to answer the question upon the technical matter at all.

The third question is very similar in character to that which was the subject of decision in the case of *Heriot's Trust* v. *Matson*, 1920 J.C. 34, a year ago, but it relates to two servants whose duties are dissimilar the one from the other. The question to which the Justices had to apply themselves was, whether these two employees performed the duties which are ordinarily discharged by a "house porter" within the meaning of the Act of 1869. In addressing themselves to the question in that form the Justices had of course in mind, as the result of the decision in the *Heriot's Trust* case, that a person who is employed as porter (in the sense of doorkeeper or janitor) in a school or other public institution—as contrasted with a domestic establishment—is nonetheless within the category of "house porter" as that expression is used in the Act of 1869. Accordingly the question of fact which the Justices had to solve in the first instance was the question whether the duties performed by these two men were or were not those ordinarily discharged by a person employed as a porter, doorkeeper, or janitor in a school? Now we are not entitled, as a Court of review, to reverse or interfere with a determination of the Justices upon a matter of fact if there was evidence before the Justices such as could not unreasonably support the conclusion which they reached. It is nothing to the point that we might have reached a different conclusion on the same evidence if it had been submitted for our judgment on fact. In short, the limits of our power of interference as a Court of review is very much the same as it is in the case of the verdict of a jury which is assailed as being contrary to the evidence.

Now with regard to the first of the two employees in question, Falconer, it seems to me impossible to say that the Justices did not have before them evidence on which they could, not unreasonably, reach the conclusion they did. Speaking for myself, with regard to those particulars among the various items of his duties which are not directly connected with doorkeeping, I am not in the least impressed with any of the suggested inconsistencies between them and the proper functions of a porter, doorkeeper, or janitor. At any rate such inconsistencies as there may be are not sufficient to deprive the evidence, as a whole, of its weight, or to make it impossible for the Justices to arrive, not unreasonably, at the conclusion that Falconer discharges the duties ordinarily performed by the porter, doorkeeper, or janitor of a school or public institution, and to apply the principle of the *Heriot's Trust* case accordingly.

With regard to the second of the two men here in question, Morrison, the Justices have given us in detail the facts which they had before them. I confess, except that this second employee is called "assistant janitor," I can find in those facts no evidence to support the conclusion that his duties were those of a porter, or doorkeeper, or janitor. I am bound, I think, to hold that there was no evidence before the Justices which could reasonably warrant the conclusion in fact regarding Morrison's duties at which they did arrive. This would lead to the answering of the third question in the negative as regards the second of the two servants (Morrison), but in the affirmative as regards the first (Falconer). If your Lordships should agree in these results, then the complaint as a whole will fall.

LORD CULLEN—I am of the same opinion. Following the decison in the *Heriot's Trust* case (1920 J.C. 34) I think, as regards Falconer, that the facts found relative to the nature of his duties justified the magistrates coming to the conclusion that he is a house porter. As regards Morrison I think otherwise. Apart from the adventitious fact that he is called an "assistant janitor," his duties as a whole seem to me to be quite outside the normal range of the duties of a house porter.

LORD BLACKBURN concurred.

The Court found it unnecessary to answer the first question, answered the second question in the affirmative, and the third question in the affirmative as regards Alexander Falconer, and in the negative as regards Robert Morrison; sustained the appeal, and quashed the conviction.

Counsel for the Appellants — Mitchell, K.C.—Keith. Agent—W. H. Mill, S.S.C.

Counsel for the Respondent—The Solicitor-General (Murray, K.C.)—R. C. Henderson. Agent—Robert Pringle, W.S.

COURT OF SESSION.

Saturday, June 18.

FIRST DIVISION.

LOCKHART'S TRUSTEES *v.* LOCKHART.

Succession — Liferent or Fee — Fiduciary Fee — Trust — Direction by Testator to Convey Heritage to his Wife, in the Event of her Survivance, in Liferent, and to the Heirs-Male of her Body, whom failing to a Series of Heirs-Substitute, in Fee —Testator Dying without Issue Survived by Wife.

