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*

party, Sir Archibald Williamson, Bart. and others, the trustees of Gray's Hospital Elgin, *fourth parties*, and the Elgin Guildry Fund Society, incorporated by Act of Parliament, *fifth parties*, brought a Special Case for the determination of questions relating to the fee of the heritable estate of Robert Young.

The holograph *will* provided as follows:—"I Robert Young of Burghead hereby leave & bequeath my property as follows viz.—To my mother Mrs Margaret Young the sum of One thousand (£1000) pounds: To my aunt Miss Lilias Ritchie, Broughton, Peebles-shire, two hundred & fifty (£250) pounds, both free of legacy duty. My estate of Fleurs I leave to my sisters Shena & Isabel, equally between them, & 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. And everything else of which I may die possessed, heritable or moveable, to my said sisters or the survivor of them. And, with the exception of the legacy of £250 to my aunt, my shares not to be sold but to be transferred to my mother & sisters at their discretion, particularly recommending that my Ceylon shares should not under any circumstances be sold. And I appoint my elder sister Miss Shena Young [*i.e.*, *the first party*] to be my executor, whom failing, David Renton, solicitor, Edinburgh. Written by me at Edinburgh on the seventeenth day of September, Nineteen hundred and fourteen years. R. Young."

The Case set forth—"The said estate of Fleurs extends to 39·025 acres or thereby. The gross annual value thereof is £122, 9s. 2d., and the annual burdens amount to about £30, leaving the net annual value at £92, 9s. 2d. or thereby. . . . (4) The testator died unmarried, and was survived by his mother, who is a widow, and his said two sisters, who are both unmarried and are his heirs-portioners. His said sisters are respectively the second and third parties to this case."

The second and third parties *contended* "that the testator bequeathed to them equally, and to the survivor of them, his said estate of Fleurs in fee, and that it vested in them *a morte testatoris*. They further maintain that the proviso purporting to qualify the aforesaid absolute gift of the fee is ineffectual, and is in any event ambiguous and should not receive effect."

The fourth and fifth parties contended "that the fee of the said estate of Fleurs, subject to a liferent in favour of the second and third parties and the survivor of them, has vested in the parties of the fourth part with a substitution in favour of the fifth parties, but subject to divestiture in the event of either of the parties of the second and third parts having a child or children."

The *questions of law* included, *inter alia*, —"1. Did the said estate of Fleurs vest in fee in the second and third parties *pro indiviso* to the extent of one-half each, and in the survivor of them *a morte testatoris*? or 2. Did the said estate of Fleurs then vest in fee in the fourth parties, with a substitution in favour of the fifth parties, subject to a liferent in favour of the second and third parties and the survivor of them, and to divestiture in favour of the second and third parties equally and the survivor of them in the event of either the second or third party having issue?"

Argued for the second and third parties—Question 1 should be answered in the affirmative. There was an absolute gift of the fee of the heritage to those parties. The testator's intention was to benefit them *primo loco*, and the result was that the fee vested in them *a morte testatoris*. The only element which could possibly be founded on as suspending vesting was the proviso; its terms were ambiguous and could not be held to affect the absolute gift of the fee—*Mitchell* v. *Mitchell*, 1877, 5 R. 154, *per* Lord Justice-Clerk Moncreiff at p. 159, 15 S.L.R. 102. Further there was no trust to protect the postponed beneficiaries if vesting was to be suspended, and that was sufficient to show that vesting must take place *a morte*—*Haig's Trustees* v. *Hay*, 1890, 17 R. 961, *per* Lord M'Laren at p. 964, 27 S.L.R. 771. The contention of the fourth and fifth parties involved vesting in the fourth party subject to defeasance; vesting subject to defeasance did not apply to heritage. If their view was right the directions of the testator could not be worked out.

Argued for the fourth and fifth parties—The testator's intention was to give the fee to the fourth parties subject to defeasance if the second and third parties had children. If a child was born he could get an adjudication of the fee. Vesting subject to defeasance was recognised in Scots law in regard to both heritage and moveables—*Earl of Caithness* v. *Sinclair*, 1912 S.C. 79, 49 S.L.R. 29; *M'Lay* v. *Borland*, 1876, 3 R. 1124; *Haldane's Trustees* v. *Murphy*, 1881, 9 R. 269, 19 S.L.R. 217; *Martin's Trustees* v. *Milliken*, 1864, 3 Macph. 326. The destination-over to the fifth parties was a substitution. The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 19, was referred to.

