which we have been referred. There may have been reasons which induced the Legislature to direct that publicity should be given to the proposed rearrangement through a newspaper which would circulate over the whole of a county or at least the whole of a district of a county in preference to publication through a newspaper having a merely local circulation. One reason might be that non-resident proprietors would be more likely to receive notice through a newspaper such as the *Glasgow Herald* having a wide circulation; but we cannot inquire into those reasons, nor can we review the discretion of the District Committee of the County Council in their choice of an organ of publication. So far as I am able to form an opinion, they seem to have chosen a suitable newspaper of very wide circulation, and one which in point of fact was taken in by the party who is stating the objection, but as Mr Clyde said that is merely a "jury point" I do not enlarge upon it. My opinion is that the District Committee has rightly interpreted its powers under the statute.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Refuse the appeal: Find in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute dated 28th June 1899: Affirm the said interlocutor: Of new assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in additional expenses from the date of said interlocutor, and remit," &c.

Counsel for Pursuers—Solicitor-General (Dickson, Q.C.)—Clyde. Agents—Webster, Will, & Co., S.S.C.

Counsel for Defenders—Ure, Q.C.—James Reid. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, January 26.

SECOND DIVISION.

[Lord Pearson, Ordinary.

MURRAY *v.* NORTH BRITISH RAILWAY COMPANY.

Arbitration—Reference—Expenses—Fee to Arbiter — Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *sec.* 32.

Section 32 of the Lands Clauses Consolidation (Scotland) Act 1845 provides that in all cases of arbitration under it "the expenses of the arbiters or oversman, as the case may be, . . . shall be borne by the promoters of the undertaking."

Held (*rev.* judgment of Lord Pearson) that these expenses included the reasonable remuneration of the arbiters and oversman.

By section 32 of the Lands Clauses Consolidation (Scotland) Act 1845 it is enacted with regard to the costs of statutory arbitrations — "All the expenses of any such arbitration and incident thereto to be settled by the arbiters or oversman as the case may be shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as, or a less sum than, shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration: And in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet-arbitral or award in the Books of Council and Session, shall be borne by the promoters of the undertaking."

In 1896, in the course of the compulsory taking of certain property in Helensburgh belonging to the trustee of the late Mrs Macintosh by the North British Railway Company under the North British Railway Act 1893, a dispute arose between the parties as to the amount of compensation claimed by the trustee, and a statutory arbitration was entered into by them to determine the amount. The Railway Company appointed Hugh Mayberry, property valuator, Glasgow, as their arbiter, and Mrs Macintosh's trustee appointed Gabriel Gullane Murray, land valuator, Glasgow, as his. The arbiters appointed the late Sheriff Comrie Thomson to be their oversman.

The arbiters inspected the subjects of the claim at Helensburgh. Proof was led before them on 3rd and 4th May 1897 in Glasgow, and on 14th October in Edinburgh, and on the last of these occasions counsel were heard on the concluded proof. In the course of the proceedings the arbiters signed eleven orders or interlocutors.

The arbiters disagreed and devolved the submission on the oversman, who after certain procedure awarded the claimant Mrs Macintosh's trustee £2090.

The clerk and legal assessor to the arbiters suggested to the Railway Company that each of the arbiters should be paid a fee of £52, 10s. for their skill, trouble, and outlays. The Railway Company, however, refused to pay any remuneration to Mr Murray, the arbiter appointed by Mrs Macintosh's trustee.

Mr Murray thereupon raised an action against the Railway Company for £52, 10s., as reasonable and suitable remuneration in the circumstances. He averred that the defender had paid suitable remuneration to the pursuer's co-arbiter Mr Mayberry and to the oversman, and that it had been the universal practice and custom since the passing of the Lands Clauses Consolidation Act of 1845 for the promoters to pay suitable remuneration to the arbiters and oversman taking part in references under the Act.

