of any of the said institutions to which bequests are made as above ceasing to exist and being discontinued, then and in that case it shall be in the power of our said trustees to apply the said bequests for such other charitable purpose or educational scheme for the poor as they may deem fit and proper."

The Case stated—"7. In 1885, under the provisions of the Aberdeen Reformatory and Industrial Schools Act 1885, there were amalgamated into one trust the Oldmill Reformatory for boys, the Mount Street Reformatory for girls, the Industrial School for boys at Oakbank, the Industrial School for girls at Whitehill, and the said House of Refuge. . . . The said House of Refuge ceased to exist and was discontinued in or about June 1885. . . . The directors of the Aberdeen Reformatory and Industrial Schools and Houses of Refuge have intimated by letter to the factor, dated 23rd September 1913, that they do not intend to make any application for the said annuity and may be held as having acquiesced in its discontinuance from the date thereof. . . ."

These *questions* were, *inter alia*, submitted —"1. Are the first parties entitled to apply the annuity of £20 bequeathed to the House of Refuge in Aberdeen in respect of its discontinuance to such other charitable purpose or educational scheme for the poor as they may deem fit and proper? 3. Is the provision in question void from uncertainty?"

Argued for the first parties—This bequest was not void from uncertainty. It had been established that the Courts would sustain any bequest for a charitable purpose, and an educational scheme for the poor was just one particular branch of charity—*Milne's Executors* v. *Aberdeen University Court*, (1905) 7 F. 642, 42 S.L.R. 533. As the bequests were really for charity the mode of their application was not of the substance of the legacy—*Mayor of Lyons* v. *Advocate-General of Bengal*, (1876) 1 A.C. 91, at p. 113.

Argued for the second parties—A bequest for purposes of education even of the poor was not a bequest for a charity — *M'Conochie's Trustees* v. *M'Conochie*, 1909 S.C. 1046, 46 S.L.R. 707. If it has been held that "religious" purposes was too vague, then *a fortiori* "educational" purposes was too uncertain also. The trustees were only entitled to apply the funds to charitable purposes in the strictest sense of the term, as the testators had in their wording of the deed carefully delimited their application.

LORD JUSTICE-CLERK—In this case I do not think there is really any serious difficulty about any of the questions. By the testator's deed of settlement a number of bequests are made in favour of certain named charitable institutions, and then it is provided that in the event of any of these institutions ceasing to exist and being discontinued the trustees are to "apply the said bequests for such other charitable purpose or educational scheme for the poor as they may deem fit and proper." Now one of the named institutions — the House of Refuge in Aberdeen—has ceased to exist, and the question is raised whether the provision by which the trustees are empowered to apply the bequest so released for such charitable purpose or educational scheme for the poor as they may deem fit is void from uncertainty. On the authorities I think it is quite clear that this question must be answered in the negative. In my opinion it is settled that the Court will sustain any bequest for a "charitable" purpose, and in accordance with what was said in the case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A.C. 531, with reference to *Baird's Trustees* v. *Lord Advocate*, 15 R. 682, 25 S.L.R. 533, I am of opinion that a provision for an "educational scheme for the poor" is a bequest for a charitable purpose, not only according to the law of England where the Statute of Elizabeth rules, but also according to the law of Scotland. Accordingly I am unable to hold that this provision is void from uncertainty.

LORD DUNDAS, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court answered the first question of law in the affirmative and the third question in the negative.

Counsel for the First Parties — Wilton. Agents—Nisbet, Mathison, & Oliphant, W.S.

Counsel for the Second Parties — Scott. Agents—Tawse & Bonar, W.S.

Tuesday, July 18.

FIRST DIVISION.

[Lord Cullen, Ordinary.

HAWTHORNS & COMPANY, LIMITED *v.* WHIMSTER & COMPANY.

Contract—Ship—Implement of Contract—Reasonable Time—Strike of Workmen—Repair of Ship — Impossibility of Performance—Subsequent Agreement.

A firm of engineers contracted to repair a ship. The contract fixed no time for completion of the repairs. When the repairs were in part carried out the engineers' workmen came out on a sympathetic strike with the engineers on sea-going vessels whose demands had been refused by the shipowners' federation. Some shipowners, however, conceded the demands of the sea-going engineers and so escaped the consequences of the strike. The shipowners in question on hearing of the difficulty discussed the matter with the ship engineers, and in so doing suggested that they would bring workmen from another locality to complete the repairs if the engineers would supply the use of tools and gear. They thereafter moved the ship from one dock to another and arranged with another firm to complete the repairs, without intimation or disclosure of the terms of the agreement to the engineers, and without any statement

to the effect that they would hold the engineers liable for any extra expense incurred. The engineers rendered their account in November 1914, and on 31st March 1915 the shipowners for the 1st time intimated a claim for the extra cost. The engineers having sued for payment of their account, the shipowners stated a counter-claim for damages for detention of the ship and the difference between the contract prices and the actual cost of getting completed the repairs which had not been completed by the engineers.

