must remember that nothing would have been easier than for the prisoner to have called a witness who could have said—"This man gets his living by working at such-and-such a trade, and has been doing so during the last few months." Further than that you must remember with these three convictions—although it is necessary by the explicit declaration of the statute that you should have to prove three convictions—their effect does not end there. That is to say, they are perfectly good evidence which may carry you so far upon the inquiry as to whether this man is habitually leading a dishonest life, because when a person is convicted at very short intervals it is not very difficult to infer that he is leading a dishonest life. Now, last of all, you have not only the three convictions, but you have got the conviction for which he has not yet been sentenced, but upon which your verdict of to-day stands. Gentlemen, it is for you to say as men of common sense whether that is not enough, although it is the fact no doubt that the persons who have come here to-day have, so to speak, lost sight of the prisoner for about something like twelve months until they caught sight of him again by his turning up for the very crime of which you have convicted him this morning. I do not need to say any more. You will now consider whether you will return a verdict for this man as a habitual criminal.

The jury returned a verdict of guilty of being a habitual criminal.

The SOLICITOR-GENERAL then moved for sentence on the first charge, whereupon counsel for the panel objected to sentence being pronounced on the ground that after the panel had been convicted on the first charge in the indictment, the diet against him had not been formally adjourned by written interlocutor before the second charge was proceeded with. Reference was made to *Corstorphine* v. *Jamieson*, December 10, 1909, 47 S.L.R. 247.

LORD JUSTICE-GENERAL—I have no difficulty in repelling this objection. I do not think that there was any necessity in this case for an adjournment. I think it would be most unfortunate if there was, because if the objection by counsel was good, it would have been necessary for us to have sentenced the prisoner upon the first charge before we went into the question of whether he was found to be a habitual criminal or not, and that really would prevent the Court doing what it can otherwise do now, viz., to consider the two sentences together. I do not think that the case quoted has any application. It was a case where one case being finished another and separate case was gone on with under a different complaint. All these matters here are on the one indictment, and the inquiry is one continuous inquiry, and therefore there was no necessity for an interlocutor or adjournment at all.

LORD JUSTICE-CLERK—I am entirely of the same opinion. The purpose evidently is that the jury in considering the first part of the case against the prisoner, viz., the question whether he has committed the crime in question, should not have their minds disturbed by having the evidence before them that he is a habitual criminal, but they should come to their deliverance on the first part of the case absolutely unbiassed by anything they may get to know about his previous history. This other part of the indictment is to be proceeded with after the first has been disposed of by the jury, and it is as absolutely clear as anything can be that the Court could not consider how to deal with the case as regards the first branch of it without knowing what the judgment was on the second branch, because the question of whether the detention under the Act of 1908 is to be of a certain duration or not, and the question whether the previous sentence of penal servitude as it must be under the Act is to be of a certain duration or not, are two questions which are necessarily looped together, and without taking them both together I do not see how the Court could arrive at a just result to the prisoner.

LORD LOW—I am of the same opinion.

LORD DUNDAS—I agree.

The panel was then sentenced to three years' penal servitude, and thereafter to five years' detention.

Counsel for the Crown—Sol.-Gen. Dewar, K.C.—A.-D. Morison, K.C.—A.-D. Lyon Mackenzie. Agent—W. S. Haldane, W.S., Crown Agent.

Counsel for the Panel—Valentine. Agents—Wilson & Matthew, S.S.C.

COURT OF SESSION.

Thursday, February 10.

FIRST DIVISION.

BOWHILL COAL COMPANY (FIFE) LIMITED *v.* MALCOLM.