A testator in his trust-disposition and settlement directed his trustees, *inter alia*, in the event of his leaving no issue and being survived by his wife, to convey to her his landed estates "in liferent during all the days of her lifetime, and to and in favour of the heirs-male of her body, whom failing" a series of heirs-substitute, in fee. The testator died without leaving issue and was survived by his wife. *Held* that the context of the settlement contained sufficient to show that the testator did not intend to confer on his wife a full fee in the landed estates, but a liferent only, coupled with a fiduciary fee.

Frog's Creditors v. *His Children*, 1735, M. 4262, 3 Ross' L.C. 602, *commented on and distinguished.*

Newlands v. *His Creditors*, 1794, M. 4289, 3 Ross' L.C. 634, *commented on, and observed* (*per Curiam*) that the use of the word "allenarly" was not necessary, in a destination to parent in liferent and children *nascituri* in fee, to limit the fee to a fiduciary one, provided the deed contained sufficient evidence that the grantor intended a mere liferent.

Opinion reserved as to whether the rule of *Frog's Creditors* applied in the case of a *mortis causa* grant conceived in favour of a surviving spouse in liferent and his or her issue born of a future marriage in fee.

Dame Hilda Maud Macdonald Moreton or Macdonald Lockhart, widow of Sir Simon Macdonald Lockhart, baronet, of Lee and Carnwath, and others, trustees under the trust-disposition and settlement of the said Sir Simon Macdonald Lockhart, *first parties*, the said Dame Hilda Macdonald Lockhart, *second party*, and Charles Angus Macdonald, Largie, Argyllshire, a beneficiary under the said trust-disposition and settlement, *third party*, brought a Special Case for the opinion and judgment of the Court on questions relating to their rights under the said trust-disposition and settlement.

The said Sir Simon Macdonald Lockhart died on 25th March 1919 leaving a trust-disposition and settlement dated 2nd March 1916, which after conveying his whole means and estate, heritable and moveable, to the first parties, giving directions for the payment of debts and legacies and for the succession to his estate in the event of his leaving issue of his body, provided as follows—"(*Fifth*) In the event of my leaving no issue of my body, or of such issue all dying without attaining majority and without lawful issue, I direct my trustees (subject to implement of the first, second, and third purposes hereof) to hold my whole lands and heritages in Scotland, and my whole other residuary means and estate, heritable and moveable, real and personal, wherever situated, in trust for the purposes following, viz. (*Primo*) . . . [Payment of an annuity to his sister] . . . (*Secundo*) Subject to implement, or due provision being made for implement, of the foregoing purposes of the trust, I direct my trustees as soon as convenient after my death to dispone, convey, and make over (subject always to the conditions after-mentioned) my said lands and estates of Lee, Cartland, Carnwath, and others in the county of Lanark, my said lands and estate of Dryden (or Roslin) and others in the county of Midlothian, and generally all my lands and heritages in Scotland, to and in favour of my said wife (if she survive me) in liferent during all the days of her lifetime, and to and in favour of the heirs-male of her body, whom failing the second son of the said John Ronald Moreton Macdonald (if the said John Ronald Moreton Macdonald shall then have an elder son or an heir of the body of an elder son in life), and the heirs-male of the body of such second son, whom failing [certain other heirs-substitute] in fee, the eldest heir-female always succeeding without division and excluding heirs-portioners throughout the whole course of succession; and declaring [*here followed a clause of devolution which is not material*]; and I direct my trustees to execute a valid disposition of my said whole lands and heritages in Scotland in terms of the foregoing directions, containing all such special clauses and conditions as my trustees deem reasonable and appropriate to the circumstances . . .; and I direct my trustees to insert in said disposition a clause making it imperative on the institute and each of the heirs-substitute foresaid succeeding to the said lands and heritages under and in virtue of the said disposition and on the husband of each female substitute so succeeding, and also in the event of my said wife surviving me and marrying again on her husband by such marriage, constantly to use and bear the name, arms, and designation of Lockhart of Lee as his or her principal name, arms, and designation; as also a clause reserving to my said wife and the institute and heirs-substitute foresaid under the said disposition successively power to grant feus and long leases of any part of my said lands and heritages at such rate of feu-duty or rent, and on such conditions as my trustees may specify or indicate in said disposition as being in their opinion reasonable and appropriate in the circumstances; and I direct my trustees to record the said disposition in the appropriate Division of the General Register of Sasines, with a warrant of registration thereon on behalf of my said wife in liferent and the institute thereunder in fee, and that before delivery of the said disposition; and without prejudice to the general and particular directions before written, but in supplement thereof, I declare that my trustees' discretion in settling the terms of the said disposition shall be absolute, and their decisions shall be final and binding on all points and on all concerned: (*Tertio*) I direct my trustees to hold the whole residue and remainder of my means and estate, heritable and moveable, real and personal, wherever situated, excepting only the lands and estates directed to be disponed in terms of the immediately preceding clause hereof, in trust for my said wife in liferent during her lifetime, and at her death to pay, convey, and make over the same to the institute or the heir-substitute then entitled to my said landed estates in fee; and I declare that the provisions herein contained conceived in favour of my said wife during her widowhood in the event of my leaving no issue of my body, or of such issue all dying without attaining majority, shall be held to be in substitution for, and if accepted by her shall supersede and extinguish the whole provisions made by me for her during her widowhood in the antenuptial marriage-contract between us."

