LORD MACKENZIE—I am of the same opinion. There was no attempt on the part of the North British Company to argue that the workman could not effect by some appropriate form of words the purpose that plainly is disclosed as his intention upon the terms of the letter of 3rd February 1915, which your Lordship has read. The only question before us is whether that purpose has been effected by the terms of the particular letter. The difficulty has been introduced into the case by the view taken in the pleadings that the payment which was made was a payment of compensation under the Act, and if that was the true view of the agreement which was made, then the case would be in a similar position to that of *Aldin* v. *Stewart*, *supra*, p. 49, which we decided yesterday. There the workman had for a period, I think, of several months, accepted payments, and upon the evidence which was led it plainly appeared that he must have been quite well aware that he was accepting those payments under the Workmen's Compensation Act. In those circumstances we held that he was barred from taking proceedings to recover damages.

This case appears to me to be in marked contrast to that, because on a fair construction of the letter I think it is apparent that what the workman was receiving in the way of payment was not compensation under the Act but payments under a special agreement, which set out that he intended to take proceedings against the Railway Company. For my part I should consider the substance rather than be anxious to criticise the precise form, and unless it was quite plain that the man had actually received compensation under the Act—effectively received it so that it must remain in his pocket for all time coming—I do not think it can be successfully pleaded against him that he is barred from taking the alternative proceedings pointed to in section 6 (1) of the Act.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—Anderson, K.C.—J. B. Young. Agents—Weir & Macgregor, S.S.C.

Counsel for Defenders (Reclaimers)—Wilson, K.C. — E. O. Inglis. Agent—James Watson, S.S.C.

Thursday, October 28.

FIRST DIVISION.

[Sheriff Court at Hamilton.

THOMSON *v.* JOHN WATSON LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, sec.* 3—*Review of Weekly Payments—Payments in respect of Partial Incapacity—Workman Subsequently Enlisting in Army—Average Weekly Wage which Workman is Able to Earn.*

A workman and his employers agreed that partial compensation be paid in respect of an industrial disease, and a memorandum of agreement to that effect was recorded. The workman thereafter enlisted in the army. The employers applied for suspension of the weekly payments while the workman was in the army.

Held that the employers were not entitled to have the payment of compensation suspended, but that the arbiter should assess compensation on the basis, not of the army, which was not "suitable employment" in the meaning of the Act, but of what suitable industrial employment the workman could have engaged in having regard to his state of health.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I, section 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."

John Watson Limited, coalmasters, Earnock Colliery, Burnbank, Hamilton, *respondents*, applied in the Sheriff Court at Hamilton for review of the weekly payments of compensation made by them to James Thomson, formerly fireman, 12 Forrest Street, Low Blantyre, and then private, 7th Battalion Royal Scots Fusiliers, *appellant*. The Sheriff-Substitute (SHENNAN) as arbitrator suspended the payment of compensation. The workman appealed by Stated Case.

The Case stated—"The following *facts* were admitted:—1. The appellant was employed by the respondents as a colliery fireman in their Earnock Colliery. He was duly certified to be disabled in respect of miner's nystagmus from 15th April 1914. On 19th June 1914 the parties agreed that partial compensation be paid by the respondents to the appellant at the rate of 17s. 8d. per week, and thereafter a memorandum of agreement to this effect was recorded in

the Special Register of the Sheriff Court of Lanarkshire at Hamilton. 2. In September 1914 the appellant enlisted in the 7th Battalion Royal Scots Fusiliers, and he is still a private in that regiment and on duty with it. 3. On 6th October 1914 the weekly compensation was by agreement reduced to 10s. per week. Compensation at this rate has been paid down to 14th April 1915.

"The respondents lodged the minute which is the subject of the present arbitration on 3rd May 1915. All that they desire meantime is to have the weekly payment of compensation suspended.