(*Ante*, vol. xlvi, p. 354.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII*, *cap.* 58), *sec.* 1 (3), *and First Schedule, Paragraphs* (1) (*b*), (3), *and* (16)—*Right of Employers to have Compensation Declared at an End when the Injured Workman is under Twenty-One and Returns to Work at Same Wages as before.*

Where an injured workman, at the date of the accident under twenty-one years of age, returns to work with his employers, the fact that he earns the same wages as before the accident is not necessarily conclusive that the employers are entitled to have the compensation declared at an end, but the arbiter should determine—having in view the workman's age at the time of the accident, and having in view the time that has elapsed since then—

whether, on the date at which the employers aver incapacity ceased, the workman's earning capacity was the same as or less than it would have been had he not been injured.

Per Lord Kinnear—"Although the amount that a man is actually earning at the moment may be evidence tending to instruct the average weekly amount he is able to earn, and may be sufficient if the Sheriff so finds, it is not in itself, apart from the special circumstances of the case, so conclusive as to preclude the Sheriff from taking other relevant facts into consideration."

Opinion (*per* Lord Johnston) that when the workman is not under twenty-one years of age, and returns to work with his employers and earns the same wages, that entitles the employers to have the compensation declared at an end.

(*See Bowhill Coal Company* (*Fife*) *Limited* v. *Malcolm*, 1909 S.C. 426, 46 S.L.R. 354.)

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (3), enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act."

First Schedule—"(1) 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 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: Provided that . . . (*b*) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, one hundred per cent. shall be substituted for fifty per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings. . . . (3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and 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, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper. . . . (16) 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, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act: Provided that where the workman was at the date of the accident under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound. . . ."

The Bowhill Coal Company (Fife) Limited being dissatisfied with a determination of the Sheriff-Substitute (HAY SHENNAN) at Kirkcaldy acting as arbiter under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in an arbitration between them and Francis Malcolm, miner, Bowhill, Cardenden, Fifeshire, appealed by way of stated case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which, by minute for the appellants lodged on 29th July 1908, the Sheriff of Fife and Kinross at Kirkcaldy is asked to grant an order declaring that upon the 13th day of April 1908 the respondent had regained his earning capacity, and terminating his right to compensation in respect of an accident sustained by the respondent in the course of his employment with the appellants on 23rd March 1908. The respondent opposed the granting of this order, and a proof was led before me on 23rd April 1909, when I made avizandum. On 5th May 1909 I issued an interlocutor, in which I found in fact (1) that the accident to the respondent on 23rd March 1908 caused a hernia of an exceptionally bad character; but it was reduced under chloroform, and has not recurred; (2) that having obtained a well-fitting truss respondent returned to work on 13th April 1908, and has continued at work since that date; (3) that he has been able to do the same work as formerly, except that he cannot lift such heavy weights or employ unusual exertion for fear of bringing down the hernia; (4) that on 13th April 1908 the respondent had not completely recovered from the effects of the accident of 23rd March, and he has not yet completely recovered; (5) that respondent being now only eighteen years old will probably be completely cured in a year or two if he continues to wear a well-fitting truss, but at present excessive exertion might cause the hernia to reappear. Evidence was led as to the wages actually earned by the respondent after 13th April 1908. It was to the effect that since that date the respondent has earned much the same wages as before the accident, but the precise amount for the whole of that period could not be ascertained, because respondent's father always drew the pay for himself and his sons, and did not always apportion it among them. There was also evidence that on account of his injury

respondent had not been credited with the increase in pay which a lad of that age is entitled to expect.

"I considered this evidence in making my award. But in issuing that award I did not make a specific finding on the point, because I wished to avoid the appearance of prejudging the claim which the respondent makes, in his minute of 26th April 1909, for increase of compensation under the proviso to Schedule I, clause 16, of the Act.

"I was of opinion that the fact of respondent earning the same wages after 13th April 1908 as before the accident was not conclusive evidence that he had regained his earning capacity at that date, and that the possibility of a recurrence of the hernia in restricting his freedom of exertion was an important element to be taken into account. In these circumstances I refused the crave of the defenders' minute of 29th July 1908 and awarded expenses to the respondent."

