LORD M'LAREN—1. In regard to the effect on vesting of a survivorship clause, it is a well-known rule of law that if a testator does not indicate the event to which the survivorship clause refers it is presumed to refer to the period of distribution. Here the testator does indicate the event which determines survivorship in the words, "should any of my daughters die without issue." The normal meaning of these words is "die without ever having had issue," for the words being general must include all possible cases classed under that head.

If we give this normal meaning to the words the will is perfectly intelligible and consistent. What the testator instructed was that each child of a daughter should take a vested interest as he or she comes into existence; nothing remained to be provided for except the event of no child coming into existence, and this is sufficiently provided for by the survivorship clause.

I find nothing in the context of this settlement to give another meaning to the clause or to modify the presumption in favour of early vesting.

2. As regards the second point, I agree with Lord Adam for two reasons. In the first place, there is a great deal to be said for this being a discretionary power conferred on the trustees to sell or not to sell the estate as they should deem advisable, and not merely a power of sale for the purpose of administration. That this is the nature of the clause appears from its terms—"should my trustees . . . think it proper they may sell and convert into money the whole residue of my estate." But in the second place there is also the consideration that this is a case in which the administration of the trust necessitates successive divisions of the estate, namely, to the testator's sons at twenty-five and to the issue of the daughters at the death of their mother, these periods naturally occurring at considerable intervals of time. The only way in which these divisions could take place consistently with the property remaining heritable would be by the trustees conveying the property jointly to themselves and to the child who was to be paid out. I agree with Lord Rutherfurd Clark's observations in the case of *Playfair* that such a method would be inconvenient, and would not satisfy the idea of payment of a share of the estate. The construction which would have this effect is not a construction to be accepted in preference to the construction which implies constructive conversion of the estate and payment in money.

In a case dealt with in this Division this year—*Watson's Trustees* v. *Watson*, May 17, 1902, 4 F. 798, 39 S.L.R. 628, we held that a beneficiary ought not to be put to the disadvantage of holding his share of the estate *pro indiviso* along with the trustees, but was entitled to have his share separated.

The result at which we arrive in this case does not conflict with the doctrine laid down in the case of *Buchanan*, that the presumption is that the estate remains, as regards the question of heritable and moveable, in the same state as at the testator's death. This presumption would prevail if the division of the trust estate in the manner directed could be carried out by *pro indiviso* conveyances. This would be the case when the whole division was to be at one and the same time. In cases of successive division there is great difficulty in carrying out the testator's directions by specific conveyances of the heritable estate. Where there is a discretionary power of sale, with a scheme of division and powers of sale such as we find in this will, I have no doubt that the case presents all the elements which have been considered sufficient to infer constructive conversion.

The LORD PRESIDENT and LORD KINNEAR concurred.

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

Counsel for the First and Fourth Parties—Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Second Party—Steedman. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Third Party—Sandeman. Agent—C. W. Bruce, Solicitor.

Tuesday, December 16.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

STEEL *v.* OAKBANK OIL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Sched. I. sec.* 12—*Review of Weekly Payment—Date from which Weekly Payment may be Ended, Diminished, or Increased.*

Held that under section 12 of Schedule 1 of the Workmen's Compensation Act the Sheriff as arbitrator has no jurisdiction to review the amount of the weekly payment either (1) as from the date upon which the workman in fact ceased to be totally incapacitated and began to earn wages, or (2) (*diss.* Lord Justice Clerk) as from the date upon which the application for review was presented, or any subsequent date prior to the date of the judgment.

Morton & Company, Limited v. *Woodward* [1902], 2 K.B. 276, *not followed.*

Observations as to the summary nature of the procedure which ought to be followed in applications for review of weekly payments.

This was an appeal in an arbitration in the Sheriff Court at Edinburgh, under the Workmen's Compensation Act 1897, between James Steel, miner, Midcalder, claimant and respondent, and the Oakbank Oil Company, Limited, appellants.

