of process: Therefore sustain the plea-in-law for Mr Reid in his defences . . . and the pleas-in-law for the compearing defenders in their revised defences. . . . : Refuse the prayer of the initial writ, and decern: Of new find the defender Reid entitled to expenses up to the date when said other defenders entered appearance, and thereafter find them entitled to expenses both in the Sheriff Court and in this Court, and remit," &c.

Counsel for Appellant—Murray, K.C.—A. M. Mackay. Agent—R. C. Gray, S.S.C.

Counsel for Respondents—Macmillan, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

HOUSE OF LORDS.

Thursday, May 14.

(Before the Lord Chancellor (Haldane), Lord Atkinson, Lord Shaw, Lord Sumner, Lord Parker, and Lord Parmoor.)

GIBSON & COMPANY *v.* WISHART.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Review of Weekly Payment—Date from which Review is Open.*

Where employers apply for a review of the compensation payable by them weekly to a workman under an arbiter's award, on the ground that the workman's incapacity ceased at a date antecedent to the date of the application, at which date they have in fact ceased payment, the review may be, not only from the date of the application, but from such date, subsequent to the antecedent date stated in the application, as in fact it is found that the incapacity ceased.

Donaldson Brothers v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920, *overruled.*

On November 4, 1912, George Gibson & Company, shipowners, Leith, *appellants*, applied for review of the weekly payment of compensation payable by them to Peter Wishart, *respondent*, and being dissatisfied with the award of the Sheriff-Substitute (GUY) acting as arbiter, appealed to the Court of Session.

The Stated Case set forth—". . . The respondent on 11th May 1912 applied for an award of compensation against the appellants under the said Act at the rate of 14s. per week as from 23rd April 1912, in respect of injuries sustained by him on said last-mentioned date by accident to his right hand, arising out of and in the course of his employment with the appellants as a dock labourer. On 5th August 1912 I issued my award, in which I found that the respondent was then totally incapacitated, and found him entitled to compensation at the rate of 14s. per week from and after 23rd April 1912. The appellants paid the respondent compensation in terms of said award up to 24th September 1912. On 4th November 1912 the appellants presented an application for review of the compensation payable to the respondent, and craved me to end the compensation as at 24th September 1912, or diminish the same, or to do otherwise in the premises as might seem proper. They, *inter alia*, averred that the respondent had, since 24th September 1912, completely recovered from his said accident, and was working in England, and earning the ordinary rate of wages there. The respondent averred in his defences that he was at the date of his defences (18th November 1912) still incapacitated as the result of said accident, and was only earning 23s. per week, which was all that he was able to earn in consequence of his injuries. At the diet of proof on 24th December 1912 the respondent's counsel stated at the Bar that he consented to the compensation being ended as at 4th November 1912. The appellants thereafter led evidence. The respondent led no evidence, did not cross-examine the appellants' witnesses, and took no part in the proof. . . .

"I found as a fact that on 24th September 1912 the respondent had recovered complete capacity for work.

"In these circumstances I ended the compensation payable by the appellants to the respondent under the award dated 5th August 1912, as at said 4th November 1912, the date of the presentation of this application for review, and I found the respondent liable to the appellants in expenses. I would have ended the compensation as at said 24th September 1912 had it been competent for me in this application to do so; but I held that it was not competent for me to do so, in respect that by doing so I would be disturbing a decree of Court as at a date when there was no proper application to enable this to be done."

The *questions of law* were—"(1) Was it competent for me to end the respondent's compensation at 24th September 1912? (2) Ought I to have ended the compensation at that date?"