The *questions of law* were—"(1) Does the fact that the respondent earned the same wages after 13th April 1908 as before the accident in itself entitle the appellants to have his compensation declared at an end? (2) On the foregoing facts were the appellants entitled to have the respondent's right to compensation terminated?"

Argued for the appellants—The fact that the same wages were being earned by the workman now as before the accident was conclusive and the arbiter should have ended the weekly payment. Ability to earn was not to be considered under First Schedule (3) where there were actual earnings. If the award were left standing, then the wages and the award would amount to more than the former earnings; but a workman could never under the Act get more than what he was earning before the accident, and this was not affected by the proviso in paragraph (16) of First Schedule. The arbiter was bound under that paragraph to end, diminish, or increase the compensation, and it was not open to him to postpone his decision just as it was incompetent to postpone the question by an interim nominal award of one penny per week—*Clelland* v. *Singer Manufacturing Company*, July 18, 1905, 7 F. 975, 42 S.L.R. 757—though it was true this decision had been doubted in *Owners of the Vessel "Tynron"* v. *Morgan*, [1909] 2 K.B. 66.

Argued for the respondent—The respondent was entitled to have the crave of the minute refused because there might be supervening incapacity, and because as he was only eighteen at the time of the accident it might well be that had it not been for the accident he would now have been earning more than when he was eighteen. The mere fact (if it were a fact, for it was not clearly found) that the same wages were earned now as before the accident did not in itself entitle the appellants to have the compensation ended, especially in view of the fact that the respondent was under twenty-one. Even apart from the specialty as to age, the question of whether the arbiter could keep alive the power of going back to him had been expressly reserved in *Nicholson* v. *Piper*, [1907] A.C. 215, 45 S.L.R. 620.

At advising—

LORD PRESIDENT — This is a case in which unfortunately the statement of facts is not altogether satisfactory. We are told that this is an arbitration in which, by minute for the appellants—that is, the employers—the Sheriff was asked to grant an order declaring that upon the 13th day of April 1908 the respondent had regained his earning capacity, and terminating his right to compensation in respect of an accident sustained by the respondent in the course of his employment with the appellants on 23rd March 1908. The respondent opposed the granting of this order, "and proof was led before me on 23rd April 1909, when I made avizandum." The Sheriff then says that he issued an interlocutor in which he found in fact that the workman had an accident on 23rd March 1908 which caused a hernia of an exceptionally bad character; that it was reduced under chloroform, and has not recurred; that having obtained a well-fitting truss, respondent returned to work on 13th April 1908, and has continued at work since that date; that he has been able to do the same work as formerly, except that he cannot lift such heavy weights or employ unusual exertion for fear of bringing down the hernia; that on 13th April 1908 the respondent had not completely recovered from the effects of the accident; and that being only eighteen years of age he probably will recover in a year or two. Then the question of wages is gone into, and the Sheriff states that the respondent has earned much the same wages as before the accident, but the precise amount is somewhat difficult to ascertain, because he was paid along with his father. The Sheriff refused the crave of the appellants and awarded expenses to the respondent, and the question of law put to us is—"Does the fact that the respondent earned the same wages after 13th April 1908 as before the accident in itself entitle the appellants to have his compensation declared at an end?"

Now I say this is unsatisfactory, because there is one fact which I do not find anywhere stated definitely and which one would have liked to have known, and that is, whether compensation was as a matter of fact being paid at the date of this application or not. Now the difficulty of the matter arises thus, that in the First Schedule of the Act, section (3), it is provided that "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and 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." That

canon is applied to an application for review, because section (16) of that schedule says—"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, subject to the maximum above provided." Accordingly, if it was the case that it was found as a matter of fact that the average weekly earnings which the workman was able to earn were equal to what he was able to earn before, there would be then no case either for giving an award if it was an original application, or for not declaring that it was ended if it was an application for a review, but your Lordships will notice that the finding of the Sheriff is not that. He only finds that as matter of fact the weekly wages have been much about the same, but it does not say whether the man's capacity to earn wages is exactly the same as it was before; and this is accentuated by the fact that he is not eighteen, for in section (16) there is also a proviso that "Where the workman was at the date of the accident under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured."