Held (*sus.* Lord Cullen) that the shipowners were not entitled to the sums claimed by them, as they had when the engineers were unable to complete their contract made a fresh agreement with them, releasing them from their prior contract without stipulating that they would be held liable for any extra costs incurred.

Held (*per* Lord Cullen, Ordinary, *following Hick* v. *Raymond*, [1893] A.C. 22; *Sims* v. *Midland Railway Company*, [1913] 1 K.B. 103) that the contract to execute the repairs fell to be implemented within a reasonable time, and that in the circumstances which had occurred the engineers, not having acted negligently or unreasonably, were not liable for damages for breach of contract on the alleged ground that they had not completed the contract within a reasonable time.

Hawthorns & Company, Limited, engineers, Leith, *pursuers*, brought an action against Whimster & Company and others, the individual partners thereof, *defenders*, concluding for decree for payment of £522, 2s. 6d., being remuneration alleged to be due to the pursuers for repairing a ship of the defenders.

The defenders *pleaded*—"1. The pursuers being in breach of their contract with the defenders are not entitled to sue upon it. 2. *Separatim*, the pursuers' averments that they were unable to perform their contract through the occurrence of an alleged strike being irrelevant should not be remitted to probation. 3. The pursuers being bound to perform the work which they contracted to do for the defenders within a reasonable time, and having failed to do so, are liable in damages to the defenders. 4. The defenders having against the pursuers, owing to the pursuers' breach of contract, a counter-claim exceeding in amount the sum for which the summons concludes, the defenders are entitled to absolvitor."

On 24th November 1916 the Lord Ordinary (CULLEN) decerned against the defenders in terms of the conclusions of the summons. To his interlocutor was appended the following opinion, from which the *facts* of the case appear:—

Opinion.—"The pursuers are engineers in Leith, and the defenders represent the owners of the s.s. 'Serapis.'

"In May 1914 the defenders employed the pursuers to make certain repairs on the ship. The original order was subsequently supplemented. There was no formal contract. The arrangements were made by correspondence. No time was fixed for the carrying out of the work, and on this fact the present controversy hinges.

"The pursuers began work on 1st July, and went on until the afternoon of Friday, 10th July. The work was then nearly done. On that afternoon the fitters in the pursuers' employment who were engaged on the work left the ship and refused to return. The cause of their action was as follows:—For some time previously there had been a dispute between the union societies representing marine engineers — the Marine Engineers Association, the Amalgamated Society of Engineers, the Steam Engine Makers Society—and the Shipping Federation (to which the defenders belong) regarding a claim by the former for a rise in the wages of sea-going engineers. As the claim was not conceded by the Federation the joint committee of the said three societies issued instructions for the withdrawal of their men from tramp steamers such as the 'Serapis,' and thereafter the withdrawal was carried out by their local branches, although in a number of instances individual shipowners succeeded in avoiding the consequences of the strike by conceding the rise which the Shipping Federation as a body had refused to concede. It would appear that membership of the Federation does not exclude such liberty of action. In order to support the strike of the sea-going engineers the said three union societies ordered a 'sympathetic' strike of shore engineers, including the class of fitters employed by the pursuers on the 'Serapis,' and it was in obedience to their orders and as part of the said sympathetic strike that pursuers' fitters left their work on 10th July and refused to return.

"The pursuers at once communicated the position of matters to the defenders, and on the following morning the defenders' representative Mr Blechynden came to Leith and had a meeting with the pursuers' engineer-manager Mr Sutherland. Mr Murray, one of pursuers' directors and their general manager, was present at the latter part of the interview. There is a conflict of evidence as to what took place at this meeting. I prefer the evidence of Mr Sutherland and Mr Murray, who gave it in a credible manner and are clear in their recollection, while both Mr Blechynden and his principal Mr Whimster are confessedly hazy in their recollection of what took place between them and the pursuers at and about the period when the pursuers' fitters struck work. At the meeting on the 11th the basis of the conversation, as I take the matter, was that it was not possible for the pursuers to get skilled men to complete the job. I think the defenders accepted this as the situation. There was a discussion as to whether it would be feasible to turn on apprentices from the pursuers' yard to the work, but the idea was abandoned. Ultimately Mr Blechynden said that he would try to arrange to get some firm in Glasgow to undertake the completion of the work, and to send men to Leith for the purpose, and the pursuers thereupon agreed to lend the use of their gear on the ship.

