the haver to produce the documents, which he again declined to do.

On the motion of the pursuer's agent the commissioner made an *interim* report to the Lord Ordinary, who heard argument on the question raised.

Other authorities cited—*Elder*, 19 S.L.R. 195; *Livingston*, 22 D. 1333.

"*Opinion.*—I cannot distinguish this case from the case of *M'Donald* v. *M'Donalds*, February 22, 1881, 8 R. 357, and as I retain the opinion given effect to in that case, I must repeat the same judgment now. The same objection is urged here that was urged in the case of *M'Donald*, viz., that the medical opinions given to the railway company are confidential, and production of them therefore cannot be enforced. Now, between whom is there this confidence? There is no confidentiality as between the pursuer and defender in this action *quoad* these medical opinions. The railway company obtained them with reference to another actual or contemplated action, and intended to have used them for their own purposes in that action. These purposes have long been served; but the information which the opinions convey still exists. There can be no breach of confidence in requiring this information to be disclosed now; and it is right that this information should be given if it be expedient in the interests of truth that this should be done. The railway company can suffer no detriment by it becoming known at this time of day in what manner they were advised of a person's health years ago. It is said, however, that the railway company had paid for these opinions; but what relevancy is there in this argument? If they were paid for, in all probability they will be the more valuable. It is again said that these opinions were of the nature of precognitions; and as precognitions even of a dead person cannot be used in evidence, neither ought these opinions. This is an objection that can only be disposed of after one has seen the opinions, and I would desiderate a perusal of them with the view of determining this point. Whether the opinions of those medical men who are still living can be put in evidence when they themselves can be *viva voce* examined, is a point that the Judge will determine at the trial. In the meantime the order that I will make will be that the haver must produce the documents, and the commissioner will at present seal them up and report them so sealed up to the Court."

Counsel for Pursuer — Rhind. Agent — D. Howard Smith, Solicitor.

Counsel for Defender — Moncreiff. Agent — D. Hunter, S.S.C.

Counsel for Railway Co.—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, June 26.

FIRST DIVISION.

SPECIAL CASE—HALLIBURTON AND OTHERS.

Succession—Mortis causa *Conveyance—Conveyance to Person and his Heirs and Assignees—Conditional Institute.*

A testator by his settlement conveyed to trustees his whole estate, heritable and moveable, and directed them after payment of his debts to dispone, convey, and make over to B. H., "my youngest surviving daughter, and her heirs and assignees, the whole of the residue and remainder of my estates, heritable and moveable (the whole of the other members of my family having already been provided for by me)." The testator had been twice married, and had children by both marriages, B. H. being a child of the second. He was predeceased by B. H. unmarried and intestate. *Held* that her heirs, the other children of the second marriage, took the bequest as conditional institutes.

This was a Special Case as to the construction of the trust-disposition and settlement of John Halliburton, bookseller in Coldstream. By this deed the testator conveyed to trustees his whole estate, heritable and moveable, for the following purposes, viz.—First, that they should pay his just and lawful debts; and "secondly, that my trustees shall, as soon after my decease as may be, dispone, convey, and make over to Barbara Halliburton, my youngest surviving daughter, and her heirs and assignees, the whole of the residue and remainder of my estates, heritable and moveable (the whole of the other members of my family having been already provided for by me); and declaring further, that the provisions already made by me to my other surviving children are hereby declared to be in full satisfaction of all claims of legitim or executry competent to them, or any of them, by or through my decease, in any manner of way." The testator, who was a widower at the date of his death, had been twice married. At the date of the settlement (March 6, 1874) there were surviving of the first marriage one son and one daughter, and of the second marriage four daughters, one of whom was the said Barbara Halliburton; she died on 3d October 1881 unmarried and intestate, predeceasing the testator, who died on 9th October 1883. A question thus arose whether or not the bequest in favour of the said Barbara Halliburton and her heirs and assignees had lapsed through her predecease, and this Special Case was accordingly presented.

The first parties were the trustees under the settlement; the second parties were the heir-at-law and next-of-kin of the testator, who maintained that the bequest had lapsed and fallen into intestacy; the third parties were the sisters of the full blood of Barbara Halliburton, who, as her heirs both in heritage and moveables, maintained that the bequest had not lapsed, and that they were entitled to the residue as conditional institutes.

The questions stated for the determination of the Court were—"(1) Did the bequest of residue

in favour of Barbara Halliburton and her heirs and assignees lapse by her predeceasing the testator, and does the residuary estate, so far as heritable, now fall to be conveyed by the first parties to the heir-at-law of the testator, and so far as moveable to his next-of-kin? or (2) Under the destination to Barbara Halliburton and her heirs and assignees, do her sisters, parties hereto of the third part, take the benefit of the bequest of residue in her favour as conditional institutes?"