Accordingly I do not think there are any facts here stated to us upon which we can pronounce a practical judgment, and I think the case must go back to the Sheriff in order that he may determine—having in view that the man was only eighteen years of age when the accident happened, and having in view the time that has elapsed since then—whether his earning capacity now is the same as it would have been but for the accident. Of course the fact of what wages he is earning is a fact which will be taken into account in coming to that conclusion, but that is not a fact which *per se* concludes the matter, and I think therefore the case must go back to the Sheriff in order that he may apply his mind to the question whether this man's earning capacity in respect of the accident has been reduced or not. If it has not been reduced, then of course the compensation must come to an end; if it has been reduced, then *pro tanto* there must be some compensation, the amount of which I cannot say.

LORD KINNEAR—I agree. If we had to answer the question as it is put—"Does the fact that the respondent earned the same wages after 13th April 1908 as before the accident in itself entitle the appellants to have his compensation declared at an end?"—I think the doctrine explained by Lord Adam in the case of *Clelland*, 7 F. 975, would apply. It is true that that is a decision as to the effect of the Act of 1897, which is expressed in different terms from those of the corresponding enactment in the Act of 1906. But the difference does not, to my mind, affect Lord Adam's reasoning to the effect that although the amount that a man is actually earning at the moment may be evidence tending to instruct the average weekly amount he is able to earn, and may be sufficient if the Sheriff so finds, it is not in itself, apart from the special circumstances of the case, so conclusive as to preclude the Sheriff from taking other relevant facts into consideration. I think, therefore, that as the case is stated, other facts which have been proved before the Sheriff ought to be taken into account to enable him to form a definite judgment. I agree with your Lordship that in the special circumstances this case must go back in order that the Sheriff may apply his mind to all the facts.

There may be various questions which might be raised if the case had been finally disposed of by the Sheriff, but at present they do not call for decision, and I express no further opinion than that the case ought to be remitted in the terms proposed.

LORD JOHNSTON—The accident to Francis Malcolm occurred on 23rd March 1908. It occasioned a rupture, for which he was under treatment for two or three weeks, but was able to return to work on 13th April 1908, and I must assume from the Sheriff's statement that from that date onwards in point of fact he earned the same wages as before the accident. If he has not done so, or if he has made the precise ascertainment now impossible by leaving his father to draw his wages, that is his fault, and the point must be, I think, assumed against him, particularly having regard to the report of the previous stage of the case to be found in 1909 S.C. 426. For it appears that at the outset he was fairly faced with this question by his employers in their note of defence to his original claim, for they pointedly averred that since 13th April 1908 he had been earning not only the same wages but "more than he did before the date of his accident."

In an application under the Workmen's Compensation Act 1906, lodged 11th July 1908, Malcolm was awarded compensation for the two and five-sixth weeks up to 13th April 1908—and at that time he claimed no more—in respect of the injuries sustained. The case was heard on 27th July, but before the Sheriff had disposed of the application the employers, the Bowhill Coal Co., Ltd., lodged a minute in the arbitration process craving the Sheriff to grant an order declaring that upon the 13th day of April 1908 the respondent had regained his earning capacity, and terminating his right to compensation in respect of the said accident as at that date. The Sheriff in awarding compensation, which he did on 30th July 1908, did not deal with the employers' minute, and, the employers appealing, this Court on 28th January 1909 corrected a mistake in the form of his award, and remitted to him to proceed as accords (1909 S.C. 426).

On reconsidering the case the Sheriff has held that the fact that Malcolm was

earning the same wages as before the accident was not conclusive evidence that he had regained his earning capacity at that date. The injury resulting from the accident being hernia, he considered that the possibility of its recurrence restricted Malcolm's freedom of exertion, and was an important element to be taken into account. He therefore refused the crave of the employers' minute to have the compensation ended. The employers have again appealed, and the first and principal question submitted is—"Does the fact that the respondent earned the same wages after 13th April 1908 as before the accident entitle the appellants to have his compensation declared at an end?"

