far as that, because, assuming that the employers were bound at all events to give the workman employment for some time, they have done so. They have given him the stipulated employment and paid him regularly the stipulated wages for two and a-half years, and it is perfectly plain that the reason why they dismissed him in the end was that there was a dispute about the kind of work he was to perform. In these circumstances I think that it is plain that the claim of damages for breach of contract is untenable. On both branches of the case, therefore, I agree with your Lordship in the chair and with the Lord Ordinary.

LORD ARDWALL—I agree with the result at which your Lordships have arrived, that we should affirm the judgment of the Lord Ordinary, but I do so only on the question of relevancy, and that for the reasons stated by my brother Lord Low.

There was no duration here, and where this is so in a contract of service it is well settled that the duration of such contracts is what is customary in the employment. In the case of gamekeepers and gardeners, &c., it is usually held that the engagement is for six months or a year according to the custom of the country. With regard to workmen in a work of this kind, they usually are employed for the term of a single pay, which is generally a fortnight. I think, therefore, it is absurd to say that after the pursuer has been three years or so in the defenders' service and, the parties having fallen out about the nature of the employment, the defenders have dismissed the pursuer, there is any relevant averment entitling him to damages, and accordingly on that ground I think the action is irrelevant, and that the defenders must be assoilzied.

But I must say that I am not, without much further consideration, prepared to agree in holding that this action is incompetent. I am not convinced that it is illegal to insert an undertaking to give employment as part of a contract for compensation under the Workmen's Compensation Act. If it is not illegal to do so the question comes to be, How is such an agreement to be enforced? It is said—"Just register your memorandum, and go on and charge upon it." Now that is all very well, but a contract of service, as is pretty well settled, is not a contract of which a court of law will decern specific implement. But the service has come to an end, and the man has been discharged. What, then, does the pursuer's claim resolve into? If a relevant case had been stated it would resolve into a claim of damages; but there is no procedure prescribed by the Workmen's Compensation Act for enforcing such a claim, and therefore I must say I am disposed to think, if there had been a relevant case here, it was not incompetent to ask in an ordinary Court of law a remedy which could not be worked out under the Workmen's Compensation Act. We, however, have not a relevant action here, and accordingly I refrain from expressing a definite opinion on the question of competency.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C.—Gillon. Agents—Kirk Mackie & Elliot, S.S.C.

Counsel for the Defenders (Respondents)—Lees, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S.

Tuesday, February 25.

SECOND DIVISION.

PENNY'S TRUSTEES *v.* PENNYS AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance — Conditional Institution of Issue.

A testator, whose estate consisted almost entirely of heritage, left his widow, whom he appointed his sole trustee, a liferent of his whole estate, "the same to be realised and divided equally on her death among my children share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." He had provided for advances being made if necessary to any child, "all payments made to children being reckoned as part of their ultimate share when the same falls to be divided."

Held (1) that the estate vested in the testator's children *a morte testatoris*, but subject to defeasance in the event of their predeceasing the liferentrix leaving issue who should take, and (2) that an advance formed a burden upon a share whether eventually falling to a child or those in his right.

Cairns' Trustees v. *Cairns*, 1907, S.C. 117, 44 S.L.R. 96, *followed.*

Question as to the effect of the issue also of a predeceasing child failing to survive the liferentrix.

James Penny of Park, in the counties of Aberdeen and Kincardine, died on the 22nd day of January 1902 possessed of estate of the net value of about £20,000, of which about £19,500 was heritage, and leaving a general settlement dated 10th September 1901, and subsequently registered 27th January 1902.

The testator's settlement was:—"I, James Penny of Park, seeing that I intend to make a will for regulating the division after my death of my means and estate, do hereby, in order to settle the same meantime until I have fully and ripely considered the terms thereof, appoint my wife to be my sole trustee and executrix, with power to her as trustee and executrix foresaid to borrow money on the security of my estate either for the purpose of setting up any of

my children in business or on their marriage, or for the purpose of paying estate duty, or for the proper upholding of the buildings on the estate of Park, all payments made to children being reckoned as part of their ultimate share when the same falls to be divided; and I leave my said wife the liferent of my whole means and estate of every kind, the same to be realised and divided equally on her death among my children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life: And I grant full powers of sale by public roup or private bargain: And I reserve my own liferent; with full power at any time to revoke these presents in whole or in part: And I consent to registration hereof. . . ."

