LORD PRESIDENT—In determining this question we must steadily bear in mind that the Act under consideration does not profess to give compensation upon common law grounds. This man has lost his life, and if we had a jury here they would rightly take into account in fixing the amount of compensation not merely the earnings of the man (who was a piece-labourer) in the employment of those in whose service he was killed, but they would consider his earnings from A, B, C, and D to the end of the alphabet, in order to ascertain what his relatives had lost by his being deprived of life.

But the theory of this Act is totally different, for the Act concentrates attention upon the earnings from the employer from whom compensation is claimed. That is very clearly brought out by the decision in the case of *Price* in the Court of Appeal to which we were referred. We must therefore attend closely to the terms of the Act, in order to find out how the rather artificial calculation is to be worked out.

To my thinking the first question is, how long—during what period—has the man been in the employment of the respondents? That he has not been for three years is found as matter of fact. He has been for a shorter period. For how long? Now, I find that the Sheriff has decided that question, and found as a matter of fact that the deceased was employed by the appellants from 29th October 1896 to 4th November 1898. It seems to me, therefore, that the period is decided for us to be the period from 29th October 1896 to 4th November 1898, and that comes to 105 weeks. Now, what did he earn? He earned, in the aggregate over the whole period, £21, 5s. 9d. I say that you must divide that sum by 105, and that gives you 4s. 2d. You then proceed to multiply 4s. 2d. by 156, and that gives you £32, 9s. 2d.

I can find no escape from that principle or method of calculation. I own that it is not quite in accord with our ideas of common law compensation, while on the other hand the formula given does not very well fit in with the case of a piece labourer. Still it was, I will not say conceded, but not seriously disputed that such piece-labourers are within the Act, and if they are, then if the formula provided in the schedule of the Act gives them less than other people we cannot help that.

We must answer the first question in the affirmative and the second in the negative, and remit to the Sheriff.

LORD ADAM—I entirely agree. I think that part of the apparent hardship of this case arises from the parties not having had their attention sufficiently directed to the period during which the deceased was in the employment of the appellants. I could quite well have understood an argument to the Sheriff that he must at any rate exclude every period before the interval of five months, and for anything I know that argument might have been successful. But that has not been done, and as your Lordship says, we must take the period of employment in this case as running from October 1896 to November 1898. That being so, I think the words of the Act are clear.

LORD KINNEAR—I concur. I am quite clearly of opinion that the first question must be answered in the affirmative. As to the second question, I agree with your Lordship that if the period of employment be taken from October 1893 to November 1898 there is no escaping the conclusion which your Lordship intimated. I express no opinion, and have none, as to whether that is the proper period of employment to be adopted as the basis for calculating compensation or not. That is not a question for us and is not before us. But upon the assumption that it is the proper period which is the assumption of the argument and of the case presented to us, I am unable to see any answer to your Lordship's reasoning.

LORD M'LAREN was absent.

The Court answered the first question in the affirmative and the second in the negative, recalled the award, instructed the Sheriff as arbitrator that the sum to be divided between the widow and children is £32, 9s. 2d., and remitted to the Sheriff to proceed.

Counsel for the Pursuer—Watt—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Ure, Q.C. —Cook. Agents—Simpson & Marwick, W.S.

Tuesday, June 6.

SECOND DIVISION.

LAING'S TRUSTEES *v.* HAMILTON.

Succession—Fee and Liferent—Fee Subject to Restriction—Vesting.

A truster directed his trustees to divide equally among "all my children" two-thirds of his estate. As regards the shares of three of his children—George, Charlotte, and Robert—he directed his trustees to hold them till they respectively attained twenty-one years or were married, "when the share of each of them shall be payable to him or her on respectively attaining majority or being married;" declaring that the trustees should, till said three children attained majority or were married, apply the whole or part of the interest of their respective shares towards their maintenance and education; and further declaring that in the event of any of said children dying without leaving lawful issue, the share of such predeceaser should be divided equally among the truster's whole surviving children or their issue.

By a codicil the truster directed his trustees to pay to his daughters Elizabeth, Jane, and Charlotte the annual interest or profits of the shares pro-

vided to them respectively, and to which they might succeed in the event of the predecease of their brothers and sisters, "in liferent for their liferent use respectively allenarly, and the fee or capital thereof shall be held by said trustees for behoof of the lawful issue of my said daughters respectively, and paid to the issue of each of them respectively, and equally among said issue, share and share alike, . . . and with these alterations I declare that my foregoing trust-disposition and settlement shall stand in full force."

