Friday, June 3.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court at Edinburgh.

ROSIE *v.* MACKAY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Schedule I, sec.* 12—*Review of Weekly Payment—Nominal Award—Competency.*

In an application by an employer for review of a weekly payment to a workman, the medical referee, whose report the parties had of consent agreed to accept, reported that the workman while able for his ordinary work was still suffering from ruptures caused by the accident which might prove detrimental to him in the future. *Held* that it was incompetent to make a nominal award of a penny a week so as to keep the question of compensation open, and compensation *terminated.*

Clelland v. *Singer Manufacturing Co.*, July 18, 1905, 7 F. 975, 42 S.L.R. 757, *followed and approved.*

Owners of "Tynron" v. *Morgan*, [1909] 2 K.B. 66, *disapproved.*

Opinions (*per* Lords Low and Skerrington) that the proper course was to sist procedure, with leave to either party to renew the application in the event of a change of circumstances occurring.

Opinion (*per* the Lord President) that the medical referee's report while conclusive as to the workman's physical condition, was not conclusive as to his wage-earning capacity, and that it would have been competent for the workman to have tendered evidence that the wage-earning capacity of a ruptured man was less than his capacity before the accident, and that on that evidence the Sheriff might have come to a conclusion.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Schedule I, section 12, enacts—"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."

The following narrative is taken from the opinion of the Lord President:—"This is a stated case under the Workmen's Compensation Act 1897, and the facts upon which the matter arises are these. The respondent, while working as a mason in the employment of the appellant in Edinburgh on 20th November 1906, had a fall from a gable wall and sustained injuries. He became totally incapacitated for work in respect of these injuries, and was allowed 18s. per week by the appellant. On 19th July 1909 the appellant presented an application to have the weekly payment reviewed in terms of section (12) of the first schedule of the Act of 1897, on the averment that the respondent's incapacity for work arising out of the accident had either entirely ceased or at least was greatly diminished. The respondent maintained that he was still totally and permanently incapacitated for work. The parties having thus joined issue, before any proof had been led or tendered, lodged a joint minute in which they consented to a remit to a medical referee in terms of the Workmen's Compensation Act 1897, and for that purpose they agreed upon the following as the statement of the circumstances of the accident and of the injuries to the respondent—'While engaged in the demolition of a tenement, and when working on the top of a gable wall, the wall gave way and the applicant was precipitated to the basement of the building, whereby he sustained injuries as follows—several of his ribs were broken, he was severely bruised, and he was also ruptured.' Upon that joint minute being lodged the Sheriff-Substitute pronounced this interlocutor—'Having considered the joint minute for the parties now lodged, in respect thereof, and of consent of parties, makes a reference to Dr Wallace, Edinburgh, medical referee.' The question which was put to the medical referee was to ask him to report 'Whether, in so far as medical examination can show, the applicant is still totally incapacitated for work; and if not totally incapacitated for work, whether he has recovered his whole capacity for work, or whether he has only partially recovered his capacity for work, and in this last event what proportion of his former capacity for work he has recovered.'

"The referee returned a report dated 8th September 1909 in the following terms—'I have examined Alexander Mackay at 41 Drummond Place on 8th September 1909, and I beg to report as follows on the questions submitted to me—(1) The applicant Alexander Mackay is not incapacitated for work. (2) He is able for his ordinary work.' Upon that report a discussion followed, and the Sheriff-Substitute found that in respect of the statements made at the bar by the workman's agent, the medical referee ought to be communicated with in order to clear up doubt as to the footing on which he proceeded in giving his said report. He ordered the sheriff-clerk to write a letter to the medical referee. I do not need to read that letter in full, but it put to the medical referee that the Sheriff was informed that the rupture was a double hernia, and that the rupture still existed; that the Sheriff had heard no proof in the case, the remit being by consent of parties; and that the Sheriff was therefore of opinion that the case must be taken and decided on the footing that the workman was ruptured through the accident. It went on to say that 'The Sheriff desires you to inform him whether your report is to be taken that notwithstanding double hernia still remains as the result of the accident, the workman has totally recovered his capacity for work as a mason's labourer, or whether he is to

take your report as meaning that you have not regarded the ruptured condition as a result of the accident.'