"On the Monday following, 13th July, Mr Blechynden came again to Leith, went on board the ship, packed the stern gland temporarily, and removed the ship from the dry dock to the Imperial Dock. This he did on the defenders' instructions, and without consulting or referring to the pursuers. The proceeding is, I think, significant of the fact that the defenders accepted the situation as being that the strike had put it outwith the pursuers' power to finish the job, whatever the consequences to the pursuers of that might be, as to which nothing was said. The evidence of Mr Blechynden and Mr Whimster is, I think, somewhat tinged, no doubt unconsciously, by the fact that the counter-claim they are supporting by it is, mainly at least, an afterthought inspired by the Shipping Federation. Thus they seek to represent themselves as having been in the constant expectation or hope that the pursuers would be turning on men to finish the job notwithstanding that the strike continued, while I think their position at the time was that of accepting the situation to be that the pursuers could not do so.

"The strike continued until the war broke out, and the pursuers' position remained the same. The defenders on their part did nothing until about 27th July, when they approached the witness Gardiner, an engineer in Glasgow, with whom on 29th July they placed an order for completion of the repairs. Gardiner's men came to Leith on 3rd August and began work on the 4th, the ship having been again put in the dry dock. There was a hitch owing to four of the men having been induced to desert by the union pickets, but the work was finished on the 7th. Gardiner's account amounted to £48, 15s. as against £18 allowed by the pursuers for the unfinished work. By Admiralty orders the ship was removed on 8th August from Leith docks to the roads, where, for some reason which the defenders in evidence say they cannot explain, she lay until 15th August, when she sailed.

"Why the defenders did nothing at all between 10th and 27th July is not satisfactorily explained. It may be that, as indicated in their letter of 13th July to Messrs Bain, Gardner, & Company, they were hopeful of a speedy termination of the strike. As I have already said, I cannot accept the view that they waited for so long in expectation of the pursuers finishing the job while the strike continued. In this connection it is noticeable that while Mr Whimster says he does not think he heard from Blechynden about the intended arrangement for getting the work done from Glasgow until about ten days after 10th July—which would be on or about 20th July—a week would be unaccounted for before the defenders took any steps, as they did by approaching Gardiner on the 27th. The defenders, denying the account given by Mr Sutherland and Mr Murray of the meeting on 11th July, seek now to put the matter as if they waited on until the 27th July solely in order to give the pursuers a chance, and only then in despair took things into their own hands. If this were true it would have been the ordinary course of business for the defenders before employing Gardiner to definitely intimate to the pursuers that they had so waited, that they could wait no longer, and that they were now taking the step of superseding the defenders on the unfinished portion of the contract by placing it elsewhere. No such intimation, however, was made.

"On 16th November 1914 the defenders wrote to the pursuers asking them to send in their account and to have it stated with a price against each item, as they desired to have the cost of each separate job. They received the account at that time. After a few letters which do not require notice, the defenders wrote on 4th January 1915 saying that they could not see their way to accept a deduction of £8 for painting not done by the pursuers, as they had paid £18, 19s. 2d. for having it done by Gardiner, and considered that the excess was caused by the pursuers' breach of contract. Some further letters passed without the account being settled, and on 3rd March 1915 the defenders wrote that they found they must submit some points to the Shipping Federation. On 30th March they wrote saying that they had just received a letter from the Federation dealing with the account, and stating that in the opinion of the Federation the pursuers were liable for the loss resulting from the detention of the steamer, and for all the extra expenses incurred as the result of their breach of contract in failing to complete the work undertaken. They went on to give a quotation from the Federation's letter as showing the ratio of the Federation's opinion, which was that the implied contractual measure of time for the work was a reasonable time, and that the calculation of a reasonable time was to be based on ordinary conditions of work, and was not affected by the occurrence of the strike.

"The pursuers' account as sued on amounts to £522, 2s. 2d. The counter-claim opposed by the defenders amounts to £899, 3s. 6d. but it now stands at £516, 10s. 8d. owing to the defenders lowering their claims for detention per ton per day from 5d. to 4d., and to their reducing the period of detention claimed for by two days. The claim for detention forms the bulk of the counter-claim. Otherwise the counter-claim is made up of the excess of Gardiner's account for the portion of the repairs not finished by the pursuers, and for charges connected with moving the ship after 10th July, including the charges for moving her from the docks to the roads on 8th August after Gardiner had finished, in response to the Admiralty order.

