6, 1880, 7 R. 566; *Simpson's Trustees* v. *Simpson*, December 10, 1889, 17 R. 248. (2) Alternatively, the fee of the share liferented by Lyon Wilson, junior, on a just construction of the testator's settlement, belonged to Lyon Wilson, junior, and had been conveyed to them by his settlement.

The fourth parties concurred in the third alternative of the third parties' argument.

Argued for the fifth party—(1) Under the destination in the settlement she was entitled to payment of, or at least was vested in, one-fourth of the capital of the share in question; (2) alternatively, she concurred in the second alternative of the third parties' argument.

At advising—

LORD JUSTICE-CLERK—The question here is, whether the share of the estate of the late Lyon Wilson, which would have fallen to his son Lyon in liferent and to his children in fee under the settlement of Lyon Wilson in respect of Lyon Wilson, junior, having died without issue, is now intestate succession of Lyon Wilson, senior, or falls to be added to the shares of the other children. The sixth purpose of the settlement, which is the one in question, is as follows:—"I direct my trustees to hold the residue of my estate for behoof of my whole children equally in liferent for their liferent alimentary use allenarly, and for behoof of their respective issue in fee; declaring that the issue of any of my children who may die shall succeed always to the share the liferent of which is hereby provided to their parent, and that in such proportions as may have been appointed by their parent, and failing such appointment equally among them *per stirpes*." Under this direction Lyon Wilson, junior, could never be entitled to more than a liferent of his share. He could have no beneficial fee. His children would have had the fee, but there were none. There is no alternative disposal of residue by substitution or otherwise. All we have here is a division into equal shares according to the number of surviving children and the families of predeceasing children, children being limited to an alimentary liferent allenarly of their shares. I think it has been well settled that where the whole estate is divided among a certain number of beneficiaries, and nothing is said about residue, then if a share lapses from unforeseen causes, that share becomes intestate succession of the testator, and must be dealt with accordingly.

I therefore would move your Lordships to answer the first and second questions in the affirmative, and if this be done the remaining questions do not require to be answered.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—The testator in this case directed his trustees to hold the residue of his estate for behoof of his whole children equally in liferent. According to the rule laid down, or rather recognised, in *Paxton's* case, this gave the children each an equal share in the liferent, but conferred no right on the survivors to the share of any one of their number who might die. There was no right of accretion. Accordingly, when Lyon Wilson died, no one succeeded to his share in the liferent. The fee of the residue was destined to the issue of the liferenters, but such issue succeeded only to the share of the residue liferented by their respective parent. As none of his brothers or sisters liferented the share of which Lyon Wilson was the liferenter, none of their issue succeed to the fee of that share. If they do not succeed, then the fee of the share liferented by Lyon Wilson is not disposed of by the testator, and becomes intestate succession, the heir entitled to which must be ascertained as at the date of the testator's death. I am therefore for answering the first and second questions in the affirmative, which makes it unnecessary to answer any of the other questions put in the case.

The Court answered the first and second questions in the affirmative.

Counsel for the First and Fifth Parties—M'Clure. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Guy. Agents—Gill & Pringle, W.S.

Counsel for the Third and Fourth Parties—Constable. Agent—N. Briggs Constable, W.S.

Friday, November 16.

FIRST DIVISION.

COUNTY COUNCIL OF DUMBARTON *v.* POLICE COMMISSIONERS OF CLYDEBANK.

Public Health—Special Water Supply District partly in County and partly in Burgh—County Council—Local Authority—Management and Maintenance—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *esp. secs.* 11 *and* 81.

In 1873 a special water supply district was formed in a county under the Public Health Acts. In 1886 part of the district was formed into a police burgh. The whole water district, including the burgh, was administered by the parochial board of the parish until the passing of the Local Government (Scotland) Act 1889, which, by subsection 4 of section 11, vested in the council of each county "the whole powers and duties of the local authorities under the Public Health Acts of parishes so far as within the county (excluding burghs and police burghs)."

