question of jurisdiction, whether any and what question had arisen at the date of the petition as to the liability to pay compensation under the Act, or as to the amount or duration of compensation, and under what circumstances such question had arisen; and also, as regards the question of competency, whether the employers had any and what opportunity before the petition was presented of settling by agreement.

We have, of course, no concern at present with the merits of either of these questions of law. The Sheriff may have decided them quite rightly; but in my opinion the employers are entitled to have his determination reviewed on a case stated, just as the workman would have been entitled if the Sheriff had decided the other way.

The cases of *Fraser* v. *Great North of Scotland Railway Company* (1901, 3 Fr. 908) and *Field* v. *Longden & Sons* (1902, 1 K.B. 47), which were referred to at the discussion, may have to be considered at a future stage of this case. They certainly emphasise the view that it involves questions of law of some importance.

It was argued for the respondent that the present application is really brought in order to get rid of the Sheriff's award of £2, 2s. of expenses; and it was pointed out that by section 6 of the second schedule of the Act the costs are in the discretion of the Sheriff. But that section can only apply to a case where the proceedings were competently before him as arbitrator under the statute; and it is the prior question of jurisdiction and competency which is sought to be raised here.

I hold, therefore, that we should require the Sheriff to state a case under the statute.

LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court ordained the Sheriff to state a case as craved.

Counsel for the Defenders and Appellants—Younger, K.C.—Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Pursuer and Respondent—MacRobert. Agent—D. G. Mackenzie, W.S.

Friday, March 16.

SECOND DIVISION.

HUNT'S TRUSTEES *v.* HUNT AND OTHERS.

Succession—Vesting—Acceleration—Conditional Institution of Issue—Liferent of Whole Capital—Postponement of Vesting till Liferenter's Death—Liferent Reducible in Certain Contingency to One-Third—Contingency having Happened Effect on Vesting of Remaining Two-Thirds—Accumulation of Income—Intestacy.

A testatrix in her trust-disposition and settlement directed her trustees to pay to her husband during his lifetime if he survived her the net income of her estate, providing, however, that in the event of his contracting a second marriage the provision in his favour should be restricted to one-third. She further directed that "upon the death of my said husband if he shall survive me, or at my own death if he shall predecease me," her trustees were to hold and apply, pay and convey, "the fee or capital of the residue of my said means and estate" to her children equally on majority, or in the case of daughters, marriage, "declaring that in the event of any of them predeceasing the period of payment and conveyance, and leaving lawful issue, such issue shall be entitled equally among them *per stirpes* to the share which their parent would have taken on survivance, and further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving, and the lawful issue of any child who may have deceased leaving such issue." No provision was made as to the disposal, (1) of the income which would be set free if the liferenter married, or (2) of such part of the capital as would in that event no longer be required for the restricted liferent.

The testatrix was survived by her husband and three children. The trustees paid the whole income to the husband until he entered into a second marriage, after which they continued to pay him one-third of the income and accumulated the remainder. The children all attained majority.

In a special case, *held* (1) that vesting was postponed until the death of the husband, and that his second marriage had not accelerated the date of vesting and payment of two-thirds of the estate; (2) that the accumulated income was not disposed of by the trust-disposition and settlement and accordingly fell into intestacy.

This was a special case brought to determine certain questions of difficulty arising out of a trust-disposition and settlement left by Mrs Mary Page M'Coll or Hunt, wife of Thomas Hunt, who died on 25th October 1885.

By her trust-disposition and settlement she conveyed her whole means and estate to trustees for certain purposes. The second and third purposes were as follow:—"(*Secondly*) I direct my trustees to hold and apply my whole means and estate in trust, and pay to my husband, the said Thomas Hunt, in the event of his surviving me, the net income or revenue arising therefrom during all the days and years of his life after my death, at such terms or times as they may consider proper, which income or revenue shall be paid to my said husband as a purely alimentary provision to him and shall not be assignable by him, nor affectable by his debts or deeds or the diligence of his creditors; but I provide and declare that in the event of my said husband entering into a second marriage, the provisions hereby conceived in his