"The medical referee replied to that letter in the following terms—'I gave my report after examination of the workman Alexander Mackay, and consideration of the double rupture from which he suffers, and in my opinion the ruptures (herniæ) do not incapacitate him from following his ordinary occupation. The agents for the employers and workman have agreed that the workman was ruptured through the accident, and the Sheriff is therefore of opinion that the case must be taken and decided on that footing. It is only right therefore that I should say that although I consider the ruptures do not at present prevent Alexander Mackay from doing his ordinary work, yet they may, and probably will, in the future become more marked (*i.e.*, increase in degree) and prove detrimental to him.'

"Upon the discussion on that answer the Sheriff-Substitute made the following findings. He first found as to the facts of the accident, and as to the compensation having been *de facto* paid at the rate of 18s. per week; and then he comes to finding (5)—'That the claimant has now partially recovered his capacity for work, but still suffers from rupture, viz., double hernia, as the result of said accident; in these circumstances diminishes the weekly payment payable to the claimant under said memorandum of agreement to the sum of 9s. per week as from 19th July 1909, being the date of lodging of the present application for review,' and grants decree for the same. That finding has been brought up by this stated case."

The *questions of law* for the opinion of the Court included the following:—"4. In the absence of other evidence than the admissions of parties and the medical referee's reports, was I entitled to find that partial incapacity continued and to award a weekly payment of 9s.?"

The case was heard by the Second Division on 29th January 1910, and thereafter appointed to be argued by one counsel on each side before Seven Judges.

The case was heard before the Lord President, the Lord Justice-Clerk, and Lords Low, Ardwall, Dundas, Johnston, and Skerrington.

Argued for the respondent—The Sheriff's finding was one of partial incapacity, for which there was sufficient evidence. The test of a workman's right to compensation was the diminution of his earning capacity in the future by reason of the injury received—*Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599; *Bowhill Coal Company (Fife), Limited* v. *Malcolm*, February 10, 1910, 47 S.L.R. 449. In the present case the workman, though now able for his ordinary work, had sustained an injury from which supervening incapacity might occur. The practice of the Court in dealing with similar injuries was not to end the compensation but to award a nominal sum so as to keep the matter open—*Ferrier* v. *Gourlay Brothers*, March 18, 1902, 4 F. 711, 39 S.L.R. 453; *Owners of the Vessel "Tynron"* v. *Morgan*, [1909] 2 K.B. 66;* *Griga* v. *The Owners of the Ship "Harelda,"* February 7, 1910, 26 T.L.R. 272. In *Nicholson* v. *Piper*, [1907] A.C. 215, there were dicta to the same effect.

Argued for the appellant—*Esto* that so long as the respondent's present condition continued his working capacity was unimpaired, the question was whether the statute warranted a *de presenti* allowance for an incapacity which might or might not exist in the future. The words of the schedule were irreconcilable with such a course being followed. *Ex hypothesi* the man's incapacity had ceased, and therefore under the statute a substantial award was clearly excluded—*Clelland* v. *Singer Manufacturing Company*, July 18, 1905, 7 F. 975, 42 S.L.R. The ratio of that decision was that the Act intended every case to be finally disposed of within six months, and a nominal award for the purpose of keeping the compensation open was therefore inconsistent with the design of the statute. The case of the "*Tynron*," *cit. sup.*, was really based on practice, and not on an examination of the statute. The other course which had been adopted, viz., that of making a declaration of liability and postponing consideration as in *Chandler* v. *Smith*, [1899] 2 Q.B. 506, and *Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599, was equally incompetent, for it was not authorised by the statute.

At advising—

LORD PRESIDENT — [*After narrative, supra*]—I understand that your Lordships of the Second Division sent this case for consideration by Seven Judges in order that what is known as the "penny a week" question might be reconsidered. Certainly if ever there was a case in which the device of awarding a penny was competent, this is a most appropriate case in which to do it. For the state of the evidence is shortly this. The man is physically fit to do the employment which he used to do before his accident. Yet the results of that accident are still with him in the shape of a rupture. And at some future time—it may be soon or it may be late—owing either to carelessness on his own part in not wearing a truss, or owing to over-exertion, or owing to an accidental blow or strain, the rupture may assume a condition which would either partially or wholly incapacitate him for work.

In the case of *Clelland* v. *Singer Manufacturing Company*, 7 F. 975, I gave with considerable minuteness my reasons for coming to the conclusion that the device of awarding a penny at a time when a man was not for the present physically incapacitated for working was a device for which there was no statutory sanction; nay, was, in my view, contrary to the obvious scheme of the statute.