A question having thereafter arisen between the County Council and the Commissioners of the burgh as to which

were the local authority within the burgh for the purposes of the special water supply—*held* (1) that, under the provisions of section 81 of the Local Government Act, 1889, the District Committee of the County Council was the local authority as regarded water supply in the whole water supply district, including the burgh; (2) that the County Council were alone entitled to impose and levy assessments for the purposes of the special water supply throughout the whole water district; (3) that all disbursements in connection with the water supply district fell to be paid by the County Council out of the county fund on the requisition of the District Committee.

(Sequel of case reported *ante*, vol. xxxi. p. 22, and 21 R. 12.)

On 25th August 1873 the special water supply district of Duntocher and Dalmuir was formed under the Public Health Acts by decree of the Sheriff of Dumbartonshire. The district was wholly landward at that date, and was situated in the eastern portion of the county of Dumbarton.

On 18th November 1886 part of the water district was formed into the burgh of Clydebank under the provisions of the General Police Act of 1862. The only waterworks within the burgh were distributing mains for the exclusive use of the burgh, the reservoirs, tanks, &c., being all situated outwith the burgh.

The water district was originally administered by the Parochial Board of West Kilpatrick, as the local authority under the Public Health Act of 1867. On 2nd March 1887 the Police Commissioners of the burgh applied to the Board of Supervision to declare under section 5 of that Act that they, the Commissioners, were the local authority within the district, but the Board on 25th May 1887 declined to comply with the application, and accordingly the Parochial Board continued to act as local authority within the whole water district until the Local Government Act of 1889 came into operation. On 6th November 1889 the Board of Supervision, in view of the provisions of the Local Government (Scotland) Act 1889, recalled the determinations made by them under section 5 of the Public Health Act. After 15th May 1890, when the Local Government Act came into operation, the Public Health Act, so far as regarded water supply, was administered throughout the whole special water district by the County Council of Dumbarton,, who annually imposed and levied special water assessments on the whole water district, received and disbursed its revenues, and through its Eastern District Committee maintained and managed the works. For a time a Sub-Committee of the District Committee, jointly with certain members of the Police Commissioners of Clydebank, managed and maintained the works in terms of section 81 of the Local Government Act, but disputes arose as to the relative numbers in which these bodies were entitled to be represented upon the Sub-Committee, and a determination issued by the Secretary for Scotland with the view of determining the question was reduced by the Court on the 19th October 1893 in an action at the instance of the *Eastern District Committee of County Council of Dumbartonshire* 31 S.L.R. 22, and 21 R. 12. After that date the District Committee managed and maintained the works.

In June 1894 the District Committee instituted actions in the Sheriff Small-Debt Court of Dumbarton against certain traders in the burgh of Clydebank for the price of water sold to them for trade purposes. The traders defended the actions, one of their defences being that the District Committee was not the local authority within the burgh, and had no title to sue. This plea was sustained by the Sheriff-Substitute.

Accordingly, on the 16th October 1894, the County Council of Dumbartonshire presented a petition to the Court of Session, in terms of section 61 of the Local Government Act, for the purpose of obtaining a decision of the Court upon the questions at issue.

The petitioners averred as follows—The whole property of the waterworks was vested in, and the whole debts and liabilities of the water district were laid on them. They alone, coming in place of the Parochial Board, were entitled to levy the assessments for water supply, one-half on owners and the other half on occupiers of heritage over the whole water district. They had charge of the financial affairs of the whole water district, and no dual or divided administration was contemplated or provided for by the Act.

The petitioners accordingly craved the Court to find "(1) that the petitioners, the County Council of the county of Dumbarton, are alone entitled to impose and levy assessments for the purposes of said special water supply district of Duntocher and Dalmuir under the said Public Health (Scotland) Act 1867, and the said Local Government (Scotland) Act 1889, or either of them, from the whole ratepayers in the said special water supply district, including the ratepayers within the burgh of Clydebank; (2) that the said Eastern District Committee is the local authority under the Public Health (Scotland) Act 1867, so far as the water supply is concerned, in the whole of said special water supply district, including such part thereof as is within the said burgh of Clydebank, subject to the regulation and control which the said Local Government (Scotland) Act 1889 confers on the petitioners; (3) that the said Eastern District Committee is alone entitled to decide the amount of water to be supplied for domestic purposes within the said special water supply district, and to arrange for the disposal of any surplus water and the rate or price to be paid therefor; . . . (5) that all disbursements in connection with said special water supply district fall to be paid by the petitioners out of the county fund, on the requisition of the said Eastern District Committee."