At advising—

Lord Johnston—The deed of settlement, upon the interpretation and effect of which this case depends, is an ordinary testament appointing an executor and disposing of moveables in combination with a direct conveyance of heritage. As regards the small heritable estate of Fleurs, the document must be regarded as a conveyance upon which the primary disponees, the granter's two sisters, can make up a title. As they are admittedly his heirs-portioners they have the choice of making up a title by expeding and recording a notarial instrument upon the settlement, or of making up their title as heirs-at-law. They will probably do the latter. But they are nevertheless bound by the conditions, limitations,

and restrictions of the settlement if there are any such valid and effectual contained in it. And these can be established and enforced against them at the instance of any ulterior disponees or others interested, whichever form of title is made up. It is to ascertain the rights under the deed of the primary disponees, Misses Shena and Isabella Young, the second and third parties, and of Gray's Hospital, Elgin, and the Guildry of Elgin, the fourth and fifth parties, that the case has been raised. But it must I think be determined purely on the footing of regarding the settlement as a direct conveyance of heritage, and as it would have presented itself if a title had been made up on it in either of the ways I have indicated, or in any other possible way. (For shortness I shall speak of the opposing parties as the Misses Young and Gray's Hospital.) The questions put to us are—1st. Did the estate of Fleurs vest in the Misses Young equally *pro indiviso* and the survivor *a morte testatoris?* or, 2nd. Did the estate vest in Gray's Hospital subject to a liferent in favour of the Misses Young and the survivor, and to divestiture in favour of them and the survivor in event of either having issue?

The opinion to which I have come is that the second question does not present what the testator directed, and besides involves a feudal impossibility, and should be answered in the negative; and that the first question should be answered in the affirmative.

Mr Young's settlement was evidently written by himself, and while his object in settling his heritable property is clearly stated, namely, to exclude any chance of his Elgin relatives acquiring the property by succession or bequest, his method of effecting that object is confused and impracticable and, as I regard it, a feudal impossibility. He says—"My estate of Fleurs I leave to my sisters Shena and Isabel, equally between them and to the survivor of them." These words import an unqualified fee, which must have effect unless there is something superadded validly to qualify it. That it was intended to qualify it will not do. If the purpose is not so expressed as validly and effectually to qualify it the direct and absolute conveyance stands.

Mr Young did intend to qualify it. But what he contemplated in providing for his object was that the fee of the estate should remain in suspense pending a contingency, the ladies having a liferent only pending purification of the contingency. After having given them the estate in direct and absolute words, Mr Young adds the alternative provision (1) that should neither of them have issue the destination shall be to them in liferent only and to Gray's Hospital in fee, and (2) that should either of them have a child their liferent shall lapse and the property become vested in them in fee. During the period which may elapse between the granter's death and either of his sisters giving birth to a child or both of them dying childless the fee is, like Mahomet's coffin, in suspense. It is neither in the Misses Young nor is it in Gray's Hospital. There is nothing which the feudal law so abhors as a vacant fee. The thing is impossible. There is therefore no valid limitation on the prior direct and absolute conveyance of the property to the Misses Young, and it takes effect accordingly.

The case for Gray's Hospital is based on the idea of a fee vesting subject to contingent divestiture—that is, in other words, to defeasance. That doctrine of succession law was developed, so far as Scots law is concerned, thirty odd years ago. Though little, in this Court at least, has been heard of it recently, and it has admittedly to be applied with circumspection, it has by no means been discarded, and I am not to be supposed as in any way calling it in question where applicable. But it is only applicable in my opinion where there is a trust, and even then it has hitherto only been applied in the case of bequests of general estate. I do not say that it might not apply under a trust of heritage. But it does not apply in the case of a direct conveyance and destination of the fee-simple of heritage. As Lord Watson said in the case of *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, at p. 63, 20 S.L.R. 566—"The vesting and divestiture of a proper feudal fee, as distinguished from a heritable *jus crediti*, is, I humbly conceive, alien to the principles of the law of Scotland." For you must have the fee somewhere. In the case of a trust of heritage you have it in the trustees. But if there is no trust, where is it under such a destination? Take the present case—If you could extend the doctrine of fiduciary fee (and in *Studd's* case no extension was needed, for it was the recognised case of the fiduciary fee in a parent for children *nascituri*) you might conceive of the Misses Young taking a liferent allenarly with a fiduciary fee for themselves if a child is born to either, and for Gray's Hospital if they both die without issue. But though the doctrine was invented to cover the case of a fee to children *nascituri*, it has repeatedly been said that it cannot be allowed to have a more extensive application. Besides this is not an instance of a gift to the parent in liferent allenarly and to his or her issue in fee, but primarily a direct gift to the parent. This then was not the case pleaded by Gray's Hospital, neither was the doctrine of defeasance pure and simple pleaded. Though it is hardly covered by the question raised, it was contended that a fee vested in Gray's Hospital subject to a shifting condition. If the result of such be (and I regret that it is one which I am unable to understand) that indicated in the opinion of Inglis, Lord Justice-Clerk, in *Martin's* case, 1864, 3 Macph. 326, at p. 330, it certainly was not what the granter here intended. But both ideas are condemned by the fatal objection that either would be a judge-made development of the granter's conveyance and destination in order to provide machinery to meet what it is conceived that he must have intended, whereas what he himself provided and on the face of his deed intended was the feudal impossibility—a suspended fee.