If there were no specialty in the case, I should be of opinion that this question fell to be answered in the affirmative. The rights conferred on workmen by the Workmen's Compensation Acts 1897 and 1906 do not flow from the common law, or from any application of legal principle; on the contrary, they controvert an established principle of the common law, that the workman undertakes the risk ordinarily incident to his employment, and confer upon him a right which is entirely the creation of the statute, and the measure of which is the statute. In its details it must be judged of by the precise terms of the statute, unaffected by any other considerations, such as received effect in the case of *Owners of the "Tynron"* v. *Morgan*, [1909] 2 K.B. 66, the authority of which I am unable to accept.

A good deal of difficulty is introduced into questions of workmen's compensation by reason of the statutory provision being distributed between the statute itself and two long schedules having statutory force —each of the three being, as may be termed, self-contained.

The statute provides, section 1, that if personal injury by accident arising out of and in the course of his employment is caused to a workman, his employer shall be liable to pay compensation in accordance with the first schedule to the Act. And if any question arises in any proceedings under the Act as to the liability to pay compensation, or as to the amount or duration of compensation, the question, if not settled by agreement, shall be settled by arbitration under the second schedule to the Act.

In ascertaining the compensation to be paid and all the conditions thereto attaching, we are directed to the first schedule, in dealing with which I discard all reference to the provision for compensation in the cases where death results from the injury, and confine attention to those only where total or partial incapacity for work results. In these latter cases section (1) of the first schedule declares that the amount of compensation shall be "a weekly payment during the incapacity, not exceeding 50 per cent. of his average weekly earnings during the previous twelve months" or during such shorter time as the workman may have been engaged in the employer's employment, such weekly payment not exceeding £1, with a special proviso in favour of workmen under twenty-one years of age at the date of the injury, who in the case of total incapacity if their average weekly earnings are less than £1 are to receive 100 per cent. thereof instead of 50, but such weekly payment in no case to exceed 10s. It is thus left to the tribunal which is to assess the compensation to determine the actual percentage of the average weekly earnings, subject to the limits which I have mentioned where respectively applicable.

But then section (3) of the first schedule contains in the case of partial incapacity a very absolute limitation upon the power of the assessing tribunal, for it provides that in fixing the amount of the weekly payment 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, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

I understand the expression "which he is earning or is able to earn" as meaning which he is *de facto* earning where he has returned to employment or would be able to earn if he returned to employment. If he has returned to employment there is no room for inquiring into hypothetical earning capacity. That is only required where he is fit for employment and has not sought it, or failed to find it. And even then it is present earning capacity, and not future earning capacity under any other or changed circumstances, which the assessing tribunal is required to consider.

The Sheriff has found that the fact of the workman earning the same wages after 13th April 1908 as before the accident was not conclusive evidence that he had regained his earning capacity at that date. But in so finding I think that the learned Sheriff has not sufficiently adverted to the very precise terms of the provision which he was applying. In the case before him "earning capacity," a term which I think has often been rather loosely used and is not a statutory expression, was concluded for him by actual earnings, and he was not concerned with hypothetical earnings. I am aware that this is a strict reading of the Act and its schedule, but I am led to it by the consideration to which I have already adverted, that there is no room for other than the statutory considerations in applying the provisions of the Act. Now the Sheriff in disposing of the remit to him was not fixing *ab initio* the amount of the weekly payment to be made as compensation, because that was done at an earlier stage with reference to the brief period of total incapacity. Whether any difference in the allowance was made under proviso (*b*) of section (1), sub-section (*b*), of the first schedule, by reason that the incapacity dealt with was total and the workman under twenty-one, does not appear, as we do we know the basis of assessment. From