Answers were lodged by the Eastern District Committee concurring in the

prayer of the petition so far as above quoted.

The Police Commissioners of Clydebank also lodged answers. They averred as follows—The Police Commissioners were the local authority under the Public Health Acts, with all the powers and liabilities attaching thereto, within Clydebank. No change was made under the Local Government (Scotland) Act 1889 in their position as the local authority within the burgh. They were admittedly so for all public health purposes other than the supply of water, and there was no warrant in the statutes for severing the powers and duties of local authorities under the Public Health Acts. They intended to make an application under the Local Government (Scotland) Act 1894, section 44, sub-sec. 9, to the Secretary for Scotland to determine the numbers of the Sub-Committee and of the representatives of the Commissioners to be charged with the management and maintenance of the water supply district, and the dispute between the parties ought to be settled under this provision. They therefore craved the Court to refuse the petition "in respect (1) that the respondents are the local authority under the Public Health Acts within the burgh for all purposes; (2) that the powers asked for in the petition were not conferred on the petitioners nor the Eastern District Committee by the said Local Government (Scotland) Act 1889; and (3) that the dispute between the parties ought to be settled as provided by the Local Government (Scotland) Act 1894, section 44, sub-sec. 9."

Section 11 of the Local Government Act of 1889 provides—"Subject to the provisions of this Act there shall be transferred to and vested in the council of each county, on or after the appointed day, or at such times as are in this Act in that behalf respectively specified—(4) The whole powers and duties of the local authorities uuder the Public Health Acts of parishes so far as within the county (excluding burghs and police burghs)."

Section 17 provides—"With respect to the transference to the county council of the powers and duties of certain local authorities under the Public Health Acts, the following provisions shall have effect:—(1) For the purposes of the administration of the laws relating to public health, the county shall, except as hereinafter provided, be divided into districts in the manner provided in this Act, and there shall be a district committee for each such district constituted as provided in this Act; (2) A district committee shall, subject to the provisions of this Act, be the local authority under the Public Health Acts, and as such shall have and may exercise within its district all the powers and duties, and be subject to all the liabilities by this Act transferred to or conferred on the county council with respect to the administration of the laws relating to public health, except those relating to medical officers or sanitary inspectors for the county, and subject to the provisions following:—(*a*) A district committee shall have no power of raising money by rate or loan." . . .

Section 81 provides—"With respect to special drainage districts or special water supply districts the following provisions shall have effect—(1) Where a special drainage district or special water supply district has been formed in any parish under the Public Health Acts, the district committee may, subject to regulations to be from time to time made with the consent of the county council, appoint a sub-committee for the management and maintenance of the drainage or water supply works, and such sub-committee shall in part consist of persons, whether members of the district committee or not, who are resident within the special drainage district or special water supply district. (2) Where a special drainage district or special water supply district is partly within a county and partly within a burgh or police burgh, the sub-committee appointed under the immediately preceding sub-section and such number of the town council or police commissioners (as the case may be) of such burgh or police burgh, as failing agreement the Secretary for Scotland may determine, having regard to all the circumstances of the case, shall be charged with the management and maintenance of the drainage or water supply works within such special district, and the determination of the Secretary for Scotland may provide for the regulation of the proceedings, and for the allocation and payment of the expenses incurred under this sub-section." "(3) Where a special drainage district or special water supply district is wholly within a police burgh formed after the passing of this Act, the police commissioners of such police burgh shall become the local authority under the Public Health Acts for such special district, and the assessments in respect of the drainage and water supply shall be levied in the same manner as they were before such district was formed into a police burgh."