The second party contended that under the direction contained in the fifth purpose of the trust-disposition and settlement she

was entitled to the fee of the heritable estate left by the testator.

The third party contended that the second party was not entitled to a conveyance of the said heritable estate in fee-simple, but that the conveyance fell to be made in terms of the directions contained in the fifth purpose, and that thereunder the second party's right was limited to a liferent with a fiduciary fee for the heirs called under the destination.

The *questions of law* were as follows — "1. Is the second party entitled under the testator's trust-disposition and settlement to an absolute fee of the said heritable estate? 2. Is the right of the second party limited under the direction contained in testator's trust-disposition and settlement to a liferent together with a fiduciary fee for the heirs called under the destination?"

Argued for the second party—The first question should be answered in the affirmative. Since *Frog's Creditors* v. *His Children*, 1735, M. 4262, 3 Ross' L.C. (Land Rights) a destination to a parent in liferent and his children *nascituri* in fee, with a direction to convey, had been recognised as conferring a full fee upon the parent, except where, as was decided in *Newlands* v. *Newlands' Creditors*, 1794, M. 4289, 3 Ross' L.C. 634, the word "allenarly" or some other restrictive word was used — *Houlditch* v. *Spalding*, 1847, 3 Ross' L.C. 667; *Dewar* v. *M'Kinnon*, 1825, 1 W. & S. 191, 3 Ross' L.C. 607; *Gordon* v. *Mackintosh*, 1845, 4 Bell 105, *per* Lord Campbell at p. 119, 3 Ross' L.C. 617; *M'Clymont's Executors* v. *Osborne*, 1895, 22 R. 411, 32 S.L.R. 279—[*Mure* v. *Mure*, 1786, M. 4288, was cited by the Lord President as explaining Lord Campbell's dictum]. There were no such restrictive words here. The ulterior destination could have no effect (*Frog's Creditors*), nor could mere expressions, such as "institute," used for the purpose of description in other clauses relating to matters which were for adjustment by the trustees — *Ralston* v. *Hamilton*, 1862, 4 Macph. 397, *per* Lord Chelmsford at p. 418; *Sandys* v. *Bain's Trustees*, 1897, 25 R. 261, 35 S.L.R. 211. Other clauses in the deed could elide the rule only if they necessarily established that the testator's intention was otherwise — *Hutton's Trustees* v. *Hutton*, 1847, 9 D. 639. The cases of *Gifford's Trustees* v. *Gifford*, 5 F. 723, 40 S.L.R. 476, and *Brash's Trustees* v. *Phillipson*, 1916 S.C. 271, 50 S.L.R. 205, were distinguishable. In the former there was no direction to convey, and in the latter there was no proper destination.