The pursuer pleaded — "(3) A suitable charge or remuneration to statutory arbiters being part of the expenses of the arbitration and incident thereto, the defenders are liable therefor under the statute, and the charge sued for being

reasonable in the circumstances, decree should be pronounced as craved, with expenses."

The defenders denied the practice alleged by the pursuer, or that they had paid any remuneration to Mr Mayberry or the oversman. They averred that section 32 of the Act of 1845 provided for payment by the promoters of the expenses of the arbiters, but did not impose any obligation on the promoters to pay fees or remuneration to either arbiters or oversman, and that the office of arbiter and oversman was purely honorary.

The defenders pleaded — "(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (2) The office of arbiter being of a purely honorary character, the pursuer is not entitled to enforce payment of any fee or remuneration."

On 1st July 1899 the Lord Ordinary (PEARSON) sustained the first plea-in-law for the defenders and dismissed the action.

Note.—"The pursuer, a land valuator in Glasgow, sues the defenders for fifty guineas, as his fee or remuneration as arbiter in a case of disputed compensation under the Lands Clauses Acts. In 1896 the defenders had occasion to take certain subjects in Helensburgh under compulsory powers, and they appointed Mr Mayberry, property valuator, Glasgow, to be arbiter on their behalf. The pursuer was nominated as arbiter by the claimant, and the arbiters appointed the late Sheriff Comrie Thomson to be oversman.

"The statutory tribunal thus constituted proceeded to determine the compensation in the usual way. They first inspected the subjects of claim, and this was followed by a three days' proof and a hearing by counsel. I was given to understand that the witnesses included the usual number of valuators on each side. The arbiters having differed, the reference was devolved on the oversman, who awarded £2090. His award, I was informed, does not deal with the question of remuneration to the arbiters or oversman.

"The pursuer then avers that a fee or suitable remuneration has been paid or accounted for by the company to Mr Mayberry and the oversman, and that they have also paid the account and outlays of the clerk to the reference, but that they dispute their liability to pay the pursuer any fee or remuneration.

"The defenders challenge the relevancy of the action, and in my opinion their plea to that effect is well founded.

"I take it to be well settled as a rule that the office of arbiter is a gratuitous office. In order to take this case out of the rule the pursuer must either put his case on contract or on the terms of the statute as importing a right to remuneration from the company.

"There is here no express contract. As to implied contract (and of course it must be a contract with the defenders that is implied) it is to be observed that the pursuer was the nominee of the claimant, not of the company. The company may quite well be bound to remunerate the arbiter of their own selection on the principle of implied contract, and yet have no such obligation towards the claimant's nominee, with whom they did not come into contact at all. The claimant is free to select his arbiter, and to make any bargain with him he chooses. He is even free in the matter of the tribunal which is to fix compensation. The notice to treat does not of necessity lead to arbitration in the event of a dispute. The option of arbitration rests with the claimant, and if he does not exercise it the procedure is by jury trial before the Sheriff.

"But apart from this, I am not satisfied that this claim as stated is relevantly brought within the principle of those cases where a contract to remunerate an arbiter has been implied. It is as a rule implied where a man of skill in a particular line is selected as referee, in order that the parties may have the benefit of his skill in the determination of the dispute. He is employed by the parties in the line of the calling or profession by which he makes his livelihood, and the presumption for remuneration which obtains in such a case is, I suppose, founded on the close analogy which the case bears to ordinary professional employment. This would apply to an accountant selected to determine questions of accounting, and perhaps the typical case is where a question of value is referred to a professional valuator. But it was determined in the case of *Kennedy*, Jan. 20, 1819, F.C., that where an accountant was selected by the parties to determine a disputed question of accounting, he was not entitled to sue for remuneration, he having remitted to other two accountants, and pronounced his decree-arbitral upon their reports.