Charlotte survived the truster, and died unmarried after attaining majority and leaving a will. The trustees had retained the share falling to her, and paid her the interest down to the date of her death.

Held that a fee vested in Charlotte *a morte testatoris*, subject to restriction to a liferent in the event of her having issue.

William Laing, ship agent and shipowner, Leith, died on 13th July 1863, leaving a trust-disposition and settlement dated 26th March 1858, and relative codicil thereto dated 4th October 1860. The truster was twice married. By his first marriage he had four children, viz., Mrs Elizabeth Laing or Milburn, William Laing, James Laing, and Mrs Jane Leith Laing or Morrison; and by his second marriage he had three children, viz., George Henry Laing, Charlotte Laing, and Robert Laing. He was survived by his seven children, with the exception of his eldest daughter Elizabeth Laing or Milburn, who predeceased him leaving issue. He was also survived by his widow Mrs Georgina Davidson or Laing.

By the fourth purpose of his trust-disposition and settlement he directed his trustees, so soon as they had realised his estate, to divide it into three parts or shares, and to pay his widow one part or share, and "the remaining two-third parts or shares I direct my said trustees to divide equally among all my children, . . . "And the shares of the said George Henry, Charlotte, and Robert Laing, and any other child or children procreated or that may be procreated as aforesaid, I direct my said trustees to hold the same till they respectively attain the age of twenty-one years or be married, whichever of these events shall first happen, when the share of each of them shall be payable to him or her on respectively attaining majority or being married as aforesaid: Declaring that my said trustees shall, till my said younger children" (*i.e.*, the children of his second marriage, viz., George Henry, Charlotte, and Robert) "attain majority or be married, pay and apply the whole or as much as they may consider proper of the annual interest or profits of their said respective shares towards their suitable maintenance and education; and declaring that in the event of any of my said younger children dying without leaving lawful issue of his or her body, the share or shares of such of them as shall so predecease shall fall and accresce to and be divided equally among my whole surviving children and the heirs of such of them as shall predecease leaving lawful issue, such issue taking the share which would have fallen to the parent if he or she had survived."

By his codicil the truster, on the narrative that he had resolved to make alterations on his foregoing trust-disposition and settlement, directed his trustees "to pay to my son James the annual interest or profit only of the shares provided to him, and to which he may succeed in the event of the predecease of his brothers or sisters in liferent, for his liferent use allenarly, which annual interest or profit shall and is hereby declared to be alimentary, and shall not be subject to his debts or deeds, nor liable to the diligence of his creditors, nor be assignable by him, but shall be strictly alimentary, and the fee or capital of said share or shares shall be held by my said trustees for behoof of and be paid to the lawful issue of my said son equally among them, share and share alike, in fee, and in like manner to pay to my daughters Elizabeth, Jane, and Charlotte the annual interest or profits of the shares provided to them respectively, and to which they may severally succeed in the event foresaid, in liferent for their liferent use respectively allenarly, and the fee or capital thereof shall be held by said trustees for behoof of the lawful issue of my said daughters respectively, and paid to the issue of each of them respectively and equally among said issue, share and share alike, which liferent hereby provided to my said daughters shall be paid to them respectively on their own several receipts, and shall be exclusive of the *jus mariti* of their husbands, and shall not be subject to the debts or deeds of their husbands, nor liable to the diligence of their creditors, and with these alterations I declare that my foregoing trust-disposition and settlement shall stand in full force."

The trustees, on the death of the truster, realised his estate, which amounted, after deducting debts, expenses, &c., to £12,388. The shares falling to Mrs Laing, the truster's widow, and William Laing, the eldest son, were at once paid. The shares falling to Mrs Milburn's children, George Henry Laing and Robert Laing, were subsequently paid as they respectively fell due, and the shares falling to James Laing, Jane Leith Laing (Mrs Morrison), and Charlotte Laing in liferent were retained in the hands of the trustees, and the interest paid over to them.

On 28th July 1898 Charlotte Laing died unmarried, after attaining majority, leaving a holograph will and testament disposing of her whole estate. After her death a question arose regarding the succession of the share of the truster's estate, viz., £1168, liferented by her, and for the settlement of the point a special case was presented to the Court by (1) the sole surviving trustee under the testator's trust-disposition and settlement; (2) Mrs Elizabeth Laing or Milburn's children, James Laing, Jane Leith Laing or Morrison, George Henry Laing, and Robert Laing; (3) Char-

lotte Laing's executor-dative; and (4) the trustees and executors of William Laing, who died on 10th October 1891 without issue, and leaving a will disposing of his whole estate.