Argued for the third party — The rule in *Frog's Creditors* was founded on the intention of the grantor of the deed, not on the theory that the fee could not be *in pendente* — Ersk. Inst. ii, 1, 4; Duff's "Deeds," p. 393; Bell's Lectures on Conveyancing, pp. 841 and 842; Menzies' Lectures on Conveyancing, p. 665. Its application was limited to simple conveyances — *Ramsay* v. *Beveridge*, 1854, 16 D. 764. It did not apply to conveyances between spouses, and had never been held to do so—*Fraser* v. *Brown*, 1707, M. 4259; *Mackellar* v. *Marquis*, 1840, 3 D. 173, *per* Lord Fullerton at p. 181. In the case of *Forrester* v. *Forrester's Trustees*, 1835, 1 Sh. & M'L. 441, there was a conveyance of the fee to the survivor. Further, the rule did not apply where a presumption could be reasonably deduced from the terms of the deed that the intention was to confer only a liferent —*Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566, *per* Lord Watson at 10 R. 61; *Maule*, 1876, 3 R. 831, 13 S.L.R. 532, *per* Lord President at 3 R. 834; *Livingstone* v. *Waddell's Trustees*, 1899, 1 F. 831, 36 S.L.R. 580, *per* Lord Low at p. 838 and Lord M'Laren at p. 846. The word "allenarly" or some equivalent in the clause itself was not necessary. Here the terms of the deed plainly excluded the rule. The provision itself was only executorial as in *Brash's Trustees* v. *Phillipson*. The widow's right in the residue and jewellery was only a liferent. The use of the word "institute" and "wife" in the same clauses pointed to the intention of the testator to confer a liferent only. So did the terms of the clause as to registration and the declaration that provisions were to be for her during her widowhood and in substitution for those conferred by the antenuptial marriage contract.

At advising the judgment of the Court (the LORD PRESIDENT, LORDS MACKENZIE, SKERRINGTON, and CULLEN) was delivered by

LORD CULLEN — Sir Simon Macdonald Lockhart of Lee died in March 1919 without leaving issue and survived by his wife, who is the second party to the present Special Case. He left a *mortis causa* general trust-disposition and settlement whereby he conveyed to trustees his whole estates, heritable and moveable, for the purposes therein contained. Apart from certain minor bequests, the main scheme of the deed applicable to the case of the testator leaving no issue may be described generally as consisting of a settlement of (1) the testator's whole lands and heritages in Scotland — which I shall hereafter refer to as "the landed estates" — and (2) the whole residue of his estates, heritable and moveable, in favour of the second party, if she survived him, in liferent, and of the heirs-male of her body, whom failing a series of heirs-substitute, in fee. There is a similar destination of the testator's jewellery, which he desires should be preserved and handed down as heirlooms along the same line of succession as his said landed estates. The said provisions in favour of the second party are described by the testator as provisions made by him for her during her widowhood, and if accepted by her are to supersede certain other provisions made antenuptially.

The question now raised relates to the nature of the interest in the landed estates intended to be given by the testator to the second party, who maintains that although *ex figura verborum* a liferent, it must be held on a due construction of the settlement to amount to a full fee.

No question admittedly arises as to the limited character of the liferent right given to the second party in the case of the residue as in that of the heirlooms.

In the case of the landed estates the trustees are directed to denude of them by a conveyance. The direction runs as follows: —"(*Secundo*) Subject to implement or due provision being made for implement of the foregoing purposes of the trust, I direct my trustees as soon as convenient after my death to dispone, convey, and make over (subject always to the conditions after mentioned) my said lands and estates of Lee, Cartland, Carnwath, and others in the county of Lanark, my said lands and estate of Dryden (or Roslin) and others in the county of Midlothian, and generally all my lands and heritages in Scotland, to and in favour of my said wife (if she survive me) in liferent during all the days of her lifetime, and to and in favour of the heirs-male of her body, whom failing the second son of the said John Ronald Moreton Macdonald (if the said John Ronald Moreton Macdonald shall then have an elder son or an heir of the body of an elder son in life), and the heirs-male of the body of such second son, whom failing [certain other heirs-substitute] in fee, the eldest heir-female always succeeding without division and excluding heirs-portioners throughout the whole course of succession." After a clause of devolution applicable to certain events which need not be specified the deed goes on — "I direct my trustees to execute a valid disposition of my said whole lands and heritages in Scotland in terms of the foregoing directions, containing all such special clauses and conditions as my trustees deem reasonable and appropriate to the circumstances." There follow certain other clauses, some of which I shall advert to hereafter.

