general regulations . . . (*a*) for determining what classes of officers are required by committees for the proper discharge of their functions . . . (*b*) for authorising the attendance of officers of the Ministry at meetings of committees, and for providing that the records of committees shall be accessible to officers of the Ministry." I think that the Ministry were clearly interested in the subject-matter of the letter, and I do not think that the presence of representatives of that body at the meeting of the Sub-Committee deprives the defender of the right to plead that his statement was made on a privileged occasion. It may be noted that the letter of the pursuer's fellow-employees reflecting upon his character had been directly communicated by them to the Regional Director.

The question that has now to be considered is whether the pursuer has or has not made averments of malice against the defender which if established would entitle him to obtain a verdict. The Lord Ordinary at the conclusion of his note says — "I further think that it would be quite irrelevant to suggest that the pursuer is entitled to prove or attempt to prove that in discharging such a duty he (*i.e.*, the defender) was acting maliciously." With this statement I am unable to agree. It is not and could not be maintained for the defender that he is entitled to absolute privilege, and it is only in cases where such privilege is enjoyed that malice is irrelevant. In all cases of qualified privilege malice is of importance, and proof that the defender acted from an illegitimate motive will give the pursuer right to a verdict unless in the case of a communication to the authorities as to the commission of an offence where the pursuer must in addition establish that the defender has not probable cause for making his statement—*Lightbody* v. *Gordon*, 1882, 9 R. 934, 19 S.L.R. 703.

What, then, is the nature of the averments made by the pursuer as to the malice of the defender? I do not think that the mere allegation that the defender acted maliciously is sufficient. There must be facts and circumstances alleged from which malice may be inferred. The pursuer does not allege that the defender was in any way personally responsible for the letter being sent, or that he made any allegation against the pursuer as being within his own knowledge. No doubt the pursuer avers that an inquiry was held, when the writers of the letter were called into the room where the Sub-Committee met and questioned as to the statements made by them, that the writers did not substantiate any of the statements therein, and that the defender at the conclusion of the inquiry said, "I believe it is true," meaning by this the charges made against the pursuer. Assuming that the defender was wrong in the inference which he drew from the statements made, I do not think that such a circumstance would justify a jury in holding that he had read the letter from a wrong or improper motive of injuring the pursuer and not from a sense of duty. In condescendence 8 there are a number of incidents referred to in which the pursuer suggests that the defender had taken up a hostile attitude towards him. These acts, however, do not appear to be in any way connected with the occasion of the reading of the letter or to justify an inference that the defender had abused the position in which he was placed in order to injure the pursuer. I think therefore that the Lord Ordinary reached a right conclusion, and that the reclaiming note ought to be refused.

LORD CULLEN and LORD ORMIDALE concurred.

The LORD JUSTICE-CLERK and LORD ANDERSON did not hear the case.

The Court adhered.

Counsel for the Reclaimer (Pursuer)—Watt, K.C.—Thom. Agents—Arch. Menzies & White, W.S.

Counsel for the Respondent (Defender)—Fraser, K.C.—J. B. Young. Agent—Campbell Smith, S.S.C.

Saturday, July 15.

SECOND DIVISION.

MONTGOMERIE-FLEMING'S TRUSTEES *v.* MONTGOMERIE-FLEMING'S TRUSTEES.

Succession—Vesting—Conditional Institution—Destination on Occurrence of Certain Event to a Person Named "and His Heirs and Assignees"—Construction of "And" preceding "Heirs" — Effect of Addition of Words "And Assignees."

A testator, on the narrative that it was his wish that his son should occupy his house on his marriage, directed his trustees on the death or second marriage of his wife, "if and when the whole of my daughters are married or when my son is married, whichever of these latter events shall first happen," to assign and dispone to his son "and his heirs and assignees" the house in question. The son died unmarried, predeceased by his mother and survived by one unmarried sister, and leaving a will by which he left all his estate to trustees. *Held* (1) that the general rule that a destination over to heirs of a person appointed conditionally made the heirs conditional institutes and thus suspended vesting till the purification of the condition, was not elided by the use of the word "and" preceding "heirs" in place of the word "or," the two words having the same meaning of "whom failing"; (2) that the addition of the words "and assignees" gave no right to the son's testamentary trustees, the son having no right to assign, and that accordingly the son's heirs took the house as conditional institutes.