The testator was survived by his wife Mrs Mary Penny and by eight children, viz., James Penny of Lochwood, Mrs Mary Penny or Adams, Mrs Alice Penny or Henry, William Penny, Robert Penny, Charles Penny, Kate Penny, and Mrs Maria Penny or Hill. James Penny of Lochwood died on 1st November 1905 survived by his wife and three pupil children. Before his death he had received a payment from his father's trustees of £609, 17s. 9d. under the powers contained in the general settlement for the purpose of setting him up in business. He left a trust-disposition and settlement whereby he conveyed to trustees his whole estate, and by the third purpose thereof he directed his trustees, to whom he also gave power to advance the capital if necessary, to pay over to his wife during her lifetime the whole annual income and profits to be applied by her in her own maintenance and support, and in the education, maintenance, and support of any of his children who might be under twenty-one years of age and unable to maintain themselves, and by the fifth purpose he directed his trustees, on the death of his wife and on his youngest child attaining majority, to divide his whole means and estate among his children equally, share and share alike. His whole estate, exclusive of any right he might have to a share of his father's estate, was estimated not to exceed £1000, and in order that his widow might be advised whether or not she should claim her legal rights, a Special Case was presented to ascertain what her husband's rights in the succession of his father might be in the circumstances which had arisen, namely, the death of her husband during the survivance of his mother, the liferentrix under his father's settlement.

The *parties* to the special case were (1) the trustees, an additional trustee having been assumed, acting under the general settlement of James Penny of Park, *first parties;* (2) the whole surviving children of James Penny of Park (and the marriage-contract trustees of one of them), *second parties;* (3) the testamentary trustees of James Penny of Lochwood, *third parties;* (4) the widow of James Penny of Lochwood, *fourth party;* (5) the tutors and curators to the pupil children of James Penny of Lochwood nominated in his trust-disposition and settlement, *fifth parties.*

The second, third, and fourth parties *maintained* that, on a sound construction of the general settlement of James Penny of Park a share of the fee of his estate vested absolutely at his death in the children who survived him. The third and fourth parties maintained that the share which so vested in James Penny of Lochwood fell to be accounted for to the third parties as his testamentary trustees and executors, and to be administered as part of his estate. In any event they maintained that the payment which the said James Penny of Lochwood received from his father's trustees before his death as aforesaid vested in him, and became *ipso facto* his property. The fifth parties maintained that as James Penny of Lochwood predeceased the period of division of the estate of the said James Penny of Park, namely, the death of Mrs Mary Penny, who was still alive, no share of the fee of the said estate had vested in him, and the share of said estate destined to him was not carried to his trustees (the third parties) by the general conveyance in his trust-disposition and settlement. The fifth parties further maintained that the payment which James Penny of Lochwood received from his father's trustees before his death never vested in him, and was not carried by the general conveyance in the trust-disposition and settlement.

The following *questions of law* were submitted for the opinion and judgment of the Court:—"(1) Did the fee of the shares of the estate of the truster vest in his children *a morte testatoris?* or Did said estate vest in the children of the truster subject to defeasance in the event of their predeceasing their mother the liferentrix, leaving issue? or is the vesting of said estate postponed till the expiry of said liferent? (2) Did payments made during the existence of the liferent to children of the truster in terms of the powers contained in his general settlement vest absolutely? or did such payments fall to be replaced in, or accounted for to, the truster's estate, should such children predecease the liferentrix?" After the conclusion of the hearing the following question was, at the suggestion of the Court, substituted for the original second question, viz.—"In the event of the first branch of the first question being answered in the negative, does the amount of the payment made to James Penny of Lochwood during his mother's lifetime fall to be deducted from the share of the estate payable to his children?"

Argued for the fifth parties—Words of "predecease" were referable to the period of distribution—*Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 66, 36 S.L.R. 959, *per* Lord Watson—in the same way that words of survivorship were referable to the period of distribution — *Young* v. *Robertson*, 1862, 4 Macq. 314. Consequently the testator's children took no indefeasible vested right *a morte testatoris.* The shares vested *a morte testatoris*, subject, however, to defeasance in the event of the children prede-

