engagement was made has expired, the position of employer and employed ceases unless there be, as in the case of *Cowler*, some act still to be done on the master's premises which has been undertaken in the contract, without the completion of which the obligations undertaken as part of the contract of service cannot be completed. There is no such case here.

On these grounds I would have your Lordships to recal the interlocutor under review, and to remit back to the Sheriff Court for probation.

LORD LOW—I have had the advantage of reading the judgment of the Lord Justice-Clerk, and I entirely concur.

LORD ARDWALL concurred.

LORD DUNDAS was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and remitted to him to proceed as accords and to allow a proof.

Counsel for Pursuer (Appellant)—Blackburn, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders (Respondents)—Wilson, K.C. — Hon. William Watson. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 28.

SECOND DIVISION.

BURNETT'S TRUSTEES *v.* BURNETT AND OTHERS.

Succession—Vesting—Limited Fee—Bequest to A, with Limited Powers of Disposal, and the Heirs of His Body, whom failing to B and C equally between Them and their Heirs and Assignees whomsoever—Death of A without Issue predeceased by B and C—Whether Heirs of B and C or Testamentary Assignees of B and C Entitled to Succeed—Conditional Institution.

By *mortis causa* disposition a testator disponed certain heritable property to A and the heirs of his body, whom failing to B and C equally between them, and their heirs and assignees whomsoever, but under the express condition that A should have no power to alienate or burden the property without the consent of B and C or the survivor of them. A survived both B and C, and died without leaving heirs of his body. On A's death a question arose between, on the one hand, the heirs of B and C, and, on the other hand, the testamentary assignees of B and C, as to which of them was entitled to the property.

Held, in a Special Case, that the fee vested in A *a morte testatoris*, that no right had vested in B and C which was transmittable to their testamentary assignees, and that the heirs of B and C were entitled to the property as conditional institutes under the testator's disposition.

John Alexander Burnett, Kennington Park, London, and another, trustees acting under the trust-disposition and settlement of the late Mary Erskine Burnett, Balbithan House, Aberdeenshire (*first parties*); Letitia Wilkins Burnett, Addleston, Surrey, and another, executors of the late Stuart Mowbray Burnett, Balbithan House aforesaid (*second parties*); and Alexander George Burnett of Kemnay, Aberdeenshire, heir-at-law of the said Mary Erskine Burnett; and John George Burnett of Powis, Aberdeenshire, heir-at-law of the said Stuart Mowbray Burnett (*third parties*), brought a Special Case, to determine their rights under a *mortis causa* disposition of certain heritable property in Aberdeen by the late Mrs Helen Burnett or Bannerman, who died on 23rd April 1864.

By the *mortis causa* disposition, dated 6th September 1854, the property was disponed "to and in favour of Charles John Burnett, presently residing in Edinburgh, my nephew, and the heirs of his body, equally among them, but with and under the special provision and declaration after mentioned; whom failing to and in favour of Mary Erskine Burnett, my niece and his sister, also presently residing in Edinburgh, and Stuart Moubray Burnett, at Cairnton, in the parish of Kemnay, my nephew, equally between them and their heirs and assignees whomsoever, heritably and irredeemably, all and whole that piece of ground lying in the Chanonry of Old Aberdeen. . . . But providing and declaring, as it is hereby specially provided and declared, that these presents are granted and to be accepted of under this express condition, that the said Charles John Burnett shall have no power or liberty to sell, alienate, or dispone said piece of ground and others before disponed, either onerously or gratuitously, or to borrow money on the same, whether he has lawful children or not, without the express consent of the said Mary Erskine Burnett and Stuart Moubray Burnett or the survivor of them, and all deeds granted by him without the consent of them or the survivor are hereby declared null and void so far as they can affect the property disponed. . . ."

Mrs Bannerman was survived by Charles John Burnett, who died on 12th August 1907 without leaving heirs of his body and without having executed any deed affecting the said heritable property. She was also survived by Mary Erskine Burnett and Stuart Moubray Burnett, who died respectively on 25th April 1890 and 9th January 1893, both leaving testamentary writings dealing with their whole estates.

The first and second parties *maintained* that Mary Erskine Burnett and Stuart Moubray Burnett were entitled each to a one-half *pro indiviso* share of the subjects either absolutely or subject to defeasance only in the event of Charles John Burnett having heirs of his body; and that the right thus vesting in Mary Erskine Burnett and Stuart Moubray Burnett passed to their respective testamentary trustees and executors, or executors and legatees in heritage, and was or became

absolute in them on the death of Charles John Burnett without heirs of his body.

