circumstances as there obtained. If we are to follow these cases, as, of course, we are bound to do, we must apply this non-technical method of construction logically and consistently. We are not to follow it up to a certain point, and then to allow it to be defeated by a mere technicality with no substance behind it. In the present case the annual interest is derived from funds which the testamentary trustees hold for the two ladies in fee. This is not the case, such as I have figured above, of a temporary windfall from a source in which the recipient has no permanent interest. On the death of the mother, so far from there being any cesser, there will be an expansion of their enjoyment of the income of these funds. In these circumstances it appears to me to be a reasonable application of the rule of *Boyd's Trustees* to hold that these annual payments, being in substance, if not perhaps in accordance with technical rule, annual income of these ladies, do not fall under the conveyances in the respective marriage contracts.

The effect which ought to be given to the special treatment of an exception in the conveyances to the marriage-contract trustees is not altogether free from difficulty. But I concur in the conclusion which your Lordship in the chair has arrived at on that matter.

I am accordingly of opinion that the questions should be answered in the manner proposed by your Lordship.

LORD CULLEN was not present.

The Court answered branch (*a*) of the first question of law in the negative and branch (*b*) in the affirmative, and found that the second question was superseded.

Counsel for the Second and Third Parties—Chree, K.C.—Normand. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Fourth Parties—The Lord Advocate (Hon. W. Watson, K.C.)—Graham Robertson, K.C.—Burnet. Agents—Carmichael & Miller, W.S.

HOUSE OF LORDS.

Thursday, June 14.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

1. MURRAY *v.* PORTLAND COLLIERY COMPANY, LIMITED.
2. JOHN WATSON, LIMITED *v.* QUINN.
3. WILLIAM DIXON, LIMITED *v.* MADDEN.

(In the Court of Session—*Murray* v. *Portland Colliery Company, Limited*, 1923 S.C. 60, 60 S.L.R. 56; *John Watson, Limited* v. *Quinn*, 1923 S.C. 6, 60 S.L.R. 1.)

1. MURRAY *v.* PORTLAND COLLIERY COMPANY, LIMITED.

Workmen's Compensation Act 1906, *First Schedule*, 1 (*b*) *and* 3—*Partial Incapacity—Failure to Obtain Employment Due to State of Labour Market—Review of Compensation.*

A miner who had been injured by an accident was awarded compensation in respect of partial incapacity, and thereafter obtained light work at a reduced wage. His right to compensation was with his consent subsequently terminated in consequence of a general rise in the level of wages, which brought the amount he was able to earn above the pre-accident level. The light work on which he was employed having ceased owing to the pit being flooded as the sequel of a strike, and no other employment being available for him, he applied for a renewal of compensation. *Held* (*aff.* the judgment of the Second Division) that as the workman's incapacity due to the accident still continued, his right to compensation was not terminated by the supervening of a period of unemployment, and that accordingly he was entitled to compensation.

2. JOHN WATSON, LIMITED *v.* QUINN.

3. WILLIAM DIXON, LIMITED *v.* MADDEN.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (3)—*Partial Incapacity — General Fall in Wages — Review of Compensation.*

A miner who had been injured by an accident was awarded compensation in respect of partial incapacity and thereafter obtained light work at the surface. His right to compensation was subsequently terminated in consequence of a general rise in the level of wages, which brought the amount he was able to earn above the pre-accident level. On wages falling again below that level in consequence of economic causes he applied for a renewal of compensation. His physical condition remained the same as it was at the date of the original award. But for the accident he would have been able during this period to earn as a miner a wage substantially the same as his average weekly earnings prior to the accident. *Held* (*aff.* the judgment of the Second Division) that as the workman's inability to earn his former wage was due to the incapacity caused by the accident and not to economic causes, he was entitled to an award of compensation.

The cases are reported *ante ut supra.*

The employers in each case appealed to the House of Lords.

At delivering judgment—

EARL OF BIRKENHEAD—I have had the pleasure and advantage of reading the judgment of my noble and learned friend Lord Dunedin in this matter, and I so completely agree with the conclusions which are stated in that speech that I find it necessary to add nothing. I have also to say that my noble and learned friends Lord Finlay and Lord Shaw find themselves equally in complete agreement with the judgment, which I shall now read, of my noble and learned friend Lord Dunedin.