"The present case is not quite so strong, but while each party appointed a valuator nobody supposed that the valuators were to go together to the spot and make up their minds without skilled assistance. At all events they did not do so. The first thing they did was to appoint a lawyer as oversman, and then followed a three days' proof, with skilled evidence. The skill of the two arbiters in the matter of valuation may have enabled them the better to follow and criticise the evidence led. But their duties in the matter were on the whole judicial and not professional. Accordingly I cannot hold that this is a case where the pursuer can succeed on the principle of implied contract.

"The argument on the statute is founded mainly on the 32nd section of the Lands Clauses Act. This section deals in the first instance with 'all the expenses of any such arbitration and incident thereto to be settled by the arbiters or oversman as the case may be.' The promoters must always bear their own expenses, whether the award is above or below the tender; and they must also bear the claimants' expenses in cases where the award is above the tender. The expenses here dealt with are, I think, the expenses of parties properly so called. The clause proceeds—'And in all cases the expenses of the arbiters

or oversman, as the case may be, and of recording the decreet-arbitral or award in the Books of Council and Session, shall be borne by the promoters of the undertaking.' The fact that the expenses dealt with in the first part of the clause are to be 'settled by the arbiters or oversman,' suggests strongly that they do not include remuneration to the arbiters or oversman. It is true that in section 22 the 'remunerative expenses of the Sheriff' seem to be included in the expression 'expenses of every such inquiry'; but then the fixing of those 'remunerative expenses' is expressly withdrawn from the Sheriff, and is made the subject of enactment in a later section (sec. 51, though this has since been abolished on general grounds). If the expenses first dealt with in section 32 do include the remuneration of the members of the tribunal, the pursuer is not able to say that they have been even provisionally 'settled by the arbiters or oversman.' He therefore pleads alternatively that his right to remuneration rests on the expression 'the expenses of the arbiters or oversman,' in which expenses the company are in every case made the proper debtors. Now, these words in my opinion mean, according to their natural construction, the expenses incurred by the arbiters or oversman, including their outlays and the clerk's account, and not expenses incurred to the arbiters or oversman. I agree that they will bear the wider construction without much straining. But when a meaning is sought to be given to words which is wider than their *prima facie* and natural meaning, I think good reason must be assigned for the extension. Here I think there is strong reason to the contrary. I take it that the language of the statute must be construed with reference to the general rule that the office of arbiter is a gratuitous office; and I think it would be an undue extension of the meaning and effect of the statutory words to hold that they introduce an exception to the general rule, and that by implication.

"It is averred by the pursuer that ever since the passing of the Lands Clauses Act it has been the universal practice for the promoters to pay suitable remuneration to the arbiters and oversman. This, however, cannot in my opinion be admitted to determine the construction of a comparatively modern statute.

"The action is brought for the recovery of a fee or remuneration. This, however, is described in Cond. 7 as a charge for skill, trouble, and outlays. The pursuer made no separate case as to outlays, but it is possible he may be entitled to them; and as I ought not to prejudge any claim the pursuer may have against the company on other grounds than those above dealt with, I think the proper course is to sustain the defenders' first plea-in-law and to dismiss the action."

The pursuer reclaimed, and argued—It might be that it was a rule of the old Scots law that an arbiter was not entitled to remuneration at common law, but this rule had been modified greatly during the course of the nineteenth century; and the decisions showed that wherever a person of skill was employed as arbiter, or an arbiter was employed on a point connected with his own profession, or where an understanding that there was to be a fee given could be read out of the facts of the case, then at common law the arbiter was entitled to remuneration—*Macallum* v. *Laurie*, June 26, 1810, F.C.; *Jolly* v. *Young*, December 12, 1834, 13 S. 188; *Fraser* v. *Wright*, May 26, 1838, 16 S. 1049; *Henderson* v. *Paul*, March 15, 1867, 5 Macph. 628; *Crampton & Holt* v. *Ridley & Company*, 1887, L.R., 20 Q.B.D. 48. An arbitration under a statute was very similar to a judicial reference, and the referee in such a reference was entitled to a fee—*Baxter* v. *Macarthur*, June 1, 1838, 16 S. 1085; *Beattie, &c.*, July 19, 1873, 11 Macph. 954. Besides, the terms of the 32nd section of the Act were quite clear. That section provided that the expenses of the arbiters were to be borne by the promoters of the undertaking. "Expenses of the arbiters" included a fee to each of the arbiters—Bell on Arbitration, sections 803, 804; *Earl of Shrewsbury* v. *Wirral Railways Committee* [1895], 2 Ch. 812. It had been the universal practice since the Act was passed for the promoters to pay a fee to each arbiter.