The third parties maintained that on a sound construction of the destination the said Charles John Burnett was fiar, that he was vested in the said subjects as such at the date of his death, and that he having died without heirs of his body and predeceased by the said Mary Erskine Burnett and Stuart Moubray Burnett, the third parties were entitled to succeed to the said subjects in equal shares, as heirs of provision under the said destination.

The *questions of law* were—"1. Were the subjects conveyed by the said disposition absolutely vested upon the death of Charles John Burnett in equal shares in the first and second parties as assignees and disponees of Mary Erskine Burnett and Stuart Moubray Burnett respectively? Or 2. Did the said subjects pass on the death of Charles John Burnett in equal shares to the third parties?"

Argued for the first and second parties—The condition burdening the right of Charles John Burnett precluded his having a fee. But as the fee must have vested in someone, it followed of necessity that it did so in Mary Erskine Burnett and Stuart Moubray Burnett, subject to defeasance in the event of Charles John Burnett leaving issue—*Stewart* v. *Nicolson*, December 2, 1859, 22 D. 72; *M'Lay* v. *Borland*, July 19, 1876, 3 R. 1124; *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Forsyth* v. *Forsyth*, February 25, 1905, 12 S.L.T. 778; *Denholm's Trustees* v. *Denholm's Trustees*, 1907 S.C. 61, 44 S.L.R. 42.

Argued for the third parties—Although limited as to his right of disposal of the property during the lives of Mary and Stuart Burnett, Charles John Burnett had a fee. He was in a better position as regards dealing with the property than an heir of entail, who was none the less a fiar. Alternatively he took a fiduciary fee—*Turner* v. *Gaw*, February 20, 1894, 21 R. 563, 31 S.L.R. 447. In any event there could not be vesting subject to defeasance in Mary and Stuart Burnett, as there was a destination-over in the case of each of them to their "heirs and assignees"—*Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346; *Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909, 12 S.L.R. 597, *per* Lord President Inglis.

Lord Low—The questions in this case depend mainly upon whether Mary Erskine Burnett and Stuart Moubray Burnett, who are both now dead, took a vested right in certain heritable subjects in Aberdeen, which were dealt with by the deceased Mrs Bannerman in a *mortis causa* disposition which she executed in 1854. That disposition did not perhaps take direct effect, because after Mrs Bannerman's death there were certain transactions among her beneficiaries, and the result was that it was agreed that the property in Aberdeen should be disponed in the precise terms of the *mortis causa* disposition of 1854; and I think the agreement of parties really was that the disposition should regulate the rights of the disponees.

Now in terms of that disposition the conveyance which was made of the subjects was in these terms—they were disponed in the first place to Charles John Burnett, a nephew of the testator, under certain conditions which in the meantime I shall leave out; but the destination was "to Charles John Burnett and the heirs of his body, whom failing to and in favour of Mary Erskine Burnett and Stuart Moubray Burnett equally between them and their heirs and assignees whomsoever." What happened was that Mary Erskine Burnett died in 1890, Stuart Moubray Burnett died in 1893, while the immediate disponee, Charles John Burnett, survived till 1907, when he died without leaving heirs of his body. If it were not for the conditions to which I have referred, although I have not yet stated what they are, it is plain that in these circumstances no right whatever would have vested in Mary Erskine Burnett and Stuart Moubray Burnett, and that, in the events which have happened, the destination-over to the heirs and assignees of Mary Erskine Burnett and Stuart Moubray Burnett would have taken effect.

But then it is said that the conditions imposed upon the right of the first disponee Charles John Burnett reduced his right to something short of that of a fiar, and that accordingly no fee of the property ever vested in him. That being so, it was argued that the only persons in whom the fee could vest were Mary Erskine Burnett and Stuart Moubray Burnett. Now, the conditions were these—that Charles John Burnett was to accept the disposition on the express condition that he should have no power to alienate the property, either gratuitously or onerously, or to borrow money on the security of it, without the express consent of Mary Erskine Burnett and Stuart Moubray Burnett, or the survivor.