The Sheriff - Substitute (HENDERSON) stated the following case for appeal:—"By agreement between the parties—a special

warrant to record a memorandum of which was granted by me on 24th February 1902—the appellants undertook to pay the respondent compensation at the rate of 18s. 6d. per week in respect of an injury sustained by him on 26th July 1901 while in their employment. The appellants paid the said compensation at said rate down to 14th October 1901, when they ceased to make payment of it on the ground that the respondent's total incapacity had then come to an end. On 8th April 1902 the appellants lodged an application under section 12 of the first schedule of the said Act, in which they sought to have the respondent's compensation ended or diminished in respect that he was no longer totally incapacitated for work, and that he was actually working and earning wages. After hearing evidence for both parties, I, on 23rd July 1902, pronounced an interlocutor finding, besides the facts above set forth, that the amount of compensation was fixed on the footing that the respondent's weekly wages were 37s. per week; that since the respondent recommenced work at 14th October 1901 his average weekly wages were £1, 6s. 11d., and that he was at the date of the judgment earning wages at that rate; that his earning capacity since he met with the accident had been considerably diminished, as he was not able to follow his former occupation as a miner. In these circumstances I diminished the weekly payments payable under the recorded memorandum of agreement by 11s. 6d. per week, leaving the respondent 7s. per week, and that from the date (23rd July 1902) of my deliverance, holding that I was not entitled under or empowered by the said Act to review any weekly payment as at or from any period of time prior to the date of the judgment in the application for review. I also found the respondent entitled to the expenses incurred by him in consequence of the procedure under the appellants' minute of 8th April 1902.

"The questions of law for the opinion of the Court are—"(1) Whether, under section 12 of the first schedule of said Act, the appellants are entitled to have the respondent's rate of compensation reviewed as from 14th October 1901, beyond which they alleged that the period of respondent's total incapacity did not extend, and since which date I found that he had earned on an average £1, 6s. 11d. per week—his average earnings before the accident being 37s. per week? (2) If not, are appellants entitled to review as from 8th April 1902, the date of their application?"

Section 12 of the first schedule of the Act enacts:—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall in default of agreement be settled by arbitration under this Act."

Argued for the appellants—*On Question* 1—The arbitrator was entitled to review the rate of compensation as from 14th October 1901. On that date the dispute was distinctly formulated as to whether the workman's total incapacity had ceased, and due notice was then given to the workman that the question was raised. The scheme of the Act was to give compensation to the workman during the period of incapacity. It therefore followed that if sufficient notice was given to the workman that in the opinion of the employer the incapacity had ceased or was diminished, and if thereafter it was decided by the arbitrator that this was the fact at the date of the notice, the arbitrator was also entitled to decide that the compensation should cease or be diminished as from that date. This result was a necessary corollary to the decision in *Morton & Company, Limited* v. *Woodward* [1902], 2 K.B. 276, opinion of Collins, M.R. 280. *On Question* 2—The argument on question 1 applied here with even greater force, because there was no doubt that the dispute was clearly formulated when the application for review was made, and there was an English decision—*Morton & Company, Limited* v. *Woodward, supra*—directly in point. Although not bound by this decision, the Court would be slow to pronounce a decision in direct conflict with it.

An answer was called for on question 2 only.

Argued for the claimant and respondent on that question—The case must be taken as if the appellants had continued to pay the compensation after 14th October. The appellants had no right under the Act to discontinue the payment without the authority of the Court. The statute had in section 11 of the first schedule provided a mode of definitely settling the condition of the workman, but that mode had not been adopted by the appellants. In terms of section 8 of schedule 2 the recorded memorandum of agreement was equal to a decree of the Court. So long as it stood unreduced or unaltered it must be enforced. There was no injustice caused by this, because the procedure under the Act was summary, and very little time ought to elapse between the date of the application and the date of the judgment.

LORD YOUNG—The only difficulty that appears to me in this case is that caused by the judgment of the English Court, which has been referred to, but the ground, irrespective of that judgment altogether, upon which I am prepared to dispose of the first question here goes, I think, a long way, if not the whole way, to the decision of the second question also, and is, as I shall try to point out, not quite consistent with the judgment of the English Court which has been referred to. The ground upon which I am of opinion and understand both of your Lordships to be also of opinion that the first question must be answered in the negative, is that the payment which was ordered by the Court should be continued at least until the date of the application for a review of that judgment. I am of opinion upon the consistent practice of this Court so far as I am aware, and upon the law and good sense of the matter, that when a judgment is pronounced under the

statute fixing the amount of payment which is to be made by a master to an injured workman under the Workmen's Compensation Act, that payment must be continued so long as the judgment subsists. The parties may of course thereafter agree without any procedure to increase the payment ordered by the judgment, or to diminish it, or to stop it. But if there is no agreement to enlarge it, or modify it, or stop it, a judgment remains in force and must be obeyed.