George Porteous Scott, Glasgow, and others, testamentary trustees of James Brown Montgomerie-Fleming of Kelvinside, Glas-

gow, *first parties;* Mrs Elisabeth Tennent Montgomerie-Fleming or Carre and others, married daughters of the testator, along with the marriage-contract trustees of two of these daughters, their assignees, *second parties;* and Mrs Elisabeth Tennent Montgomerie-Fleming or Carre and others, testamentary trustees of Major James Brown Montgomerie-Fleming, son of J. B. Montgomerie-Fleming of Kelvinside, *third parties,* presented a Special Case for the opinion and judgment of the Court. *Inter alia* the question submitted to the Court was whether the late Major J. B. Montgomerie-Fleming died vested in a right of fee in the family house in terms of his father's will. James Brown Montgomerie-Fleming of Kelvinside, Glasgow, Major Montgomerie - Fleming's father, died on the 18th June 1899 leaving a trust-disposition and settlement dated 4th February 1898 which provided, *inter alia*—"*In the Fourth Place* It is my wish and desire that on the death or second marriage of my said wife my children should so long as they remain unmarried live together at Beaconsfield house Kelvinside And further as it is my wish and desire that my son James Brown Montgomerie-Fleming Junior should occupy Beaconsfield House on his marriage I hereby direct and appoint my said trustees on the death or second marriage of my said wife if and when the whole of my daughters are married or when my son is married whichever of these latter events shall first happen to assign and dispone to my son the said James Brown Montgomerie-Fleming Junior and his heirs and assignees (First) the said Beaconsfield House offices ground garden and pertinents . . . (Second) the Gardener's Cottage ground attached thereto and kitchen garden and all presently attached to Beaconsfield House but that under such burdens as may at the date of my death exist over the said subjects Declaring that as my unmarried daughters will on my son's marriage and entry to and occupation of Beaconsfield House and pertinents before mentioned be deprived of a residence at Beaconsfield I Provide and Declare that my son if and when my unmarried daughters are so deprived of a residence at Beaconsfield shall be bound and obliged as by acceptance of the foresaid conveyance in his favour of Beaconsfield House and others before mentioned he shall be held to bind and oblige himself to make payment to each of my unmarried daughters till each of them shall respectively be married of a free yearly annuity of Fifty pounds payable at two terms in the year Whitsunday and Martinmas by equal portions beginning the first term's payment of said annuity at the first of these terms which shall happen after my son's marriage and entry and occupation of Beaconsfield House and pertinents before mentioned for the period preceding the said term and the next term's payment at the first term of Whitsunday and Martinmas thereafter and so forth half-yearly and termly thereafter Declaring that if and when each of my daughters shall be married the annuity of the daughter so getting married shall cease as at the date of such marriage." Beaconsfield House was subsequently known as Kelvinside House.

The Case stated, *inter alia*—"6. The testator was survived by his widow the said Mrs Jane Robertson Pritchard or Montgomerie-Fleming (who accepted and was paid the liferent of testator's whole estate up to the date of her death), by his son, Major James Brown Montgomerie-Fleming, by his daughters Mrs Carre, Mrs Balfour Paul, and Mrs Neilson, the second parties hereto, and by another daughter, Miss Margaret Mary Montgomerie-Fleming. At testator's death all his children were unmarried. 7. The testator's widow, the said Mrs Jane Robertson Pritchard or Montgomerie - Fleming, died on 14th February 1913. The said Major James Brown Montgomerie - Fleming died of wounds on 18th August 1917 unmarried. At his death there was only one unmarried daughter, the said Miss Margaret Mary Montgomerie - Fleming, who died unmarried on 21st September 1921, being at the date of her death over twenty-one years of age. 8. It was decided in a Special Case taken to the Court (*Montgomerie-Fleming's Trustees* v. *Carre*, July 4, 1913, 1913 S.C. 1018) that the testator, in expressing the desire in the fourth place of his said trust-disposition and settlement that his children so long as they remained unmarried should live together in said Kelvinside House, had given his children a mere right of occupancy and not a liferent of the house, and they were therefore not liable in payment of any annual burdens and charges thereon beyond those payable by a tenant - occupier. The right of occupancy of Kelvinside House under this decision was exercised by the said Major James Brown Montgomerie-Fleming and Miss Margaret Mary Montgomerie-Fleming until the autumn of 1914, when they gave up said occupancy and intimated to the first parties that they preferred that the first parties should let the house and deal with the rent thereof as part of the general revenue of testator's estate. Thereafter Kelvinside House was let and is still let, the rent being treated as part of the general revenue of the trust estate. 9. By his trust-disposition and settlement and codicil, dated 16th September 1915, and registered in the Books of Council and Session 30th August 1917, the said Major James Brown Montgomerie-Fleming assigned and disponed to and in favour of the said Mrs Elisabeth Tennent Montgomerie - Fleming or Carre, Henry Carre, and Alfred James Fleming, as trustees for the purposes thereinafter mentioned, all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description and wheresoever situated that should belong to him at the time of his death, including therein all means and estate over which he had powers of disposal, testing, or appointment by will or otherwise, together with the titles, writs, and vouchers of the same, and he nominated his said trustees to be his sole executors. 10. The said Miss Margaret Mary Montgomerie - Fleming died intestate, and by decree of the Sheriff of Edinburgh, the