"As I have already pointed out, the contract for the repairs contained no express time limit. Admittedly therefore the implied time for executing the repairs the pursuers undertook to do was a reasonable time. The question for decision is how this measure of a reasonable time falls to be regarded in view of the conditions which supervened on 10th July when the strike took off the pursuers' fitters.

"What is a reasonable time for fulfilling a contract containing no express time limit

is a question of fact. This familiar general rule, however, does not carry one very far in solving the difficulties of a particular case. In the present case the defenders' main proposition is that the measure of a reasonable time is such a time as would be required for the work under what they call 'ordinary or average conditions,' so as to exclude the exceptional condition of a strike affecting the contractor's workmen. It is, however, always a question of special conditions when a particular case arises, and if there are special conditions admissible in the problem average conditions do not rule. The particular question as to how a strike including a contractor's workmen is to be regarded as affecting the operation of a limit of reasonable time under a contract has been matter of decision in various cases relating mainly to the matter of discharging cargo from a ship. I need not refer to all the cases more or less bearing on the present which were cited to me, but I may refer to the cases of *Hick* v. *Raymond*, 1893, A.C. 22, and *Sims* v. *Midland Railway Company*, L.R. 1913, 1 K.B. 103. And as showing that the ratio of these decisions is not limited to the case of carriage of goods I may quote from Lord Watson in the first-mentioned one. 'When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted, and has invariably been held to mean that the party on whom it is incumbent duly fulfils his obligation notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably.'

"In *Hick* v. *Raymond* (*cit.*) the consignees of a cargo were bound to discharge it within a reasonable time. The work was being done by the Dock Company as agents of the consignees. It was begun on 16th August, but was interrupted from about 20th August until 16th September by a general strike of dock labourers. Thereafter it was completed on 18th September. It was held that the consignees were not liable for the delay. The decision involved (1) that the delay was not caused or contributed to by the consignees, and (2) that in point of fact they could not procure labour to replace that of the dock labourers who had struck.

"It will be observed that in *Hick* v. *Raymond* the strikers were not the direct servants of the contracting parties, the consignees, but of their agents, the Dock Company. This distinction formed the main topic of discussion in the other case above cited, *Sims* v. *Midland Railway Company*. There the railway company accepted for conveyance and delivery a consignment of butter on 17th August 1911. The butter got so far on its journey—viz. to Sharpness—on the following day, but owing to a strike of the company's servants, which was part of a general railway strike, it could not be sent on further to its destination. It began to deteriorate, and was sold at considerably below its original value by the railway company. An action for damages having been brought, it was held that the railway company was not liable. The question mainly debated was whether the rule of *Hick* v. *Raymond* was displaced by the fact that the strikers were the servants of the railway company, the plaintiffs contending that as the railway company had undertaken that the goods would through their servants be delivered within a reasonable time, it was entirely their affair whether their servants went on strike or not, and not the affair of the other party. It was held that the ratio of *Hick* v. *Raymond* applied, and that in the case of a strike disabling performance there was no valid distinction to be drawn between a strike of the servants of the contracting party's agents, as in *Hick* v. *Raymond*, and a strike of the contracting party's own servants. As in *Hick* v. *Raymond*, it was involved in the decision that the disablement of the strike was not caused or contributed to by the obligants, the railway company, and also that the effect of it was to prevent their procuring the necessary labour to enable them to fulfil their obligation.

"Now in the present case there is no room for any suggestion that the strike which took off the pursuers' workmen on 10th July was caused or contributed to by the pursuers. It was rather the other way, seeing that the strike was brought about by a dispute between the marine engineers and shipowners, like the defenders, represented by the Shipping Federation, and that while a number of other shipowners shook themselves free of the strike by conceding the rise of wages claimed, the defenders, through loyalty to the Federation as they put it, preferred to resist the rise, with the attendant consequence of having their unrepaired ship held up. I cannot, however, on the evidence express any opinion on the merits of the question involved in the strike, and whether the defenders were or were not unreasonable in the stand they took. What is clear is that the pursuers were innocent of having in any way caused or contributed to the strike.