Now, the judgment here ordering the master to pay the injured workman 18s. 6d. a-week was implemented by the master until the 14th of October 1901, when he ceased to obey it, and stopped the payment which that still subsisting judgment ordered him to make weekly. I think that was unwarrantable stoppage on his part, that he was bound, both according to the practice which I have referred to and according to the law and the sense of the matter, to continue the payment so long as the judgment continued, and that he acted illegally in disobeying it on the 14th of October when it was still current. The master was entitled under the statute to present an application to the Sheriff to modify or to end the payment ordered by the judgment, and he availed himself of that right by presenting such an application upon the 8th of April. It does not appear to me that that application under clause 12 of the statute had any operation whatever upon the subsisting judgment. The judgment still subsisted, notwithstanding an application to review it, until it was reviewed and a judgment in the review pronounced, and ought to have been obeyed, notwithstanding the application for review, so long as it remained unreviewed and unaltered. It did so remain unreviewed and unaltered until I think the 23rd of July. What explanation there is of that long delay between the 8th of April and the 23rd of July I do not know. I should think that, generally speaking, such applications for review were very speedily considered and disposed of, but here there was certainly an unusually long time. But that does not interfere with the law as I have stated it, according to my judgment, that the judgment although submitted for review remained operative until reviewed. The Sheriff did review the judgment on the 23rd of July, and his judgment was to the effect that from that date onward the amount decerned for in the judgment should be reduced. That was the only review. The judgment otherwise remains unreviewed, and therefore to be implemented not merely down to the date of the application but until the date of the judgment on 23rd July.

Now, that is not consistent as regards the period of the *lis pendens* so to speak with the judgment of the English Court, but it is alone consistent with my view of the law as it stands upon practice and as it stands upon the reason and sense of the thing. I am therefore of opinion that we should answer both these questions accordingly, that the judgment under which the payment was made in obedience to the order in that judgment subsisted and must be implemented by the appellants here until the 23rd of July when it was altered, and that from that date alone the alteration takes any effect or the judgment was interfered with.

LORD ADAM—I am of the same opinion. The facts in this case are that the respondent Steel received an injury while in the employment of the appellants on the 26th of July 1901. By an agreement entered into between the appellants and the respondent, which was duly recorded in the Sheriff Court Books of the county, they agreed to give him a weekly payment of 18s. 6d. That was half the total wages he was earning at the time he was injured, and therefore it is clear that that was given to him on the footing that the injury had resulted in total incapacity for work. Well, Steel, the injured workman, received his weekly payments until the 14th of October 1901, when the appellants at their own hands stopped it. Now, I agree with Lord Young that an employer has no right to withhold payments which he is decerned and bound to pay under a finding, whether by agreement or a judgment of the Sheriff, or by arbitration or otherwise. He has no right whatever at his own hands to stop making these weekly payments. The Act has appointed a way in which the employer who is of opinion that recovery from the injury has resulted, may proceed. He has his summary remedy pointed out in the 11th section of the 1st Schedule to the Act. That perhaps is not so applicable to a case of this kind where it is not entirely a question of the physical condition of the man, to be ascertained by medical evidence, as it also embraces the fact that he had been earning wages at the time that the inquiry takes place—but the ordinary summary procedure is under the 11th section. Well, having stopped payment upon the 14th of October 1901, the appellants, the employers, take no steps to have this matter settled judicially or otherwise until the 8th of April 1902. Why the workman was quiescent all that time and did not demand payment of his weekly wages I do not understand. There is no explanation given, but of course as the employers had stopped making the weekly payments there was no particular urgency on their part to bring the matter before the Court to have it set right. However, they did at last, on the 8th of April, I think, present to the Court under the 12th section of the 1st Schedule to the Act an application, which they were quite entitled to do, to have the weekly payment, fixed between the parties by agreement, reviewed either by being ended, increased, or diminished The result of that was that although the application was made on the 8th of April, it was not disposed of until the 23rd of July 1902, a very long time in a case of this sort, although no doubt there may be very good reasons for it, and the conclusion the Sheriff came to at that date, after considering the proof and so on, was that

he found "that the amount of compensation was fixed on the footing that the respondent's weekly wages were 37/ per week;" that was his total wage before injury; "that since the respondent re-commenced work at 14th October 1901 his average weekly wages were £1, 6s. 11d, and that he was at the date of the judgment earning wages at that rate," and that being so, the total incapacity having disappeared, but partial incapacity still remaining, the Sheriff deducted a sum of 11s. 6d. from what he had previously got, and that was the judgment of the Sheriff.