Since that decision was pronounced the case has been brought before the notice of the English Court of Appeal, who, in the case of *Owners of the Vessel "Tynron"* v.

Morgan, [1909] 2 K.B. 66, have refused to agree with it. The knowledge that the Court of Appeal is of a different opinion, and the respect which I entertain for their opinions, make me naturally diffident of the correctness of my own judgment, and I have carefully reconsidered it. I sincerely regret that I have not been able to consider it in the light of any judicial argument. My opinion was based upon a consideration of the clauses of the statute. None of the learned Judges in the Court of Appeal examine a single clause of the statute; nor do they give their reasons for differing from me as they say they are compelled to do. Practically the judgment comes to this—that the practice is a recognised practice, and that it is convenient. With great respect I think it must either be sanctioned by the statute, or it must be bad. For this is a purely statutory matter, for which there is no common law basis, and to which equitable considerations, even if existing, seem to me to have no application.

One further remark I must make. Lord Justice Farwell cites Lord Halsbury as recognising the existence of the practice. But a reference to the case of *Nicholson* v. *Piper*, [1907] A.C. 215, at p. 218, will, I think, convince anyone that Lord Halsbury was mentioning the fact as an aid to examining the particular judgment before him; and that so far from giving the practice his imprimatur he was especially careful to reserve his opinion as to whether the practice could be legally supported—a course in which he was followed with equal distinctness by Lord Roberston. Until, therefore, the matter is otherwise settled by the House of Lords I retain my opinion as delivered in *Clelland*.

Now that being so, it is clear that there is no evidence at all to support the finding of the Sheriff-Substitute fixing the compensation at 9s. My view of the case is shortly this. The report of the medical referee on the agreed-on remit was conclusive of the man's physical condition, and that condition was a condition of capacity to do what he had done before the accident. It was not, however, conclusive as to what has been conveniently called his wage-earning capacity, and in my judgment it would have been perfectly proper for the workman, had he so wished, to have tendered evidence to show that the wage-earning capacity of a ruptured man was less than the capacity he had before the accident—in other words, that he was not now worth so much in the labour market as he had been; and on that evidence the Sheriff might have come to a conclusion. But as it was, as no such evidence was tendered, and as the matter was allowed to rest purely on the medical report, which affirmed capacity now, although indicating that at some future date, uncertain, and brought on by causes equally uncertain, incapacity might supervene, of which it could then be said that the *fons et origo mali* was the accident, there was no proper course open to the Sheriff-Substitute but to end the compensation.

LORD JUSTICE-CLERK—This matter has created difficulty in the Courts, and we are dealing now with a case in which a new expedient has been resorted to to get out of the difficulty. The way in which the Sheriff-Substitute has dealt with the case seems to me to be entirely erroneous. Having before him the report of the medical referee to the effect that the claimant, the respondent in this appeal, was not incapacitated for work, but was capable of doing the work which he had been previously doing in his own trade, and having also before him a second report, which he received from the medical referee at his own request, stating that something might possibly supervene to produce a certain result consequent upon the original injury, he allows the workman now a sum of 9s. a-week. There was no evidence whatever before the Sheriff-Substitute to justify him in awarding any such sum of compensation; and it is not inconsistent with the opinion of the medical referee that such sum might be drawn by this man during the whole of the rest of his working life, although all the time he might be quite able for his ordinary work in his particular trade and be able to earn full wages in that trade. To such a judgment as that I could not assent. The only possible way out of the difficulty would be the course adopted by the Courts in England and by the Second Division of this Court in more than one case—the course, namely, of giving a nominal sum of compensation in order to keep the question open, so that there might be review at any time if there was ground for holding that the workman was not capable of earning the full wages of his trade.

I cannot myself see any other way in which it could be done. I certainly admit that it is of the nature of an extreme expedient, and there is great force in what your Lordship has said as to its not being in accordance with the terms of the statute. If that course is not competent—and a majority of your Lordships think that it is not—then the only question which remains is, Can this claim for compensation be kept open at all? If we hold that the Sheriff had no right to do what he did, and that he would have had no right to award a nominal sum in order to keep the question open, then I can come to no other conclusion than that at which your Lordship has arrived, namely, that there can be no award in favour of the respondent, and that the compensation must cease.