"On this footing the defenders say that the pursuers have not satisfied the other condition postulated in the cases of *Hick* and *Sims*, to wit, proved inability to perform notwithstanding the *prima facie* disabling effect of the strike. The pursuers they contend have failed to demonstrate clearly and exhaustively by a process of exclusion that there was no source of any kind from which they might not have derived skilled labour adequate to finish the job which they had undertaken. In the case of *Sims* there are remarks by Scrutton, J., which seem to put it as if, in the presence of a strike of the contractor's workmen which *prima facie* disables the contractor, the *onus* is on the other side to prove that the contractor might notwithstanding the strike have obtained the necessary labour. I am not quite sure as to this

possibly suggested view of the *onus*. In the present case I am content to judge the matter in the light of the parties' actings at the time. The position taken up by the pursuers was clearly, as I think, that they were powerless to perform owing to the strike. And my construction of the attitude and actings of the defenders then is that they accepted and acted on this as the true view of the situation. On 11th July they proposed as a solution the sending of workmen from Glasgow. They would not have done so had they thought that the conditions left it open to the pursuers to get the necessary labour in Leith. Two days afterwards Blechynden removed the ship from the dry dock on the defenders' instructions without consulting or referring to the pursuers. The defenders must have been then satisfied that the pursuers could do nothing. And when ultimately on 27th July the defenders placed their order with Gardiner there was no intimation by them to the pursuers that they were doing so because they had outwaited an expectation of the pursuers being able to obtain outside labour. My construction of the evidence, as I have indicated, is that when the strike drew off the pursuers' men on 10th July the defenders, like the pursuers, accepted the situation as being one whereby the pursuers were, owing to the strike, which they had not in any way caused or contributed to, disabled from performing the unfinished portion of their contract.

"On this footing it seems to me that the ratio of the cases of *Hick* and *Sims* applies to the present one to the effect of absolving the pursuers from the charge of breach of contract on which the defenders' counterclaim is based, and I do not think that the matter of Gardiner's account is in a special position.

"I may add that if it were to be assumed, contrary to the view which I have expressed, that the pursuers were guilty of a breach of contract through not having finished the repairs on the ship by, say, 11th or 13th July 1914, I should have felt the greatest difficulty in sustaining the defenders' counter-claim in respect of the long period of detention of the ship involved in it. The defenders would have been bound to act promptly in order to minimise the damage. As it was they did not act until 27th July. Further, I should doubt very much whether the charges in the counterclaim for the expense of removing the ship on 8th August—when Gardiner had finished—to the roads under an Admiralty order could have been regarded as a natural consequence of the pursuers' assumed breach of contract.

"Following the views which I have above expressed, I shall repel the defences, and grant decree in terms of the conclusions of the summons."

The defenders reclaimed, and argued—The pursuers were in breach of their contract; the contract provided no time limit for completion of the repairs; the pursuers were therefore bound to complete them in a reasonable time; that they had failed to do. The pursuers could not plead reasonable time, for when the fitters had left the ship they had done nothing, instead of doing everything in their power to get the repairs completed. There was no impossibility of performance, for the defenders had actually got the work completed by other engineers; the same course could have been taken by the pursuers. The risk of a strike of the pursuers' workmen which would be occasioned by taking such a step was no excuse—*Milligan & Company* v. *Ayr Harbour Trustees*, 1915 S.C. 937, 52 S.L.R. 748. If the pursuers had exercised reasonable diligence they could have had the contract completed; having failed to do so they were liable in damages—*Ford* v. *Cotesworth*, 1868, 4 Q.B. 127, *per* Blackburn, J., at p. 133 and 134. *Hick* v. *Raymond & Reid*, 1893, A.C. 22, and *Sims & Company* v. *Midland Railway Company*, [1913] 1 K.B. 103, were distinguished, for impossibility of performance was admitted. Further, the alleged agreement of 11th July superseding the original contract was not proved; further, the original contract being in writing any subsequent modification of it must also be in writing—*Burrell & Son* v. *Russell & Company*, 1900, 2 F. (H.L.) 80, 37 S.L.R. 641. The defenders had done what was fair and reasonable in getting the contract completed by other engineers and they were entitled to the additional costs thereby occasioned—Mayne on Damages (8th ed.), at p. 21.

Counsel for the pursuers were not called upon.

LORD PRESIDENT—In form this is an action for payment of an account for repairs incurred to a firm of Leith engineers by a firm of shipowners in Glasgow for a vessel belonging to them, but in substance it is an action of damages for breach of contract at the instance of the shipowners against the engineers, for when the work was approaching completion on the evening of 10th July 1914 the fitters employed at the job struck work. They had no quarrel with their employers—it was a sympathetic strike. Nevertheless when the foreman expostulated with them they point blank refused to proceed, and confessedly their conduct brought the work for the time being to a standstill.

On the following morning, 11th July 1914, the shipowners' marine superintendent came to Leith to discuss the situation with the engineers, and to endeavour if possible to devise some method of surmounting the difficulty which had occurred. There were two courses, and two courses only, open, either to invoke the aid of outside fitters to complete the job, or else to turn the apprentices on to accomplish the work, for the shipowner himself observed in his evidence that he presumed that "the only way in which the work could have been done was to have got in strangers or to do it with the apprentices." The latter alternative having been discussed, was rejected as impracticable, and the former alternative was resorted to.

