of distribution, but in all of them the Court was asked to elect between no vesting at all and absolute vesting *a morte testatoris*. Either of these theories would involve a violation of the plain intention of the testator. To hold that there is immediate unconditional vesting would ignore the rights of the grandchildren. That was actually the solution of the problem which was accepted by this Court in the case of *Hay's Trustees*, 1890, 17 R. 961, 27 S.L.R. 771, and which fortunately was disapproved of by the House of Lords in the case of *Bowman's Trustees*, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959. In other cases it was decided that vesting was postponed until the date of payment, the effect of which was to introduce into the bequest a gift-over in favour of survivors for which no justification was to be found in the words used by the testator. The doctrine of vesting subject to defeasance is valuable merely because it provides legal machinery whereby in certain cases (of which the present is an example) one can give effect to what appears to have been the true intention of the testator. The copious citation of decisions demonstrates (if such a demonstration were needed) that the doctrine may be invoked not merely in the case long familiar in destinations of heritage, viz., on the birth of a nearer heir, but also on the birth of an heir further off in the destination.

For these reasons I agree with your Lordships.

The Court answered the first question in the affirmative.

Counsel for the First and Third Parties—R. C. Henderson. Agents—R. D. Ker & Ker, W.S.

Counsel for the Second Party—W. J. Robertson. Agent — A. E. S. Thomson, Solicitor.

Saturday, January 12.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

NIDDRIE AND BENHAR COAL COMPANY, LIMITED *v.* MONTGOMERY.

Workmen's Compensation — Question — Injury by Accident—Workman Suffering from Two Affections—Duty of Arbitrator to Make Findings as to Character of Injuries due to Accident — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*C.A.S.*, 1913, *L, xiii*, 17 (*a*).

A workman injured by accident claimed compensation, and attributed to the accident injuries to his back and to his heart. His employers admitted liability to pay compensation, but denied that the accident had injured the workman's heart, and further averred that the incapacity due to the injury to the back had ceased at a certain date, and that thereafter any incapacity was due to the condition of the heart. They stopped payment. The arbitrator, without pronouncing findings as to what injuries had resulted from the accident, found the workman entitled to compensation after the date when payment ceased. The employers required a stated case, and proposed questions as to whether the arbitrator was entitled to refrain from stating whether the incapacity was due to the injury to the back or to the heart condition, and as to whether the award should have disclosed a finding as to the *onus* of proof relative to the heart condition. The arbitrator refused to state a case. *Held*, in a note by the employers to show cause why a case should not be stated, that a question of law was involved, and the sheriff *ordered* to state a case containing specific findings regarding the character of the injuries said to have been caused by the accident.

The Niddrie and Benhar Coal Company, *appellants*, presented a note under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) craving for an order upon James Montgomery, *respondent*, to show cause why a case should not be stated for appeal.

The *note* set forth—"In this arbitration, which was decided by Sheriff Guy on 12th November 1917, the said Sheriff has refused, conform to certificate herewith produced, to state and sign a case for which the appellants duly applied in writing.

"In the arbitration the respondent craved an award against the appellants ordaining them to pay to the respondent the sum of £1 per week in name of compensation under and in terms of the Workmen's Compensation Act 1906, commencing the first of said weekly payments as at 27th June 1917 for the week preceding that date.

"The respondent in his pleadings averred that on or about 26th March 1917, while he was engaged in the ordinary course of his employment with the appellants, he sustained personal injuries by accident arising out of and in the course of said employment, viz., injuries to back and heart, in respect of which he averred that he had been, and at the date of the application (10th August 1917) was, incapacitated from work and entitled to compensation therefor under and in terms of the Workmen's Compensation Act 1906. The respondent further averred that the appellants had admitted liability in respect of said accident and said injuries, and had paid him compensation at the rate of £1 per week up to and including payment for the week ending 20th June 1917.

"The appellants in their pleadings denied that the respondent had by the said accident sustained injury to his heart, but admitted that as the result of said accident the pursuer's back had been bruised. The appellants further denied that they had admitted liability in respect of the alleged injuries to the respondent's back and heart, and averred that any inability for work on the respondent's part since 20th June 1917

was due to the condition of his heart alone, and that that condition was in no way connected with said accident, and they further averred that on 20th June 1917 the pursuer's incapacity for work in respect of the said accident came to an end or at least became greatly lessened.