ceasing the liferentrix leaving issue, the present case being indistinguishable from and ruled by *Cairns' Trustees* v. *Cairns*, 1907, S.C. 117, 44 S.L.R. 96. The only conceivable distinction from *Cairns* was that here there was an implied power to advance part of the shares to the children, but a power to advance did not accelerate the period of vesting and was equally consistent with postponement of vesting — *Bowman* v. *Bowman*, (*cit. sup.*), Lord Watson at p. 73-75; *Fyfe's Trustees* v. *Fyfe*, February 8, 1890, 17 R. 450, *per* Lord Rutherfurd Clark at p. 453, 27 S.L.R. 329. The attempted distinction between cases where "predeceasing" was unambiguously referable (or "made expressly referable") to the period of division, and cases where this was not so, had been unsuccessfully argued in *Cairns' Trustees*. Alternatively, they submitted that vesting was postponed till the death of the liferentrix—*Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421. They conceded that the payment or advance made formed a burden on the share.

Argued for the second, third, and fourth parties—There were two classes of cases with destinations-over to heirs or issue,—(1) where the destination-over was unambiguously referable to the period of division, (2) where the destination-over was capable of being read either as referable to the period of distribution or to some other period, *e.g.*, the testator's death. Excluding the case of *Cairns' Trustees* v. *Cairns*, *cit. sup.*, every case falling within the second category had been decided in favour of vesting *a morte*. Thus indefeasible vesting *a morte* had been held to take place in *Bowman* v. *Bowman*, *cit. sup.*; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346; *Taylor's Trustee* v. *Christal's Trustees*, June 24, 1903, 5 F. 1010, 40 S.L.R. 738; *Ogle s Trustees* v. *Ogle*, February 4, 1904, 6 F. 359, 41 S.L.R. 284; and even where the destination-over was unambiguously referable to the period of distribution—*Matheson's Trustees* v. *Matheson's Trustees*, February 2, 1900, 2 F. 556, 37 S.L.R. 409. The circumstances here were very similar to those in *Taylor's Trustees* v. *Christal's Trustees*, *cit. sup.*, which should be followed. They admitted that "predeceasing" was primarily and in the absence of other indications to be read as referable to the period of division, but as in *Bowman* v. *Bowman*, *cit. sup.*, so here there were contrary indications sufficient to displace the primary presumption. There was (1) a power of advance—a circumstance expressly founded on in *Bowman* by Lord Shand at p. 77, and treated as favourable to early vesting in *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697, 15 S.L.R. 395, and in *Matheson's Trustees* v. *Matheson's Trustees*, *cit. sup.*; (2) the fact that the power of advance was limited to children and did not apply to grandchildren; (3) the fact that the estate was almost entirely heritage, which furnished a reason for postponement of division, *i.e.*, that testator's widow might enjoy the liferent thereof; and (4) the absence of anything tending to show that payment and vesting were postponed in order to determine a class. In *Parlane's Trustees* v. *Parlane*, *cit. sup.*, and in *Forrest's Trustees* v. *Mitchell's Trustees*, *cit. sup.*, the destination-over was unequivocally referable to the period of division.

At advising—

LORD STORMONTH DARLING—The will in this case is a very simple one, with few complications. I am of opinion that its just construction is governed, so far as the provisions of one will can be said to govern another, by the case of *Cairns' Trustees*, (1907) S.C. 117, and that we should answer the first question by affirming its second alternative, *i.e.*, by holding that the fee of the shares of the truster's estate vested in his children *a morte testatoris*, but subject to defeasance in the event of their predeceasing their mother the liferentrix, leaving issue.

The only material facts are that the testator Mr Penny of Park in Aberdeenshire died on 22nd January 1902 possessed of a heritable estate worth nearly £20,000, which was almost all he had. He was survived by his widow, who is still alive, and by four sons and four daughters. To his widow he left the liferent of his whole estate. He also appointed her his sole trustee and executrix, giving her power to borrow money on the security of his estate either for the purpose of setting up any of his children in business or on their marriage, or for the purpose of paying estate duty, or for the proper upholding of the buildings on the estate of Park, "all payments made to children being reckoned as part of their ultimate share when the same falls to be divided." With regard to the fee of his estate, after giving the liferent to his widow he directed the same to be "realised and divided equally on her death among my children, share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life."

