stated why this *pro indiviso* proprietor who wishes the subjects divided should not have them divided.

LORD ARDWALL was absent.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to give effect to Mr Ormiston's report with due regard to the interests of the parties, and to proceed.

Counsel for the Pursuer (Reclaimer)—Graham Stewart, K.C.—Armit. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders (Respondents)—Wilson, K.C.—Jameson. Agents—Garden & Robertson, S.S.C.

Saturday, November 4.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

FOOTE *v.* SHAW STEWART AND OTHERS (DIRECTORS OF GREENOCK HOSPITAL AND INFIRMARY).

Reparation—Negligence—Public Hospital—Liability of Directors for Unskilful Treatment of Patient by Staff—Paying Patient—Special Contract—Relevancy.

The pursuer of an action of damages against the directors of a public hospital averred that having met with an accident by which the lower part of her thigh bone was fractured she called in a doctor, who advised her to go at once to the hospital in order to have the advantage of the medical appliances there, and in order to have the injury examined and treated; that she accordingly applied to the hospital, and was received as a paying patient therein at "the rate of £2, 2s. per week for board and medical treatment, by arrangement made on the defenders' behalf with Dr G., the defenders' house surgeon, to whom the pursuer explained the circumstances above narrated"; that the treatment of her case by the defenders' surgeons was negligent and unskilful, and resulted in injury and damage to her.

Held (1) that the obligation undertaken by the directors of a public hospital towards the public is only to furnish the services of competent medical and surgical practitioners, and (2) that the pursuer had not relevantly averred any contract whereby the defenders undertook any other obligation toward the pursuer, and action therefore dismissed as *irrelevant*.

Hillyer v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, *approved*.

Mrs Joicey Marion Brown or Foote raised an action of damages against Sir Hugh Shaw Stewart and others, the office-bearers and directors of the Greenock Hospital and Infirmary, as representing the Hospital and Infirmary.

The pursuer averred—("Cond. 2) On or about 19th February 1910, the pursuer, who was residing at an hotel in Gourock, had a very severe fall there, by which her leg was broken above the knee, the lower part of her thigh bone being fractured. (Cond. 3) After the accident the pursuer, finding she was severely hurt, sent for a doctor in Gourock. The said doctor found the pursuer suffering from a serious injury to her leg in the region of the knee, and advised her to go at once to the Greenock Infirmary in order to have the advantage of the medical appliances there, and in order to have the injury examined and treated, and if necessary to have the Röntgen rays applied. She accordingly applied to the defenders' infirmary, and on or about 20th February was received as a paying patient therein at the rate of £2, 2s. per week for board and medical treatment, *by arrangement made (on the defender's behalf) with Dr Greaves, the defenders' house surgeon, to whom the pursuer explained the circumstances above narrated.*" [The passage in italics was added at amendment in the Inner House]. The pursuer further averred that the defenders' surgeons treated her for a sprain of the knee, that their diagnosis and treatment of her case was negligent and unskilful, and resulted in loss, injury, and damage to her.

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault of the defenders, or of those for whom they are responsible, is entitled to reparation therefor in terms of the conclusions of the summons, with expenses. (2) The defenders having undertaken to treat the pursuer for her said injuries, and having failed to do so with proper care and skilfulness, and the pursuer having suffered loss in consequence, they are bound to make reparation therefor to the pursuer."

The defenders, who denied the pursuer's averments of negligence or unskilfulness, pleaded, *inter alia*—"(3) The averments of the pursuer being irrelevant, the action should be dismissed."

On 4th November 1910 the Lord Ordinary (SKERRINGTON) sustained the third plea-in-law for the defender and dismissed the action.

Opinion.—"The pursuer alleges that she entered the Greenock Infirmary as a paying patient in consequence of having met with an accident to her leg, and she further alleges that the doctors in the infirmary failed to diagnose her injuries correctly, and treated her for a sprained knee, whereas in point of fact she was suffering from a broken thigh. She accordingly claims damages from the directors of the infirmary upon the footing that the defenders are responsible for the doctors whom they employed. It is not alleged that the defenders failed to employ competent doctors, nor is it alleged that the pursuer received any treatment in the infirmary except what was in conformity with the directions of the infirmary doctors. In