LORD LOW—The respondent is a mason, and on 20th November 1906, while in the employment of the appellant, he fell from a building, the result of which was that among other injuries he sustained double rupture. The respondent was for a time totally incapacitated for work, and the appellant paid him the maximum amount of compensation, namely, 18s. a-week. On 19th July 1909 the appellant presented an application to the Sheriff to have the weekly payment reviewed, on the ground that the respondent was no longer in-

capacitated. By consent of parties a remit was made to a medical referee, who reported that the respondent was not incapacitated for work and was able for his ordinary work. Subsequently, in reply to the letter which the Sheriff caused to be sent to the medical referee, the latter wrote:—"Although I consider the ruptures do not at present prevent Alexander Mackay from doing his ordinary work, yet they may, and probably will, in the future become more marked (*i.e.*, increase in degree) and prove detrimental to him."

It is therefore plain that the respondent has received an injury of a continuing nature, and that although he is at present able for his ordinary work, he will probably again become incapacitated for work to a greater or less extent. In these circumstances I think that the Sheriff was right in refusing to end the weekly payment. By paragraph (1) (*b*) of the first schedule to the Act of 1897, under which this case falls, it is enacted that "where total or partial incapacity for work results from the injury" the compensation shall be "a weekly payment during the incapacity." Therefore when the injury is (as in this case) permanent, and may again incapacitate the workman, the fact that he recovers sufficiently to be able for the time to earn as good wages as prior to the accident does not deprive him of his right to compensation in the event of his again becoming incapacitated by the injury. That, I think, is the natural meaning of the language of the statute, and it has been so judicially construed.

The question therefore is, What is the proper course for the arbiter to follow in an application for review in a case where the workman is at the time of the application able to do his ordinary work but is permanently injured and may at any time again become incapacitated by reason of the injury?

The Sheriff in this case has diminished the weekly payment to one-half the maximum amount, that being the best estimate which he was able to make of the amount to which the respondent was entitled in respect of the permanent diminution of his wage-earning capacity. I am not surprised that the Sheriff adopted that course in view of the judgment of the First Division in the case of *Clelland* v. *Singer Manufacturing Company*, 7 F. 975. That case, however, appears to me to differ in a material respect from that with which we are now dealing. There the injury which the workman sustained was the loss of two fingers, and I imagine that the arbiter would not have much difficulty in ascertaining with reasonable certainty the extent to which the workman's wage-earning capacity had been diminished by that loss. Here, on the other hand, where the injury is rupture, it seems to me to be impossible for the arbiter to make more than a mere guess at the extent to which the respondent's wage-earning capacity has been diminished. No doubt he might ascertain how far the respondent's chance of obtaining employment in the open market had been affected by the rupture. But that would be upon the assumption that the respondent continued to be able to do his ordinary work, and in order to fix the amount of compensation it would further be necessary for the arbiter to take into account the probability that the respondent might again become incapacitated for work. I suppose that with care and good fortune the respondent may continue to be able for work for an indefinite period, perhaps for his whole life; but any day a slip of the foot or a sudden strain, such as a labouring man cannot always avoid, may wholly and permanently incapacitate him. It therefore seems to me that it is impossible for the arbiter to fix with any certainty or precision the amount of a weekly payment which will compensate the respondent for such diminution in his capacity for work as he may have sustained. It may be said that juries have constantly to assess damages in similar cases, and that the difficulty of the problem is no reason why an arbiter should not exercise his jurisdiction. That is true enough, but I do not think that the function of an arbiter under the statute is at all the same as that of a jury in an action of damages. The statute fixes a maximum amount above which compensation is not to go, and it lays down certain rules for the guidance of the arbiter in fixing the amount within that maximum. In the great majority of cases there is, I imagine, but little difficulty in ascertaining with reasonable precision what the weekly payment should be in order to give the workman that limited compensation to which under the statute he is entitled. I think that it was the general case which the Legislature had in view in framing the Act, and where, as here, it is impossible for the arbiter to fix the compensation with anything approaching to precision, and without running the risk of being unfair to the one party or the other, it seems to me that it would be consistent with the intention of the statute, and conducive to its equitable administration, that the arbiter should have power to delay dealing with the question until emerging events enabled him to do so with reasonable certainty.

