident House Physicians, Non-Resident House Surgeons, and Clinical Assistants.*

"Non-resident house physicians, non-resident house surgeons, and clinical assistants are appointed by the Board of Managers on the recommendation of the respective members of the honorary medical and surgical staff to whom they are to be attached. They must be duly qualified medical men, and a number of them subsequently become resident physicians and resident surgeons on completing their term of six months as clinical assistants. Their duties are to assist in the care and treatment of patients. They are occupied in the performance of their duties for two or three hours daily on an average. Their appointment remains in force for six months, but may be renewed by the managers for a further period of similar duration. Each is responsible to and under the control of the physician or surgeon under whom he acts professionally, and to the Superintendent of the Infirmary for the discipline and general conduct of his wards or department when such is under his charge.

"They are subject to the regulations above referred to so far as is compatible with non-residence in the Infirmary. Each applicant for appointment is required to fill up the form of application above quoted.

"There is no remuneration for the work, but a number of the holders of the office are allowed lunch at the residency.

"(*c*) *Supervisors of the Administration of Anæsthetics.*

"These are appointed by the Board of Managers on the recommendation of the various members of the honorary staff to whom they are to be attached. They must be duly qualified medical practitioners. The holders of the office are generally young medical men who have commenced practice on their own account, and who may also be acting as private assistants to surgeons and specialists. Their duties are to supervise and direct the administration of anæsthetics in the various operating theatres of the institution. Each supervisor is attached to a particular surgeon under whose directions he acts and whom he attends when required. The physician or surgeon is entitled to give directions to the administrator not only as regards the time, place, and general mode of performance of his duties, but also as regards the particular method of administration, including the prescribing of the particular anæsthetic to be administered. The Board of Managers regard the physician or surgeon and not the administrator as the person responsible.

"The said supervisors are subject to the before-mentioned regulations and also to the further 'Rules for Supervisors of the Administration of Anæsthetics,' adopted 21st October 1912. The time occupied in the performance of their duties varies from one to two hours per day on an average.

"They receive an honorarium of £20 per annum, a rate of remuneration which, in the petitioners' opinion, is not equivalent to a rate of remuneration exceeding £160 a year for whole time service.

"All the members engaged in the three classes of employment (*a*), (*b*), and (*c*) above specified are liable to be suspended by the Superintendent for any insubordination or improper conduct, or any infraction of the said regulations."

Argued for the petitioners—There was present in the three classes of employment all the elements indicative of the relation of master and servant. These members of the medical staff were appointed by the Board of Managers and could be dismissed by them. They gave services, and, what was of most importance, they were under the control of the Board of Managers. Their employment was therefore employment under a contract of service. There might be the requisite control of a servant by his master though the servant's work was such as the master could not himself do—*Walker* v. *Crystal Palace Football Club, Limited*, 1910, 1 K.B. 87. There

might not be direct control by the Board of Managers in the treatment of the patients, but there was control by the Board through the principal physicians and surgeons, just as in *Walker*, *supra*, there was control of the football player through the captain of the team. *Hillyer* v. *Governors of St Bartholomew's Hospital*, 1909, 2 K.B. 820, which was followed in *Foote* v. *Directors of Greenock Hospital*, 1912 S.C. 69, 49 S.L.R. 39, decided no more than that the governing body of an hospital is not the superior of the medical men who treat the patients therein in the sense of the maxim *respondeat superior*. *In re Employment of Church of England Curates*, 1912, 2 Ch. 563, was not in point. A curate was not appointed by the vicar and could not be dismissed by him. A curate was the holder of an ecclesiastical office, and was not a person whose duties were defined by contract at all. *Re Employment of Ministers of the United Methodist Church*, and *re Employment of Ministers (Under Probation) of the Wesleyan Methodist Church*, 28 T.L.R. 539, had no bearing on the question. Reference was also made to *Simmons* v. *Heath Laundry Company*, 1910, 1 K.B. 543, and Pollock on Torts (9th ed.), p. 81.