these circumstances the pursuer cannot succeed unless she has relevantly averred that the doctors were the servants of the defenders, or unless she has relevantly averred a contract on the part of the defenders, not merely to supply competent medical men, but also a contract that these medical men should treat the pursuer with skill and care. As regards the first ground of liability, there is, in my opinion, no relevant averment that these doctors stood to the infirmary managers in the relation of servants. The pursuer's counsel, however, rested his case principally upon the ground of contract, and he founded on the statement in the third article of the condescendence to the effect that the pursuer was received into the infirmary as a paying patient 'at the rate of £2, 2s. per week for board and medical treatment.' I read that as meaning that in return for £2, 2s. per week the pursuer was to receive board and medical treatment from the physicians and surgeons in the infirmary, and the defenders' duty as regards medical treatment was, I think, fulfilled if they provided her with competent surgeons and physicians to attend to her case. The pursuer's counsel, however, argued that the contract went further, and that the defenders, by receiving the £2, 2s., undertook that the treatment which the pursuer should receive from their doctors would be reasonably skilful and careful. There is no averment of any such express contract, and I am unable to find within the four corners of the record any facts and circumstances which would give rise to the inference that that was in fact the footing upon which this lady was received into the infirmary. In these circumstances it would be useless to have an inquiry either before a jury or before a judge. I accordingly dismiss the action with expenses."

The pursuer reclaimed, and argued—The obligation of the defenders to the pursuer was not the obligation of the directors of a public hospital towards the public, as defined in *Hillyer* v. *Governors of St Bartholomew's Hospital*, [1909] 2 K.B. 820, but an obligation arising from the particular contract they made with the pursuer as set forth in article 3 of the condescendence. That contract was to the effect that in return for a payment of £2, 2s. per week the defenders undertook to give the pursuer board and medical treatment for the injuries which she had sustained. In other words, the obligation undertaken by the defenders was not merely to procure for the pursuer the services of competent practitioners, but to treat her case (medically and surgically) through the agency of the hospital staff—Beven, Negligence, 3rd ed., ii. 1165. The defenders were therefore liable for the negligence and unskilful treatment by the staff—*per* Walton, J., in *Evans* v. *Liverpool Corporation*, [1906] 1 K.B. 160, at p. 164. In the case of *Hall* v. *Lees*, 1904, 2 K.B. 602, it was held that the documents imported a contract to procure the services of competent nurses for the pursuer, not to nurse the pursuer through the agency of the nurses, in which case there would have been liability. The pursuer was therefore entitled to a proof.

Argued for the defenders and respondents —Apart from special contract the only obligation which lay on the defenders was to procure competent practitioners—*Evans* v. *Liverpool Corporation*, *cit.*; *Hillier* v. *Governors of St Bartholomew's Hospital*, *cit.*—and there was no averment that that obligation was not fulfilled. There was no relevant averment of a special contract imposing any other obligation on the defenders. The defenders' house-surgeon could not and did not make any other contract with the pursuer than the ordinary one with a paying patient, namely, that in respect of payment the defenders undertook to board the pursuer and procure for her the services of a competent staff. A contract of the very special nature argued for by the pursuer would require to be averred on record with very much greater precision and specification.

At advising—

LORD DUNDAS—The pursuer of this action sues the office-bearers and directors of the Greenock Hospital and Infirmary, as representing that institution, for damages in respect that while she was a paying inmate in the infirmary the house surgeons treated her case in an unskilful and negligent manner, to her great physical and pecuniary loss and injury. The question is whether or not the pursuer has set forth on record a case against the defenders relevant to be admitted to probation. The Lord Ordinary decided that question in the negative, and the pursuer has reclaimed, and asks that the case be remitted to his Lordship, with instructions to allow a proof before answer of her averments. It will therefore be necessary to examine these averments with care and in some detail. But the ground may with advantage be cleared by considering at the outset the general rules, apart from special averments, concerning the liability in such a case of the governing bodies of institutions like the Greenock Infirmary in a question with their patients. It is clear enough, and was admitted by the pursuer's counsel, that the medical men on the staff of the establishment are not the servants of the governing body. The pursuer's case must rest, as it was rested in the argument at our bar, upon contract, express or implied. Where no special terms are expressed, the limits of legal responsibility attaching to the governing body are, I take it, confined to a due and careful selection by them of a competent staff, and do not extend to the supervision by them of the professional actings of members of the staff, or to any sort of guarantee that these will be performed with skill and care in any given case. The institution offers and undertakes to furnish to the public the services of competent medical and surgical practitioners, and nothing more. Considerations of reason and good sense seem to negative any further degree of responsibility on the