Argued for petitioners—If a water district were formed and a burgh carved out of it subsequently, as in the present case, the burgh did not get powers of its own, but the district remained the same, the police commissioners having nothing to do with the finance of the water district. The "management and maintenance" conferred by the Acts upon the sub-committee referred merely to the daily operations of the district, not to any capital expenditure. With regard to the latter, the sub-committee acted merely as advisers of the county council. The police commissioners had no powers of levying assessments upon "owners," but only upon "occupiers." As the petitioners levied, and would continue to levy, assessments upon both occupiers and owners, there would be an anomalous state of things created if the respondents' views were adopted. The terms of sections 21 and 43 of the Burgh Police Act 1892 did not apply to the present case, only being applicable to the burgh itself, not to assessment in the water district. So this ques-

tion could not be settled by the Secretary for Scotland.

Argued for respondents, the Police Commissioners — They were admittedly the local authority within the burgh for all other public health purposes except water, and the powers under the Public Health Acts could not be split up in the way suggested by the petitioners, who, if they were the local authority for water purposes, ought to be so for all others. No special powers were by sec. 81 of the Local Government Act of 1889 conferred upon county councils. That clause provided for a body to carry out the necessary work by forming a "joint committee." There was at the time of the formation of the burgh no stereotyped local authority, but when the change occurred the powers of the local authority were transferred to the police commissioners. It was true that they could only levy assessments upon occupiers, but it was conceivable that as the occupiers had erected themselves into a burgh advisedly subject to such changes as these, the charge upon the original rates might be converted into one upon the substituted rates. In any case, the dispute between the parties might be settled by an application to the Secretary for Scotland under the Local Government (Scotland) Act 1894, section 44, sub-section 9, by which he had now power to fix the proportion of the members on the joint-committee. The petition therefore was unnecessary.

In the course of the discussion the following sections of statutes were referred to:—Local Government Act 1889, secs. 11, 17, 25-27, 73, 75-77, 81, 89, 90. Local Government Act 1894, sec. 44; Public Health Act 1867, secs. 5, 89, 94, 97; the Burgh Police Act 1892, secs. 4, 5, 7, 21, 42, 43.

At advising—

LORD PRESIDENT—It admits of no doubt that in places within the jurisdiction of police commissioners, these commissioners are in the normal case the local authority for executing the Public Health Act. This was the scheme of the Public Health Act of 1867. It has been adhered to in the Local Government Act of 1889, and it is again confirmed in the General Police Act 1892.

What I have called the normal case is that in which the unit of administration and assessment for the purposes of public health is the area of the Commissioners' ordinary jurisdiction. An examination of the statutes, however, shows that what are called special water supply districts have been the subject of very special legislation.

To begin with, a special water supply district forms in its nature an exception from the ordinary system. It is a district not co-extensive with the jurisdiction of any local authority, but marked out by its needs or opportunities in the matter of water as a proper unit for supply and assessment, and furnished with a common system of works for its special use.

Now, when a district is thus separated from the rest of the assessable area of any local authority, and where it has self-contained works, establishment, and rates, it would seem natural that a unit of property and administration founded on permanent and distinctive requirements should not be broken up on a change in the municipal and police authorities.

It is true that the statutes give to the commissioners of each new police burgh which springs up the position of local authority. But side-by-side with these general provisions there will be found special clauses dealing with special water supply districts. The relation of these two sets of provisions and their bearing on the district of Duntocher and Dalmuir constitute the question before us.

The special water supply district in question was formed in 1873, when, as yet, there was no police burgh of Clydebank. The district was carved out of the parish of West Kilpatrick, of which the local authority was the parochial board. Waterworks were constructed by the local authority for the special district, and these works supplied and continue to supply it with water. Now, in 1886 the police burgh of Clydebank was formed, being carved out of the area of the special water supply district, of which area it includes about one-third. After the formation of the police burgh the administration of the waterworks *de facto* remained in the Parochial Board just as before, and it has continued *de facto* with their statutory successors as local authority of West Kilpatrick, to wit, the Eastern District of the County Council of Dumbartonshire. In 1887, indeed, the Police Commissioners applied to the Board of Supervision to have it determined that they should be the local authority within the water supply district, but this the Board of Supervision declined to do. The decision of the Board is to be read as an exercise of their power to determine which of the two bodies should be the local authority within this part of the parish of West Kilpatrick under the 5th section of the Public Health Act.

