Now, if this evidence is to be taken as truly representing what took place on the occasion in question, and I do not see why it should not, it does not appear to me to disclose a case of the husband forcibly driving his wife from his house, and locking her out to prevent her returning to live with him. They had had one of their too frequent quarrels and both were angry, and the evidence rather suggests to me that, in order to get rid of his importunities about seeing what she was writing, she left the house to go to her mother's, which was within a few minutes' walk, and he followed her and locked the doors behind her, as the Lord Ordinary says, in a fit of temper. I do not think that there is more in the incident than that, and if so, it furnishes no sufficient ground, either alone or in connection with the previous incidents in the case, for a judicial separation.

Agreeing as I do with the opinion of the Lord Ordinary, I do not think it necessary to add any further observations.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR was absent at the advising.

The Court adhered.

Counsel for the Reclaimer — Campbell, Q.C.—Hunter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Respondent—Solicitor-General (Dickson, Q.C.)—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 20.

FIRST DIVISION.

FREELAND *v.* MACFARLANE, LANG, & COMPANY.

Reparation — Workmen's Compensation Act 1897, Schedule I., clauses 1, 2, and 12 —Estimation of Compensation—Earning Capacity.

When, as the result of an accident, the earning capacity of a workman is diminished, he has a claim to compensation under the Workmen's Compensation Act 1897, and the fact that he actually receives the same wages after the accident as he did before it, is merely an element to be taken into account in fixing the amount of compensation. The fact that the pursuer would but for the accident probably have been employed in a different capacity at higher wages, and the question how far the wages given after the accident partake of the nature of a gratuity, are also relevant considerations in fixing compensation.

When an arbitrator finds that on these considerations a workman is not at present entitled to any compensation, but that the accident will probably result in a loss of earning capacity, his proper course is to make a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed on an application to vary the award under clause 12 of Schedule I, should the workman at any future time be unable by reason of the accident to earn the same wages.

By the Workmen's Compensation Act 1897 it is provided in respect to a claim for compensation (Schedule I (1) (*b*)—"When total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months . . . such weekly payment not to exceed one pound. (2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

By clause 12 of the same schedule (I) it is provided—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased."

In a case stated for appeal at the instance of Robert Freeland junior in an action at his instance against his employers, Messrs Macfarlane, Lang, & Company, bakers, Glasgow, for compensation under the Workmen's Compensation Act 1897, the Sheriff-Substitute (FYFE), found the following facts admitted or proved:—(1) That appellant, a boy of about fourteen years of age, had been for about three months prior to 12th November 1898 in the employment of respondents at their bakery in Wesleyan Street, Glasgow; (2) that his duties were general, but he was chiefly engaged preparing fruit for baking; (3) that on 12th November 1898, in the course of his employment, and upon instructions from respondent's foreman, appellant proceeded to dust the rollers of a machine used for crushing almonds; (4) that whilst so engaged, his right hand was drawn between the revolving cylinders and injured; (5) that in consequence portions of his thumb and of three fingers had to be amputated, occasioning permanent partial disablement; (6) that said accident arose out of and in consequence of appellant's employment within the meaning of the Act; (7) that prior to the accident the wage earned by appellant was 5s. per week; (8) that whilst he was off duty respondents continued to pay appellant 5s. per week (9) that when he was able appellant returned to the factory, and the respondents employed him at nondescript work at the same wage of 5s. per week, which has recently been increased to 6s.; (10) that in respondents' factory the ordinary course of employment as regards boys is, that after some months' nondescript service a boy is employed as a packer (on piece work),

which is work done by boys of a similar age and capacity to the appellant; (11) that boys employed as packers work on piece-work, and earn an average wage of 8s. per week; (12) that at the time of his accident the appellant had reached such an age and acquired such experience as made him suitable as a packer; (13) that the injury to his hand precludes him from obtaining employment as a packer, and he is still engaged at nondescript work, but he earns as high a weekly wage as he did before the accident."