part of the governing body. It is obvious that they have and can have no control, no means and no ability of control, no power or capacity of supervision, over the professional treatment of their patients. The medical staff must *ex necessitate rei* act on their own responsibility; they are not appointed as in room and stead of the Governors, to perform duties which the latter might or could themselves undertake. It follows that, though the Governors appoint and may dismiss the medical staff, they cannot be held responsible for the degree of skill or care exercised by the latter in the treatment of any patient. They undertake to furnish their patients (whether paying or non-paying) with the services of a competent staff; they do not undertake indemnity against errors of treatment arising from want of skill or negligence on the part of practitioners whom they have reasonably and properly appointed as persons competent for their posts. There is not, so far as I know, any Scottish decision on this matter; but the law has been clearly and authoritatively laid down in England in the sense I have endeavoured to indicate by a series of decisions, and particularly by the Court of Appeal in the recent case of *Hillyer* v. *Governors of St Bartholomew's Hospital* (1909, 2 K.B. 820). The learned Judges there approved and confirmed the pithily expressed opinion of Walton, J., in *Evans* v. *Liverpool Corporation* (1906, 1 K.B. 160), to the effect that persons in the position of the present defenders "do not undertake the duties of medical men or to give medical advice, but they do undertake that the patients in their hospitals shall have competent medical advice and assistance." I entertain no doubt that the doctrine laid down in England is sound, and is the law of Scotland. Mr Morison, indeed, in his able and temperate argument for the pursuer, disavowed any intention of disputing the general rules of law applicable to such cases, but devoted himself to the effort of distinguishing the case before us from their scope and effect.

One must therefore turn to the pursuer's record to see what is the alleged contract with the defenders upon which her case depends. It appears that about 19th February 1910 the pursuer had a severe fall, "by which her leg was broken above the knee, the lower part of her thigh bone being fractured." She sent for a doctor in Gourock, where she was residing, who "advised her to go at once to the Greenock Infirmary in order to have the advantage of the medical appliances there, and in order to have the injury examined and treated, and if necessary to have the Röntgen rays applied." I pause to observe that no point was attempted to be made of the fact that the Röntgen rays were not applied in the hospital. The pursuer proceeds to aver that "she accordingly applied to the defenders' infirmary, and on or about 20th February was received as a paying patient therein at the rate of £2, 2s. per week for board and medical treatment." This is the sole statement on record of the contract founded upon, and it is certainly very bald and meagre. The rest of the condescendence is taken up with the pursuer's story of the alleged maltreatment of her case by the house surgeons, their negligent and unskilful diagnosis, actings, and advice, and of the injury and damage thereby resulting to her. It is to be observed that no suggestion is made that the defenders were not justified in appointing the surgeons as men competent to their respective positions. I confess that I read the pursuer's crucial averment as meaning, according to the ordinary use and interpretation of language, that she was to pay £2, 2s. per week during her stay in the infirmary, and was to receive board after the scale and fashion usually supplied to their paying patients, and the medical (and surgical) treatment available to all patients in the infirmary—that is (as I read the matter), the services of a competent staff of medical men. I cannot take it off the pursuer's hands, in the absence of much more specific averments than she makes, that her payment of £2, 2s. per week was to ensure to her a special degree of medical care and attention, or a guarantee of skill on the part of the house surgeons. I agree with the clearly and concisely expressed opinion of the Lord Ordinary, and shall not attempt to elaborate or improve upon its language. At our bar the pursuer's counsel asked and obtained leave to add by way of amendment at the end of Cond. 3 a statement to the effect that the contract was arranged on the defenders' behalf by Dr Greaves, the house surgeon, to whom the pursuer explained the circumstances above narrated in her condescendence. I do not think the amendment makes any substantial difference as regards the relevancy of the pursuer's case. It is not said (and in the absence of averment I decline to assume) that the house surgeon had power to bind the defenders by entering into an unusual contract with a patient; and I do not think that the statement that he was made aware by the pursuer of what had passed between her and her professional adviser in Gourock serves at all to supply the radical deficiency of the crucial part of her condescendence. I hold with the Lord Ordinary that it would require very full and precise averments, which are here totally lacking, to justify us in allowing proof of a special and abnormal contract from which the ordinary rules of legal liability are to be excluded. To desiderate a due degree of precision in the statement upon record of so peculiar a case does not, to my mind, impose any harsh or unfair burden upon the pursuer. To relax proper requirements in that direction might, I think, expose governing bodies of public institutions to much harassing and unnecessary litigation. For these reasons, I am of opinion that we ought to adhere to the interlocutor reclaimed against.