Argued for the parties of the second part—Although the general rule was that where there is a *mortis causa* disposition to "A, his heirs and assignees," failing A, the disponee, his heirs will take, yet the words "heirs and assignees" are not *voces signatæ*, but may be controlled by the context. They were here controlled by the words in the parenthesis which followed—("the whole of the other members of my family having been already provided for by me.") The deed was simply of the nature of a bond of provision in favour of the daughter—*Findlay* v. *Mackenzie* July 9, 1875, 2 R. 909; *Donald's Trustees* v. *Donald, &c.*, March 26, 1864, 2 Macph. 922. In any view, there was a presumption against conditional institution as regarded the heritage.

Argued for the parties of the third part — The general rule should be applied, as there were no specialties—*Maxwell* v. *Maxwell*, Dec. 24 1864, 3 Macph. 318; *Russel* v. *Russel*, 1769, M. 6372; *Inglis* v. *Miller*, 1762, M. 8084; *Boston* v. *Horsburgh*, 1781, M. 8099.

At advising—

Lord President—In this case we have to construe certain provisions made by the testator in 1874 in favour of his youngest daughter Barbara Halliburton and her heirs and assignees. The competition has regard to the estate which was left to Barbara, and arises in consequence of the fact that Mr Halliburton was twice married. The surviving children at the date of the deed, were one son and one daughter of the first marriage, and four daughters of the second marriage, of whom one, Barbara, subsequently died, predeceasing the testator. Now, Barbara having predeceased the testator, if the estate left to her does not go to her heirs and assignees in terms of the second purpose of the settlement, and the residue thus falls into intestacy, the effect will be that the whole surviving children of Mr Halliburton will be entitled to the residue; if, on the other hand, the heirs of Barbara are conditionally instituted, then her brothers and sisters of the full blood, that is to say, the surviving children of the second marriage, will become entitled. And these are the parties before us.

The deed is exceedingly simple in its terms, and there is not much means of obtaining light on the question except the words themselves in the clause under construction. The testator conveys his entire estate to trustees for the purpose, in the first place, of paying his debts, and then the only other purpose is stated in the following terms:—"That my trustees shall, as soon after my decease as may be, dispone, convey, and make over to Barbara Halliburton, my youngest surviving daughter, and her heirs and assignees, the whole of the residue and remainder of my estates, heritable and moveable (the whole of the other members of my family having been already provided for by me); and declaring further that the provisions already made by me to my other surviving children are hereby declared to be in full satisfaction of all claims of legitim or executry competent to them, or any of them, by or through my decease, in any manner of way." The rest of the deed consists entirely of what may be called mere clauses of style.

Now, as a general rule, where there is a conveyance to a person named, and his or her heirs and assignees, or a conveyance to trustees in these terms, in the event of the person dying before the granter the heirs of the grantee take. That rule is applicable to *mortis causa* deeds as well as to others, but it is a rule not without exceptions of course, and examples of such exceptions have been brought under our notice. The most important and recent of these cases is that of *Findlay* v. *Mackenzie*, and if this case had at all resembled in its circumstances the case of *Findlay* v. *Mackenzie*, I would have been prepared to follow the decision there pronounced; but the difference between the two cases is very material. In *Findlay* v. *Mackenzie* the testator had one daughter who had been amply provided for by his marriage-contract, and he had no other object of affection except his wife, and therefore he conveyed to her his whole estate; and the terms of the conveyance are similar to the present so far as regards the person to whom the gift was made, for it is to her "and her heirs and assignees whomsoever;" but then in the same clause the testator had expressed himself in this way—"it is my wish to provide further for my wife. . . in the event of her surviving me, over and above the provisions already conceived in her favour in an antenuptial contract of marriage," and further, he had nominated his widow to be his sole executrix. From these expressions the Court came to the conclusion that the object of the testator was to make a gift to his wife only in the event of her surviving him, and that intention was gathered from the words in which the gift was made. But here there are no such expressions to guide us. No doubt there follows this statement, in a parenthesis, "the whole of the other members of my family having been already provided for by me," and therefore we must take that as a fact, and a fact very particularly present to the mind of the testator. We have no information as to what these provisions were, and we are not entitled to assume that they were contained in bonds of provision, or that they were of such a nature as not to pass to heirs and assignees. The probability is that they were not of that kind at all. The other daughters of the testator were married, and it is exceedingly probable that their provisions were settled upon them by marriage-contract. His sons were well advanced in life, and therefore most probably engaged in trades or professions, and the money expended in establishing them in business would very naturally form the provisions to them. They may have been of a different nature, but we cannot speculate as to that. We have the simple fact that in the opinion of the testator his other children had been sufficiently provided for, and therefore he gives the balance to his single daughter Barbara, who was apparently living in family with him, and he gives it also to her

heirs and assignees Now, the word assignee does not affect the question, which is, whether the heirs of Barbara were conditionally instituted in the event of her predecease. Upon that point I cannot find any indication that the testator's intention was that the ordinary rule should not apply, and I am therefore of opinion that it must receive effect.