It appears from the evidence that although it was open to the shipowners to invoke the

aid of outsiders it was not open to the engineers. Their representative says in his evidence—"We could not do anything. We could not have got labour. We could not have got skilled union men; they would not have worked, and we could not employ blacklegs; our shop would have been called out on strike. We did not try any of those things because we knew it was hopeless." Whether that is true or not is immaterial. It was sufficient to satisfy Mr Blechynden, who seems to have been a shrewd man of business. He grasped the situation at once, and promptly replied that he would arrange to bring men from Glasgow to complete the job if and provided that the engineers would supply the necessary tools and gear and render all the assistance necessary. That arrangement the Lord Ordinary holds to have been proved by the very distinct and explicit evidence given by the marine manager of the engineers, Mr Sutherland, and by their general manager, Mr Murray, and indeed it is not contradicted by the shipowners' representative, Mr Blechynden, although he is somewhat hazy as to the date on which the arrangement was made.

Having regard to the facts proved and to the events which followed, it appears to me that it would be impossible for us—the Lord Ordinary holding the views which he does in regard to the credibility of these witnesses—to reject that view, and accordingly I hold it proved that the shipowners' representative on the day following the commencement of the strike did not hold the engineers to their contract, but on the contrary made this pre-eminently reasonable and business-like arrangement to surmount the difficulty with which both parties were at that date confronted. If this view be sound then there is obviously an end of the case, because the shipowners themselves do not say that the arrangement they made was on the footing that the engineers should bear the extra expense incurred by the shipowners in finding the men to complete the job.

That might have been a reasonable enough arrangement to have made, but the complete answer is that the shipowners do not say it was made, and subsequent events make it quite clear that it was not made. If any such arrangement had been intended we should require to have had explicit evidence that it had been effected, but subsequent events seem to me to negative that view entirely. I refer in the first place to the long and inexplicable delay in undertaking the work, unbroken by any remonstrance on the part of the shipowners. Nothing was done until close on the end of July. I refer in the second place to the fact that when the shipowners ultimately did secure men from Gardner & Company, a firm in Glasgow, to perform the work, they did not inform the engineers of the terms on which Gardner & Company had agreed to do it, or indeed that they had secured their aid at all; and in the third place their conduct, or the conduct of their representative, on 13th July, two days after the bargain was made, seems to me to point clearly to the arrangement having been what Murray and Sutherland both say it was, and what Blechynden does not deny it was, that the shipowners should find the men and the engineers should find the gear and tools.

The Lord Ordinary observes—"On the Monday following, 13th July, Mr Blechynden came again to Leith, went on board the ship, packed the stern-gland temporarily, and removed the ship from the dry dock to the Imperial Dock. This he did on the defender's instructions and without consulting or referring to the pursuers. The proceeding is, I think, significant of the fact that the defenders accepted the situation as being that the strike had put it outwith the pursuers' power to finish the job—whatever the consequences to the pursuers of that might be." That seems to me distinctly to corroborate the view that no arrangement had been made to the effect that the engineers should bear the additional cost of executing the work as was arranged on the morning of 11th July.

The whole of the subsequent actings of the parties and their correspondence bear in the same direction and lead straight to the conclusion at which the Lord Ordinary arrived when he says—"The position taken up by the pursuers was clearly, as I think, that they were powerless to perform owing to the strike. And my construction of the attitude and actings of the defenders then is that they adopted and acted on this as the true view of the situation;" the situation being "that when the strike drew off the pursuers' men on 10th July, the defenders, like the pursuers, accepted the situation as being one whereby the pursuers were, owing to the strike which they had not in any way caused or contributed to, disabled from performing the unfinished portion of their contract."

I cannot find, from the beginning to the end of the evidence, or the correspondence which passed between the parties, a single hint to the effect that the shipowners contemplated making a claim against the engineers for the extra cost incurred. Indeed, the correspondence appears to me to point exactly in the opposite direction. The letter of 25th July 1914 was founded on by the shipowners as indicating that a claim was still held over the heads of the engineers. In my view that letter points in the opposite direction. It shows clearly that the shipowners themselves did not entertain the view that they had any claim whatever, but that they were instigated to make the counter-claim—as indeed Mr Whimster expressly admits in his evidence that he was instigated—by the Shipping Federation.