On these facts the Sheriff found in law—"(1) That in respect the Workmen's Compensation Act does not take any cognisance of what may be the effect upon his future career of a workman's permanent disablement, but deals only with its present effect as regards earning of wages, and the only basis of compensation recognised by the Act being that expressed in section 2 of the first schedule, the Act does not apply where present reduction of wage is not one of the results of the accident; and (2) that in respect the appellant at the date of his application to the Court was able to earn, and in point of fact was earning, a weekly wage not less than he earned before the accident, there arose no 'difference' in the sense of section 2 of the first schedule of the Act, and therefore that the appellant was not entitled to an award of compensation under the Act."

He accordingly dismissed the application.

The following questions of law were stated—"(1) Whether, having regard to the fact that the weekly wage which the appellant is presently able to earn is not less than the weekly wage which he earned before the accident, any claim for compensation arises under the Act? and (2) Whether the appellant's application for an award of compensation was properly dismissed?"

After counsel had been partly heard on the appeal the Court remitted the case to the Sheriff, with the following interlocutor—"Remit to the arbitrator, with instructions to state whether the appellant was employed after the accident at the same kind of work as that at which he was employed before the accident, and if there was any difference in that work, what was that difference."

The Sheriff submitted the following report—"(1) That during the period 'before the accident'—that is, from the time of his entering the factory in August 1898 till the occurrence of the accident on 12th November 1898—the petitioner was one of a large number of boys stationed in the fruit room, and the kind of work these boys do is cleaning fruit. (2) That during the period 'after the accident'—that is, from his return to the factory early in January 1899 down to the presenting of the petition to the Court on 20th March 1899, petitioner was one of two boys stationed in the timekeeper's office at the factory gatehouse, and the kind of work these boys do is acting as messengers."

Argued for the appellant—The appellant was entitled to compensation, because although he actually earned the same wages as before, there was no doubt his earning capacity was diminished, and it was clear that but for the accident he would now have been earning more. The amount of wages earned after the accident as compared with that before it was only one element in fixing compensation. The whole injuries inflicted and the suffering endured should be taken into account—*Geary* v. *William Dixon, Limited*, May 12, 1899, 36 S.L.R. 640. If the English cases—*Irons* v. *Davis & Timmins* (1899), 2 Q.B. 330, and *Chandler* v. *Smith* (1899), 2 Q.B. 506, were inconsistent with this, the Scotch decision in *Geary* should rule, There was no real hardship to the employer. He could never be liable for more than half the pursuer's wages, 2s. 6d. a-week, and could commute his liability, or have the award reviewed under clause 12 of Schedule I. (quoted *supra*)—*Bennett* v. *Wordie & Co.*, May 16, 1899, 36 S.L.R. 643. In any event, the case must be kept open, as was done in the English cases cited above.

Argued for the respondent—Compensation under the Act was a new creation, differing from reparation at common law, and the only considerations on which it could be given were those set forth in clause (2) of Schedule I. (quoted *supra*). Neither his personal sufferings nor any calculation as to what he might have become were relevant. The workman is only regarded as a wage-earner, and if he can earn the same wages as before the accident he has no claim under the Act—*Irons* v. *Davis & Timmins*, and *Chandler* v. *Smith*, both cited *supra*. For his personal sufferings and injury to his prospects the workman had a remedy at common law or under the Employers Liability Act, but the consideration of damage relevant in such actions was irrelevant in a claim under the Workmen's Compensation Act—*Small* v. *M'Cormick & Ewing*, June 6, 1899, 1 F. 883, *per* Lord President, p. 885.