LORD SKERRINGTON—I do not consider that there is any real doubt as to the manner in which the testator intended to

dispose of his estate of Fleurs, nor do I see any legal difficulty in the way of giving effect to his wishes as expressed in his holograph will. An apparent difficulty, no doubt, is created by the fact that in the first sentence in which he mentions that estate he leaves it to his two sisters and to the survivor of them in language which, if it had stood alone and unqualified by any further provision, would have operated as a bequest in their favour of the estate in out-and-out property. It follows that, if one construes this will by the illegitimate process of relegating each sentence to a water-tight compartment, it would seem as if there was an inconsistency between the first sentence and that immediately following, in which the testator declared in so many words that if and so long as his sisters should be childless their right should be one of liferent only and that the fee should belong to Gray's Hospital. If in the first sentence the testator had expressly bequeathed the fee of the estate to his sisters, there would have been a real inconsistency which might have occasioned serious difficulty in discovering his actual meaning. As matters stand, however, there is no inconsistency, because the language of the proviso makes it clear that the bequest by the testator in favour of his sisters contained in the previous sentence was intended to operate as a bequest of the liferent only if and so long as neither lady had a child. It follows, in my opinion, that the holograph will (to quote the language of section 20 of the Titles to Land Consolidation (Scotland) Act 1868), uses words with reference to the estate of Fleurs which would, if used in a will with reference to moveables, be sufficient to confer upon the testator's sisters and upon the hospital a right to claim and receive the same in liferent and fee respectively.

A different and more serious difficulty is created by the fact that the will goes on to provide that in the event of either sister having a child the liferent rights should lapse and the property become vested in the testator's sisters or sister in fee. This intention the law can give effect to by attributing to the right of fee vested in the hospital the quality that it is liable to be divested in favour of the testator's sisters or sister on the occurrence of the event mentioned by the testator, or perhaps more simply by holding that the gift to the hospital is conditional upon the hospital denuding on the occurrence of that contingency. One ought, I think, to be slow to apply the principle of vesting subject to a defeasance or a condition to a conveyance or destination of heritable property as distinguished from a heritable *jus crediti*. To that extent, but no further, I respectfully agree with what fell from Lord M'Laren in *Turner* v. *Gaw*, (1894) 21 R. 563, at p. 567, 31 S.L.R. 447, and from Lord Watson in *Studd* v. *Cook*, (1883) 10 R. (H.L.) 53, at p. 63, 20 S.L.R. 566. There is, however, authority in our law sanctioning the principle of conditional vesting and divestiture as applicable to destinations of heritable property. Amongst others we were referred to the case of *Martin's Trustees* v. *Milliken*, (1864) 3 Macph. 326, and to the opinion of Lord President Inglis in *Haldane's Trustees*, (1881) 9 R. 270, 19 S.L.R. 217. The principle in question ought, in my opinion, to be invoked where, as in the present case, it provides the machinery necessary in order to carry out the plain intention of a testator. The application of the principle to the language of any particular deed and to the circumstances of any particular case may of course vary. We are not asked in this Special Case to express any opinion as to the effect in a question with adjudgers or purchasers from the hospital of a clause of divestiture which (*a*) is not fortified by a trust and (*b*) would not if it took effect open the way to a service by some other heir. I shall not assume that the hospital may become bankrupt or may try to defeat the expressed wishes of its benefactor. I simply apply the principle enunciated by Lord Kinnear in the case of *Caithness* v. *Sinclair*, 1912 S.C. 79, at p. 85, 49 S.L.R. 29, as follows —"a gratuitous donee must accept the gift subject to the conditions which are imposed upon it by the granter. He binds himself by acceptation of the gift to give effect to the conditions attached to it."

I accordingly answer the first question of law in the negative, and the second in the affirmative. The remaining questions were withdrawn.

I regret that I cannot agree with the judgment about to be pronounced, which, as it humbly appears to me, denies effect to the plain wishes of the testator owing to the supposed difficulty of finding machinery by means of which to carry it into effect.

LORD PRESIDENT — I agree with the opinion of Lord Johnston which I have had an opportunity of considering. My own views on the topic of vesting subject to defeasance were expressed fully in my opinion in the case of *Bannatyne's Trustees*, 1914 S.C. 693, 51 S.L.R. 605. I do not repeat them nor seek to add to them. I think I understand a destination to the testator's sisters Shena and Isabel, equally between them and to the survivor, but I am completely baffled when I seek to frame a destination giving effect to the clause which follows, and that for the reason given by Lord Watson in his opinion in *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566, which has been quoted by my brother Lord Johnston. But of one thing I am perfectly certain—that if I could frame such a destination as the testator had in view it would entirely fail to achieve his object, namely to exclude his Elgin relatives from benefit by succession or bequest.

We shall therefore answer the questions as suggested by Lord Johnston.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the First, Second, and Third Parties — Moncrieff, K.C.—C. H. Brown. Agent—David Renton.

Counsel for the Fourth and Fifth Parties —Chree, K.C.—R. C. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.