Argued for the respondents—The relation of master and servant did not exist between any of the three classes of employees and the Board of Managers. The contract with the Board was not a contract of service, but a contract for services—*Simmons* (*cit. sup.*), *per* Fletcher Moulton (L.J.) at p. 548. A servant is a person subject to the command of his master as to the manner in which he shall do his work—*Yewens* v. *Noakes*, (1880) 6 Q.B.D. 530, *per* Bramwell (L.J.) at p. 532. The question was not whether there was control, but whether control was exercised in the matter of the services rendered. Here it was not so exercised. The managers could not interfere with the medical staff in their treatment of the patients—*Evans* v. *Liverpool Corporation*, 1906, 1 K.B. 160; *Hall* v. *Lees*, 1904, 2 K.B. 602. *Hillyer* (*cit. sup.*) was decided on the ground that the physicians and surgeons were not the servants of the governors. Reference was also made to *Murphy* v. *Guardians, Enniscorthy Union*, [1908], 2 Irish Reports, 609.

LORD PRESIDENT — This is a petition presented by the Scottish Insurance Commissioners under the National Insurance Act 1911, in terms of the provisions of sec. 66 of the Act, which provides that "if any question arises (*a*) as to whether any employment or any class of employment is or will be employment within the meaning of this part of this Act," the Commissioners may, if they think fit, instead of deciding that question themselves, submit it for decision to the Court. The particular question that has been submitted to us is as regards three classes of persons in connection with the Royal Infirmary of Edinburgh, to wit, the resident physicians and the resident surgeons; the non-resident physicians, non-resident house-surgeons and clinical assistants; and the supervisors of the administration of anæsthetics.

The facts bearing upon the position of these various classes of persons are set forth in the petition, and there is no difference of opinion as to their being correctly set forth. Roughly speaking, it comes to this, that the resident physicians and the resident surgeons are appointed for periods of six months, that they have to reside in the Infirmary, and that their duties are in connection with the patients, they being subordinated in all matters of professional treatment and care of the patients under their charge to the honorary physicians and surgeons. Then the non-resident house physicians and non-resident house surgeons and the clinical assistants, not being residents, do not give their services at all times of the day; in the same way, supervisors of the administration of anæsthetics are only present if necessity calls for them in operations.

Now a member of any of these classes of persons in the carrying out of his work is either the senior medical man present, in which case he is himself the judge of what is the proper course of treatment to be carried out at the moment, or he is acting with senior physicians or surgeons, in which case he is under the orders of whoever is the head physician or surgeon present at the moment. In no case is he or can he be interfered with by the managers of the Infirmary in his treatment of the patients.

Now the Act provides (section 1) that the persons who must be insured are "all persons of the age of sixteen and upwards who are employed within the meaning of this part of this Act," and "the persons employed within the meaning of this part of this Act . . . shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I of the First Schedule to this Act, not being employments specified in Part II of that Schedule." If you turn to Part I (*a*) of the First Schedule you find that it specifies "employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied"—I gloss the rest of the section—whether there is payment or whether there is not.

The matter therefore seems to turn entirely upon whether these people are employed under a contract of service.

I am of opinion that they are not. Various cases have been quoted to us by which the subject has certainly been illuminated. And it cannot be more tersely put than it has been put by Fletcher Moulton, L.J., in *Simmons* v. *Heath Laundry Company*, ([1910] 1 K.B. 543 at p. 549), where he says the question depends on whether the matter is a contract of service or a contract for services. It is a very convenient way of expressing the real question at issue. I think this is a contract for services and not one of service. The test is, I think, as Mr Macmillan put

it to us, control in the matter of service rendered. There are many cases where there is a proper control of service, and yet when you come to the details of how that service is carried out, there is no practical control, because there may be skill in the servant which the master does not possess, but nevertheless in the general direction of what the servant is or is not to do the master is supreme.