At advising—

LORD PRESIDENT—In this case the Sheriff-Substitute has found it to be admitted or proved that on 12th November 1898, after the appellant had been for about three months in the employment of the respondents, his right hand was, in the course and in consequence of his employment, drawn between revolving cylinders and injured, with the result that portions of his thumb and three fingers had to be amputated, occasioning partial disablement; that at the date of the accident he was earning wages at the rate of 5s. a-week; that the respondents continued to pay him 5s. a-week while he was off duty; and that when he was able to return to the factory the respondents employed him at nondescript work at the rate of 5s. a-week, which has recently been increased to 6s., but that whereas before the accident he was employed in cleaning fruit, he is now one of two boys stationed at the timekeeper's office of the factory, and that he and the other boy act as messengers. The Sheriff-Substitute has further found that boys of similar age and capacity

to the appellant are, after some months of nondescript service, employed as packers on piece work at 8s. a-week, and that the appellant had at the time of the accident reached such an age and acquired such experience as made him suitable to be a packer, but that the injury to his hand precludes him from obtaining employment as a packer.

Section 1 of the Workmen's Compensation Act 1897 provides, that if in any employment to which the Act applies personal injury by accident arising out of and in the course of his employment is caused to a workman, his employer shall, subject as thereinafter mentioned, be liable to pay compensation in accordance with the first schedule, and that schedule provides, *inter alia*, (1) (*b*) that the amount of the compensation shall be, "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week, not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound;" and (2) that "in fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity."

The effect of these provisions appears to me to be that a workman who has suffered an injury from accident, leading to partial disablement or incapacity, is entitled to compensation in respect of the difference between his earning capacity after the accident and his earning capacity at the time of the accident. Sub-section (2) of the first schedule just quoted does not, in my judgment, provide that the fact of his earning the same wages after the accident as he was earning at the time of the accident shall *per se* preclude any claim on his part, but only that regard shall be had to the difference between his average weekly earnings before the accident and the average amount which he is able to earn after the accident—it may be, amongst other things, in determining whether or not he is entitled to compensation. The statutory test is earning capacity, and if it should appear upon the facts that his earning capacity is less after than it was before or at the time of the accident, it seems to me that he might have a claim even if he was in fact receiving the same wages at the two periods.

It therefore appears to me that the answer to the first question of law put in the case should be that the fact that the weekly wage which the appellant is presently earning is not less than the weekly wage which he earned before the accident, would not necessarily or *per se* preclude any claim under the Act.

I think that in such a case the Sheriff-Substitute would be entitled to consider the fact of the appellant having attained to such an age, and had such experience, that he was fit to be a packer, and that he might any day have been made a packer at a higher rate of wages than he was receiving, and that he might also consider whether the wages paid to the appellant after the accident represented the true value of the services which he was rendering as a message boy, or whether they were in part a gratuity. In this connection the current market value of the services which he was rendering at the two periods respectively might be kept in view.

Even if I had thought that there were no grounds of the nature now indicated, upon a consideration of which the Sheriff-Substitute might possibly come to be of opinion that there had been a diminution of the appellant's earning capacity by the accident, in respect of which some compensation should now be awarded, I should have considered that the second question should be answered in the negative, as the dismissal of the appellant's application would preclude him from obtaining compensation in the event of its afterwards appearing that his earning capacity has been diminished by the accident. I think that in such a case it would be better to adopt either the course which was taken in *Irons* v. *Davis & Timmins, Limited*, 2 Q.B. 330 [1899], of making a nominal award (*e.g.*, a weekly payment of 1d.), so as to enable the County Court judge to review the award under clause 12 if it should afterwards appear that the ability of the appellant to earn wages was affected by the accident, and to increase the amount of the weekly payment, or preferably the course which was followed in *Chandler* v. *Smith*, 2 Q.B. 506 [1899], of making a declaration of the liability of the employer, leaving the amount and duration of the compensation to be fixed upon on application under Schedule 1, clause 12, to vary the award should the appellant at any future time be unable by reason of the accident to earn the same wages.

For these reasons I think that the questions should be answered in the sense above explained, and that the case should be remitted to the Sheriff-Substitute.

LORD ADAM and LORD M'LAREN concurred.

It was intimated that LORD KINNEAR, who was not present at the advising, concurred.