We are informed that the account of the engineers was rendered in the middle of November. Then would have been the time for the shipowners to have ventilated their claim if they had one, but not one syllable was received from them until 31st March 1915, when not they but the Shipping Federation suggested that there was a claim and that the parties might quite fairly divide the extra cost between them, to which came the prompt reply on 2nd April 1915 from the engineers—"We made an arrangement at the time the suggestion that the apprentices should finish job was mooted

and laid to one side, and Mr Blechynden, the representative of the shipowners, undertook to supply the men and we to supply the tools." To that letter there was no answer given, and it is impossible, I think, to suggest that it was a bolt from the blue. It was obviously stating to the shipowners a fact which was quite well within their knowledge.

What might have happened if on the 11th of July the shipowners' representative had held the engineers to their contract and insisted upon them fulfilling it to the best of their ability it would be idle to speculate. I have not the faintest idea what they would have done; they might have found means to finish their contract; but undeniably they would have been liable in damages unless they had done their best; for it was no answer for them to say that they were not going to look for men because they thought it would be hopeless to find them. However, these are idle speculations, because the explanation that was given by the engineers to the shipowners was accepted at once by the shipowners' representative, and we can see very well the reason for that, for the good sense and practical business-like sagacity of both parties led them to adopt a device which, had it not been for the signal lack of alacrity on the part of the shipowners in securing the men and completing the job, would, I am persuaded, have tided over the difficulty without any very material loss to either side.

I agree with the reasons stated by the Lord Ordinary in his opinion and with the conclusion at which he has arrived, and I move your Lordships to adhere to his judgment.

Lord Johnston — At the first blush of this case the counter-claim for the defenders seems to have a great deal to say for itself, but the more one knows of the history out of which the claim has arisen the more clearly does it appear that a great deal of the defenders' case is entirely an afterthought, and an afterthought suggested by and in the interest of a third party to the case, namely, the Shipping Federation. But as there is this element of the subsequent in the case there is also, I think, something of the precedent, and that something precedent is necessary to be known in order to understand the attitude which the principal parties to the case took at the outset towards one another. Messrs Whimster and Hawthorns & Company, Limited, found themselves between the hammer of a strike — none the less that it was only a sympathetic strike—and the anvil of the Shipping Federation. I think it clearly appears that Messrs Whimster knew perfectly well that they could have obviated the difficulty in which that strike placed Messrs Hawthorns & Company, Limited. They had nothing to do but to say as a number of other members of the Federation did, "In order to obviate the stoppage of this work we will consent to pay the additional wages claimed by the engineers employed on our ship." They chose as a matter of honour to stick to their Federation and not to do so, and I think in doing so it is quite clear that at the time they felt equally in honour bound to see Messrs Hawthorns & Company, Limited, who had contracted to do the necessary repairs on their ship, through the difficulty which had been occasioned to them by their attitude in sticking to the Federation, for one must always keep in view that it was not a direct strike of Hawthorns' own men but a sympathetic strike which caused the whole difficulty.

This in my opinion explains the attitude which Messrs Whimster's manager took in coming at once to the reasonable arrangement which your Lordship has explained between him and the manager of Hawthorns & Company. If I wanted corroboration of the preference which has been given by the Lord Ordinary to the evidence of Mr Sutherland and of Mr Murray, witnesses for the pursuers, over that of Mr Whimster and Mr Blechynden, witnesses for the defenders, I should find it in this, that the actings of Messrs Whimster, whether directly or through Mr Blechynden, are consistent only with the arrangement which your Lordship has held proved. I cannot understand, if such an arrangement had not been come to, that Mr Blechynden would or could then and there have intervened without notice to remove the ship from the dry dock, and that afterwards he should have proceeded to put her back again, and then on his own initiative have employed another firm to do the work, again without notice. I think that his actings are not consistent with the case now made, and which has been dictated to Messrs Whimster by the Federation of shipowners, who are the true defenders, but that they are consistent with the facts which the Lord Ordinary has held proved.

Even on that view of the case it may be quite possible to maintain an equitable counter-claim of a minor character confined to the extra expense involved in bringing men from Glasgow and in undocking and re-docking the vessel, but no such separate case has been made. The defenders stand on their claim as it is stated, and I do not feel called upon to say anything further upon this subject.

On the whole matter I do not think the case could be better stated than it has been by the Lord Ordinary, and in his judgment I entirely concur.