The Parochial Board therefore was the local authority in the disputed territory, when the Local Government Act passed on 26th August 1889. Now, it is said for the Burgh of Clydebank that on the 6th November 1889 the Board of Supervision recalled all their determinations under the 5th section of the Public Health Act, and that the result was that free play was given to the provisions contained in both the Public Health Act and the Local Government Act, by which police commissioners were recognised as local authorities within the boundaries of their burghs. It seems to me that the validity of this argument depends upon what is the effect of section 81 of the Local Government Act of 1889. If it shall appear that the section specifically determines the question which body shall be the local authority for special water supply districts, then, plainly, the circular of the Board of Supervision could in no wise undo this determination of Parliament. Now, this is just what I think

the section has done. The second subsection is that directly applicable to the case in hand, viz., that of a special water supply district partly within a county and partly within a police burgh. But the second subsection is merely a qualification of the procedure prescribed in the first subsection, whence it appears that the District Committee of the County Council is, in the case in hand, to submit to a particular kind of sub-committee the management and maintenance of those particular water districts. There cannot be a plainer implication that, but for the particular procedure prescribed, the District Committee would have had to look after those matters themselves, and also that, but for subsection 2, the particular procedure in the case of districts partly rural and partly within police burgh would have been that specified in subsection 1. Moreover, the specific rule for the formation of the sub-committee under subsection 2, excludes the idea that the police burgh commissioners are themselves the local authority; for, if they were, it could never have been proposed that a certain number of their body should be added to a sub-committee of the county authority. To speak of the sub-committee as a joint-committee of the two bodies is contrary not merely to the scheme but to the substance of the section. The test of this question is, how do you work out the assessing of the district? If you hold that the district committee is the local authority, the thing runs out smoothly; for the district committee presents its requisition to the county council, who proceed to assess for the whole amount required. On the other hand, if the burgh commissioners are alone entitled to assess, within their boundaries, for the costs of the establishment of the district, no machinery exists for their being brought into action; and if they were to assess, they would do so on occupiers alone, whereas in the rest of the district the assessment would be half on owners and half on occupiers.

This leads me to observe that in the 3rd subsection of section 81 there occurs another and, as I think, a conclusive answer to the police commissioners' claim. That subsection provides that, where a special water supply district is wholly within a police burgh formed after the passing of the Act, the police commissioners shall be the local authority for such special district, but that the assessments shall be levied in the same manner as before the formation of the police burgh. Now, if special water supply districts, in their ordinary case, formed no exception to a rule that in all parts of all police burghs the police commissioners are the local authority, why this enactment? It would be manifestly superfluous. The presence of this provision shews that, but for special enactment, the police burgh would not have been the local authority, and that, just because the general rule about police commissioners being local authorities does not apply to special water supply districts. But, then, this subsection evidences also the desire of the Legislature that the assessment for those districts shall continue to be half on owners and half on occupiers. Now, if the argument of the Clydebank Commissioners were sound, this desire would be defeated in the set of cases now in question, for there the assessment would inevitably be wholly on occupiers.

The result of my examination of the 81st section of the Act of 1889 is that it negatives the claim of the Police Commissioners to be the local authority within any part of this special water supply district in so far as relates to water. I think that by this section the Legislature confirmed to the new county authorities the powers exercised by their predecessors, the parochial boards, in relation to special water supply districts, and only modified those powers to the extent set forth in that section. Recognising the appropriateness of some special representation of local interests, the section puts local representatives on the committee which is to manage the waterworks; where there is no police burgh, it takes those local representatives from the residents; where there is a police burgh, then from the police commission. But, in the one case as in the other, this special representation is merely engrafted on the ordinary system of county administration.

In order to ascertain the statutory rights of the county authorities and of the burgh authorities, I have made mention of the sub-committee which is the point of contact between those two bodies under section 81. The fact that through some lapse of administration this sub-committee has not been set up in the case of the Duntocher and Dalmuir district does not affect the argument.

Turning to the prayer of the petition, I think that a finding in terms of the first head would be an accurate statement of the law.