favour shall be reduced and restricted to one-third as from the date of such second marriage; and (*Lastly*) Upon the death of my said husband if he shall survive me, or at my own death if he shall predecease me, I direct my trustees to hold and apply, pay and convey, the fee or capital of the residue of my said means and estate to and for behoof of my children equally among them, share and share alike, payable and to be conveyed to them on their respectively attaining the age of twenty-one years, or, in the case of daughters, on their being married, should that event happen before they attain majority: Declaring that in the event of any of them predeceasing the period of payment and conveyance and leaving lawful issue, such issue shall be entitled equally among them *per stirpes* to the share which their parent would have taken on survivance, and further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving and the lawful issue of any child who may have deceased leaving such issue, such issue always being entitled equally among them *per stirpes* to the share which their parent would have taken on survivance. And I hereby specially authorise and empower my trustees and executors, in the event of the said income and revenue being in their opinion at any time insufficient for the requirements of my said husband and the children of our marriage, to pay to him such portion or even the whole of the fee or capital of the residue of my said means and estate as they in their discretion may see fit; and my trustees shall also have full power and liberty to advance from time to time as they may see fit to my children or their issue during their minority not only the income but also the fee or capital of their presumptive shares in whole or in part for their education, maintenance, advancement in life, or establishment in business; and with regard to such of the foregoing provisions, or of any provisions that may be made by me in any codicil hereto, as are in favour of or may fall to females, the same shall be purely alimentary and exclusive of the *jus mariti* and right of administration of their respective husbands. . . ."

The testatrix was survived by her husband and by three children, a son and two daughters, all of whom were major at the date of the special case. The husband entered into a second marriage on 14th September 1886. Up to that date the trustees regularly paid him the whole revenue of the trust estate, but after it they only paid him one-third and accumulated the remaining two-thirds in their hands. Questions having arisen as to the disposal of the estate, the present special case was submitted for the opinion and judgment of the Court. The parties of the first part were the trustees acting under the trust-disposition and settlement, the party of the second part was the testatrix's husband Thomas Hunt, and the parties of the third part were the children of the marriage between Thomas Hunt and the testatrix.

The questions of law submitted to the Court were the following:—"(1) Did the rights of the parties of the third part under said trust-disposition and settlement vest *a morte testatoris*, or at all events on their respectively attaining majority? Or (2) Is vesting postponed till the death of the said Thomas Hunt? (3) Did the re-marriage of the second party liberate two-thirds of the capital of said estate in the hands of the first parties from the burden of the provisions in said settlement in favour of the second party, and are the third parties entitled now to payment of said two-thirds of the capital of the estate equally among them? Or (4) Are the first parties bound to hold the whole capital of said trust estate until the death of the second party, paying the second party one-third of the income thereof, and on his death to pay over the capital to the third parties? (5) Does the accumulated income in the hands of the first parties fall to be added to the capital of said trust estate and dealt with by them as such? Or (6) Does the said accumulated income fall now to be divided equally among the third parties? Or (7) Does the said accumulated income fall into intestacy?"

The following were the contentions of the various parties. The parties of the first part maintained that they were bound to retain the whole trust estate in their hands and pay to the second party one-third of the net income thereof; further, that the parties of the third part had no vested right in the estate until the death of the party of the second part, or alternatively that they as trustees were bound to hold the whole trust estate in their hands until the death of the second party, and thereafter divide it and pay it to the parties of the third part. The party of the second part maintained that the income from the estate, which had accumulated in the hands of the first parties since the date of his said second marriage fell into intestacy, and that he was entitled to payment of one-third thereof as it accumulated in name of *jus relicti*. He was quite willing that the two-thirds of the capital, which by his second marriage might have been liberated from the burden of his liferent, should now be made available for instant division among his children, the parties of the third part, in the event of the Court being of opinion that such a course was competent. . . . In the event of its being held that the accumulated income did not form intestate estate, the party of the second part was willing that it should, if competent, be now divided among his children. The parties of the third part maintained that their interests in the estate vested *a morte testatoris*, or at all events on their respectively attaining majority, subject to the burden of the second party's liferent interest therein; that in consequence of the second marriage of the second party two-thirds of the capital of the estate was liberated from the burden of the provisions in the trust-disposition and settlement in favour of the second party, and to that

extent the estate, with the income thereof which had accumulated in the trustees' hands since the date of the second marriage, fell now to be divided into equal shares and paid to the parties of the third part, or alternatively, that the accumulated income fell into intestacy, and that they were entitled now to payment of two-thirds thereof equally among them.

