be a division of the legitim fund any right which she may have to demand collation be given effect to.

Other questions in the case cannot be determined without proof.

LORD MACKENZIE—I entirely agree with the passage in the Lord Ordinary's opinion in which he says—"It is their common law claims to legitim, and nothing different, that he directs his trustees to pay and satisfy under the third purpose;" and that is sufficient for the disposal of the second plea-in-law stated for Mr and Mrs Bissett.

In regard to the point raised by the third plea-in-law, I think that, looking to the fact that there is to be a proof in any event, it is desirable to extend it as suggested by your Lordship in the chair.

LORD SKERRINGTON—I agree with your Lordships. I do not wish to express any disagreement with the Lord Ordinary's view of the law, but I think that it would be safer to know the precise circumstances before giving judgment.

The Court pronounced this interlocutor—

"Recal said interlocutor [17th April 1917]: Repel the second plea-in-law for said defenders: Of new allow the pursuer and the said defenders a proof of their respective averments (1) *quoad* the fact of the making of the gifts by the deceased James Crichton to the defender Mrs Bissett mentioned in the declaratory conclusion of the summons so far as the making of these gifts is not admitted by the defenders Mr and Mrs Bissett; and (2) *quoad* the values for purposes of collation of the said gifts mentioned in the declaratory conclusion of the summons: Further, before answer, allow the said defenders and the pursuer a proof of their averments contained in statement 5, and the answer thereto of the statement of facts for said defenders and the answers thereto for pursuer, and remit the cause to the Lord Ordinary to proceed as accords."

Counsel for Pursuers (Respondents)—Mitchell. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for Defenders (Reclaimers) Mr and Mrs Bissett—The Lord Advocate (Clyde, K.C.)—MacRobert. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders (Respondents) Crichton's Trustees—Maclaren. Agents—Webster, Will, & Company, W.S.

Wednesday, May 30.

SECOND DIVISION.

[Sheriff Court at Falkirk.

JAMES NIMMO & COMPANY, LIMITED *v.* MYLES.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1, *First Schedule—Partial Incapacity—Employers Refusing to Pay Full Compensation for One Week during which the Workman's Earnings together with his Compensation Exceeded his Average Weekly Wage before the Accident.*

A workman who was receiving compensation as for partial incapacity earned during one week wages which together with his compensation would have amounted to more than his average weekly wage prior to the accident. His employers offered him only so much of his compensation as would with his earnings equal his former weekly wage. He refused that offer and charged his employers on the recorded memorandum. The employers made no application for review of the weekly payments. *Held*, in a suspension of the charge by the employers, that as the workman's earnings in one week were no criterion of his average weekly earnings the workman was entitled to charge the employers, and the suspension *refused*.

Opinion reserved as to the competency of the suspension.

James Nimmo & Company, Limited, coal masters, Redding, Polmont, *pursuers*, presented a note of suspension in the Sheriff Court at Falkirk in which they sought to suspend a charge at the instance of Matthew Myles, miner, Reddingmuir, Polmont, *defender*, upon a recorded memorandum under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), for payment of fifteen shillings, being compensation for one week.

The *facts* of the case were as follows:—"(Cond. 2) It is explained and averred that defender's average weekly earnings prior to his accident were 36s.; that he was paid compensation to 3rd February 1917, the payment for the week ending on that date being 15s.; that for the week ending on 10th February 1917 defender earned 23s. 4d. and was offered but refused 12s. 8d. as compensation for that week; that in charging pursuers to pay him 15s. as compensation for the week ending 10th February 1917 defender has charged for 2s. 4d. more than the full difference between his earnings for that week and his average weekly earnings prior to his accident, and that said charge is therefore inept and incompetent. (*Ans.* 2) With reference to the amended statement No. 2 for pursuers, it is admitted that defender's average weekly earnings prior to the accident were 36s., and that he was paid compensation to 3rd February 1917, the payment for the week ending on that date being 15s. It is further admitted that for the single week ending on 10th

February 1917 defender earned 23s. 4d., and was offered but refused 12s. 8d. as compensation for that week. It is further explained and averred, however, that for the immediately succeeding week defender only earned 14s., being three days' earnings, to which limited period of employment he was restricted as a result of his incapacity for work caused by his accident; that he has been similarly restricted on many occasions since the date of the arbiter's award of compensation in December 1915, and that the total of the average weekly amount which the defender has earned since that date, and the weekly payment of 15s. made under that award, is considerably less than the average weekly earnings prior to the accident. In these circumstances the charge given by the defender for payment of the sum of 15s. for the week referred to was regularly proceeded and was in order. The defender holds an award by the arbiter of 15s. per week in unqualified terms, which in the circumstances gives him right to charge the pursuers for payment of that amount until the payment is reviewed under the appropriate procedure laid down in terms of the Workmen's Compensation Act 1907, and no hardship whatever will result to the pursuers if the suspension is refused."