LORD DUNEDIN — These three appeals have one common feature. In each of them a workman was injured and after a period of total incapacity was awarded compensation fixed as for partial incapacity, he being able to earn, and *de facto* earning, a certain amount of wages less than the average pre-accident wage earned when he was an uninjured man. Then came a period of inflated wages due to the war, with the result that his *de facto* earnings for light work rose to a greater figure than his average pre-accident wage. In terms of section 3 of the First Schedule of the Act his right to compensation then became suspended. Wages having fallen his earnings no longer exceeded the average pre-accident wage. His physical condition remained the same, and the wages earned by him having fallen below the pre-accident rate, the question arises whether he is entitled to partial compensation. In each case the Court of Session has held that he is so entitled, and has either affirmed the judgment of the arbitrator awarding such compensation or has remitted the matter to the arbitrator to fix the amount. The appellant in each case has put forward the same argument. He argues that there being no change referable to the workman himself since his right to compensation was suspended, there is not such a change of circumstances as warrants an application to the Court to fix the compensation anew, and he cites, in respect of this contention, a number of cases where it has been held that to allow of application to revise under section 16 of the First Schedule a change of circumstances must be averred, and that a change of circumstances is not sufficiently averred by merely averring a change in the labour market.

It seems to me that the decisions here referred to are quite beside the point. The right of compensation rests not on the schedule but on the first section of the Act —"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The First Schedule in section 1, sub-section (*b*), deals with total and partial incapacity for work arising from the injury and prescribes the liability as follows:—"A weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous 12 months . . . such weekly payment not to exceed one pound." Section 3 of the same schedule deals with the fixing of the amount of the weekly payment and says—"In the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident. . . ." This settles the extreme limit of what is to be paid, but this is a rider on the computation of the amount; it is not a statutory termination or interruption of the state of incapacity. When the words can no longer be applied then there is no bar to the right which the injured man has to be compensated for partial incapacity. What compensation is then to be paid must obviously in the absence of agreement be determined by arbitration. The technical position at the moment may vary according to circumstances and is well illustrated by the differences of fact between the three cases which I have hitherto taken as one.

In the case of the *Portland Colliery* v. *Murray* the worker was so injured that he could no longer work as a collier, but was given light work on the surface and had in addition to his wages a compensation award. When by the rise of wages his earnings equalled his pre-accident wage the employer simply ceased to pay the compensation and the workman acquiesced without either having to go to the Court. The light work came to an end owing to the pit being flooded as the sequel of a strike. The workman then applied for compensation, but it does not appear that there was any standing decree on which he could have charged. The arbitrator took the peculiar and unwarranted course of making an award which should be unavailable so long as the man did nothing, but became available as soon as he was able to resume light work, which would be when the pit was free of water. The Second Division rightly recalled this finding and simply remitted the case to the arbitrator to find what compensation under the circumstances was due.

In *John Watson, Limited* v. *Quinn* there was an award dated January 1917 for 10s. 4d. per week in respect of partial incapacity. Payments were made under that down to May 1920. Thereafter the wages of the light employment he was engaged in rose to a level higher than the pre-accident wage and the employer ceased to pay compensation, in which the workman acquiesced. Wages having fallen to a level below the pre-accident wage the workman applied for payment of the old partial compensation, and that being refused he charged upon his subsisting decree. The charge was suspended and the application for review was made by the employers. The arbitrator inquired into the facts and made an award fixing partial compensation payable from the date when wages had fallen so as to prevent the application of the limit fixed by article 3 of the schedule. His judgment was confirmed by the Court of Session.

In *William Dixon, Limited* v. *Madden* there being an award for partial compensation, and the workman maintaining that even after the rise of wages he was still entitled to the compensation, the arbitrator, on application by the employer, ended the compensation "until further order." When the wages fell again the workman applied and was awarded partial compensation, and the judgment was confirmed by the Court of Session.