The question has been raised whether, when both Mary Erskine Burnett and Stuart Moubray Burnett were dead, and their consent could no longer be obtained to any alienation which Charles John Burnett might desire to make, the restriction imposed upon him flew off altogether, or whether it became absolute. I think that is a somewhat nice question, and I do not think it necessary to express an opinion upon it the one way or the other. But assuming that the prohibition against alienation became absolute, the condition was really no more than a limitation of the right of the fiar. It seems to me that did not take away from him the character of a fiar. If he were not a fiar, I do not know what he was; I know of no legal category in which he could be placed. It is a very familiar position for a fiar to have limited powers. For example, an heir of entail, holding under the fetters of an entail, is undoubtedly a fiar, but he is subject to very much the same restrictions as were placed upon Charles John Burnett, because he cannot alienate, or borrow, or change the order of succession. Therefore

I have no doubt that Charles John Burnett was a fiar, although subject to certain limitations upon his powers as fiar. If that be so, it solves the question before us, because it follows that Mary Erskine Burnett and Stuart Moubray Burnett never took a vested right to the property at all.

The claimants to the property, whose respective rights this case has been brought to determine, are on the one hand the heirs of Mary Erskine Burnett and Stuart Moubray Burnett, and upon the other hand their testamentary assignees. The right under which both of these sets of claimants claim is, as I have said, a destination-over to the heirs and assignees whomsoever of Mary Erskine Burnett and Stuart Moubray Burnett. Now if I am right in holding that no right vested in Mary Erskine Burnett or Stuart Moubray Burnett, then the parties entitled to the property, whether heirs or assignees, must take it in their own right by virtue of the destination-over in the disposition, not as in succession to Mary Burnett and Stuart Burnett. That being so, I have no doubt that the heirs are entitled to succeed in exclusion of the assignees, because it is well settled that the word "assignees" does not mean nominees; it means the persons to whom a right has been assigned, and a right cannot be assigned unless the assignor had that right vested in him; so that the assignees are in my opinion plainly excluded, and the heirs take in their own right as nominated conditional institutes in the disposition.

Accordingly I am of opinion that the first question should be answered in the negative and the second question in the affirmative.

LORD ARDWALL—I agree entirely with the opinion which my brother Lord Low has delivered, and I have nothing to add.

LORD DUNDAS—I concur.

LORD JUSTICE-CLERK—That is my opinion also.

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

Counsel for the First and Second Parties — A. M. Mackay. Agents — Dalgleish, Dobbie, & Company, S.S.C.

Counsel for the Third Parties—A. R. Brown. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, December 1.

SECOND DIVISION.

(SINGLE BILLS.)

SERRELLS *v.* SERRELLS.

Poor's Roll—Admission—Declaration and Certificate of Poverty—Scottish Soldier Stationed in England—Remit to Regimental Chaplain.

A private soldier, who had a Scottish domicile, but was resident with his regiment in England, applied for admission to the poor's roll. The Court *remitted* to the chaplain for the time being ministering to the regiment to take the applicant's declaration of poverty, and, if so advised, to grant him a certificate of poverty in usual form.

The Act of Sederunt of 21st December 1842, sec. 2, enacts—"That no person shall be entitled to the benefit of the poor's roll unless he shall produce a certificate under the hands of the minister and two elders of the parish where such poor person resides, setting forth his or her circumstances according to a formula hereto annexed (Schedule A)."

David Farquhar Serrells, driver in the Royal Field Artillery (No. 147th Battery), stationed at Aldershot, England, presented to the Lord Justice-Clerk a note stating —"The said David Farquhar Serrells is a domiciled Scotsman, and is desirous of applying for the benefit of the poor's roll for the purpose of raising an action in the Court of Session against his wife Mrs Catherine Clapperton or Serrells, residing at No. 60 High Riggs, Edinburgh. He is and expects to be for an indefinite period at Aldershot, where his regiment is stationed. On that account he cannot obtain the usual certificate of poverty from the minister and elders of a Scottish parish required by the Act of Sederunt of 21st December 1842. He desires to make a declaration of poverty before the chaplain of his regiment or any other suitable person. May it therefore please your Lordship to move the Court to remit to the chaplain for the time being ministering to the Royal Field Artillery to receive the said David Farquhar Serrells' declaration of poverty, and, if so advised, to grant him a certificate of poverty in usual form. . . ."

Counsel for the petitioner, in moving the Court to grant the prayer of the note, cited in support of the motion *Forrest*, 1907 S.C. 435, 44 S.L.R. 315.

The petitioner's wife opposed the motion, and argued that if the declaration were allowed to be made in England she would thereby, as she had no means, lose the opportunity of objecting to it which the Act of Sederunt, sec. 4, contemplated she should have.

LORD JUSTICE-CLERK—If the respondent has any questions which she desires to put to the applicant on the subject of his poverty, they can be forwarded to the chaplain who is to take the declaration.