Argued for defenders—The rule of the Scots law was that an arbiter's office was a gratuitous one, and that he was not entitled to a fee, and this rule still held. The cases in the common law quoted by the pursuer were all exceptional and cases of special circumstances. In *Macallum* there was an understanding between the parties that the arbiter was to receive a fee. *Jolly* was not a case of proper arbitration at all—opinion of L.P. Hope, 13 S. 190. In *Fraser* the parties had bound themselves to pay the arbiters. In *Henderson*, Lord Cowan, 5 Macph. 632, and Lord Neaves, 637, both declared that in order to entitle an arbiter to remuneration, remuneration must be stipulated for. *Crampton & Holt* was an English case and did not apply. There was no analogy between a judicial reference and a statutory arbitration. On a construction of the section of the Act expenses did not include a fee to the arbiter. Expenses meant outlays. There was nothing in the Act to overturn the well-recognised rule of the common law.

Lord Young—In this case a party had some property which the Railway Company needed to acquire, and one of the statutory modes of acquiring it was, that each party should name an arbiter, and that the two arbiters should name an oversman in case of difference of opinion. Now this was, on the face of it, an expense consequent on the promoters of the undertaking acquiring the property. The statute gives the right to acquire property, and it provides for the claim of the proprietor being submitted to such a tribunal as was here constituted. In addition to the expense of constituting the tribunal and getting it to act in the discharge of the duty which the statute puts upon the tribunal so con-

stituted, each party has the ordinary expenses of litigants or contending parties before the tribunal; the claimant has the expense of his man of business and counsel, where it is a case requiring the aid of counsel, and also witnesses if evidence is necessary; and the promoters of the undertaking have corresponding expenses. The statute makes provision for all these expenses being paid, and the provision is that the whole expenses of constituting and upholding the tribunal, and also the expenses of the litigants—certainly and obviously their own expenses as contending parties before the tribunal, and the expenses of the claimant also—shall be borne by the promoters of the undertaking, unless they have tendered a sum larger than that in which the proceedings result. In that case the claimant will have to pay his own expenses as one of the contending parties. But, says the statute, in that case as well as in the other, where the sum awarded is not less than the sum tendered—I am reading the words of the Act—"and in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet-arbitral or award in the Books of Council and Session, shall be borne by the promoters of the undertaking." So that the expenses of creating, upholding, and maintaining throughout the tribunal specified in the statute, and assumed to be constituted as the statute prescribes, is on the promoters of the undertaking. It is not necessary to defend the justice of that, for it is obvious enough, and if it had not been obvious it would have been sufficient for us that it is prescribed by the Legislature. Now, what are the expenses of the arbiters or oversman? These constitute the expense of the tribunal. It is suggested that it is only the expenses incurred by the arbiters or oversman—that is, I suppose, paying for their lodgings during the time they are performing their duty—their hotel bill and their railway ticket. I do not think that is the meaning at all. If you put the question to any intelligent person or man of business, What constitute the expenses of two arbiters and an oversman, such as were sitting here? he will answer, They include the expense of remunerating the arbiter and the oversman for the attendance they give and the services which they give in the course of that attendance. They are not to fix their own charges so as to impose more than is reasonable upon the promoters of the undertaking, but the reasonable cost of providing, of obtaining their services, and the expenses incurred in the discharge of their duty as members of the tribunal constitute the cost and expenses of the arbiter and oversman. That is very clearly my opinion on the subject, and it receives countenance, and more than countenance, from the averment that that has been the experience during over half a century of these tribunals. The statute has been in existence since the year 1845, that is, a period of five years over half a century, and during that time this sort of tribunal has been constantly constituted, both in this country and in England; and I think all of us have judicial cognisance of it as a fact that in circumstances exactly similar to those occurring here the promoters of the undertaking have always paid, as part of the expenses of the arbiters and oversman, their reasonable fees, the proper expense of having their services — that the arbiters and oversman have been paid, and have been paid not by the claimants for a reasonable price for their property, but have been paid by the promoters of the undertaking. The services of the arbiters here were given on the understanding established by the practice of half a century. The practice is therefore in irresistible support of what appears to me, without any reference to practice, to be the plain meaning of the words of the statute. It does not signify by whom they are nominated—I mean whether by the promoters of the undertaking or by the claimant. They are nominated according to the statute. The arbiter who is here claiming is claiming against the proper debtor — his debtor by the statute. If he had been nominated by the Sheriff of the county, or by any other party to whom the statute gave the power to nominate, the promoters of the undertaking would still have been liable to pay him his reasonable expenses, as the expense of the tribunal which their wants required to be constituted. I am therefore of opinion that the judgment of the Lord Ordinary ought to be altered.

