His wages for the greater part of the year were 24s. a-week, he finding his own bed and board, and for the remainder of the year 14s. a-week, his bed and board being found for him. That the respondent had purchased a number of growing trees in a wood near Blanefield belonging to Mr John Coubrough, and the deceased and another workman had been for some days before 4th December 1901 engaged in cutting down these trees and removing them to the sawmill of the respondent. That on 4th December 1901 the deceased was killed by being crushed to death between a standing tree and the trunk of a tree which he was removing on a cart through the wood. That George Ellis, a gardener in the regular employment of Mr Coubrough, and who had charge of his woods, had previously marked the trees which were sold to the respondent."

On these facts the Sheriff-Substitute found that the deceased was killed while in the employment of the respondent, that the deceased was a "workman in agriculture," in respect that he was at the time of his accident engaged in forestry, and that the respondent, his employer, "habitually employed" such workmen in forestry in the sense of the Workmen's Compensation Act 1900, sec. 1; and consequently, that the respondent (the employer) was liable in compensation to the applicant under the Workmen's Compensation Act 1897.

Both the employer and the applicant appealed.

The questions of law stated for the opinion of the Court at the instance of the employer (respondent) were as follows—"(1) Is the employment of the respondent at which deceased met with the accident which caused his death an employment to which the Workmen's Compensation Act 1900 applies? and (2) Is the respondent an undertaker within the meaning of the Workmen's Compensation Acts 1897 and 1900, and as such liable in compensation to the applicant?"

In the view ultimately taken by the Court it was unnecessary to consider the questions stated at the instance of the applicant.

The Workmen's Compensation Act 1900 (63 and 64 Vict. c. 22), sec. 1, sub-sec. (1), enacts as follows:—"From and after the commencement of this Act the Workmen's Compensation Act 1897 shall apply to the employment of workmen in agriculture by any employer who habitually employs one or more workmen in such employment." Sub-section (3) . . . "The expression 'agriculture' includes horticulture, forestry, and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live-stock, poultry, or bees, and the growth of fruit and vegetables." Section 2—"This Act may be cited as the Workmen's Compensation Act 1900, and shall be read as one with the Workmen's Compensation Act 1897, and that Act and this Act may be cited together as the Workmen's Compensation Acts 1897 and 1900."

Argued for the appellant—The definition of "agriculture" in section 1, sub-section (3), of the Act of 1900 (63 and 64 Vict. c. 22), included forestry. Forestry meant planting and cultivation of trees and management of growing timber. The appellant was not the owner of a forest or a cultivator of timber, but merely a buyer of wood. The fact that he had to cut down the wood was merely an accident of his contract. In any case he was not an "undertaker," being neither the owner nor occupier of a forest.

Argued for the respondent — Cutting down wood was "forestry," and the appellant was liable as an "undertaker" to pay compensation.

At advising—

LORD JUSTICE-CLERK — The first question is, whether the operation which was being carried on was one of forestry. The operation was cutting down trees which the employer had purchased, putting the wood upon carts, and carting it away. As I am of opinion that the operation in which the deceased was employed was not forestry it is unnecessary to consider the other questions in the case.

LORD YOUNG and LORD TRAYNER concurred.

The Court pronounced this interlocutor:—

Sustain the appeal. Find in answer to the questions of law therein stated that the employment in which the deceased met with the accident which caused his death was an employment to which the Workmen's Compensation Acts 1897 and 1900 do not apply. Therefore recal the award of the arbitrator, and remit to him to dismiss the claim.

Counsel for the Appellants—Watt, K.C. —Guy. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—D. Anderson—Munro. Agents—Simpson & Marwick, W.S.

Thursday, June 19.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire at Airdrie.

PARKER *v.* WILLIAM DIXON, LIMITED.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule, secs.* 1 (*b*), *and* 2—*Partial Incapacity—Amount of Compensation.*

Where a workman had been injured, and as the result of his injuries was able to earn only £1 per week instead of 39s. 6d., the amount of his earnings previous to the accident, the Sheriff-Substitute, as arbitrator under the Workmen's Compensation Act 1897, awarded him compensation at the rate of 19s. 6d. per week. *Held* that this award was

in conformity with the provisions of Schedule I., sections 1 (*b*) and 2 of the Act, and appeal *dismissed*, in respect that the arbitrator, in the case of partial incapacity, was not, as had been contended by the employers, restricted by the terms of these sections to awarding not more than 50 per cent. of the difference between the earnings before and after the accident, but was entitled to award any sum which in the circumstances he might consider just, provided only that it did not exceed either 50 per cent. of the pursuer's previous average weekly earnings, or the sum of £1 per week.