LORD JUSTICE-CLERK—The facts of the case have been so fully and clearly stated by my brother Lord Dundas, that I pass over what I had written of narrative.

There was at the debate only one argument stated which appeared to have any plausibility. The pursuer's counsel urged that the hospital doctor made a bargain with the pursuer under which the pursuer was to be received as a paying patient. The argument was based upon the view that the doctor, who was the official who saw her, arranged a bargain with her for the hospital. I am very clearly of opinion that this is a fallacious contention. It was quite natural that the pursuer and the doctor being brought into contact, he should give information as to the fixed tariff of the managers for the reception of paying patients. In doing so he was not making any bargain at all, but simply communicating the terms, as regards board and lodging, on which she could be received under the fixed rules of the establishment. The case was, I think, in that matter practically in the same position as if the facts had been that at the gate of the hospital the pursuer had been informed by the gatekeeper of the terms of board and lodging for paying patients.

Upon the general question I concur entirely with what your Lordship has said. I do not think that the law of the case could be better stated than in the words of the American Chief-Justice in *Glavin* v. *Rhode Island Hospital* (34 Amer. Rep. 675), words with which Farwell, L.J., expressed his concurrence in the case of *Hillyer* ([1909] 2 K.B. 820, at p. 825)—"Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A out of charity employs a physician to attend B, his sick neighbour, the physician does not become A's servant, and A if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognise the right of the corporation, while retaining them, to direct them in their treatment of patients."

This seems to me to be absolutely sound. What would be the case if the managers interfered with the surgeon in his work?—if they refused to allow him to proceed with an operation which he thought necessary? Is it not plain that the patient would have ground for complaint against the managers if they interfered, and the interference led to bad consequences? Again, if they insisted that the surgeon should obey them as to the conduct of an operation, would he not be entitled to refuse, and to decline to act as their employee any longer, and to complain of their conduct?

The matter is illustrated by the question whether in assisting at an operation, nurses though the servants of the managers in their ordinary work, must at the operation obey the doctor's directions absolutely. This view is very clearly brought out in the opinion of L. J. Farwell in the case of *Hillyer*.

On these grounds, and on those stated by your Lordship, I concur in adhering to the Lord Ordinary's interlocutor.

LORD SALVESEN concurred

LORD ARDWALL was absent.

The Court adhered.

Counsel for Pursuer and Reclaimer—Morison, K.C.—Jameson. Agent—Allan M'Neil, Solicitor.

Counsel for Defenders and Respondents—Wilson, K.C.—MacRobert. Agents—Cadell & Morton, W.S.

Thursday, November 9.

FIRST DIVISION.

CUMMING (SMART'S TRUSTEE) *v.* FORGAN AND ANOTHER (SMART'S TRUSTEES).

Succession — Testament — Public Burdens — "Liferent Use and Enjoyment" of House—Liferent or Right of Occupancy — Liability for Feu-duty, Proprietor's Taxes, and Landlord's Repairs.

A testator directed his trustees to give his sister "the liferent use and enjoyment" of his house, to realise the whole residue of his estate and divide it into seven equal shares, and to pay these over to seven persons, of whom the sister was one, and on the death of the sister to realise the house and divide the proceeds amongst the other six residuary legatees. On the death of the testator the trustee divided the residue, and the sister had possession of the dwelling-house until her death. During the period that she survived the testator she paid feu-duty, proprietor's taxes, fire insurance premium, and proprietor's repairs. After the sale of the house, and prior to the distribution of the proceeds, *held*, in a Special Case, that the said annual burdens ought to have been made a charge upon the general residue of the testator's trust estate, and that the sister's trustees were entitled to repayment of the amount thereof, with periodical interest thereon, to the extent of six-sevenths thereof, out of the funds in the hands of the testator's trustee.

Robert Cumming, S.S.C., Edinburgh, trustee of the deceased Robert Smart, acting under his trust-disposition and settlement (*first party*), and John Forgan, S.S.C., and another, trustees of the deceased Janet or Jessie Smart, acting under her trust-dis-