Lord Mure and Lord Shand concurred.

The Court pronounced this interlocutor:—

"Find and declare that under the destination to Barbara Halliburton, and her heirs and assignees, in the trust-disposition and settlement of the late John Halliburton, her sisters, parties of the third part, do, in consequence of Barbara Halliburton predeceasing the testator, take the benefit of the bequest of residue as conditional institutes, and decern."

Counsel for First and Second Parties—Martin. Agents—Bruce & Kerr, W.S.

Counsel for Third Parties—Darling. Agents—W. N. Fraser, S.S.C.

Saturday, June 28.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SOMERVELL AND OTHERS *v.* SOMERVELL.

Succession—Entail—Bond of Provision—Equitable Compensation.

An heir of entail in possession who had made provisions for his children under his marriage-contract, and had granted provisions to his younger children by bond under the Aberdeen Act, directed his trustees by the fifth purpose of his trust-disposition and settlement to hold and apply £6000 for each of his children other than the heir, which provision was to be inclusive of the sums to which they were entitled under the marriage-contract and bond of provision. He bequeathed the residue of his estate to the heir of entail. By a codicil he revoked the fifth purpose of his settlement, and in place thereof he directed his trustees to hold, apply, and pay to his younger children certain legacies, including legacies of £5000 each to three of his younger sons, "which shall include and comprehend, and be subject to abatement and deduction, or shall consist, as the case may be," of the sums to which they should be entitled under the marriage-contract and bond of provision. By a second codicil he revoked the destination of residue in the settlement, divided the residue among the three younger sons to whom he had given legacies of £5000, and confirmed the settlement and preceding codicil except in so far as thereby altered. These three younger sons claimed from their elder brother, who succeeded as heir of entail, unconditional payment of the sum in the bond of provision. *Held*, that on a sound construction of the settlement and codicils, the provisions thereby made for these younger sons were intended to be in satisfaction of their claims under the bond of provision, and therefore that they could not exact from the heir of entail payment of the sum contained in the bond without making compensation to him out of the general estate.

Mr Graham Somervell, heir of entail in possession of the estates of Sorn and others in Ayrshire, Hamilton's Farm, Lanarkshire, and Dalgain and others, in Ayrshire, died on 11th November 1881, survived by his widow, his eldest son James Somervell, and five younger children, Mrs Middleton, William Somervell Somervell, Graham C. Somervell, Henry David Somervell, and Louis Somervell. All these children had reached majority. By his marriage-contract, executed before he succeeded to the estates, he had bound himself to pay £3000 to the children of the marriage if more than three, with an additional sum of £3000 in the event of his succeeding to the entailed estates, and power was reserved to him of apportioning the whole £6000 among his children.

In 1857 Mr Somervell having succeeded to the entailed estates, executed a trust-disposition and settlement. This settlement, which was dated 19th February 1857, and proceeded on the narrative of the marriage-contract, and that he had now succeeded to the entailed estates and had resolved to allocate the provisions contained in the contract in favour of the children, allocated £100 to the child who should succeed to the entailed estates, and the remainder to the testator's other children, equally between them. The settlement also, on the narrative, *inter alia*, that the testator had executed or was about to execute a bond of provision in favour of his children by virtue of the Aberdeen Act (5 Geo. IV. c. 87), "which provisions made by the said bond are intended by me to be over and above the provisions in favour of the children of the marriage between me and my said spouse made by the said contract of marriage," conveyed to trustees his whole estate, heritable (except the entailed lands) and moveable, for payment of debts, conveyance of furniture in Sorn Castle to the heir of entail, provisions for the widow, etc.; and *fifth*—"In the fifth place, the said trustees and their foresaids shall hold, apply, and pay the sum of £6000 to and for behoof of each of the children born, or that may hereafter be born, to me, exclusive of any child who shall succeed to me in the foresaid entailed lands and estates, bearing interest at the rate of five per cent per annum from and after the first term of Whitsunday or Martinmas occurring after my decease, till payment: But declaring, as it is hereby expressly provided and declared, that the said sum of £6000 and interest shall include and comprehend, and be subject to abatement and deduction of the sum or sums to which my children shall respectively be entitled in his or her own right (not by way of accretion or succession) under the contract of marriage and bond of provision before recited, or either of them, it being my will and intention that each of my said children, exclusive as aforesaid, shall receive in his or her own right the said sum of £6000 and interest thereon from the date foresaid without prejudice to his or her receiving more under and in virtue of the contract of marriage and bond of provision before narrated, or