The pursuers pleaded—"The charge being inept and incompetent as condescended on, suspension should be granted as craved, with expenses to pursuers."

The defender pleaded—"(2) In respect the total of the average weekly earnings of defender and the 15s. weekly compensation is considerably less than the average weekly earnings at the time of the accident, the charge given is regularly proceeded and in order, and the suspension thereof should be refused, with expenses to the defender. (3) The defender, holding as he does an award of 15s. weekly compensation in unqualified terms, is entitled to charge for payment of that amount in the circumstances until the same is reviewed by a competent order of the arbiter. (4) The question at issue between the parties being virtually one of review of the amount of compensation payable to the defender, should not in the circumstances be determined in proceedings by way of suspension, and the suspension now brought should accordingly be refused, with expenses."

On 13th April 1917 the Sheriff-Substitute (MOFFATT) sustained the third and fourth pleas-in-law for the defender.

Note.—"I have come to the conclusion that this suspension ought to be refused. I do not think the pursuers have set forth sufficient grounds for its being sustained. No doubt suspensions of a charge on a registered memorandum of agreement in workmen's compensation cases have been granted by the Supreme Court in circumstances where there was manifest injustice. In the first of that class of case—*Beath & Keay* v. *Ness*, 1903, 6 F. 168—the suspension was granted on the ground that the pursuers' claim was unconscionable. In the case of *Fife Coal Company* v. *Lindsay*, 1908 S.C. 431, Lord Ardwall said—'. . . A suspension ought not readily to be entertained, and to justify its being granted it ought to be shown that without such suspension the complainer would suffer some manifest injustice, and further that the end to be attained by such suspension could not be attained by proceedings under the Act' (p. 438).

"It does not appear here that the pursuers have suffered manifest injustice. It seems to me that it would be an abuse of the forms of process to allow this action to proceed. The pursuers seek only to suspend a charge of payment of compensation for one week, and they do not set forth that the defender's 'average' weekly earnings are so great as to make his combined wages and compensation higher than permitted by the statute. It is not for me to say how many weeks would require to be condescended upon so as to arrive at an average, but I am quite clear that the average is the point and that one week cannot make an average. This case is entirely different from *Beath & Keay (cit.)*, *Nimmo* v. *Fisher*, 1903 S.C. 890, and *Baird* v. *M'Whinnie*, 1908 S.C. 440. In all these cases there was an unconscionable demand or a manifest injustice."

The pursuers having appealed, the Sheriff (LEES) on 2nd May 1917 recalled the judgment of the Sheriff-Substitute and granted the suspension.

Note.—"It is quite plain on the authorities that suspension is not the form to obtain review of an arbiter's award under the Workmen's Compensation Act.

"But no such review is sought here. The pursuers do not impugn the award, but they say that, standing the award, they are entitled to protection by the Court against compulsion to pay more than they are legally liable for.

"The parties are agreed as to the facts. The average weekly earnings of the defender were 36s. prior to his accident, the award is for compensation at 15s. per week, up to 3rd February he has been paid in full, in the succeeding week he earned 23s. 4d., he demanded 15s. a week under the award, and as he was offered only 12s. 8d. he has charged the pursuers for payment of 15s.

"Now it is clear on the authorities that if a workman charges his employer to pay more than he is entitled to ask, the employer is entitled to protect himself by suspension—see *Nimmo & Company* v. *Fisher*, 1907 S.C. 890; *Beath* v. *Ness*, 6 F. 168; and *Baird & Company* v. *M'Whinnie*, 1908 S.C. 440.

"It is indisputable that if the pursuers are made to pay 15s. of compensation for this week the defender will be getting 2s. 4d. more than the agreed-on average of his earnings prior to his accident. To that he is not entitled.