the figures I should judge that there was none. He is now required to proceed under the first half of section (16), which provides that any weekly payment may be reviewed at the request of either party, "and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall in default of agreement be settled by arbitration under this Act." That appears to me to infer that there is to be a reconsideration or reassessment *de novo* of compensation or of the weekly payment to be made; and as in the first instance, so in the review or reassessment, the assessing tribunal is, I think, bound to have in view the provisions of the third section of the schedule to which I have just referred. The incapacity at best can now only be deemed partial, and for partial incapacity that section lays down a very definite rule which admits, as I have shown in the present case, of no hypothetical considerations. It is actual earnings that the arbiter must go by.

Instead of confining himself to his strict statutory duty, the Sheriff has projected himself into the future, and has conceived the possibility—and I fully admit that there is a possibility—that at some future time there might be a recrudescence of the result of this accident, and on that consideration he has refused to deal with the employers' demand. In the peculiar circumstances of the case he has been able simply to give the question the go-by, whereas the schedule contemplates either that the weekly payment should be continued or should be ended, diminished, or increased. This course has been rendered possible by the fact that no payment is being made or demanded. The workman took his assessed compensation for the two and five-sixths weeks of total incapacity, and apparently recognising that he could and should return to work at his old wage has demanded no further payment, and more than eighteen months have elapsed since the accident. Had the compensation assessed continued to be paid, as is the more usual circumstance, the Sheriff must have applied his mind to continuing, ending, diminishing, or increasing. In face of the fact that the full prior wages were being earned, it is impossible under the statute that he could have avoided ending it except by the device of awarding an illusory payment. This I think he has in effect done, for I see no difference except in form between awarding one penny per week and suspending the whole matter. Now it has been determined by this Court in *Clelland* v. *Singer Manufacturing Company*, 7 F. 975, that the practice of awarding an illusory payment for the purpose of keeping open the question is incompetent and illegal. By that judgment I am bound until it is reconsidered or reversed; and consistently with it I think that the Sheriff was not justified in hanging up the question as he has done.

But for a specialty to be immediately adverted to, I have therefore no doubt that we ought to answer the question put in the affirmative and remit to the Sheriff to proceed as accords.

But this case is exceptional. The workman is under twenty-one years of age, and twelve months have elapsed since the accident. The latter half of section (16) of the first schedule of the Act provides that where review takes place under these circumstances "the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound." The workman here, while the Sheriff had the remitted case before him on 26th April, lodged a minute asking for an increase of compensation under this proviso, and the Sheriff says that there was evidence before him that, on account of his injury, the workman had not been credited with the increase of pay which a lad at his age is entitled to expect. I think that before disposing of the matter which is the subject of this appeal the Sheriff should have considered and determined the question raised by this minute. For aught that we know, the workman but for his injury might have been earning more than he does at present, and if so, he may still be entitled to some compensation.

But it is very difficult to work section (1) (*b*), section (3), and section (16) together, consistently with giving each its literal effect. It is more than probable that when section (3) was drafted section (16) was not in contemplation. The payment is, section (1), to be a percentage of average weekly earnings. It is, section (3), not to exceed the difference between prior earnings and actual or potential present earnings, while, section (16), it may be increased to any amount not exceeding 50 per cent. of what the minor workman might have been earning had he remained uninjured. The fact is that section (16) only expressly contemplates the case of total disablement, ignores the case of partial disablement and return to employment, and disregards proviso (*b*) of section (1). To complete the idea of the Legislature it would be necessary to read section (3) as meaning by implication that the weekly payment shall in no case exceed the difference between the average weekly earnings of the workman, actual before the accident, or constructively increased after the accident in accordance with section (16), and the average weekly amount which he is earning or is able to earn after the accident. While I think that this is a wide stretch of construction, I think the intention of the Legislature is sufficiently clear to make it legitimate.