Now if the business of the Infirmary managers was to treat the patients, then there might be control; but that is not the business of the Infirmary managers, as is pointed out in the case of *Hillyer* v. *Governors of St Bartholomew's Hospital* ([1909] 2 K.B. 820), which was quoted to us. The managers of an hospital do not go to the public with a profession of themselves operating on or nursing or treating patients. They only hold out themselves as providing an institution where patients will be able to meet with skilled persons who will do those things. And that is the real distinction between this case and the case of *Walker* v. *Crystal Palace Football Club* ([1910] 1 K.B. 87), because the latter case I think is only supportable upon the view that the profession of the company there was to provide a game of football, and as they could not do this themselves they could only do it through employees, whom they accordingly hired for the purpose of doing that which they could not do themselves but which was their business. Here the treatment of the patients is not the business of the Infirmary managers. All the managers do is to provide the infirmary; when it comes to the treatment that is done by the skilled persons who give their services gratuitously or upon very inadequate terms.

Accordingly I am of opinion that we should answer the question by saying that these persons, one and all of them, do not fall within the expression "contract of service," and consequently are not employed within the meaning of the Act.

LORD KINNEAR—I am of the same opinion, and for the reasons your Lordship has given. I think that the relation of master and servant has not been established between the governors of the Infirmary and the resident physicians and surgeons. These gentlemen are not employed by the Infirmary, as I understand it, under a contract of service, and the governors of the Infirmary have accordingly no power to regulate their treatment of patients or even to interfere with their treatment in any way whatever. They are subject to the orders and at the disposal of the non-resident honorary physicians and surgeons but not of the governors of the Infirmary. I think that any apparent difficulty which might arise at first sight upon the statement of this question is completely removed by a correct definition of the contract of service, because the relation of master and servant exists only between persons of whom one has the order and control of the work done by the other, not only as regards its object but also as regards the method of execution. It is satisfactory that the view which your Lordship has taken has the authority both of the Court of Appeal in England and of the Chief-Justice in America, whose judgment is cited by that Court.

LORD JOHNSTON—I concur with your Lordships, and I have nothing to add.

The Court found and declared that the classes of employment in question were not employments within the meaning of Part I of the National Insurance Act 1911.

Counsel for the Petitioners—The Solicitor-General (Anderson, K.C.)—A. R. Brown. Agent—James Watt, W.S.

Counsel for the Respondents—M'Millan, K.C.—Hon. William Watson. Agents—Hope, Todd, & Kirk, W.S.

Friday, March 7.

FIRST DIVISION.

[Lord President and a Jury.

THOMS *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Process—Damages for Personal Injury—Excess of Damages—New Trial.

In an action of damages at the instance of a farmer for personal injury, involving the possibility of permanent disablement, the jury assessed the damages at £4000. *Circumstances* in which the Court *refused* to disturb the verdict on the ground of excessive damages, although in the opinion of the majority of the Court the sum given was considerably larger than they themselves would have awarded.

William Lawson Thoms, farmer, Benvie, near Dundee, *pursuer*, brought an action against the Caledonian Railway Company, *defenders*, in which he sued for the sum of £5000 as damages for injuries received while travelling on the defenders' railway.

An issue having been allowed, the case was tried before the Lord President and a jury on 10th December 1912, when a verdict was returned for the pursuer awarding him £4000 damages.

On the motion of the defenders the Court on 28th January 1913 granted a rule to show cause why the verdict should not be set aside and a new trial granted in respect that the damages awarded were excessive, and on 7th March 1913 the case was heard on the rule.

The following narrative of the *facts* is taken from the opinion of Lord Johnston:—"The pursuer in this case met with an accident due to careless shunting at Invergowrie station of a couple of horse-boxes, in one of which he was seated in attendance on valuable horses belonging to him which were being conveyed to a show at Perth. The pursuer is a man of thirty-six, and when a boy he suffered from