Argued for the first parties—This was a typical case of postponement of vesting till liferenter's death—*Forrest's Trustees* v. *Mitchell's Trustees*, March 17, 1904, 6 F. 616, 41 S.L.R. 421; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632. The second marriage of the husband could not be taken, in the matter of vesting, as equivalent to his death in regard to two-thirds of the estate, as the result might be to give these two-thirds to persons other than those whom the truster had appointed to take. The interest of the issue of children prevented acceleration of vesting—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.), 45, Lord Watson, at p. 48, 27 S.L.R. 917; *Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911. To give effect to the third party's contentions would involve reading into the will provisions which did not exist. As to the accumulations, the income followed the capital and the accumulations swelled the residue—*Logan's Trustees* v. *Logan*, June 24, 1896, 23 R. 848, 33 S.L.R. 638; *Gollan's Trustees* v. *Boath*, July 5, 1901, 3 F. 1035, 38 S.L.R. 762. There was always a strong presumption against intestacy. Truster's intention evidently was that whole estate should ultimately go to children or issue.

Argued for the second party—Vesting was suspended till death of liferenter. The accumulation of income fell into intestacy, there being no general bequest of residue which could cover accumulations. There was only a direction to divide "the fee or capital of the residue of my said means and estate," and the context showed that the expression must be read as referring to the estate as at the time of testatrix' death.

Argued for the third parties—The only object of postponement of vesting and payment being the protection of the liferent, there was no reason for the postponement of vesting or payment so far as the two-thirds of capital were concerned. So far, at any rate, his second marriage was equivalent to death—*Annandale* v. *Macniven*, June 9, 1847, 9 D. 1201. There was no intestacy, and the accumulations followed capital.

At advising—

LORD LOW—If the trust-disposition and settlement of Mrs Hunt had not contained the declaration restricting the liferent given to her husband in the event of his entering into a second marriage, I do not think that it could have been doubted that the fee of the residue of the trust estate did not vest in the truster's children or their issue until Mr Hunt's death. It was maintained, however, that the declaration to which I have referred had the effect, in the event which happened of Mr Hunt marrying again, of accelerating the period of payment and vesting as regarded a portion (namely two-thirds) of the estate.

The direction to the trustees in the second purpose of the trust is to pay the income of the trust estate to Mr Hunt during his life, declaring, however, that if he entered into a second marriage "the provisions hereby conceived in his favour shall be reduced and restricted to one-third as from the date of such second marriage." By the third purpose the trustees are directed, "upon the death of my said husband," to convey "the fee or capital of the residue of my said means and estate" to the truster's children, equally among them, payable to them on their respectively attaining majority, or in case of daughters on their being married should that event happen before they attained majority. It was, however, declared that in the event of a child predeceasing the period of payment leaving lawful issue, such issue should come in the parent's place, and that "in the event of any of them predeceasing said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving, and the lawful issue of any child who may have deceased leaving such issue."

Nothing is said in the settlement in regard to the disposal of the two-thirds of the income which would be set free if Mr Hunt married, nor in regard to the disposal of such part of the capital as would in that event not be required to secure his restricted liferent.

Mrs Hunt was survived by three children who have all attained majority, and they claim that they are entitled to have immediate payment equally among them of two-thirds of the capital. They argued that the terms of the settlement showed that there was no reason for postponing the period of payment until Mr Hunt's death except to protect his liferent, and that, accordingly, his second marriage was, for the purposes of the settlement, equivalent to his death as regarded two-thirds of the capital.

In order to give effect to that view it would be necessary to take great liberties with the quite unambiguous directions in the third purpose. In that purpose there is (apart from the condition as to majority or marriage) only one term of payment, and only one set of beneficiaries who are given right to the whole residue. The contention of the third parties, however, involves reading into the third purpose a second period of payment as regards two-thirds of the residue, and also involves the possibility that, instead of the whole of the residue being divided among the same persons, two-thirds of it would be divided among one set of persons and one-third among another set; and further, that the persons who would only get one-third would be those who, according to the ordinary meaning of the language used, would be entitled to the whole. To give effect, therefore, to the contention of the third parties would be not to construe the settlement as it stands, but to read into it provisions which

it does not contain. I am therefore of opinion that the first and third questions should be answered in the negative and the second and fourth in the affirmative.