Lothians, and Peebles, dated 4th November 1921, her sisters the said Mrs Carre, Mrs Balfour Paul, and Mrs Neilson were appointed her executrices-dative *qua* next-of-kin. 15. The second parties maintain that as the said Major James Brown Montgomerie-Fleming was at the date of his death unmarried, and his sister the said Miss Margaret Mary Montgomerie-Fleming was also then unmarried, he was not entitled to receive from testator's trustees during his lifetime a conveyance of Kelvinside House, and that he was not vested with any right of fee therein at the date of his death. They further maintain that Mrs Carre, Mrs Balfour Paul, and Mrs Neilson, being the whole surviving daughters of the testator, and all married, are, as heirs-portioners of the said Major James Brown Montgomerie-Fleming at the date of death of the said Miss Margaret Mary Montgomerie-Fleming, entitled, under the destination of Kelvinside House in testator's said bequest thereof, to a conveyance equally to them or their respective assignees, the above-mentioned marriage-contract trustees, of the said subjects to the extent of one-third each, subject to such burdens thereover as existed at the date of testator's death. Alternatively, they maintain that in the events which have happened said subjects form part of the residue of the testator's estate and fall to be dealt with under the fifth purpose of his said trust-disposition and settlement. . . . 16. The third parties maintain that on a sound construction of said trust-disposition and settlement the said Major James Brown Montgomerie-Fleming was vested with a right of fee in Kelvinside House subject to the right of occupancy of testator's unmarried children, and that they, as trustees of the said Major James Brown Montgomerie-Fleming, are now entitled to a conveyance of said subjects under the foresaid burdens." [An alternative contention that the bequest had failed and fell to be regarded as intestate succession of the testator, and was therefore vested in Major Fleming as his heir-at-law, was subsequently given up.]

The *questions of law* were, *inter alia*—"1. Was the said Major James Brown Montgomerie-Fleming vested with a right of fee in the subjects now known as Kelvinside House at the date of his death, subject to such burdens as existed thereover at the date of the death of the testator? 2. In the event of the first question being answered in the negative—(*a*) Are the surviving sisters of the said Major James Brown Montgomerie-Fleming, the said Mrs Carre, Mrs Balfour Paul, and Mrs Neilson, or their respective assignees, second parties, as his heirs at the date of death of the said Miss Margaret Mary Montgomerie-Fleming, entitled as conditional institutes to a conveyance of said subjects subject to said burdens? or (*b*) In the events which have happened do said subjects fall into and form part of the residue of testator's state?"

Argued for the second parties—No right of fee in the house had vested in Major Montgomerie-Fleming. This was plain on the terms of the clause apart from the destination-over, because the gift was purely conditional and the condition had never been purified—*Bell* v. *Cheape*, 1845, 7 D. 614; *Bryson's Trustees* v. *Clark*, 1880, 8 R. 142, and *per* Lord President Inglis at p. 145, 18 S.L.R. 103; *Graham's Trustees* v. *Graham*, 1899, 2 F. 232, 37 S.L.R. 163; *Baillie's Trustees* v. *Whiting*, 1910 S.C. 891, and *per* Lord President Dunedin at p. 894, 47 S.L.R. 684. There was here, further, a conditional institution of the heirs and assignees of Major Montgomerie-Fleming, and in accordance with authority this gave a right to his surviving sisters to take as his heirs in preference to his testamentary assignees—*Halliburton, &c.*, 1884, 11 R. 979, and *per* Lord President Inglis at p. 980, 21 S.L.R. 686; *Cleland* v. *Allan*, 1891, 18 R. 377, 28 S.L.R. 264; *Macleod* v. *Wilson*, 1903, 6 F. 213, and *per* Lord Young at p. 216, 41 S.L.R. 130; *Wylie's Trustees* v. *Bruce*, 1919 S.C. 211, and *per* Lord Justice-Clerk (Scott-Dickson) at p. 222, Lord Dundas at p. 223, and Lord Sands at p. 232, 56 S.L.R. 156. *Marshall's Trustees* v. *Campbell*, 1914 S.C. 443, 51 S.L.R. 397, founded on by the third parties, was inconsistent with *Wylie's Trustees* v. *Bruce*, *cit. sup.* The addition of the words "and assignees" to the destination did not strengthen the third parties' contention—*Bell* v. *Cheape*, *cit. sup.*