"No doubt if in the succeeding week he earned only 18s. 8d. he would be entitled to charge, if necessary, for payment of 15s. a week for each of the two weeks, because then his average wage for the two weeks would be 21s., and 15s. added to this would bring the total payments made to him up to 36s., the average of his wages before his accident.

"It is said a single week will not give an average. But it is the act of the defender himself in electing to charge in regard to the single week that compels that week's earnings to be accepted as an average, instead of taking the average of two or more weeks. The Supreme Court have steadily declined to allow the Act to be so worked as to allow a workman to demand more than he is legally entitled to, and I must therefore grant suspension of the charge."

The defender appealed, and argued—The cases cited by the Sheriffs were distinguished, because here the workman had returned to his former employment. One week's earnings could never be taken to constitute an average. The workman could not be considered to be earning more on an average than his average weekly wages prior to his accident. This proceeding did usurp statutory proceedings, and was not auxiliary.

The pursuers argued — A workman was not entitled to receive more compensation than what would bring his weekly earnings up to the amount of his weekly wages prior to the accident. When he charged for a greater amount suspension ought to be granted—*Beath & Keay* v. *Ness*, 1903, 6 F. 168, 41 S.L.R. 113; *James Nimmo & Company, Limited* v. *Fisher*, 1907 S.C. 890, 44 S.L.R. 641; *Baird & Company* v. *M'Whinnie*, 1908 S.C. 440, *per* the Lord Justice-Clerk at 443, 45 S.L.R. 338; *Gibson & Company* v. *Wishart*, 1914 S.C. (H.L.) 53, 51 S.L.R. 516.

LORD JUSTICE-CLERK — I think this is a very special case, and I am not inclined to lay down any general rule going beyond the circumstances of the case we have in hand. The workman was partially disabled, and on an application under the statute it was found that he was entitled to 15s. per week of compensation. His wages before the accident were 36s a-week, and therefore along with the 15s. he required to earn 21s. to get back to his former wage. In one particular week he earned 23s. 4d., and therefore if he got his full 15s. he received 2s. 4d. more than he earned when he was an uninjured man. But then in the following week it is admitted that he only earned 14s., and therefore if he got his 15s. he would be 7s. worse off than he was before the accident. But the employers said—We are not going to pay you 15s. in the week in which you earned 23s. 4d., because that would be making you better off than you were before. We will only give you 12s. 8d.; and the workman having charged for the full amount of 15s. this suspension was brought.

It was conceded that none of the cases referred to were exactly on all-fours with the present, and I think they can be distinguished on one or two grounds. The case of *Baird & Company* v. *M'Whinnie*, 1908 S.C. 440, in which the opinion of the Lord Ordinary (Lord Mackenzie) was adopted by the Inner House, was a case where there had been total incapacity. The Lord Ordinary there said—"I am of opinion in the present case that there should be a finding that the compensation due to the respondent was payable only during his total incapacity; and further, in respect of his refusal to accept the complainers' offer of £9, 10s. 3d., that the reasons of suspension should be sustained and the charge suspended *simpliciter*." That points to a distinction between cases of total incapacity and cases of partial incapacity. I do not think that cases like that of *Baird* are really of much assistance in cases of partial incapacity like the present.

Then in the cases dealing with partial incapacity, in that of *Beath & Keay* v. *Ness*, 6 F. 168, the period concerned extended over several weeks, and there was the means of striking an average, but in this case there is no means of striking an average at all. As the Sheriff-Substitute says—"The pursuers seek only to suspend a charge of payment of compensation for one week, and they do not set forth that the defender's 'average' weekly earnings are so great as to make his combined wages and compensation higher than permitted by the statute. It is not for me to say how many weeks would require to be condescended upon so as to arrive at an average, but I am quite clear that the average is the point, and that one week cannot make an average." I agree with that view. I do not think you can fairly accept the experience of one week as regulating the liabilities of the employer to the workman, or as enabling you to lay down a rule applicable to more than one week. Accordingly I think the Sheriff-Substitute was right in sustaining the third plea-in-law for the defender.