The contentions of the parties were thus stated in the special case--"8. The third party maintains that he, as executor-dative of the said Charlotte Laing, is entitled to payment of the share (amounting to £1168) liferented by her, in respect that, on a sound construction of the trust-disposition and codicil of the truster, the fee thereof vested in her, subject to defeasance only in the event of her leaving issue. The second parties maintain that, on a sound construction of said testamentary writings of the truster, the share which would have fallen to the issue of Charlotte Laing, if she had left any, falls to be divided in this way—One-fifth part to the children of the truster's daughter Mrs Elizabeth Laing or Milburn, and one-fifth part to each of the truster's children James, Jane, George, and Robert. The fourth parties maintain that on a sound construction of said testamentary writings of the truster, the said share has fallen into intestacy, and therefore falls to be divided in this way—one-seventh part to them (the fourth parties); one-seventh part to the children of the truster's daughter Mrs Elizabeth Laing or Milburn; one-seventh part to each of the truster's children James, Jane, George, and Robert; and one-seventh part to the third party."

The questions of law were—"(1) Is the share of the truster's estate which was liferented by the deceased Charlotte Laing now payable to the third party? (2) Does said share fall to be paid to the second parties in the proportions set forth in the contention of the second parties in article 8 hereof? or (3) Does said share fall to be paid to the second, third, and fourth parties in the proportions set forth in the contention of the fourth parties in article 8 hereof?"

Argued for the third party—The fee of Charlotte Laing's share of the trust-estate was vested in her at the date of her death. The only alteration that the codicil made was to provide that if she had children her fee was to be restricted to a liferent. She not having had children, this provision never took effect. The case was ruled by *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281, and *Dalglish's Trustees* v. *Bannerman's Executor*, March 6, 1889, 16 R. 559.

Argued for the second parties—Charlotte Laing had only a liferent of her share of the truster's estate, not a fee subject to defeasance. The present case was distinguished from those quoted on behalf of the third party, in respect that in the present case there was a proper destination-over in the original deed. That taken along with the codicil showed that Charlotte's right was confined to a liferent, and that under the clause of survivorship the second parties were entitled to the fee of her share.

Argued for the fourth parties—They agreed with the second parties that a liferent was all that had been given to Charlotte Laing, but they contended that the fee had fallen into intestacy. The original settlement and the codicil must be read as one deed, and if this was done it was plain that there was in the present case no independent unqualified gift to the immediate beneficiary capable of taking effect where the special trust created by the codicil failed. This was essential to show that the original gift had not been displaced—*Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R., Lord M'Laren's Opinion, 557. A direction to divide was not in itself a gift—*Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566. If Charlotte was entitled to a liferent only, then the fee must fall into intestacy, because the survivorship clause did not effectually convey it.

Lord Justice-Clerk—It appears to me that the original deed expresses that a gift of fee is to go to the younger children, and that each of them is to receive his or her share on attaining majority or being married. The subsequent clause merely declares that if any child shall not attain majority or be married then his or her share is to accresce to the shares of the other children. That being so, the only remaining question is, whether there is anything in the codicil to alter that arrangement in the event of Charlotte dying unmarried. I cannot read the codicil as making an alteration. The purpose and intention of the codicil is to provide that the share that was given to Charlotte should be kept safe for any children she might have, and I read the words "and with these alterations I declare that my foregoing trust-disposition and settlement shall stand in full force" as meaning that if Charlotte had no children the original gift of fee should remain in force.

Lord Young—I am of the same opinion. I think that on principle and on the authority of the cases of *Lindsay's Trustees* and *Dalgleish's Trustees*, which were cited by the third party, the fee of Charlotte's share must be held as vested in her at the date of her death. I think that the words "declaring that in the event of any of my said younger children dying without leaving lawful issue of his or her body, the share or shares of such of them as shall so predecease shall fall and accresce to and be divided equally among my whole surviving children and the heirs of such of them as shall predecease leaving lawful issue," and so on, apply only to the case of a child who might die before majority or marriage. With respect to the codicil, looking to the authorities cited, I think that it is to be taken as providing for the case of a daughter dying having issue. In order to provide for that it was necessary to give directions to the trustees so as to make it their duty to give the liferent of her share to each daughter during her life, and to retain the fee during her life with a view to paying it over to any issue which she might have. If there were issue they were to get it, and if not, then

the provision of the will was to hold good. That was a provision which made the child a fiar, and I think that the intention of the testator would not be carried out in any other way than by holding Charlotte to be a fiar at her death.