Argued for the third parties—Major Montgomerie-Fleming took a vested right of fee *a morte testatoris* in the house, burdened with a right of occupancy in his sisters, terminable in certain events. The use of the word "and" in the destination instead of the word "or" his heirs showed that this was the true construction. The word "or" had been interpreted as equivalent to "whom failing," and therefore as unfavourable to vesting. The word "and" on the other hand was cumulative in its effect and emphatic of the gift, and therefore favourable to vesting—*Findlay* v. *Mackenzie*, 1875, 2 R. 909, 12 S.L.R. 597; *Bowman* v. *Bowman*, 1899, 1 F. (H.L.) 69, 37 S.L.R. 959; *Thompson's Trustees* v. *Jamieson*, 1900, 2 F. 470, 37 S.L.R. 346; *Marshall's Trustees* v. *Campbell*, 1914 S.C. 443, 51 S.L.R. 397; *Wylie's Trustee's* v. *Bruce*, 1919 S.C. 211, 56 S.L.R. 156. The presumption in favour of vesting was unusually strong where children were favoured and the object in postponing payment was accounted for as in the present case. To overcome this presumption the ulterior destination must be such as to indicate specific favour on the part of the testator—*Jackson* v. *Macmillan*, 1876, 3 R. 627, *per* Lord Justice-Clerk Moncrieff at p. 630, 13 S.L.R. 388. *Graham's Trustees* v. *Graham*, *cit. sup.*, was not in point, because neither the word "and" nor the word "or" was there subject to construction. *Wylie's Trustees* v. *Bruce*, *cit. sup.*, did not disapprove of *Marshall's Trustees* v. *Campbell*, *cit. sup.* The addition of the words "and assignees" strengthened the presumption in favour of vesting—*Thompson's Trustees* v. *Jamieson*, *cit. sup.*, *per* Lord Stormonth Darling at p. 493 and Lord Low at p. 495. In this respect *Bowman* v. *Bowman*, *cit. sup.*, and *Wylie's Trustees* v. *Bruce*, *cit. sup.*, were distinguishable. *Bell* v. *Cheape*, *cit. sup.*, did not

decide any question of vesting. The question there raised was whether the destination let in assignees before vesting. *Home's Trustees*, 1891, 18 R. 1138, was also referred to.

At advising—

LORD ORMIDALE —. . . The questions submitted to the Court are concerned with the meaning and effect of the directions given in the fourth and fifth purposes of Mr Fleming's settlement.

The fourth purpose is as follows—"It is my wish and desire that on the death or second marriage of my said wife my children should so long as they remain unmarried live together at Beaconsfield House Kelvinside; And further, as it is my wish and desire that my son James Brown Montgomerie-Fleming Junior should occupy Beaconsfield House on his marriage I hereby direct and appoint my said trusteees on the death or second marriage of my said wife if and when the whole of my daughters are married or when my son is married whichever of these latter events shall first happen, to assign and dispone to my son James Brown Montgomerie-Fleming Junior and his heirs and assignees" Beaconsfield House and the gardener's cottage ground attached thereto. Major Fleming's trustees (the third parties) maintain that he was vested with a right of fee in Beaconsfield House, &c., at the date of his death, that a right of fee vested in him *a morte testatoris* burdened only with a right of occupancy by his sisters so long as they or any of them remained unmarried. The second parties, on the other hand, maintain that no right of fee vested in their brother, and that they as his heirs at the date of Miss Margaret's death are entitled as conditional institutes to a conveyance of the subjects. In the case (article 16) an alternative contention is stated by the third parties, that in the events which happened the bequest of Beaconsfield House, &c., has failed, and the subjects fall to be regarded as intestate succession of Mr Fleming, but they gave up this contention and I do not consider it. The answer to the question that is raised depends therefore, it seems to me, on whether or not the reference to heirs imports a conditional institution of Major Fleming's heirs, and therefore a destination-over. If it does, then following the rule laid down in *Bryson's Trustees* (8 R. 142), and given effect to in many subsequent cases, as nothing is expressed in favour of Major Fleming except a direction to the trustees to convey to him on the happening of a certain event, and *ex hypothesi* failing him to his heirs and assignees, and as he has not survived the event he took no right under the clause.