It is common ground that the time has now come in a due course of administration for a disposition of the landed estates being executed by the trustees.

As the destination above quoted is primarily in favour of the second party in liferent and the heirs-male of her body in fee, the second party maintains, on the authority of the rule established by the case of *Frog's Creditors* v. *His Children* ((1735) M. 4262, 3 Ross's Leading Cases, 602) that the interest in the landed estates given to her is one of full fee, and that upon a disposition being granted in these terms without qualification she will be vested with such a fee, the heirs-male of her body as well as the other heirs-substitute called after them being called as substitutes to her as the institute in fee.

The case of *Frog* related to a disposition to one Robert Frog in liferent and to the heirs of his body in fee, whom failing to other parties in liferent and fee respectively. It was held that the disposition gave the full fee to Robert Frog, named liferenter. The grounds of the decision would appear to have been that as the disposition implied an immediate divestiture of the disponer, and as the fee could not be supposed to be *in pendente*, it must be presumed that the maker of the deed intended to give the fee to Robert Frog. Otherwise where was the fee? At the period of this decision the conception of a fiduciary fee in such a parent liferenter, avoiding pendency of the fee had not been introduced. There followed about sixty years later the case of *Newlands* ((1794) M. 4289, 3 Ross's Leading Cases, 634) where the liferent given by the disposition was in terms a liferent "allenarly." It was not reasonably possible to attribute to the maker of the deed in question an intention to give the fee to the disponee in liferent allenarly. The difficulty about the fee not being *in pendente* was met by conceiving the liferenting parent as intended to be given a fiduciary fee to be held by him for behoof of the heirs of his body. It seems obvious enough that this conception of a fiduciary fee might equally well have solved the case of *Frog* in favour of the children seeing that the word "allenarly" only indicated that the maker of the deed meant to give a liferent when he said so; and that this reasonable conclusion might have been derived in *Frog's* case from the disponer giving in terms a liferent to Frog and the fee to others. But the rule laid down in *Frog*, within its limits, has held good, and is now too firmly established to be displaced unless by legislation.

But the rule of the case of *Newlands* is of equal validity. And while the decision in that case turned on the liferent being styled a liferent "allenarly," it has long been well recognised that there is nothing magical or inflexibly technical about the word "allenarly," and that the use of it is not in any way necessary as a solemnity to admit of the conception of a fiduciary fee only, as opposed to a full fee, being given to the liferenting parent. It is true that in the earlier period following on the case of *Newlands* there was a tendency to confine the application of its principle within too severe and narrow limits. But latterly a wider conception has prevailed. And this, I think, logically and necessarily, and in accordance with sound sense. As I have ventured to observe, the destination in *Frog* to Robert Frog "in liferent" was quite as susceptible of the view that a fiduciary fee only was being conveyed to the liferenter as was the destination "in liferent allenarly" in the case of *Newlands*. All that was necessary was to hold very reasonably that the disponer intended a liferent when he in terms gave one. But the idea of a fiduciary fee had not then been introduced. The case of *Newlands*, starting from the artificial rule of *Frog* as an established doctrine, laid down this other rule, that only a fiduciary fee was to be held as intended where the disponer not merely said "in liferent," but also expressed his intention in some independent mode that he really meant a liferent and not a full fee. For this was all that was done by the use of the word "allenarly." Apart from the unfortunate rule of *Frog* the word "liferent" and the words "liferent allenarly" designate the same species of interest. It would, accordingly, be against reason to exclude an application of the principle of *Newlands* in any case where the deed under construction, while containing, like the disposition in *Frog*, a destination to a parent in liferent and his issue *nascituri* in fee, also contains, independently, sufficient evidence of inten-