Therefore on principle and on authority I am of opinion that the representatives of Charlotte are entitled to the sum of £1168 in question.

LORD TRAYNER — I am of the same opinion. The right conferred on Charlotte under the will was a right of fee vesting in her *a morte*, but with a postponement of the beneficial enjoyment until she attained majority or was married. The codicil altered this to the extent of giving a liferent of her share to Charlotte, and the fee to her issue if she had any. But this, in my opinion, and according to the authorities cited to us, had no further effect than to limit Charlotte's right to a liferent only in the event of her having issue, which not having happened, her original right of fee belonged to her unburdened at her death. The clause of survivorship relied on by the second parties does not appear to me to take the case out of the rule settled by the authorities, and to which I have given effect.

LORD MONCREIFF — I agree with the result arrived at by all your Lordships. Both on authority and principle I am of opinion that the first question should be answered in the affirmative.

The Court answered the first question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for First and Second Parties—Craigie. Agents—Snody & Asher, S.S.C.

Counsel for Third Party — Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for Fourth Parties — Bartholomew. Agents — Galloway & Davidson, S.S.C.

Wednesday, June 7.

SECOND DIVISION.

M'MAHON *v.* MATHIESON.

Executor—Personal Liability—Small-Debt Decree—Process—Small Debt Act 1837 (1 *Vict. c.* 41).

A, a creditor of B, brought an action in the Small Debt Court for the amount of his debt against C, who was B's trustee and sole executor. The summons was at the instance of A, against C, "commission agent, 21 Guthrie Street, Edinburgh, trustee and sole executor on the estate of the deceased B." The decree following upon this summons "found the within designed C as libelled, defender, liable to the pursuer in the sum of £3, 12s." with expenses. Upon this decree A proceeded to poind the personal effects of C, who had informed him that he had no funds belonging to B's estate in his possession. C thereupon brought an action in the Sheriff Court to interdict A from proceeding with the poinding, and averred the facts above set forth. A in his defence alleged that the decree in the small-debt action was a personal decree, having been pronounced in the Small Debt Court in spite of C's defence, then stated, that he had no funds belonging to the deceased, which defence the Sheriff-Substitute had found not proved. In the action of interdict the Sheriff-Substitute and the Sheriff held that the pursuer's averments were irrelevant.

On appeal the pursuer maintained that the small-debt decree was directed against him in his representative capacity only. The defender, on the other hand, contended (1) that a small-debt decree was necessarily directed against the pursuer personally, and (2) that in this case he was not sued and decerned against "as" trustee. The parties were at issue as to whether the pursuer had executry funds in his hands.

The Court recalled the interlocutors appealed against *in hoc statu*, and remitted to the Sheriff to allow the parties a proof of their averments before answer, the proof to be directed to the state of the executry funds (1) when the claim was first made; (2) when the small-debt action was raised, and (3) when the decree therein was pronounced.

This was an action brought in the Sheriff Court at Edinburgh by James M'Mahon, commission agent, residing at No. 21 Guthrie Street, Edinburgh, against A. A. Mathieson, M.D., Edinburgh, in which the pursuer prayed the Court to interdict the defender, and all others acting under his instructions, from selling, removing, or interfering with the goods or effects belonging to the pursuer, and in his house at 21 Guthrie Street, under an alleged extract-decree containing warrant to poind, dated 26th October 1898, and in particular certain specified articles which had been poinded under that decree, and for interim interdict.

The material part of the summons upon which this decree and poinding followed was as follows:—"Whereas it is humbly complained to me by A. A. Mathieson, M.D., 41 George Square, that James M'Mahon, commission agent, 21 Guthrie Street, Edinburgh, trustee and sole exor. on the estate of the deceased Mrs Jane Ward, 5 College Street, Edinburgh, defender, is owing the complainer the sum of Three pounds twelve shillings, conform to statement of account hereto annexed, ending 16th July 1897, which the said defender refuses or delays to pay; and therefore the said defender ought to be decerned and ordained to make payment to the complainer, with expenses. Herefore it is my will," &c.

The sum sued for was the amount of an account for professional services rendered to the deceased Mrs Ward.