The eldest son, James Penny of Lochwood, died on 1st November 1905, having received a payment from his father's trust of £609, 17s. 9d. under the powers of the will for the purpose of setting him up in business. He was survived by a widow and three daughters who are still in pupillarity. It is maintained for the tutors and curators of these pupil children that their father James Penny of Lochwood having died before the period of division of the truster's estate, viz., the death of the liferentrix, no share of the fee vested in him but passed to them as conditional institutes. Their mother also urges a plea which has some similarity to that stated in *Cairns'* case, viz., that she desires to know what her late husband was entitled to under his father's will in order that she may decide whether to claim her legal rights or not. The same principle which led us to sustain the competency of the special case in *Cairns'* case, though the liferentrix

was alive and no payments could take place till her death, should enable us I think to answer the second question. I should propose to answer it in the affirmative, simply because the testator has expressly said that "all payments made to children are to be reckoned as part of their ultimate share when the same falls to be divided." These words seem to me to include a prospective share ultimately falling either to an immediate child of the truster or to those in his right.

With regard to the question of vesting, it all turns, just as it did in *Cairns'* case, on the meaning to be attached to the words "the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." Now when the word "predecease" or "survivorship" occurs in a will it plainly refers to some point of time, either death before the time, whatever it may be, or survivance after the time. I find that Lord Low in his opinion, at the top of page 124, deals with the words as *in pari casu,* for he speaks of "there being nothing in the context to take the case out of the general rule that provisions in regard to predecease or survivorship refer to the term of payment." And the effect of the whole judgment was to hold that while it was impossible to limit the words "any predeceasing child" to the event of the immediate child predeceasing the testator himself, it would be contrary to the current of recent decision to hold that vesting was absolutely suspended. Accordingly, we all agreed with Lord Kyllachy in the view which he had expressed in the case of *Wylie's Trustees,* 8 F. 617, that "a contingency depending merely upon the existence or survivance of issue falls to be read as a resolutive and not as a suspensive condition." But we did not decide there—and as I understand we do not decide here—that defeasance necessarily takes place on the child's issue merely surviving their parent (which has happened in the case of the three children of James Penny of Lochwood) irrespective of whether or not they also survive the liferentrix (which either may or may not happen). That question was expressly reserved by Lord Kyllachy in his opinion at 122 of S.C. (1907), and it would hardly be proper that we should attempt to decide it *ab ante,* since it may never arise as a practical question. I think, therefore, that we should reserve it here.

For these reasons, I am for answering the first and third branches of the first question in the negative, and the second branch of the first question in the affirmative. Further, I am for answering the second question (as amended) in the affirmative.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD LOW was absent.

The Court answered the second branch of the first question of law in the affirmative, and the first and third branches thereof in the negative, and answered the second question of law (as amended) in the affirmative.

Counsel for the First and Fifth Parties—The Dean of Faculty (Campbell, K.C.)—A. R. Brown. Agent—R. C. Gray, S.S.C.

Counsel for the Second, Third, and Fourth Parties — Cullen, K.C. — A. M. Mackay. Agents—Alex. Morison & Company, W.S.

Thursday, February 27.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

ABERDEEN MASTER MASONS' INCORPORATION, LIMITED *v.* SMITH.

Friendly Society—Company—Trade Union—Title to Sue—Validity of Registration of Friendly Society under the Companies Acts—Trade Union Act 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 5—*Trade Union Act Amendment Act* 1876 (39 *and* 40 *Vict. cap.* 22), *sec.* 16.

A society of master masons was formed, *inter alia,* to take over the assets of a previously existing unincorporated society said to have been a trade union, and it was incorporated and registered under the Companies Acts. The memorandum of association set forth a large number of objects connected with the trade, and prohibited the enforcement or support of any regulation which would make it a trade union. Its title to sue was challenged upon the ground that it was a trade union under sec. 16 of the Trade Union Act Amendment Act 1876, and consequently that its registration under the Companies Acts was void, in virtue of sec. 5 of the Trade Union Act 1871.

Held, upon a consideration of the constituting documents, that the society was not a trade union, and consequently that its registration was not void, and its title to sue good.

Friendly Society—Company—Member—Admission of Member not having Qualifications Prescribed by Articles of Association—Right of Member to Plead Nullity of Admission when Sued by Society—Friendly Society Registered under the Companies Acts.

The articles of association of a friendly society incorporated under the Companies Acts required certain qualifications as to age, medical examination, &c., in members on admission. A, who did not fulfil these qualifications, was admitted in 1904, and acted as a director, but in March 1906 he wrote a letter resigning. In June 1906 the society sued him for sums due as a member prior to his letter of resignation, when A pleaded that he had never been a member, his admission having been *ultra vires.* In October 1906 the society