tion on the part of the granter that the liferent to the parent is to be a liferent and not a full fee, as did the disposition in *Newlands* by the particular method of adjecting the word "allenarly." For this there is no lack of authority. Thus in the case of *Studd* v. *Cook* (1883, 10 R. (H.L.) 53) Lord Watson said — "The rule established in *Frog's Creditors* v. *His Children*, and the series of decisions by which that case has been followed, is not an inflexible rule, but must yield to reasonable presumption that the maker of the deed intended otherwise." Again, in *Gifford's Trustees* v. *Gifford* (1903, 5 F. 723) Lord M'Laren said — "By the general consent of judges and lawyers the rule of *Frog's* case has been recognised to be a purely arbitary rule, incapable of extension, and not to be followed where the context shows that the word liferent is used in its ordinary signification." The same learned Judge, in the case of *Livingstone* v. *Waddell's Trustees* (1899, 1 F. 831) said—"It results from the case of *Newlands*, and a long train of subsequent decisions, that any collateral expressions in the deed showing an intention to limit the right of the nominal fiar to a usufructuary interest, or to set up a trust in favour of the children, are sufficient to exclude the construction of the word 'liferent' in the sense of fee." I do not think it necessary to quote further judicial utterances on this topic. Senior counsel for the second party hardly disputed the principle embodied in those I have ventured to quote, although he preferred to express it by saying that the context of the particular deed under construction must be such as to carry a reasonable conviction to the mind that a liferent and not a fee is intended—a way of stating the principle which may be readily accepted.

The argument in this case, accordingly, takes one to a consideration of the deed here under construction in order to see whether the context of the prescribed destination does or does not yield a "reasonable presumption," or carry to the mind a reasonable conviction, that the maker of it intended to confer on the second party a liferent only (with a fiduciary fee) and not a full fee of the landed estates. And it may be observed that we have here to construe not a feudal conveyance but a will, and have therefore all the more freedom in endeavouring to solve what is a *quæstio voluntatis*.

The first feature of the will which one observes is the similarity of the terms in the different parts of the scheme of bequest applicable respectively to the landed estates, to the residue, and to the heirlooms. In each case the subject of bequest is given in terms to the second party in liferent, and in fee or property to the person called to the fee of the landed estates on her death. And in the case of the residue, as in that of the heirlooms, it is not in dispute that the right given to the second party is one of liferent only. This, the second party argues, does not go very far, inasmuch as the testator in the case of the landed estates may quite well have intended to make a difference by giving her a full fee, and may only have preferred, instead of using more ordinary words for the purpose, to adopt the archaic but well-established formula of the disposition in *Frog*. We find, however, in the settlement a significant characterisation by the testator of the provisions he intended to make for the second party. He says—"And I declare that the provisions herein contained conceived in favour of my said wife during her widowhood . . . shall be held to be in substitution for, and if accepted by her shall supersede and extinguish, the whole provisions made by me for her during her widowhood in the antenuptial marriage contract between us dated the 13th day of December 1898." This declaration applies to, *inter alia*, the interest given to the second party in the landed estates, and it stamps that interest as a temporary one given to the second party only "during her widowhood." The word "widowhood" is an obvious slip in language, and in lieu of it the testator should have said "survivance of me." But the need for this correction does not in any way lessen the force of the testator's declaration in showing that he intended to confer on the second party a temporary interest only. It would, I think, have been unnatural for the testator to describe a bequest of the entirety of his large landed estates in Scotland to the second party in permanent property as a provision made for her during her survivance of him. And when one goes on to consider the language used by the testator in certain other parts of the settlement his intention seems to me to become quite clear. I refer to the way in which he speaks of the "institute" under the destination. This word "institute" occurs frequently in the settlement. It is to be found more than once in the earlier part of the settlement which prescribes the destination of the landed estates in the event of the testator leaving issue. And it is there used to designate the person actually first taking, or entitled actually first to take, the fee of these estates under the destination. When one passes to the part of the settlement in which he deals with the destination of the landed estates in the event of his leaving no issue, we find there also a repeated use of the word "institute." Now according to the contention of the second party she is the person instituted under the said destination to the fee of the landed estates, following the rule of *Frog*. But it seems to me clear enough from the testator's use of the word "institute" in this part of the settlement that he did not so regard her. The word is there used in several clauses. The clause which perhaps brings out the contrast most sharply is that as to feuing and leasing, where the trustees are directed to insert in the disposition of the landed estates "a clause reserving to my said wife and the institute and the heirs-substitute foresaid under the said disposition successively power to grant feus and long leases of any part of my said lands and heritages at such rate of feu-duty or rent and on such conditions as my trustees may specify or indicate in said disposition as being in their opinion reasonable and appropriate in the circumstances."