The variation of circumstances depending upon whether there was a standing decree on which a charge could be given really makes no difference. In each case the

features are, first, partial incapacity found and compensation awarded; second, suspension of the payment of compensation owing to the wages actually earned exceeding the pre-accident wage; and third, wages actually earned fallen below the pre-accident wage. The right to receive compensation for partial incapacity then revives and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn. The whole position is absolutely different from that to which the appellants seek to assimilate it, *i.e.*, when a workman with a standing award makes an application to have that award altered upon a mere averment that the wages in respect of partial employment have fallen. Even then the case of *M'Alinden* v. *James Nimmo & Company* (1919 S.C. (H.L.) 84, [1920] App. Cas., p. 39), not adverted to by the appellants, may have to be considered.

I am of opinion that the judgments in all three cases are right, and that the appeals should be dismissed with costs.

LORD ATKINSON—I too have had the pleasure and advantage of reading the judgment prepared by my noble and learned friend Lord Dunedin. I thoroughly concur in it and have nothing to add.

Their Lordships ordered that the interlocutors appealed from be affirmed and the appeals dismissed with costs.

Counsel for the Portland Colliery Company, Limited, Appellants—Graham Robertson, K.C.—Albert Russell—Beveridge.

Counsel for John Watson, Limited, and William Dixon, Limited, Appellants—Graham Robertson, K.C.—J. R. Marshall—Beveridge. Agents—W. & J. Burness, W.S.—Beveridge & Company, Solicitors, Westminster.

Counsel for John Murray, Respondent—Mackay, K.C.—Normand—B. Sandeman. Agents—Macpherson & Mackay, W.S.—John Kennedy & Company, Solicitors, Westminster.

Friday, July 6.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

CORPORATION OF GLASGOW *v.* BARCLAY, CURLE, & COMPANY, LIMITED.

(In the Court of Session, March 18, 1922 S.C. 413, 59 S.L.R. 329.)

Road—Public Street—Damage to Street by Exceptionally Heavy Traffic—Liability of Traffic Owner at Common Law—Whether Abuse of Street or only Wear and Tear—Rights of Public Authority against Persons Responsible for Illegal Use of Street.

A firm of boilermakers transported along the streets of a city a number of boilers which, along with the bogies on which they were mounted, weighed from 65 to 82 tons each, with the result that many of the granite setts with which the streets were causewayed were "crushed and ground." The streets, however, were not made dangerous or inconvenient for public use, although the date when operations of repair would be required was materially hastened, and part of the permanent material of the causeway was so damaged as to necessitate, when the time for relaying the streets arrived, complete renewal. The local authority within whose jurisdiction the streets in question lay brought an action of damages at common law against the firm—there being no statutory enactments dealing with excessive weight or extraordinary traffic applicable to the streets in question—in which it claimed to recover the cost of replacing the setts which had been destroyed. The evidence showed that traffic of the sort complained of had been taken along the streets in question for many years, and that the respondents had conducted it with proper care and caution. *Held* (*aff.* the judgment of the First Division) that as on the facts proved the user complained of did not amount to an abuse of the streets, but disclosed merely exceptionally heavy wear and tear, it was not illegal, and that as the pursuers had failed to show any negligence on the part of the defenders in their use of the streets the defenders were not liable at common law for the damage done.

Observed per Lord Atkinson—"I think it is ordinary wear and tear, and that therefore the appeal fails, but I do not desire for one moment to give any countenance to the respondents' contention that they are entitled to transport over the Glasgow streets whatever weights they please irrespective of the results to the streets."

The case is reported *ante ut supra.*

The Corporation of Glasgow appealed to the House of Lords.

EARL OF BIRKENHEAD—[*Read by Lord Dunedin*]—The issues raised in this appeal have caused me considerable doubt. Indeed, had I been sitting alone I am inclined to think that I should have decided the matter favourably to the appellants. But I should have regarded such a decision as highly disputable. I have now had the advantage of reading the opinions of those of your Lordships, who sat with me to hear the appeal. I find that all your Lordships, including my noble friends Lord Dunedin and Lord Shaw who advise with so much authority on matters appertaining to the law of Scotland, are of opinion that the appeal fails. In a Scotch appeal, raising some matters at least which are peculiar to the practice and law of Scotland, I am not prepared to set myself against so great a weight of authority. I do not, therefore, great as is the doubt which I have entertained, record a dissenting opinion, but I move that the appeal be dismissed.