I am also prepared to affirm the second head down to and including the word "Clydebank." The words which follow, beginning "subject to," were intended to recognise the powers of the County Council under the statute, but I scarcely think "regulation and control" are appropriate description of those powers, and the object of the petitioners will be better and more accurately effected by inserting as a parenthesis after "Eastern District Committee" the words ("subject to the provisions of the said Local Government Act").

I am not prepared to affirm the third head, because we have not got the statutory sub-committee here, and it might turn out on further argument that the declaration asked would trench on their province of management. On the other hand, it does not seem necessary expressly to negative the right of the Clydebank Commissioners to decide these particular matters about surplus water, as they have not pretended any claim to interfere with them, unless they were held to be the local authority.

The fourth head was withdrawn from our consideration by the petitioners. The fifth head seems to me to be accurate, and

should, in my opinion, be affirmed.

In proposing a judgment which turns upon a construction of the 81st section of the Local Government Act as affecting police burghs, it is right to say that, while none of the parties denied that the question was one which, under the 43rd section of the Burgh Police (Scotland) Act 1892, might have been submitted for the determination of the Secretary for Scotland, yet all of them disclaimed any desire to avail themselves of this privilege, and claimed the judgment of the Court.

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

The Court pronounced the following interlocutor:—

"Find (1) that the petitioners the County Council of the county of Dumbarton are alone entitled to impose and levy assessments for the purposes of the special water supply district of Duntocher and Dalmuir under the Public Health (Scotland) Act 1867, and the Local Government (Scotland) Act 1889, or either of them, from the whole ratepayers in the said special water supply district, including the ratepayers within the burgh of Clydebank: Find (2) that the said Eastern District Committee, subject to the provisions of the Local Government (Scotland) Act 1889, is the local authority under the said Public Health (Scotland) Act 1867 so far as the water supply is concerned in the whole of said special water supply district, including such part thereof as is within the burgh of Clydebank: Find (3) that all the disbursements in connection with the said special water supply district fall to be paid by the petitioners, the said County Council, out of the county fund on the requisition of the said Eastern District Committee; and decern," &c.

Counsel for the Petitioners—A. Jameson—C. K. Mackenzie. Agents—C. & A. S. Douglas, W.S.

Counsel for the Respondents, the Eastern District Committee—Ure—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents, the Clydebank Commissioners—D.-F. Sir Charles Pearson, Q.C.—Napier. Agents—Douglas & Miller, W.S.

Saturday, November 17.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

CONNOLLY *v.* YOUNG'S PARAFFIN LIGHT COMPANY.

Reparation—Master and Servant—Limited Company—Manager—Fellow Servant.

A widow raised an action of damages at common law against a limited company in whose works her deceased husband had been employed, alleging that her husband's death had been caused by the negligence of the defenders' manager, who had superintendence entrusted to him under them, and who had ordered certain dangerous operations to be carried out without taking reasonable precautions for the safety of the workmen employed.

The Court *dismissed* the action as irrelevant, on the ground that the pursuer had not made any averments to take the case out of the ordinary rule, by which the manager was the fellow-servant of the workman.

Reparation—Master and Servant—Process—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 4—*Notice of Injury—Excuse for Want of Notice.*

Section 4 of the Employers Liability Act 1880 enacts that an action for recovery under the Act of compensation for an injury shall not be maintainable unless notice of the injury is given within six weeks of the accident causing it, provided always that in case of death the want of such notice shall be no bar to an action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

In an action of damages brought under the Act by the widow of a deceased labourer against his employers, the excuse offered by the pursuer for having omitted to give notice within the statutory period of the injury alleged to have caused her husband's death, was, that she was in such a state of mind from grief that she overlooked the necessity of having the circumstances of the death investigated.

The Court *dismissed* the action as incompetent, *holding* that no reasonable excuse for the failure to give notice had been stated.

Mrs Ellen Connolly, widow of Thomas Connolly, for herself and as tutor of her pupil sons, Thomas and Peter, and Ellen Connolly, a minor child of Thomas Connolly, raised an action in the Sheriff Court at Edinburgh against Young's Paraffin Light and Mineral Oil Company, Limited, for payment of £500, as damages for the death of the said Thomas Connolly, who had been employed in the defenders' works at Addiewell.

The action was laid both at common law and under the Employers Liability Act.