If the clause had been expressed "or" his heirs and assignees, instead of "and" his heirs and assignees, there would in my opinion have been no room for argument. So long as the rule enunciated by Lord M'Laren in *Hay's Trustees* (1890, 17 R. 961, 27 S.L.R. 771) was recognised as sound, there might have been, but that the rule is not sound has now been conclusively determined so far as this Court is concerned, if not by earlier cases, certainly by the case of *Wylie's Trustees* (1919 S.C. 211) in which it was held by the whole Court, following certain dicta of Lord Watson and Lord Davey in *Bowman* (1 F. (H.L.) 69) that under a direction by a testator to his trustees to hold his dwellIng-house and a sum of £3000 for his wife in liferent, and, shortly put, on her death to convey the house and pay the £3000 to A B or his heirs in heritage, the destination to the heirs in heritage was a conditional institution which suspended vesting until the death of the testator's widow. As Lord Dundas puts it (page 224), referring to the dicta of Lord Watson and Lord Davey—"These noble and learned Lords laid down in effect that a gift-over in favour of persons unnamed, but described as heirs, issue, or the like, of the first legatee should, as a general rule, be construed and have the same effect as one in favour of another, relative or stranger, *nominatim*."

With reference to the words "and" and "or," I regard them when used in such a destination as we have here as substantially the same in effect. That I consider was clearly the expressed view of Lord Dundas and Lord Sands in *Wylie's* case, and I do not think the contrary has ever been authoritatively indicated. In the case of *Hay's Trustees* itself the destination was to A B and his heirs, and I observe that the Lord Ordinary (Kinnear) said this (at p. 962)—"The only question therefore is whether a direction to convey to Charles Crawford Hay and his heirs is equivalent to a direction to convey to him, whom failing to his heirs. But the general rule is that under a direction to convey in these terms, if the first institute does not survive the period of conveyance, the heirs take as conditional institutes in their own right and not as representing him." In *Bowman's Trustees* ((1898) 25 R. 811) Lord M'Laren, in dealing with a distinction attempted to be made between *Bowman's* case and that of *Hay's Trustees*, depending on the use of "or" in *Bowman* in place of "and" in *Hay*, says (at p. 818)—"I think that in the case of *Hay's Trustees* we construed the destination to Charles Crawford Hay and his heirs as equivalent to a destination to him or his heirs—that is, we held it to be a conditional institution, but limited to the event of Mr Crawford Hay dying in the testator's lifetime. If this be so, the suggested distinction has no substance in it." There is no ground therefore in my opinion for not giving to the word "and" the meaning of 'whom failing."

If that be so, then there is nothing in the rest of Mr Fleming's settlement to take the present case out of the general rule that the destination to heirs constitutes them conditional institutes. I cannot give to the word "assignees" any such effect where the gift to the primary institute is otherwise so clearly conditional. The destination cannot of course vest a substantive right in Major Fleming's trustees as his assignees. That was decided in *Bell* v. *Cheape*, 7 D. 614. One may be impressed by the reasoning of Lord Fullerton at pages 633 and 634, but his Lordship thought that even then the question

was no longer open. As the Lord President (Inglis) said in *Halliburton* (11 R. 979, at p. 981), in considering whether under a destination to A B and her heirs and assignees the heirs were conditionally instituted and in determining that they were—"The word 'assignee' does not affect the question." [*His Lordship then proceeded to deal with questions relating to the construction of the fifth purpose.*]

LORD HUNTER—I concur. The question whether the late Major Montgomerie-Fleming had a vested right of fee in the subjects now known as Kelvinside House at the date of his death appears to me to depend upon whether or not there was a proper conditional institution of his heirs in the event of his not surviving the occurrence of the events upon which his right to get a conveyance from the trustees depended. If this question falls to be answered in the affirmative I think that the contention of his testamentary trustees cannot be sustained.