"On 7th November 1917 proof was led before Sheriff-Substitute Guy sitting with a medical assessor, and evidence upon the question whether the condition of the respondent's heart and any resulting incapacity was or was not due to the said accident was adduced by the parties. On the same date the Sheriff-Substitute also heard parties' agents, when the agent for the appellants maintained in argument that the *onus* lay upon the respondent to prove either (1) that the condition of the respondent's heart and any incapacity resulting therefrom was caused by the said accident, or (2) that the appellants had admitted liability for and had paid compensation in respect of injury to the pursuer's heart.

"On 12th November 1917 the Sheriff-Substitute issued the following interlocutor:—'*Edinburgh, 12th November* 1917.—The Sheriff-Substitute having heard parties' procurators and considered the cause, along with the medical assessor who sat at the trial of the cause, finds (1) that on or about 26th March 1917, while the pursuer James Montgomery was in the employment of the defenders the Niddrie and Benhar Coal Company, Limited, as a miner, he sustained personal injury by accident arising out of and in the course of his employment; (2) that the pursuer was totally incapacitated for work as the result of said accident; (3) that the pursuer's average weekly earnings prior to the accident were £2, 17s.; (4) that the defenders admitted liability to pay compensation to the pursuer under the Workmen's Compensation Act 1906 in respect of said accident and injury, and they agreed to pay him and he accepted the sum of £1 per week as such compensation; (5) that no memorandum of this agreement has been recorded; (6) that the defenders paid said sum of £1 per week down to 20th June 1917, when they stopped payment; (7) that the pursuer has been since 20th June 1917 and still is totally incapacitated for work as the result of said accident; (8) that the defenders are liable to pay compensation to the pursuer under said Act as from and after 20th June 1917: Assesses said compensation under said Act at the sum of £1 per week: Grants decree against the defenders for payment to the pursuer of the said sum of £1 per week as from and after 20th June 1917, with such addition, if any, to which the pursuer may be entitled under the provisions of the Workmen's Compensation (War Addition) Act 1917: Finds the defenders liable to the pursuer in expenses, and remits,' &c. The Sheriff-Substitute issued no note with or relative to this interlocutor.

"By reason of the terms of the said interlocutor, and of the fact that no note or statement of the reasons for the Sheriff's findings has been issued, the appellants are left in complete ignorance as to whether the continued total incapacity of the respondent for work, which has been found to be the result of the said accident and in respect of which the award of compensation has been made, arises from the injury to the respondent's back or from the injury to the respondent's heart, or from both of these injuries. As the Sheriff has found that there is at present incapacity as the result of the accident, and as it is open to the appellants to review the weekly payment in the event of the respondent's incapacity decreasing or ceasing, it is of great practical importance to the appellants that the arbitrator should decide the questions between the parties raised in the pleadings and submitted for his decision. The appellants are further left in ignorance (*a*) as to whether the Sheriff in arriving at his decision held that the *onus* of proving that any condition of the respondent's heart which incapacitated him from work resulted from the accident lay upon the respondent, or held that the *onus* of proving that any such condition of the respondent's heart was not the result of the accident lay upon the appellants, and (*b*) as to whether in either of these cases such *onus* had in the Sheriff-Substitute's opinion been discharged.

"The appellants being dissatisfied with the determination of the arbitrator lodged on 16th November 1917 a minute craving a Stated Case.

"Thereafter the Sheriff-Clerk prepared a draft case and submitted it to the appellants' agents, who revised it, and submitted it as so revised to the respondent's agent, who declined to revise it on the ground that no case ought to be granted. Accordingly, having failed to adjust the draft case, parties were heard before the arbitrator upon 13th December 1917, with the result that on 14th December 1917 he issued the following certificate of refusal which is herewith produced, viz.—'*Edinburgh, 14th December* 1917.—The Sheriff-Substitute of the Lothians and Peebles having seen the request by the defenders that he should state a case for the opinion of the Division of the Court of Session on the following proposed questions of law, viz.—1. In issuing my award was I entitled to refrain from stating whether the incapacity from which the pursuer suffers was attributable to (1) the injury to the back in respect of which compensation was paid, or (2) the heart condition in connection with which evidence was led? 2. Should my award have disclosed my finding on the question of *onus* raised in connection with the pursuer's heart condition?—hereby certifies that he has to-day refused to state a case for the opinion of the Court on said questions, for the following reasons (1) that the said questions of law proponed by the defenders are not questions of law, and (2) that if they are he determined neither of them.'—JOHN C. GUY.

"The *questions of law* proposed to be submitted for the opinion of the Court are—1. In issuing my award was I entitled to refrain from stating whether the incapacity from which the respondent suffers was attributable to (1) the injury to the back, in

respect of which compensation was paid, or (2) the heart condition, in connection with which evidence was led? 2. Should my award have disclosed my finding on the question of *onus* raised in connection with the respondent's heart condition?