In these circumstances I think with your Lordships that the case must be sent back to the Sheriff.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"*Hoc statu* refuse to answer the questions of law in the case: Recal the

determination of the Sheriff-Substitute as arbitrator appealed against: Remit to him to determine whether on 13th April 1908 the pursuer's earning capacity was the same as or less than it would have been had he not been injured by the accident founded on, and to proceed as accords, and decern: Reserve all questions of the expenses of the stated case on appeal, with power to either of the parties to move this Court after the arbitrator has determined the matter above remitted to him."

Counsel for the Appellants — Horne — Strain. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Watt, K.C. —Wilton. Agent—D. R. Tullo, S.S.C.

Tuesday, March 8.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Dumbarton.

PATERSON AND ANOTHER *v.* WILLIAM BEARDMORE & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* 17 (*b*)—*Process—Stated Case—Certificate of Refusal—A.S.*, 26*th June* 1907, *sec.* 17 (*c*) *and* (*h*).

A certificate of refusal to state a case for appeal under the Workmen's Compensation Act 1906 must be written on a separate paper and not on the interlocutor sheet in the arbitration process.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. ii, sec. 17 (*b*), enacts—"Any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily . . . subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session. . . ."

The Act of Sederunt, 26th June 1907, section 17, enacts—"The following regulations shall apply to cases to be stated by a Sheriff in virtue of the provision contained in paragraph 17 (*b*) of the second schedule appended to the Act. . . . (*c*) Should the parties or their agents fail to agree as to the terms of the case, these shall be settled by the Sheriff, provided always that if the Sheriff on a draft case being submitted to him is of opinion that any question of law stated in it was not raised by the admissions made or the facts proved before him, or that the application for a case is frivolous, he may refuse to state or sign the case, but in that event he shall grant to the applicant a certificate specifying the cause, and bearing the date, of the refusal. . . . (*h*) When a Sheriff has refused to state and sign a case, the applicant for the case may, within seven days from the date of such refusal, apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note . . . . shall be accompanied by the above-mentioned certificate of refusal, and shall state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise. . . ."

On 8th March 1910 William Paterson, apprentice joiner, Greenfield Street, Govan, and another, presented a note to the First Division for an order on the respondents William Beardmore & Company, Limited, shipbuilders and engineers, Dalmuir, to show cause why a case should not be stated in an arbitration under the Workmen's Compensation Act 1906 raised at the company's instance against the petitioners. The note stated that the appellants, on 27th December 1909, craved the Sheriff-Substitute (BLAIR) at Dumbarton, acting as arbiter, to state a case for the First Division of the Court of Session; that on 20th January 1910 the Sheriff-Substitute refused to state a case; that the appellants duly applied for a certificate of refusal to the Sheriff-Clerk, but that no such certificate had been issued?

Counsel for appellants stated that they had been unable to obtain the usual certificate of refusal owing to its having been written on the interlocutor sheet in the arbitration process, and that accordingly they had been unable to lodge it along with the present note. In these circumstances he craved the Court to hold a copy of the Sheriff's interlocutor as equivalent to a certificate of refusal, and to pronounce the usual order.

LORD PRESIDENT — In this case the respondents, in an application under the Workmen's Compensation Act for review of compensation which was being paid by an employer to a workman, upon a certain judgment being pronounced by the Sheriff acting as arbitrator, applied to the Sheriff to state a case on what they considered to be an erroneous decision on a point of law. The Sheriff decided that the facts were not such as entitled him to state a case.

The Sheriff's duty in that matter is regulated by the 17th section of the Act of Sederunt of 26th June 1907, which provides—"(*c*) Should the parties or their agents fail to agree as to the terms of the case, these shall be settled by the Sheriff, provided always that if the Sheriff, on a draft case being submitted to him, is of opinion that any question of law stated in it was not raised by the admissions made or the facts proved before him,"—I may remark in passing that this provision also applies where there is no room for stating a case at all,—"he may refuse to state or sign the case, but in that event he shall grant to the applicant a certificate specifying the cause and bearing the date of the refusal." It is