This was an appeal from a decision of the Sheriff-Substitute at Airdrie in an arbitration under the Workmen's Compensation Act 1897, between William Dixon, Limited, iron manufacturers, Glasgow (appellants), and James Parker, furnace filler, Calder Street, Greenend, Coatbridge, claimant and respondent.

The facts found proved or admitted by the Sheriff-Substitute (MAIR) in the stated case were as follows:—"(1st) That prior to 20th March 1900 the respondent was engaged in appellants' works as a furnace filler at the weekly wage of 39s. 6d.; (2nd) that on that date he was by an accident arising out of and in course of his employment burned in the face and hands; (3rd) that in consequence of the injuries he thus sustained he was confined to the Alexandra Hospital, Coatbridge, for a period of eight weeks; (4th) that about 26th November 1900 he was employed by the appellants to do light work, and continued to perform such work until about 22nd May 1901, when the work ceased, and he was earning £1 per week; (5th) that it is admitted that his claim for compensation has been satisfied till 24th June 1901; (6th) that sometime after that date the appellants offered him the job of burner at Hoffman Kiln at a weekly wage of 33s., and that the respondent refused the offer on the ground that his injuries incapacitated him from performing it; (7th) that when he received the offer he was and still is incapacitated from performing the duties of a burner."

In these circumstances the Sheriff-Substitute held that the appellants were liable to pay compensation, and granted decree against the appellants, ordaining them to pay to the respondent the sum of 19s. 6d. (being the difference between his earnings of 39s. 6d. per week as a furnace filler, and the wage of 20s. per week which he could now earn at light work), beginning the first payment as on 2nd July 1901 for the week preceding that date, and so on weekly thereafter (with interest as craved) till the respondent was again able to earn his full wage, or until such weekly payment should be varied by the Court.

William Dixon, Limited, appealed.

The following questions were submitted for the opinion of the Court:—"1. Whether the parties having agreed that 9s. 9d. was the proper amount of weekly compensation due to respondent when he was earning £1 per week it is competent to increase the rate of compensation to 19s. 6d. when his earning capacity is still £1 per week. 2, Whether the rate of compensation, viz., 9s. 9d. per week, offered by the appellants on record, being 50 per cent. of the difference between respondent's average weekly earnings before the accident and his present earning capacity, is not in the circumstances the proper amount due?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Schedule 1, section 1, enacts—"The amount of compensation under this Act shall be . . . (*b*) where total or partial incapacity for work results from the injury a weekly payment during the incapacity after the second week not exceeding 50 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." Section 2 enacts—"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."

Argued for the appellants—9s. 9d. was the extent of the respondent's statutory right, being 50 per cent. of the difference between his average weekly earnings before the accident and his present earning capacity. Section 2 of Schedule 1 says, in fixing the amount "*regard shall be had to the difference*," . . . that implies by way of reduction, otherwise the effect would be to give as much compensation in cases of partial incapacity as in cases of total incapacity. The Sheriff-Substitute ought to have taken into account the respondent's present earning capacity. The case of *Geary* (cited *infra*), which the Sheriff-Substitute thought he was bound to follow, led to the respondent getting the whole of the difference between 39s. 6d. and £1, *i.e.*, 19s. 6d., as much as he would have got had he been totally incapacitated. The decision in that case ought not to be followed. The "difference" referred to in section 2 was meant to be subject to the limitation of 50 per cent. imposed by section 1 (*b*). The policy of the statute was that where the injury was not due to the fault of the employer, one-half of the loss resulting from the accident should be borne by the employer and the other by the workman. This policy applied to section 2 as much as to section 1 (*b*), and it was therefore incompetent for the arbitrator to award more than half of the difference between the former and the present rate of wages—*Pomphrey* v. *Southwark Press* [1901] 1 K.B. 86, *per* Collins, L.J., at. p. 91; *Irons* v. *Davis* [1899], 2 Q.B. 330.