The question is whether under the statute the arbiter has any power to adopt such a course? The answer to that question depends upon the construction of paragraph (12) of the first schedule to the Act. It is argued that that enactment ties up the arbiter to do one of three things, namely, either to end or diminish or increase the weekly payment. I am unable to assent to that view. I regard that section as providing the procedure to be adopted where the circumstances under which the amount of the weekly payment was last fixed have changed, and I read the words "may be ended, diminished, or increased" as indicating generally the scope of the arbiter's jurisdiction in an application for review, and not as being an exhaustive enumeration of his powers or as necessarily excluding another course if the justice of the case should so require.

It is not unimportant to observe that the word used is "may" and not "shall," and I rather think that it would be conceded that there is one case in which the arbiter is not bound either to end, diminish, or increase the weekly payment. That case is where he comes to be of opinion that there has really been no change of circumstances, and that accordingly the existing weekly payment should be continued. In such a case I cannot doubt that the arbiter could dismiss the application although he is not specially empowered to do so. In like manner, it seems to me that where, as in this case, the arbiter cannot declare the weekly payment to be altogether ended, and has no materials to enable him to fix a diminished amount without grave risk of doing injustice on the one side or the other, it is competent for him to supersede consideration of the question, leaving it open to either party to move in the matter should a change of circumstances occur.

If that view be sound, the next question is, what is the form of procedure which should be adopted? The method adopted in the English courts, and which has now received the approval of the Court of Appeal, is to diminish the weekly payment to the nominal sum of 1d. With great respect, I cannot think that that is a course which should be followed. It seems to me to proceed upon the view that the arbiter must either end, diminish, or increase the weekly payment. I have already given my reasons for thinking that the arbiter is not so restricted, but assuming that he is, the awarding of a nominal sum seems to me to be indefensible, because it is a device whereby it is attempted to keep the letter of the law while disregarding the substance.

The course which I venture to suggest should be followed in this and similar cases is something of this nature—the arbiter might find that in respect the medical referee had reported that the respondent was not incapacitated for work but was able for his ordinary work, he was not entitled to receive any weekly payment so long as he remained in that condition, and with that finding he might sist procedure or continue the cause, with leave to either party to renew the application in the event of a change of circumstances occurring. Of course I merely suggest the kind of order (and not the precise terms of it) which I think would best meet the necessity of the case.

It may be objected that such a course would interfere with the employer's right to redeem. No doubt it would postpone the exercise of that right, and I recognise the force of the objection. But it seems to me that there is no course which is not open to some objection. If the weekly payment were ended, then, although the workman is permanently injured and may any day become totally incapacitated, he would lose his right to compensation in the event of incapacity actually recurring, a result which in my opinion would be contrary to the statute. On the other hand, if it were held that the arbiter is bound at once to fix the amount of compensation, he can do no more than make a rough estimate, which as events turned out might be a great deal too much or a great deal too little. I therefore think that in a case such as the present—where you have a workman permanently injured but able in the meantime to do his work—the course which is fairest to both parties and most in consonance with the scheme of the statute is of the kind which I have indicated. I do not think that the employer can complain if he is relieved of all payments so long as the workman is able for his ordinary work, while the workman gets all that he is entitled to if he can come back to the arbiter in the event of incapacity supervening.

That is the opinion which I have formed, but as the majority of your Lordships take a different view, I need hardly say that I state it with much diffidence.

LORD ARDWALL—The question has been raised in this case whether it is competent for an arbitrator or the Court to postpone the final determination of the question of compensation by making an interim nominal award of one penny per week? This course, as we were informed at the debate, has been sanctioned by two recent English decisions, but after perusing these I am unable, with all deference to the learned Judges who decided them, to hold that this course is authorised by statute; on the contrary, I am of opinion that the question was rightly decided by the Lord President of this Court in the case of *Clelland* v. *Singer Manufacturing Company* (7 F. 975), and that for the reasons stated by him there.

The question still remains, whether the judgment of the Sheriff-Substitute in the present case is to be affirmed or recalled. Now with regard to that matter it has to be noted that by joint minute lodged in process the parties consented to a remit to a medical referee in terms of the Workmen's Compensation Act 1897. The referee reported in the following terms:—"(1) The applicant Alexander Mackay is not incapacitated for work. (2) He is able for his ordinary work."