I accept the views expressed by Lord Shaw in the case of *Wishart* v. *Gibson & Company*, 1914 S.C. (H.L.) 53, to which we were referred. I do not think that you can lay down a general rule that in every case suspension is competent, but it seems quite clear that there are cases where suspension may be competent. Whether to make it competent it should be accompanied by an application for review under the 16th paragraph of the First Schedule I do not enter upon, but I think that there are cases where suspension is competent, and also that there are cases where a workman would be entitled to charge for an amount of compensation although the result would be that in one particular week, as in this case, he might receive—in respect of his wages and the amount of compensation — more than the total amount of the wage which he had previously been earning. I am therefore of opinion that we should revert to the judgment of the Sheriff-Substitute and sustain the third plea-in-law for the defender. We do not require to deal with the fourth plea-in-law.

LORD DUNDAS—On the facts of the case before us I prefer the judgment of the Sheriff-Substitute to that of the learned Sheriff, and I agree with all that your Lordship has said.

LORD SALVESEN—I have more difficulty than your Lordships, because I think that to sanction such a charge as this in the circumstances stated on record might lead

to abuse if the legal rights of a workman were always enforced in the drastic manner that this workman took. There is great force in the view of the employer that if a workman gets his wages made up, taking into account both his earnings and the compensation that is given to him, to the full figure that he earned before the accident he can claim nothing more. But I feel the force of the special circumstances of this case, which are adverse to the employer, because the suspension relates to a single week in which the man happened to earn more than the difference between his former wage and the compensation which had been awarded to him by the Sheriff as for partial incapacity.

The workman, in answer 2, explains that in the immediately succeeding week he only earned 14s., and that this was all he could earn because of his physical state not permitting him to work more than three days in the week. That is not dealt with in the condescendence for the employer, but Mr Wilson frankly stated that having had the man's physical condition examined he did not find that he could proceed with an application for review on the ground that the amount of the proposed award was more than the workman required or was more than could competently be given him by the Sheriff—in short, there had been no change in the man's physical capacity between the date of the award and the date when this week's earnings were made. It is in these very special circumstances, and without committing myself in the least to some of the views of the Sheriff-Substitute as to when suspension may be competent, that I concur in the proposed judgment.

LORD GUTHRIE—I agree with your Lordship in the chair.

The Court recalled the interlocutor of the Sheriff, and reverted to and affirmed that of the Sheriff-Substitute except in so far as it sustained the fourth plea-in-law for the defender, and found it unnecessary to deal with the fourth plea-in-law.

Counsel for the Pursuers—Wilson, K.C. —R. Macgregor Mitchell. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for the Defender—The Lord Advocate (Clyde, K.C.)—MacRobert. Agents —Dove, Lockhart, & Smart, S.S.C.

Saturday, June 2.

FIRST DIVISION.

WILSON'S TRUSTEES *v.* WILSON AND OTHERS.

Succession — Will — Accumulations — Thellusson Act (39 and 40 Geo. III, cap. 98), sec. 1—Jus relictæ—Disposal of Surplus Income when Accumulation has Become Illegal.

A testator directed his trustees — "(Lastly) And with regard to the residue of my means and estate I direct my said trustees should my said wife survive me to hold and retain the same and all accumulations thereof until her death, and on her death, or at my own death should she predecease me, my said trustees shall pay over the whole of said residue and all accumulations thereon to the trustees and managers of the Royal Infirmary of Glasgow to be used and applied by them for the purposes of the said infirmary." The testator's widow having survived him for more than twenty-one years, when further accumulation became under the Thellusson Act illegal, *held* in a special case that the surplus income after the lapse of twenty-one years from the testator's death fell to the testator's heirs *ab intestato* and that the testator's widow was not entitled to *jus relictæ* therefrom.

Logan's Trustees v. *Logan*, 1896, 23 R. 848, 33 S.L.R. 638, and *Campbell's Trustees* v. *Campbell*, 1891, 18 R. 992, 28 S.L.R. 771, in so far as they applied the law of resulting intestacy, *doubted per* Lord Skerrington.

The Thellusson Act (39 and 40 Geo. III, cap. 98), sec. 1, enacts—"That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividend, or annual produce so directed to be accumulated; and in every case where any accumulations shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

William Nicol and others, testamentary trustees of the deceased Lyon Wilson junior, *first parties*, Miss Jane Wilson and others, the heirs both in heritage and moveables of the said Lyon Wilson junior, *second parties*, the Glasgow Royal Infirmary, *third party*, and Mrs Elizabeth Anderson or Wilson, widow of the said Lyon Wilson junior, *fourth party*, brought a Special Case for the opinion and judgment