The power here directed to be given is a peculiar one and does not seem very well conceived. Probably, as was suggested in the course of the discussion, it was intended to relate to the real burdens on the lands which the settlement prescribed. The peculiarity attending the conception of the power does not however displace the inference to be derived for the present purpose from the language used by the testator in speaking as he does "of my wife and the institute and heirs-substitute foresaid under the said disposition *successively*." There is here a plain announcement of the testator's view that the "institute" to the fee is not to be the second party as she contends, but some other person who under the destination possesses after her. Mr Chree, for the second party, acknowledged that the language of this clause occasioned some difficulty in his argument. I think it presents a very real difficulty, to which I do not see a satisfactory answer. For I confess I am not impressed with the answer offered for the second party, to wit, that the testator must be regarded as having only scrupulously followed the conveyancing formula of *Frog* already adopted by him *ex hypothesi* in the destination, where *ex figura verborum* the heirs-male of the body of the second party are instituted. I cannot see that the arbitrary decision in *Frog* compels one to adopt this, as I think, strained construction of such a collateral expression of the testator's intention in his settlement which finds no analogue in the feudal disposition in *Frog's* case. Moreover, as I have already pointed out, the testator's use of the word "institute" is not confined to this part of his settlement, but freely occurs in the earlier part applicable to the destination of his landed estates to his own issue should he leave any, where *Frog* has no bearing, and where the word plainly means the person actualy first taking, or entitled actually first to take, the fee of the lands under the destination. And it would, I think, be unreasonable to suppose that he used the word in any different sense in the later part of the deed here under construction.

Taking together the several *indicia* of the testator's intention to be found in the context of the settlement as above adverted to, I am of opinion that these are sufficient to yield a reasonable presumption—or to carry to the mind a reasonable conviction—that the testator in destining the landed estates to the second party in liferent did not intend to confer on her a full fee therein but a liferent only coupled with a fiduciary fee.

A separate line of argument was presented for the third party to the effect that the rule of *Frog* has no application to conveyances or destinations flowing from one spouse to another, the authority chiefly relied on being the case of *MacKellar* v. *Marquis*—1840, 3 D. 172. While there are obvious considerations adverse to the application of the rule in the case of most matrimonial settlements or deeds whereby heritage is settled on the children of a marriage in fee, it does not seem clear that these have the same force in the case of a *mortis causa* grant such as the present conceived in favour of a surviving spouse in liferent and his or her issue born of a future marriage in fee. In the view I take, however, of the meaning of the settlement here under construction it is unnecessary to come to a decision on this general topic, and I prefer to reserve my opinion regarding it.

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

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

Counsel for the First Party—Monteith. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second Party—Chree, K.C. —D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Counsel for Third Party—Dean of Faculty (Constable, K.C.)—Skelton. Agents—Alex. Morison & Company, W.S.

Saturday, June 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BANK OF SCOTLAND *v.* CRERAR.

Bank—Loan—Right in Security—"Secured Loan Account"—Transfer to Bank of (a) Specific Shares, and (b) Part of an Aggregate of Unspecified Shares—Right of Bank on Repayment of Loan to Tender Shares of Same Denomination in Lieu of Specific Shares Transferred — Acquiescence in System Followed by Bank—Bar.

A customer of a bank on various occasions bought through her stockbrokers ordinary shares in an industrial company, which she paid for with money advanced by the bank on a "secured loan account." Of the total shares thus purchased much the smaller proportion consisted of specific shares distinguished by numbers, of which the borrower executed a formal transfer in favour of the bank's nominees in security of the advance. The remainder consisted of various *quantities* of unspecified shares which were not distinguished by numbers, but which formed part of the total aggregate of ordinary shares of the company held by the bank, and vested in its nominees, on account of all its customers who had transferred shares of that particular denomination in security of advances. In an action of accounting at the instance of the borrower against the bank, in which the pursuer claimed that the bank must account to her for its intromissions with each specific share, and also with the "quantities" of unspecified shares transferred on her behalf, the evidence showed that the pursuer's loan account was opened on a delivery letter by her brokers transferring to her a certain *quantity* of shares, which she endorsed with a