Nothing could be clearer than this, but the Sheriff-Substitute raised a new question as to whether at any future time the respondent might become incapacitated by reason of the nature of the injuries he had received, namely, a double rupture. The medical referee adhered to his report, but stated that in future the respondent's injuries might prove detrimental to him. The Sheriff-Substitute asked counsel for the appellant whether he desired to lead further proof, but he declined to do so, on the ground that the matter by consent of parties had been remitted to a medical referee, and thereupon the Sheriff-Substitute made a finding that the respondent had only partially recovered his capacity for work, and was entitled to 9s. a-week of compensation. It appears to me that this finding is not authorised by any evidence in the case, but is contrary to the terms of the referee's report, which is the only

evidence on which the Sheriff-Substitute was entitled to proceed, and indeed was the only evidence he had before him. I therefore am of opinion that the judgment of the Sheriff-Substitute was wrong, and that the compensation should be ended in respect that the applicant is not now incapacitated for work, and is able for his ordinary work.

LORD DUNDAS—I am for answering the fourth question of law in the negative. I think the Sheriff-Substitute was not entitled upon the evidence before him—consisting solely of the medical referee's reports—to deal with the case as one of partial recovery of capacity. The reports seem to me to disclose a state of present capacity, although with a chance (indeed, a probability) of supervening incapacity at some future time. I cannot see any ground at all for the Sheriff-Substitute's award of a weekly payment of nine shillings. I think he was bound to end the subsisting weekly payment altogether unless it was competent to him to keep the matter open by resorting either to what has sometimes been called "the device of the penny," or to a declaration of liability coupled with a stay of proceedings, or to some other method of keeping the matter in suspense. Resort to a weekly payment of a penny or some other nominal sum has become a recognised practice in England, as is plainly shown by the most recent decisions in that country, though the legality of the practice has not yet been affirmed by the House of Lords. I must confess, however, for my own part, that I cannot find any warrant whatever for this "device" in the Act of 1897, under which this matter arises, and the whole of this region of law is, I apprehend, solely the creation of statute. Therefore, however reasonable it might have been for the Legislature to create such a procedure, I do not see how we (in administering the statute) are entitled to introduce it. I need not elaborate my reasons for this opinion, for they are substantially those enunciated by the Lord President in *Clelland's* case and to-day. No other method of suspending matters was pressed upon us in the argument. The result has, it seems, been sometimes effected in England by a procedure apparently originated by Vaughan-Williams, L.J., in *Chandler's* case, viz., a declaration of liability and an adjournment of the question of the amount and duration of compensation. The idea may be equitable enough, and is perhaps less open to adverse criticism than a money payment even of nominal amount. In *Nicholson* v. *Piper* (1907 A.C. 215) this method of staying procedure was, along with that of a weekly payment of nominal amount, alluded to in the arguments before the House of Lords, and though neither was in words condemned in the opinions delivered, the former method was not commended nor in any way differentiated in principle from the latter. There is, no doubt, room for argument in favour of resorting, in cases of this kind occurring in Scotland, to some sort of declaration of liability coupled with a sist of proceedings, on the ground that any judge or arbiter has inherent discretionary power to sist process apart altogether from statute. But I cannot help thinking that indefinite suspension, by whatever means effected, would be contrary to the scope and intention of the statutory scheme for workmen's compensation, for the reasons indicated by the Lord President and also by Lord M'Laren in the case of *Clelland*. The respondent's counsel did not move or invite us to adopt the method of sisting in this case, and in the whole circumstances I think the weekly payment must be ended.

LORD JOHNSTON—This case is one arising under the Workmen's Compensation Act 1897, and must be determined in view solely of the provisions of that Act, and to no extent of the altered provisions of the subsequent Act of 1906.

The circumstances of the case have already been explained by your Lordship.

Compensation at the rate of 18s. a-week was being paid, and the appellant (the employer) applied for review.

Now the precise course indicated by the 11th section of the first schedule to the Statute of 1897 for obtaining the report of a medical referee was not taken, but a joint minute for the parties was lodged, in respect of which, and of consent of parties, a reference was made to an official medical reporter. The result of his report on the condition of the respondent must, I think, be held to be as conclusive evidence of that condition as if the strict order of the statutory schedules had been followed. The report stated that the respondent was not incapacitated for work, and that he was able for his ordinary work.

The Sheriff thereafter, on considering the medical referee's report, found that the respondent had now practically recovered his capacity for work, but still suffered from rupture as the result of the accident, and reduced the compensation from 18s. to 9s. a-week.