In *Hay's Trustees* v. *Hay* (17 R. 961) Lord M'Laren (at p. 965) said—"I think the true criterion is this, that where the legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be *personæ delectæ*, and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children, or issue, or heirs of the institute (there being no ulterior destination), these are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the truster to give him consistently with the benefits previously given to liferenters or other persons." This expression of opinion was disapproved by Lord Watson and Lord Davey in *Bowman* v. *Bowman* (1 F. (H.L.) 69). Lord Watson said (at p. 72)—"I fail to see why a gift-over in favour of the heirs of an instituted child should be otherwise construed or have any different effect than a gift-over in favour of another relative or of a stranger *nominatim*." Lord Davey (at p. 77), after expressing the same view, said—"I cannot therefore assent to the proposition laid down by Lord M'Laren as a general rule of construction or criterion to be applied in such cases. But I think the circumstance that the gift-over is not in favour of some *persona delecta* by name may be taken into consideration together with other circumstances appearing on the will which affect the construction."

In *Marshall's Trustee* v. *Campbell* (1914 S.C. 443), decided after the case of *Bowman*, a testator conveyed his whole estate to trustees, and directed them to pay the whole income to his widow, and on her death to convey a certain heritable subject to his daughter "and her heirs and successors." The daughter survived the testator but predeceased the liferentrix. It was held by the Second Division of the Court that the bequest vested in the daughter *a morte testatoris*. It was maintained before us on behalf of Major Montgomerie-Fleming's testamentary trustees that this case was binding upon us. I am of opinion that that decision cannot be looked upon as authoritative in view of the decision of the whole Court in *Wylie's Trustees* v. *Bruce*, 1919 S.C. 211. In that case a sum of money was left on the expiry of a liferent to A B "or his heirs in heritage." It was held that this destination amounted to a proper conditional institution which suspended vesting until the death of the liferentrix. The suggestion that there is a distinction between the effect of a destination to A and his heirs and to A or his heirs does not appear to me to be well founded. In *Wylie's Trustees* the case of *Hay's Trustees* was expressly overruled, and in that case the destination was to A and his heirs, not to A or his heirs.

Another point of distinction between the destination dealt with in the case of *Bowman* and *Wylie's Trustees* was founded upon the circumstance that not only the heirs but also the assignees of the first institute are called. Importance was certainly attached to these words as favouring vesting in the first institute by both Lord Low and Lord Stormonth-Darling in the case of *Thompson's Trustees* v. *Jamieson*, 2 F. 470. But in *Bell* v. *Cheape* (7 D. 614) a legacy was left to A, his heirs, executors, or assignees in the event of B, who liferented the subject of it, dying without issue. A assigned the legacy but predeceased the liferenter. A's executor was preferred to his assignee, the Court holding that assignees are no persons at all till an assignation is made, and it cannot be made until the right vests. In explaining the effect of that decision Lord President Inglis in *Steel's Trustees* v. *Steel* (1888, 16 R. 204, at p. 209, 26 S.L.R. 146) said—"That judgment (*i.e.*, *Bell* v. *Cheape*) proceeded on the ground that B's heirs and executors were called as conditional institutes after B, and were entitled to succeed in place of B if he predeceased the death of the liferenter and the term of payment. . . ."

LORD ANDERSON—I also agree.

This Special Case is concerned with the construction of two clauses—the fourth and fifth—of the trust-disposition and settlement of the late James Brown Montgomerie-Fleming of Kelvinside, Glasgow. The answers to the first two questions of law stated in the Case depend upon the meaning assigned to the fourth clause of the trust-disposition; the answers to the remaining four questions of law depend on the construction of the fifth clause. With reference to the fourth clause, which is concerned with the destination of Kelvinside House, the rival contentions are (*a*) that this property vested *a morte testatoris* in the truster's son Major Montgomerie-Fleming subject to a right of occupancy conferred on his unmarried sisters, and (*b*) that there was no vesting in Major Montgomerie-Fleming, but that, subsequent to his death and to the death of his only unmarried sister Margaret, vesting took place in his

heirs as conditional institutes called after him by the provisions of the clause. I am of opinion that the latter contention must prevail.