"I rejected the respondents' argument to the effect that the appellant was barred by section 9 of the Workmen's Compensation Act 1906 from claiming compensation under the Act—*S.S. "Raphael" (Owners of)* v. *Brandy*, [1911] A.C. 413, 4 B.W.C.C. 307. But I held that the respondents were entitled to temporary suspension of payment of weekly compensation, because the appellant by enlisting has made it impossible to apply the provisions of Schedule I, par. 3, in assessing partial compensation with reference to 'the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.' In my opinion such 'suitable employment or business' means an industrial or commercial employment in which the workman may earn as much money as his physical condition permits, and does not mean naval or military service. The appellant did not enlist in order to earn wages. Accordingly, however creditable his action has been in enlisting, he has thereby made it impossible for the employers to assess the extent to which he is at present disabled in respect of miner's nystagmus from earning full wages at his work.

"On 7th June 1915 I issued an award suspending the weekly payment of compensation to the appellant as at 14th April 1915."

The *question of law* for the opinion of the Court was—"On the foregoing facts were the respondents entitled to an award suspending the weekly payments of compensation to the appellant?"

The appellant argued—There was no impossibility in finding out what the workman could earn in a suitable employment, *i.e.*, in a suitable civil employment. It was the arbitrator's duty to discover what the workman could earn in such an employment, and assess the compensation payable accordingly. [The argument was stopped.]

The respondents argued—The statute required compensation to be assessed on the basis of what the workman was able to earn in suitable employment. The appellant could not enter civil employment, and the calculation required by Schedule I, section 3, could not be made. It was idle for the arbitrator to imagine what the appellant might be able to earn in an impossible set of circumstances.

LORD PRESIDENT—I cannot agree with the conclusion reached by the learned arbitrator in this case.

The respondents, who had been paying the appellant compensation under the Workmen's Compensation Act, applied to the arbitrator for a review of the weekly payments, but the arbitrator has refused to review, and has *in hoc statu* suspended, the weekly payments on the ground that the workman has joined the colours, and therefore is not at the present moment engaged in a suitable employment in the sense of the Workmen's Compensation Act. Accordingly in the arbitrator's opinion there are no data upon which he can proceed in reviewing the compensation.

In coming to that conclusion it seems to me that the arbitrator has overlooked the alternative in the Act which warrants him, if the workman is not actually engaged in some suitable employment, to consider what suitable employment he could engage in, and what he is capable of earning in that suitable employment.

I agree with the arbitrator that the workman's employment as a soldier is not the employment which is referred to in the Act, and that the standard would be some suitable industrial or commercial employment. But there appears to me to be no difficulty whatever in ascertaining from the man's physical condition what suitable employment in the industrial sphere he could engage in at the present moment, having regard to his state of health. That, then, would be the standard to apply, and from his conclusion upon that inquiry the arbitrator would be able to reach, I have no doubt, a sound conclusion as to what amount of compensation the workman is now entitled to have if any.

I therefore think that we ought to answer the question put to us in the negative and remit to the arbitrator to make the inquiry and to review, as he thinks proper, the amount of compensation originally awarded.

LORD MACKENZIE—I am of the same opinion. I so far agree with the learned arbitrator that I do not think the workman in this case is entitled to have his compensation assessed on the footing that what he is earning as a soldier is all that he is able to earn, because serving with the colours is not, in the sense of the statute, a suitable employment which enables the workman to say that he has tested the market and is giving his services in return for the wages that he is able to earn.

But then that does not by any means solve the problem to which the arbitrator must address himself, because under the statute his duty is to go on with the best materials he can get to consider the alternative question—what is the workman able to earn in an employment within the meaning of the Act, and when he has reached a conclusion upon that point then the compensation will be assessed accordingly.

LORD SKERRINGTON—The arbitrator has suspended the compensation upon the ground that by enlistment the workman has made it impossible for the arbitrator to assess the extent to which he is at present disabled by miner's nystagmus from earning full wages at his work. I see no impossibility whatever in the arbitrator fulfilling his statutory duty, and accordingly I agree

that the question must be answered in the negative.