Argued for the respondent—There was nothing in the statute to support the contention that only 50 per cent. of the difference between the rates of wages could be

awarded. Section 1 (*b*) of Schedule 1 provides that the compensation shall be 50 per cent. of the average weekly wages, such weekly payment not to exceed £1, and not 50 per cent. of the difference between the original and present wages. Within that limitation—50 per cent. of the original wages—the arbitrator may take into consideration the loss of earnings suffered by the workman. In the present case the loss was the difference between 39s. 6d. and £1, *i.e.*, 19s. 6d.; and it was competent for the Sheriff to award the whole of that difference. The present case was ruled by the case of *Geary* v. *Dixon, Limited*, May 12, 1899, 36 S.L.R. 640. The test of a workman's right to compensation was the diminution of his earning capacity—*Freeland* v. *Macfarlane, Lang, and Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 699.

At advising—

LORD JUSTICE-CLERK—The workman in this case received compensation for his injury to the amount of 19s. 9d. weekly up to 26th November 1900, being up to that time wholly incapacitated. From that time down to 22nd May 1901 he was employed at certain light work at wages of £1, and accepted from the defenders 9s. 9d. weekly during the time he was earning £1. At that date—22nd May 1901—the work for which he was paid £1 of wages came to an end, and his employers offered him in lieu of it other work, the wages for which are £1, 13s., but he refused it on the ground that he was by the accident incapacitated for it. This was the fact. Accordingly he asked the arbitrator to award him compensation.

The Sheriff arbitrator, taking his earning capacity as £1, has awarded to him 19s. 6d. of compensation.

The appellants maintain that, as he now has earning capacity, and as that under the schedule is a matter to which "regard" is to be had in considering the compensation, it was incompetent to give an award up to the maximum allowed by the statute—19s. 6d. being practically one-half of his earnings at the time of the accident.

Upon a careful consideration of the matter I have come to be of opinion that this contention of the appellants is not sound. I hold that whether the incapacity be total or partial, it is in the discretion of the arbitrator, on a consideration of the whole circumstances, to award half of the former earnings, or any less sum, as long as the sum awarded does not exceed £1. I think the sound principle is expressed in *Geary's* case, that the compensation is for the difference between his earning capacity at the time of the accident and his earning capacity after the accident, this latter being of course in many cases a varying quantity from time to time, as changes take place in the measure of improvement in recovery, and this is provided for by the statute, as application to vary the amount of the weekly payments may be made from time to time. Here the Sheriff has awarded a sum not in excess of the amount competent to be given under the statute, and not bringing the amount he can receive from wages at £1 and the sum awarded above what he earned with his full capacity. I am unable to hold that he was not entitled legally to make such an award, and I am therefore in favour of answering the first question in the affirmative. The second does not require reply, relating to no real question of law.

LORD YOUNG—I am of the same opinion. There is no dispute that compensation is due, and the compensation being in respect of incapacity to work caused by an accident falling within the statute, it is left to the arbiter to determine its amount, subject only to these two checks—(first), that it shall not exceed 50 per cent. of the workman's average weekly earnings during the previous twelve months, if he has been so long in the employment, and (secondly), that it shall not in any event exceed £1 a-week. Now, in fixing the amount here the arbiter has not violated either of these checks; the sum awarded does not exceed 50 per cent. of his average weekly earnings, and does not exceed £1 per week. The argument against the award, however, is this, that if no more could be given him when he is earning nothing, so much cannot be given him when he is earning something. The arbiter could not, even when he was earning nothing, have given him more, for he would have been restrained by the Act from giving more than 50 per cent. of his average weekly earnings.

The same restraint was upon the arbiter here, but he was entitled to give the same sum if he thought fit to do so.

LORD TRAYNER—The questions appended to this special case are not well framed. The second of them raises no question of law, and may therefore be disregarded. But the first question is intended to raise the point whether the Sheriff-Substitute has acted within his power in reaching the award now appealed against. Having regard to the language of the statute I cannot say that the Sheriff-Substitute has exceeded his power. I think the statute leaves it to the Sheriff-Substitute to fix the weekly payment to the injured workman provided he does not award more than the half of the workman's average weekly earnings at the date of the injury, or give more in any case than 20s. a-week. Neither of these limitations has been violated by the Sheriff-Substitute, and his award therefore does not seem to me to be open to challenge.

LORD MONCREIFF was absent.

The Court found in answer to the questions of law that the award of the arbitrator was in conformity with the terms of the Workmen's Compensation Act 1897, and therefore dismissed the appeal, and affirmed the award of the arbitrator.

Counsel for the Appellants—Salvesen. K.C.—Hunter. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Orr—A. M. Hamilton. Agents—Clark & Macdonald, S.S.C.