Vesting, in my judgment, never took place in Major Montgomerie-Fleming for two reasons—(1) Because the grant to him was conditional (*a*) on his marriage, which never occurred, or (*b*) on his survival of the marriage of all his sisters, and it has happened that his sister Margaret survived him without having married. The alternative conditions therefore on which vesting was to take effect were neither of them purified. (2) Because there was in the clause a proper destination-over. It is well settled that where a destination-over occurs in a deed containing no words of gift save a direction to convey on the happening of a future event, the legal result is that vesting is postponed until the date when the conveyance fell to be made. As this date was subsequent to the Major's death, it follows that no vesting in him ever took place—*Bryson's Trustees*, 8 R. 142; *Baillie's Trustees*, 1910 S.C. 891. The third parties to the case contended that the terms of the fourth clause did not set forth a proper destination-over. It seems to me that on the authority of *Bowman* (1 F. (H.L.) 69) and *Wylie's Trustees* (1919 S.C. 211) this contention is not well founded, and that a conveyance to Major Montgomerie-Fleming "and his heirs and assignees" constitutes a proper destination-over, being a conditional institution either of the heirs or the assignees of Major Montgomerie-Fleming.

The next point to be determined is whether the heirs or the assignees of the Major are to take as conditional institutes. I am of opinion that the heirs are to be preferred to the testamentary assignees of the Major, for the reason that when the testamentary assignation was executed the Major had no right in Kelvinside House to assign—*Bell* v. *Cheape*, 7 D. 614.

From all this it follows that question 1 should be answered in the negative, question 2 (*a*) in the affirmative, and question 2 (*b*) in the negative. [*His Lordship then dealt with the questions raised by the fifth clause.*]

The LORD JUSTICE-CLERK did not hear the case.

The Court answered the first question in the negative, question 2 (*a*) in the affirmative, and question 2 (*b*) in the negative.

Counsel for the First and Second Parties—Wark, K.C.—W. A. Murray. Agents—Laing & Motherwell, W.S.

Counsel for the Third Parties — A. M. Mackay, K.C.—Gilchrist. Agents—W. & J. Burness, W.S.

HIGH COURT OF JUSTICIARY.

Monday, July 17.

(Before Lord Ormidale, Lord Hunter, and Lord Ashmore.)

[Sheriff Court at Paisley.

FOTHERINGHAM *v.* BABCOCK & WILCOX, LIMITED.

Justiciary Cases—Statutory Offences—Factory Acts—Electricity Regulations—Dangerous Machinery—Danger to Workman—Neglect to Fence—Warning of Danger—Factory and Workshop Act 1901 (1 *Edw. VII, cap.* 22), *secs.* 79, 136—*Regulation* 24 *of Regulations No.* 1312, 23*rd December* 1908.

A workman in the employment of a firm of engineers was engaged in work in connection with the erection of an electric overhead crane at a place immediately above which were situated three live electric trolley wires. The workman was killed through coming in contact with the wires. The wires were bare, though capable of being protected; and by the use of reasonable care it would have been possible for the workman to perform his duties without coming in contact with them. In a prosecution against the employers under the Factory and Workshop Act 1901, and the regulations issued in terms thereof, for neglecting to provide adequate safeguards against danger from exposed electric wires, it was proved that the workman had been warned of the danger of coming in contact with the wires, and the employers were found not guilty. *Held* on appeal that a warning to the workman by his employers of the danger of coming in contact with the wires did not operate as a defence against a prosecution for a breach of regulations designed to provide against danger arising from exposed electrical appliances, and that on the facts stated the employers should have been found guilty of a contravention of the regulations.

Regulation 24 of Regulations No. 1312, issued under the Factory and Workshop Act 1901 (1 Edw. VII, cap. 22), secs. 79-86, and the Factory and Workshop Act 1907 (7 Edw. VII, cap. 39), dated 23rd December 1908, provides—"Portable insulating stands, screens, boots, gloves, or other suitable means shall be provided and used when necessary adequately to prevent danger, and shall be periodically examined by an authorised person."

Babcock & Wilcox, Limited, Renfrew, *respondents*, were charged in the Sheriff Court at Paisley at the instance of Andrew Fotheringham, H.M. Inspector of Factories, *appellant*, with a contravention of the Electricity Regulations made under the Factory and Workshop Acts 1901 to 1911. The complaint was in the following terms:—"You are charged at the instance of the complainer that you, being occupiers of