LORD CULLEN—I concur.

LORD JOHNSTON was absent.

The Court answered the question of law in the negative, and remitted the case to the arbitrator to proceed.

Counsel for Appellant—Moncrieff, K.C.—Burnet. Agents — Simpson & Marwick, W.S.

Counsel for Respondent—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, November 4.

FIRST DIVISION.

GLASGOW SCHOOL BOARD *v.* GLASGOW PARISH COUNCIL.

Poor—School—Pauper—Children—"Feeble-minded Persons"—Maintenance—Mental Deficiency and Lunacy (Scotland) Act 1913 (3 *and* 4 *Geo. V, c.* 38), *sec.* 2 (1).

The Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, c. 38), enacts—Section 1—"The following classes of persons who are mentally defective shall be deemed defectives within the meaning of this Act. . . . (*c*) Feeble-minded persons, that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools. . . ." Section 2 (1)—"It shall be the duty of the parents or guardians of children between five and sixteen years of age who are defectives within the meaning of this Act, to make provision for the education or for the proper care and supervision of such children as the case may require, and where the parent or guardian of a defective child is, by reason of the attendant expense, unable to make suitable provision as aforesaid, it shall be the duty of the school board (except as hereinafter in this section provided) to make such provision either in virtue of their powers under the Education of Defective Children (Scotland) Act 1906, as read with the Education (Scotland) Act 1908, or in terms of this Act, as the local authority concerned."

Held that the duty to make provision for the food, clothing, and lodging of defective children in the sense of section 1 (*c*), above quoted, who were paupers, was upon the parish council, and was not transferred by section 2 (1), above quoted, to the school board.

The School Board of Glasgow, *first parties*, the Parish Council of the Parish of Glasgow, *second parties*, and the Parish Council of the Parish of Glasgow as the Glasgow District Board of Control acting under the Lunacy (Scotland) Acts, and particularly the Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, c. 38), *third parties*, brought a Special Case in the Court of Session.

The Case stated, *inter alia* — "2. The Mental Deficiency and Lunacy (Scotland) Act 1913 came into operation on the 15th day of May 1914. 3. At the time when said Act came into operation there were chargeable to the second party as proper objects of parochial relief certain children, more particularly after described, between the ages of five and sixteen, who are defectives and fall within the meaning of section 1, sub-section (*c*), ... of the said Mental Deficiency Act, and some of the same character have since become chargeable. 4. The parochial relief to some of said children consisted in the second party boarding them in the Waverley Park Home for defective children at Kirkintilloch, which was conducted by a philanthropic association for the care and education of feeble-minded children, and since the passing of the said Act of 1913 has been licensed as a certified institution for the reception of defective children; and the parochial relief to others was given in a ward of the second party's Eastern District Hospital, Glasgow. 5. Said children are educable, that is, they are not incapable by reason of their mental defects of receiving benefit or further benefit from instruction in the special schools, of which there are seven, or in the special classes which are provided in sixteen ordinary public schools by the first party for defective children under the Education of Defective Children (Scotland) Act 1906, or in certified institutions under the said Act, nor would their presence prove detrimental to the interests of the other defective children attending such special schools or classes. The first party have offered and are still willing to receive and educate these children in one or more of their special schools or classes, but such children are without homes, and this offer does not include the provision of clothing, board, and lodging for these children . . . 7. None of the said defective children have means of their own, nor have they parents or guardians (unless the first and second parties or either be held to be included under that designation) able by reason of the attendant expense to make provision for their education, proper care and supervision and maintenance, including food, clothing, and lodging. For the purposes of this case all reside within the School Board area of the first party in the parish of Glasgow. 8. The particulars of the children referred to are as follows:—(1) *Educable Defectives between Five and Sixteen*, under section 1, sub-section (*c*). — *A.* Catherine Rankine (13), boarded Waverley Park Home by Second Party—an orphan. Date of chargeability to second party, 10th November 1907. *B.* Mary Ann Docherty (11),