Lord Trayner—I also am of opinion that the Lord Ordinary's judgment cannot be maintained. That judgment proceeds upon the ground that there is a rule in the law of Scotland that an arbiter can claim no remuneration for acting as such. No doubt that is so. There is plenty of authority for it. It is stated by institutional law writers, but the rule was laid down at a time when arbitrations were not so common as they are now, and at a time when statutory arbitrations with reference to claims under the Railways and the Lands Clauses Acts had no existence. Without, therefore, saying anything against the general rule, I am disposed to say this, that that general rule cannot be stated now with the same absoluteness as formerly. In later cases it seems to have been laid down that even in the case of an arbiter whose office is otherwise a gratuitous one, there might arise on the part of the arbiter a claim for remuneration for his services if it was stipulated for before he entered upon his duties, or understood by the parties before he entered upon his duties that he was not acting or going to act gratuitously. Now, applying that rule to the present case, I entertain no doubt that the pursuer is entitled to recover, because it is just as certainly understood by the railway companies that an arbiter is not going to act gratuitously as it is understood that he is going to act at all. The Railway Company in this case, or in any case I have ever had any connection with, never had reason to suppose that the arbiter who was nominated by the

claimant was going to act gratuitously, and in this particular arbitration they had no reason to believe that he was acting on any other than ordinary terms—the receiving of reasonable remuneration for the services he rendered. And it is worth noticing in passing, that the services which the claimant's arbiter rendered was a service rendered to the Railway Company. It is quite right to say that neither arbiter is the agent or the private representative of the party who nominates him. They are the members of a court, constituted no doubt by selection, but by selection according to statutory provision, and once constituted they are not serving either party but serving the interests of both parties alike. And accordingly in this case, to my mind, they were rendering a service to the Railway Company just as much as to the person who nominated them—in this case the claimant. But apart from these considerations, which are more *obiter* than anything else, I take it that the case may be decided upon the terms of the statute. As to the meaning of the statute I entertain no doubt. The statute provides that the expenses of any arbitration, and all the expenses incident thereto, are to be paid by the promoters (except in a case which does not occur here). But, putting that aside, the general rule is, according to the statute, that the expenses of the arbitration, and the expenses incident to it, are to be paid by the promoters. It is no straining of the language to any extent whatever, but taking the language in its plainest possible significance, to say that part of the expenses incident to an arbitration is the payment of the arbiters; and if that be so then there is an end of the discussion. The suggestion is that the expenses of the arbiters are provided for elsewhere. Let us see how they are provided for elsewhere. In a case where the party claiming is not entitled to the expenses of the arbitration—that is, properly, the expenses of process—the promoters are still liable in the expenses of the arbiters and oversman. "In all cases the expenses of the arbiters and oversman shall be borne by the promoters." But it is said that that is only the expenditure of the arbiters and oversman—what they are out of pocket. But they are out of pocket a great deal more than the price of their railway ticket and hotel bill. They are practically out of their day's time, and that is of as much value to them as is the cost of a railway ticket or a hotel bill. That, again, is not straining the language of the Act. The ordinary and plain meaning of the statute, to my mind, covers just as much the remuneration of the arbiters and oversman as it does the reimbursement of any expenses they may have been necessarily or properly put to in attending the arbitration. Therefore upon the statute alone I am of opinion that the company here are responsible. And it is of extreme importance to notice that this statute, which has been in existence since 1845, has been so interpreted and acted upon, because we may take it that this is the first case in which any of us ever heard of a promoter declining to pay the fee of an arbiter on the ground that that fee was not part of the expenses provided for under the statute. I think the language of the statute is not open to construction, but if it were, that language has been construed as I now construe it for five-and-fifty years against the view now maintained by the defenders.