It is clear that this award is indefensible. And I understand that the case has been sent to a Court of Seven Judges in order that the competency of the course taken in one or two previous cases, following on English precedent, of practically suspending the review demanded by the employer, may be considered. That question must sooner or later be authoritatively determined on appeal to the House of Lords, as the First Division of this Court in *Clelland* v. *Singer Manufacturing Company* (7 F. 972) have held it incompetent, and the Court of Appeal in England in *Owners of the "Tynron"* v. *Morgan* ([1909] 2 K.B. 66) have held themselves bound by the practice above referred to, which has grown up in England, while on appeal in the case of *Nicholson* v. *Piper* ([1907] A.C. 215) both Lord Halsbury and Lord Robertson in the House of Lords expressly reserved the question.

Though I do not want to be understood as dissenting from the opinion expressed by your Lordship and the majority of the

consulted Judges, I do not think that the present case requires that this vexed question should be reconsidered just now. Postponement of such reconsideration appears to me to be preferable in respect that few if any cases can now occur under the 1897 Act, and that when it arises under the 1906 Act certain different considerations arising on the different provisions of that Act will apply, rendering a decision on the Act of 1897 no conclusive authority in a case arising under the Act of 1906.

I think it is unnecessary to entertain it in the present case, because I am satisfied that the learned Sheriff was bound by the terms of the medical report, on a remit made nearly three years after the date of the accident, and which report conclusively determined that the respondent had recovered his capacity for his ordinary work. No proof being tendered, as I think it might, that notwithstanding his recovery of capacity he was only able to earn a less weekly wage than before his accident, the Sheriff was, I think, bound then and there to end the compensation.

The LORD PRESIDENT intimated that Lord Skerrington, who was absent at the advising, concurred in the opinion of Lord Low.

The Court pronounced this interlocutor—

"The Lords having resumed consideration of the stated case with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Court of Seven Judges, answer the fourth question in the negative, and find it unnecessary to answer the other questions: Remit the case to the arbitrator to find and declare that the applicant's right to compensation has come to an end, and to dismiss the application for review accordingly: Find the appellant entitled to the expenses of the stated case," &c.

Counsel for Appellant—Constable, K.C. —Jameson. Agents—Simpson & Marwick, W.S.

Counsel for Respondent—Umpherston—Hendry. Agent—John S. Morton, W.S.

Thursday, May 26.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

MAIN AND OTHERS (OWNERS OF THE "GRATITUDE") *v.* LEASK AND OTHERS (OWNERS OF THE "COMELY").

Ship — Collision — Total Loss — Damages, Measure of — Remoteness — Prospective Profits—Fishing Vessel—Joint Adventure.

A fishing vessel became a total loss in consequence of a collision. In an action by her owners and crew, who were joint-adventurers, *held* that the claim of the pursuers was not limited to the market value of the ship at the date of her loss, but that they were entitled to recover the profits they would have earned between the date of her loss and the end of the fishing season, if relevantly averred and supported by sufficient evidence, and *proof before answer allowed.*

On 3rd June 1909 James Main and others, three of the registered owners of the steam drifter "Gratitude," and (2) Alexander Stewart and others, members of the crew, brought an action against W. H. Leask and others, owners of the steam drifter "Comely," in which they sued for £400 as the profits they would have earned during the fishing season had the vessel not been lost. The "Gratitude" had become a total loss in consequence of a collision with the "Comely" on 8th October 1908.

The pursuers averred that the collision was due entirely to the fault of the defenders, and further averred:—"The 'Gratitude' was insured for £2600, and this sum has been recovered from the insurance company. That sum, however, does not represent her full value at the time of the collision. The pursuers have in consequence of said collision suffered serious loss and damage. All the fishing gear on board . . . as well as the stores, and also the personal effects of the pursuers, have been lost. . . . In addition to the loss of these, the pursuers lost their respective interests in the profits of the fishing which they would have made but for the sinking of the 'Gratitude,' and which are moderately estimated at the sum of £400. . . . The 'Gratitude' was being worked under an agreement in terms of which the profits of the fishing (after deducting expenses) were to be allocated one-third to the owners of the boat, one-third to the owners of nets, and one-third to the crew. . . . In any event, the pursuers, or such of them as are registered owners of the 'Gratitude,' are entitled to recover said sum of £400, or proportional shares thereof, as representing the special or enhanced value of the vessel at the time of the collision. She was lost during the fishing season, and was engaged in fishing at the time of her loss. But for her loss she would have earned during the remainder of the season, in