Now, the Sheriff's judgment ascertained in point of fact that his total incapacity had ceased on the 14th of October 1901. That is quite true, and the Sheriff in proceeding to dispose of the case, after having given these findings, had to consider the question —From what date shall I make the new award of a weekly payment? Have I power to go back to the 14th of October 1901? I find in point of fact that the total incapacity had ceased then. Shall I take the date of the application to the Court, namely, the 8th of April 1902, and fix the new rate from that date, or am I compelled to fix the date of my judgment, and no sooner? These are the questions which were before the Sheriff's mind in the decision, and these are the points pressed by the parties before us. The result was, as he tells us, that he thought it was incompetent for him to go further back than the date of the judgment; he says — "I was not entitled under or empowered by the said Act to review any weekly payment as at or from any period of time prior to the date of the judgment in the application." That is his judgment, and he puts it on the want of power to give any award prior to the actual date of the judgment.

The first of the questions put to us is, whether or not under the 12th section of the Act the Sheriff's ruling that he was not entitled to go back to 14th October 1901 was right; and the second question is, if he was not entitled to go back to the earlier date of 14th October 1901, was he entitled to go back to the date of the application, namely, 8th April 1902. These are the two questions put to us, and it appears to me, along with Lord Young, that the solution of the first question almost covers the second—I mean the grounds on which I come to that opinion. I think that once an order for weekly payment has been obtained by the workman under the Act, and the memorandum of agreement or the Sheriff's order, whichever it is, has been duly recorded in the Sheriff Court books, it continues in force until it is altered by some other order, ordering a lesser or it may be a greater sum.

Now, in my opinion the mere bringing of a judgment under review, as was done here, does not stop the currency of the weekly payments. I see no warrant for that. Well, then, if the mere bringing of the judgment under review does not stop it, why should it stop at any period prior to the date of the new order? I think that under the agreement the workman was entitled to his weekly payments until there was some other document in existence, and that could only be a new award under this application. It is said to have been decided otherwise in England. I do not know how these matters may be in England, but I agree with Lord Young that that is not the view that we take in this Court. Here we have an operative judgment still in force, and so far as I see the mere bringing of that judgment under review does not stop its effect. Well, then, if that be so, it is clear to me we must answer the first question in the negative; that the Sheriff had no power to go back to the 14th of October 1901, when this man was no longer totally incapacitated for working; and for the same reason I think we must also answer the second question in the same way, because I think there was nothing that could stop the operation of this decree. On these grounds I agree with Lord Young.

LORD JUSTICE-CLERK — I am unable to agree in the judgment which your Lordships hold to be the right, and which will be pronounced as the judgment of the Court. There is no doubt that in one aspect of this case it is a case of review, but it is certainly not a case of review in the ordinary sense in which we use that word in our courts. It is not a case in which it has to be decided whether something that was formerly done was right or wrong. It is a new decree, a new process, by which upon new facts a new decision may be given, and if there are new facts there must be a deliverance given in accordance with those facts not merely as a matter of review of a former decision upon some question of law or fact which was before the original tribunal to be disposed of. Therefore I do not think that the arguments which apply to all ordinary questions of review apply here in the true sense at all. The application here is an application under section 12 of the first schedule of the Act, which gives the right to the party at any time to apply to the Court. Under this enactment—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." Now, each party was entitled to come to the Court under that section without any reference to any other section either in the schedule or in the Act. An absolute right is given to ask that an alteration should be made if there are grounds in fact for it, and accordingly in considering the matter I pay no attention to other clauses either in this schedule or any other schedule. Section 11 of the schedule which has been referred to is a section under which a party may take action if he thinks there is a change in the medical condition of the patient, and the condition of the patient is to be ascertained by medical examination. In this case there was no room for any such inquiry. All that the

appellants required to prove was that this person who had been before dealt with as totally incapacitated was now a wage-earning man, earning wages of considerable amount, although not up to the amount he had formerly earned, and that unquestionably entitled them to review on that fact alone, and so far as we see from the case which is before us there were no other facts before the Sheriff at all. He states no other facts. There is no allusion to medical questions in the whole of the case that was before him. It was solely a question—What is he to get now in respect that whereas he formerly was able to earn nothing he is now in fact earning £1, 6s. 11d. a week.