"The appellants pray for an order on the respondent the said James Montgomery to show cause why a case should not be stated by the Sheriff for the following reasons, viz. —*First*—That the appellants are aggrieved and may be seriously prejudiced by the failure or omission of the arbitrator to disclose his decision upon the questions raised by their pleadings and contentions hereinbefore referred to. *Second*—That it is proper that in fairness to the appellants the arbitrator should have stated the grounds upon which he arrived at his award of compensation. *Third* — That proper questions of law having been raised by the questions proposed, the refusal of the Sheriff to state a case is unwarranted."

The *answers* were—"The certificate of refusal to state a case, the closed record in the arbitration, and the interlocutor of the Sheriff-Substitute dated 12th November 1917, are referred to for their terms, beyond which no admission is made. Admitted that the Sheriff-Substitute did not issue a note, that the appellants asked for a Stated Case, that a draft case was prepared by the Sheriff-Clerk and revised by the appellants, and that the respondent maintained that no case ought to be granted. Explained that the questions raised in the pleadings have been decided by the Sheriff-Substitute so far as necessary for the determination of the questions between the parties under the said Act, and that no question has arisen between the parties other than a question of fact. *Quoad ultra* the appellants' statement is denied. The respondent therefore respectfully submits that the Sheriff-Substitute was entitled to decline to state a case and that the present application should be refused, with expenses, in respect that no relevant ground has been averred for interfering with the discretion of the Sheriff-Substitute."

Argued for the appellants—It was essential that there should be a finding as to what was the true cause of the resulting incapacity, for unless that was known the appellants would be at a loss how to proceed in a question of review. On that point also the question of *onus* of proof was important. The interlocutor of 12th November 1917 was defective, for it neither specified the nature of the actual injury sustained nor the cause thereof. It was the duty of the arbitrator to state the grounds of his award—*Jones* v. *Tirdonkin Colliery Company*, 1911, 5 B.W.C.C. 3; *Griggs* v. *Owners of s.s.* "*Gamecock*," 1913, 6 B.W.C.C. 15. Here he had not done so. Further, the present case was *a fortiori* of those cases, for in them the finding desiderated was upon a point of minor importance; here the point was essential. The arbitrator should be ordained to make specific findings on the points raised.

Argued for the respondent—The arbitrator's duty was to state a case on any question of law determined by him—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule, section 17 (*b*); C.A.S., 1913, L. xiii, 17 (*a*). Here the arbitrator had not decided a question of law but merely one of fact. Further, the questions now raised had not been stated to the arbitrator and it was too late to raise them now. The arbitrator was master of his own procedure and was entitled to make the award in the terms in which he had made it. The cases cited by the appellants did not apply, for in England the arbitrator had to take notes which went before the Court of Appeal. In any event the arbitrator's award could not be affected by any findings on the questions now raised.

LORD PRESIDENT—I think there is a question of law involved here. The learned arbiter found on 12th November 1917 that the respondent had sustained personal injury by accident arising out of and in the course of his employment, and further that he was totally incapacitated by that accident, and he then made the award of so much per week.

When we bear in mind that the appellants are entitled at some future date to return to the arbiter and to ask for a review of his decision in view of a change of circumstances, it appears to me to be essential that the arbiter should in issuing his award state with precision the personal injuries which he finds were the result of the accident arising out of and in the course of the man's employment.

In the present case we are told that the respondent attributed to the accident injury both to his back and to his heart. We are told by the appellants on the other hand that they maintained that the injury to the back was the sole personal injury due to the accident. In these circumstances it was incumbent upon the arbiter in view of the dispute before him to find either that the personal injury affected the man's heart and back, or that it affected the one or the other. In the absence of such a finding it would be extremely difficult for the appellants to come to any decision at some future date as to whether they should ask for a review of the award.

Accordingly I think we ought to order the arbiter to state a case, and to give us a specific finding in regard to the character of the injuries to the respondent which he is satisfied on the evidence have been due to this accident.

LORD MACKENZIE and LORD SKERRINGTON concurred.

LORD JOHNSTON was absent.

The Court ordered the Sheriff-Substitute as arbiter to state a case as craved, said case to contain specific findings regarding the character of the injuries said to have arisen out of the accident.

Counsel for the Appellants—Watson, K.C. —Gentles. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—Christie, K.C.—A. M. Stewart. Agent—R. D. C. M'Kechnie, Solicitor.