Lord Mackenzie — I agree with your Lordship and with the Lord Ordinary. I think the decision of the case depends entirely upon the view taken on the question of fact, and that no general question of law, such as was discussed in the cases of *Hick*, 1893 A.C. 22, and *Sims*, [1913] 1 K.B. 103, arises. The vital question is, what happened on the 11th of July, when Mr Blechynden came through from Glasgow and saw Mr Sutherland and Mr Murray? On that date a troublesome situation had arisen in which both parties were interested. The owners were desirous of having the work on their ship completed, and the engineers who were under contract were placed in a difficulty because the fitters had left their work the day before. The view I

take is the same as that of the Lord Ordinary upon the evidence. When one reads the evidence of Mr Sutherland and Mr Murray, and compares it with the account given by Mr Blechynden and Mr Whimster, one is not surprised that the impression made upon the Lord Ordinary is that which he has described. The evidence of the first two witnesses is given with great distinctness, and the Lord Ordinary has believed them.

Taking that view, what was done on the 11th July was that the matter was discussed and the difficulty of the situation was explained, although Mr Blechynden, who was the marine superintendent of the shipowners, would be aware of the somewhat far-reaching effect of the policy which had been adopted in regard to certain classes of employees. He was told by the engineers that they could not find men, and I take the view that he accepted the situation. Then there was a discussion as to whether the work was too heavy for the apprentices, and apparently all parties were agreed that it was. What was done upon that day was that a new arrangement was made, and that new arrangement was that the engineers were to give the use of their gear and tools, and Mr Blechynden was to bring men from Glasgow.

That seems to have been an eminently business-like arrangement. It was of course open to the shipowners to hold the engineers to their contract, and if they had said "It is for you to find a way out of the difficulty, not for us," I think they would have been quite entitled to take up that position. It is not necessary to discuss that, for I hold it proved that that was not the position that was taken up, and that the arrangement which the Lord Ordinary has held to be proved was concluded on the 11th July. There is no dispute between the parties that there was such an arrangement; the only dispute is as to whether it was concluded so early as the 11th July, and I think that that date is made out.

The position then was that the engineers had made a bargain by which the labour was to be found by the shipowners. It would of course have been not unnatural and not unreasonable that there should have been further terms adjusted between the parties as to who was to bear any extra cost that was occasioned by this departure from the contract, but no such arrangement was made. There was no notification made by Messrs Whimster as to the terms of the bargain they made with Messrs Gardiner, and under these circumstances I do not think any part of the counter-claim for extra cost in consequence of the way the work was actually carried out can be put upon the engineers.

On the whole matter, I adopt the view on the question of fact put by the Lord Ordinary in his opinion, and have nothing further to add.

LORD SKERRINGTON—I agree with your Lordships. The case as I regard it depends primarily upon considerations of credibility as to what passed at the interview of the 11th July. No one suggests that the witnesses on either side did not speak the truth to the best of their recollection, but they were all speaking of what had happened two years previously, and the Lord Ordinary has expressd a distinct preference for the testimony of the pursuers' witnesses as being the more satisfactory and credible. The result at which he arrived is consistent with the whole surrounding circumstances; and also with the subsequent conduct of both parties; and accordingly I see no reason for disturbing his judgment.

The Court adhered.

Counsel for the Pursuers (Respondents)—Anderson, K.C.—Gentles. Agents—Scott & Glover, W.S.

Counsel for the Defenders (Reclaimers)—Blackburn, K.C. — Leadbetter. Agents—Boyd, Jameson, & Young, W.S.

Thursday, July 19.

FIRST DIVISION.

YOUNG'S EXECUTRIX AND OTHERS *v.* GRAY'S HOSPITAL, ELGIN, AND OTHERS.

Succession — Fee and Liferent — Vesting — Vesting subject to Defeasance — Direct Bequest of Fee of Heritage Followed by Proviso that if Legatees should not have Children the Destination to them should be in Liferent only, and the Fee should go to A B, whom failing to C D, but if either Legatee had Children the Liferent Destination should Lapse, and the Property should Vest in them in Fee.

A testator left his heritable estate of F. to his sisters equally between them and to the survivor of them, "providing that should neither of them have children the destination shall be to them in liferent only, & to Gray's Hospital Elgin in fee, & failing the Hospital, then to the Guildry Society of Elgin in fee—but should either of them have a child or children the liferent destination shall lapse & the property become vested in my said sisters or sister in fee—my object being to exclude any chance of my Elgin relatives acquiring said property by succession or bequest." *Held* (*dis.* Lord Skerrington) that as the effect of the proviso of the will was to leave the fee of the heritage in suspense, which was not permissible by the law of Scotland, there had been no effective qualification of the direct gift of the fee to the testator's sisters, who were therefore vested in the heritable estate *a morte testatoris*.

Jane Marjorie Young, executrix of Robert Young of Burghead and Fleurs, her brother, who was killed in action on 15th December 1915, leaving a holograph will, *first party*, Jane Marjorie Young, as an individual, *second party*, Isabella Thurburn Young, another sister of Robert Young, *third*