The other questions in the case relate to accumulations of surplus income which have been made since Mr Hunt's second marriage, which took place in 1886. The first parties maintain that these accumulations fall to be retained by the trustees and added to the capital, while the second and third parties contend that the accumulations are undisposed of and fall to be dealt with as intestate succession of the truster.

The question is not without difficulty, but I am of opinion that the latter view must prevail. If the words of the settlement are read literally, the accumulations of income are not included in the residue which the trustees are by the third purpose directed to divide upon the death of Mr Hunt. What they are directed to divide is "the fee or capital of the residue of my said means and estate." The context shows that the expression "my said means and estate" must be read as referring to the means and estate belonging to the truster at her death which she had conveyed to her trustees, and, accordingly, I am unable to read the words "the fee or capital of the residue of my said means and estate" as including income accumulated after the truster's death.

It was argued that the language of the settlement was sufficient to show that the truster's intention was that, with the exception of so much of the income as might be required to meet the liferent provisions to Mr Hunt, the whole trust estate in the hands of the trustees should ultimately go to the truster's children or their issue.

I recognise the force of that argument, but my difficulty is that, while the truster has dealt in unequivocal terms with the capital of the means and estate belonging to her at her death, she has not expressed her intention in any way whatever in regard to income set free by her husband's marriage. What the first parties, therefore, ask the Court to do is to give effect to what presumably would have been the truster's wishes if she had thought fit to express them. To do so, however, would be, not to construe the settlement, but to make an addition to it which is quite incompetent. I am therefore of opinion that the accumulated income is undisposed of and falls into intestacy, and that, accordingly, the fifth and sixth questions should be answered in the negative, and the seventh question in the affirmative.

LORD JUSTICE-CLERK—I concur.

LORD KYLLACHY—I concur.

LORD STORMONTH DARLING—When a testator leaves a will professing to deal with his or her whole estate, one is always unwilling to find that the result is intestacy as regards a part of it.

But having had an opportunity of reading the opinion which has just been delivered by my brother Lord Low I have come to think that his conclusion is the right one.

The Court answered the first, third, fifth, and sixth questions in the negative, and the second, fourth, and seventh questions in the affirmative.

Counsel for the First Parties—C. N. Johnston, K.C.—Burt. Agent—A. F. Fraser, S.S.C.

Counsel for the Second Parties—Kemp. Agents—Whigham & Macleod, S.S.C.

Counsel for the Third Parties—Wark. Agents—Patrick & James, S.S.C.

VALUATION APPEAL COURT.

Saturday, March 10.

(Before Lord Low and Lord Dundas.)

PARISH COUNCIL OF EDINBURGH *v.* ASSESSOR FOR EDINBURGH.

Valuation Cases—Municipal Electric Light Undertaking — Method of Valuation — "Revenue" Principle or "Contractor's" Principle.

Held that in ascertaining the true yearly rent or value of a municipal electric lighting undertaking which had been in existence for ten years the "revenue" or "profits" method should be applied. *Opinions* that the "contractor's" principle (viz., a percentage upon the cost of the undertaking) might be usefully employed as a means of testing the amount arrived at by another method.

Valuation Cases—Municipal Electric Light Undertaking — "Revenue" Method of Valuation—Deductions for Depreciation.

An electric undertaking was carried on by a municipal corporation as undertakers under a Provisional Order. The necessary power stations were erected by and belonged to the corporation, together with the whole machinery and plant therein, and the electric mains, &c., throughout the burgh. *Held* that in ascertaining the true yearly rent by the "revenue" method no deduction fell to be allowed in respect of depreciation of lands and heritages, but that a deduction should be allowed for interest on tenant's floating capital and depreciation of tenant's chattels, and 6 per cent. allowed on the *cumulo* amount thereof.

Valuation Cases—Municipal Electric Light Undertaking — "Revenue" Method of Valuation—Deductions—Tenant's Profits—Power to Let Undertaking.

A municipal corporation carrying on an electrical undertaking was entitled by Provisional Order to make profit on the undertaking subject to certain restrictions as regards rate of charge for the supply of energy and the amount of profit which might be made. It was further entitled to let the undertaking to a tenant subject to similar