LORD MONCREIFF — I am of the same opinion. It is not necessary to say much, except incidentally, as to the general law of the right of an arbiter to sue for remuneration. I think, with Lord Trayner, that if the question arose now we might find that the law has changed somewhat since the beginning of the century. But in the present case the question we have to decide must be decided on the statute of 1845; because if the promoters had been able to make out that the expenses specified in the 32nd section are confined to the outlays of the arbiters and oversman, then it might have been open to them to contend that they entered into the arbitration on the footing that the arbiter should in any case get nothing unless for outlays, for travelling expenses and lodging, and so forth. But when we look to the whole scheme of the statute it is perfectly plain that, in the first place, this tribunal, which is to sit under the statute, is to be paid, and, in the next place, that the whole expense of paying and remunerating the arbiters is to fall upon the promoters. The tribunal is to be provided by the promoters. It is a case of compulsory sale. The owner of the land is selling against his will, or at least his consent is not asked. He has got a statutory right to name an arbiter, and it is suggested that he must look about until he finds an arbiter who will act without remuneration. I think it is plain that the arbiter must be entitled to remuneration. And then, in regard to the incidence of that expense, it is plain that the expense must fall, under the statute, upon the promoters of the undertaking. Therefore when we come to consider the 32nd section, I consider it in the light of the whole scheme of the statute in the matter of compulsory sale. That, I think, involves this, that the expenses incidental to compulsory sale necessarily include the reasonable remuneration of the arbiters and oversman. On that ground I concur that in this case the pursuer is entitled to succeed.

LORD JUSTICE-CLERK—I am of the same opinion. If the contention for the respondent in this reclaiming-note is to be accepted, it must mean this, that an arbiter appointed under the statute is not entitled to any remuneration, and that this arbiter having been appointed by the claimant ought to have none. But how can it be said with any show of probability that either of these propositions is sound? I cannot conceive that anyone who has been associated with the working of this Act could say that. And I agree with your Lordships also that the reasonable and sensible

interpretation of the word "expenses," as referring to an arbiter's expenses, is that which practically has been adopted and carried out ever since the Act came into force, viz., that arbiters in such cases are entitled, as part of the expenses of the cause, to be paid a reasonable sum for their services. Therefore I agree with your Lordships that the reclaiming-note should be sustained.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against: Sustain the first part of the pursuer's third plea-in-law, and remit to the Auditor of Court to fix the amount of the fee due to the pursuer as arbiter; and decern."

Counsel for the Pursuer—Vary Campbell—R. B. Pearson. Agent—Charles George, S.S.C.

Counsel for the Defenders — Dean of Faculty (Asher, Q.C.)—Grierson. Agent—James Watson, S.S.C.