The Court pronounced this judgment—

"In answer to question 1, say that the fact that the weekly wage which the appellant is presently earning is not less than the weekly wage which he earned before the accident would not necessarily or *per se* preclude any claim under the Act: Answer question 2 in the negative: Find the appellant entitled to the expense of the stated case . . and meanwhile continue the case."

Counsel for the Appellant—M. P. Fraser —Spens. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for the Respondents—Ure, Q.C. —Glegg. Agents—Macpherson & Mackay, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILN AND GILL *v.* ARIZONA COPPER COMPANY.

(*Ante*, June 16, 1899, 36 S.L.R. 741, 1 F. 935).

Company — Transfer of Shares — Shares Transferred to Company "for Behoof of Class of Shareholders"—Power of Company to Hold fully Paid-up Shares in its own Name.

No illegality attaches to a company holding shares in its own name where the shares are fully paid up and involve no liability upon the holder. If the transfer of the shares to the company is unqualified, it will have the effect of a surrender of the shares; if qualified by a trust for a particular class of shareholders of the company, a title may be made up in name of a nominee, subject to a declaration of trust in favour of the class indicated.

By an agreement between a company and the vendors of the company's property it was narrated that the directors of the company had intimated certain claims against the other parties in connection with the formation and management of the company and its property, which were denied by the vendors; and further, that a certain sum of cash was needed to extricate the company from difficulties, and that by the agreement the claims and disputes were compromised. The vendors held certain deferred shares which had been issued to them as fully paid up and payable to bearer. They undertook under the agreement to transfer these in favour of the company "or their nominees for behoof of the preferred shareholders." The whole of the deferred shares were transferred to the company with the exception of a certain number which had been acquired by the public.

An action having been raised by a holder of some of these deferred shares and also of preference shares, for declarator that the transferred shares were held by the company in trust for the preference shareholders and belonged beneficially to them, the company maintained that the effect of the transfer was a surrender of the shares to the company as a whole and not for the benefit of the preferred shareholders as a class, and alternatively, that if the latter were the true meaning of the transfer, the transaction was an illegal one, on the ground that the company could not traffic in or hold its own shares, or procure a benefit for one class of its shareholders as against the remainder.

The Court *held* that the transaction was not *ultra vires* of the company, that the shares in question were held in trust for the preferred shareholders, and that they belonged beneficially to that class.

Company — Shareholder — Resolution of Majority of Shareholders — Resolution Affecting Contract Right—Ultra vires.

By an agreement between a company and the vendors of its property the latter undertook to transfer certain deferred shares held by them to the company or their nominees, to be held by them "for behoof of the preferred shareholders."

Thereafter a new company was incorporated, and one of the objects of the company as stated in the memorandum of association was to execute an agreement with the old company. One term of this agreement was, that "the rights of the preferred shareholders of the new company to certain of the deferred shares thereof shall be the same as the rights of the preferred shareholders of the old company are under the agreement first above mentioned" (being that referred to above) "to certain of the deferred shares thereof." One of the articles of the association bore that any right "attached to the preferred or any other particular class of share may be modified by agreement between the company and any person purporting to contract on behalf of that class," provided such agreement were confirmed at two separate general meetings of the holders of shares of that class.

An agreement was entered into between the company and persons contracting on behalf of the various classes of shareholders, and confirmed as above set out, which provided, *inter alia*, for the consolidation and division of the shares, and contained the following provision—"the holders of preferred shares and deferred shares shall . . . have no right to or any interest in or in respect of any deferred shares previously held by the company or any other party whatsoever, either for behoof of the company or of the preferred shareholders thereof."

Held that this constituted an extinction of the right of the preferred shareholders to the deferred shares to which they were beneficially entitled, that it was not authorised by the article of association above quoted, and was *ultra vires* of the company, and that as it formed a material part of the agreement the whole scheme as embodied therein fell to be reduced.

(Sequel to the case reported *ante, ut supra.*)

The Arizona Copper Company, Limited, was originally incorporated on 11th August 1882