Well, now, an application was made for review upon the footing that at the time the application was made that man was not totally incapacitated, and admittedly was not totally incapacitated, because the fact that he was earning wages made it impossible to deny that the circumstances had changed. Now, the Sheriff has held that he had no right to deal with the matter as at the date of the application, and to fix the amount of compensation due since the date of application, but that he could only fix what was the new amount of compensation as at the date at which he gave his judgment. That in this case most unquestionably leads to a substantial injustice. It may not be a matter of very much consequence to these employers of labour whether they have to pay six or seven pounds more than they ought to pay, but it is a question of consequence in the general administration of the law. The whole cause, the real cause, of any such question arising at all is apparently that this statute is carried out in a way which it was certainly never intended to be carried out. The object of the Act was in all these matters to give a quick, summary, and inexpensive mode of inquiry with rapid decision. Instead of that, both in this case and in another case to which I have to refer immediately, there seem to have been months and months spent in making an inquiry which should not have taken more, at the utmost, than a week under any circumstances that one can conceive. No such thing was contemplated by the Act, and there was probably no idea upon the part of the Legislature or anybody else that such a question as this could possibly arise, it being assumed that any question as between the date of application and the date of judgment would be one of those minute matters to which the maxim *non curat* would apply. But this case being in the position in which it is, one of the expressions of opinion in the judgment of Lord Justice Matthew in *Morton & Co.* v. *Woodward* [1902], 2 K.B. 276, at page 281, commends itself to my mind, viz.—"The delay that has taken place in the hearing of the case ought not to prejudice either side, and according to the judgment of the learned County Court Judge (in that case) it does prejudice the employers, as they are treated as liable up to the date of the final decision." Nobody can dispute for a moment that that is a practical injustice.

Where an application like the present is made to end or diminish a workman's compensation on the ground that he is no longer totally incapacitated, my view is that the judge is entitled under the Act to alter such compensation either from the date at which the application is made, or from any date between that time and the date on which the judgment following on the application is pronounced. That was the view I formed on the first study of the case, and it has been strengthened by finding that in *Morton & Co.* v. *Woodward*, which I have already referred to, there is a judgment of the Court of Appeal in England by three distinguished judges which I think exactly bears upon this case. I read these words of the Master of the Rolls as expressing my view on the matter—"It has been urged before us, and it seems to be clear from the note, that the Judge was of opinion that he had no right to deal with the question at what date, if at all, the workman's incapacity had ceased before the ultimate hearing of the case." (I would substitute "altered" for the word "ceased.") "If that is so, the learned judge was wrong in saying that he had no jurisdiction to deal with this matter, because the dispute which arose when the matter was first initiated before the Court was as to whether the workman at that time was subject to any incapacity for carrying on his work. That dispute was distinctly formulated, and the Court could not escape from the obligation of deciding that issue by reason of the interval that had elapsed. It may have become more difficult to decide, but it was still there." (Then I leave out the clause as to the medical certificate, because there is none here.) "The scheme of the Act is that compensation is to be given during the period of incapacity—that is, incapacity of the workman to earn his wages. Therefore when the dispute arose as to the man's incapacity for work, the essential question was his condition, not when the Court was able to give its attention to the matter, but when the dispute was formulated as to whether the man's incapacity had ceased or not." I think that is a sound view, and holding that view I am unable to concur in the judgment which will be pronounced in accordance with the opinion of your Lordships.

LORD TRAYNER and LORD MONCREIFF were absent.

The Court answered the two questions of law in the negative, found and declared accordingly, therefore affirmed the deliverance of the arbitrator, and decerned.

Counsel for the Claimant and Respondent—Dove Wilson—T. Trotter. Agent—M. Graham Yooll, S.S.C.

Counsel for the Appellants—Hunter—W. Thomson. Agents—W. & J. Burness, W.S.