Friday, January 26.

FIRST DIVISION.

(Without the Lord President.)

NISBETT AND ANOTHER (SCOTT'S TRUSTEES) *v.* DUNBAR.

Succession—Vesting—Vesting in Children as a Class.

By her trust-disposition a testatrix left £1800 to A, and failing him to his child or children. By codicil she directed her trustees to invest and settle the sum provided to A "in such manner as to secure the liferent of the said sum to A and the fee to his children equally, and failing the said A and his children, the capital of the said legacy is to revert to my own next-of-kin." A survived the testatrix. He had eight children, two of whom survived the testatrix, but predeceased him. *Held* that the legacy vested *a morte testatoris* in A's children as a class if a child of A was then alive, and therefore that the shares of the children who survived the testatrix but predeceased him had vested in them.

Mrs Jane Cunninghame or Scott died on 8th February 1872 leaving a trust-disposition and settlement and several codicils. By her settlement she made, *inter alia*, the following provision:—"*Secondly*, that my said trustees shall make payment at the first term of Whitsunday or Martinmas after my death of the following legacies to the persons after named, viz., to John Dunbar, my nephew, son of my sister Mrs Lavinia Cunninghame or Dunbar, and of the late John Thomas Dunbar, Esq., the sum of £18,000 sterling, and this in consideration of his having little or no patrimony, and failing the said John Dunbar to his child or children."

By codicil she directed her trustees "to invest and settle the legacy of £18,000 sterling provided to my nephew John Dunbar in said settlement in such manner as to secure the liferent of the said sum to the said John Dunbar and the fee to his children equally; and for that purpose I empower my said trustees and their foresaids to act as trustees themselves in regard to said legacy, or to appoint other trustees for the special purpose; and I also empower my said trustees to appoint curators and tutors to said children during their minority in regard to their interest in the said sum of £18,000 sterling, and failing the said John Dunbar and his children the capital of said legacy is to revert to my own next-of-kin."

John Dunbar above referred to survived Mrs Scott and died on 20th May 1894. He had nine children, one of whom predeceased Mrs Scott, while two others survived her but died unmarried and intestate before their father.

On the death of Mrs Scott her trustees set apart and invested the sum of £18,000 for behoof of John Dunbar in liferent and his children in fee.

By indenture dated 17th October 1894 John Dunbar assigned to his son George Dunbar "All and every the part or share, parts or shares, and interests whatsoever to which he the said John Dunbar then was in anywise entitled in possession, reversion, expectancy, contingency, or otherwise in or by virtue of, *inter alia*, the said trust-disposition and settlement of the 14th day of June 1869, and codicil thereto of the said Mrs Jane Cunninghame or Scott, or as next-of-kin or one of the next-of-kin of his deceased children, the said John Dunbar junior, Arthur French Dunbar, and Florence Scott Dunbar, or any of them, or by any means whatsoever."

Questions having arisen on the death of John Dunbar as to the right passing under this indenture, a special case was presented, in which Mrs Scott's trustees were the first parties, George Dunbar was the second party, and John Dunbar's other children were the third parties.

The second parties maintained that one-eighth part or share of the fee of the said trust fund or legacy of £18,000 duly vested in terms of the said trust-disposition and settlement and the codicil thereto last above mentioned in each of the said two children who survived the truster but predeceased their said father; that the said John Dunbar succeeded on the death of his said two children, by the operation of the Intestate Moveable Succession (Scotland) Act 1855, to one-half of the said two-eighth parts or shares which had so vested in them—that is to say, one-eighth in all of the said *cumulo* fund or legacy—and that the said last-mentioned one-eighth part or share was carried to the said second party by the assignment contained in the foresaid indenture, of date the 17th day of October 1894; that accordingly the second party is now entitled to one-fourth part or share (being one-eighth in his own right and one-eighth as in right of his father) under the said assignment of the investments now repre-