On 28th June 1913 their Lordships of the Second Division delivered these opinions:—

LORD DUNDAS—. . . The arbiter in declining to end the compensation as at a date antecedent to that of the application proceeded upon the authority of *Donaldson Brothers* v. *Cowan* (1909 S.C. 1292). In that case the application for review, under Schedule I (16) of the Act 1906, was made to the arbiter on 30th December 1908. The arbiter found in fact that the workman had on 24th October 1908 completely recovered capacity, but he ended the compensation only as from the date of his own decision—23rd February 1909—in deference to the cases of *Steel* (1902, 5 F. 244, 40 S.L.R. 205), and *Pumpherston Oil Company* (1903, 5 F. 963, 40 S.L.R. 724). The question of law stated to the Court was whether the compensation ought to have been ended as at the date of the arbiter's judgment (23rd February 1909), or as at the date (24th October 1908) when the arbiter found that the workman's incapacity had ceased. The case was sent to a bench of Seven Judges in order that the two cases mentioned, which decided that compensation could not competently be ended at any

date prior to that of the arbiter's judgment, should be reconsidered. It was unanimously held by the Seven Judges that the compensation ought to be ended at neither of the dates mentioned in the stated question, but at an intermediate date, viz., that of the presentation of the application for review (30th December 1908). The judgment in *Donaldson's* case is binding upon us as determining this point of general application. It is perhaps unfortunate that the Court were not, as appears from the report, in possession of the full text of certain judicial opinions in England tending in favour of the competency of ending compensation at a date antecedent to that of the application for review, when such date is specifically tabled in the application. The appellants' counsel inform us that they desire to submit the judgment in *Donaldson Brothers* v. *Cowan* for review by the Court of last resort. They will be entitled there to found upon the weight of the English cases, but so far as this Court is concerned the general question sought to be raised—and it is an important one, though the pecuniary amount at stake in this particular case is very small—appears to be closed by the decision of the Court of Seven Judges.

When the case came before us it was ingeniously suggested by the junior counsel for the appellants that it was distinguishable from *Donaldson's* case in respect of an important element which was absent in the former case. It was urged that the workman here had disappeared from Leith on 24th September 1912, that his agent had refused to give his address, and that the workman had obstructed and prevented the appellants from examining into his physical condition of capacity or otherwise for work. The case of *Finnie* (1904, 7 F. 254, 42 S.L.R. 192) was referred to and founded upon. There was some dispute as to whether or how far this aspect of the case was before the learned arbiter, and upon a suggestion from the Bar, and of consent of both parties, we decided to order the process to be transmitted to this Court. The process having been transmitted, it seems quite clear—and was I think admitted by the appellants' counsel—that the parties did not join issue before the arbiter upon any question of obstruction or of consequent suspension of the compensation. The suggested distinction between the present case and that of *Donaldson* falls therefore out of account. It is not necessary to decide whether or not it would be competent in an application (like this) for review of compensation, under Schedule I (16) of the Act, to ask for or obtain a suspension of compensation on the ground that the workman had obstructed examination as to his physical condition (see Schedule I (4) (14) (20) of the Act). It seems to me that the answer to that question, if it had been raised, should —notwithstanding *Finnie's* case, where the point does not seem to have been taken—be in the negative; and I may refer to Lord Kinnear's observations in *Pumpherston Oil Company* in support of this view.

It may be right to add, as the case will probably be taken to a higher Court, that at the hearing at our Bar after the transmission of the process, the respondent's counsel desired to raise and discuss the question whether the learned arbiter's finding that the respondent was liable to the appellants in expenses could be supported. There is no question stated to us upon this point. No application was made to us to have the arbiter ordained to state a case in regard to it, upon the ground, which I apprehend could alone have justified such an application, that the arbiter had exceeded his jurisdiction in the matter. In these circumstances we declined to entertain the learned counsel's argument.

I think we must answer the first question put to us in the negative, and find it unnecessary to answer the second question.

LORD SALVESEN—The question raised in this case is one of great practical importance in the administration of the Workmen's Compensation Act 1906. An attempt was made in the opening speech for the appellants to persuade us that the case was not necessarily ruled by the decision in *Donaldson*, but in the end it became reasonably clear that there was no substance in the attempted distinction. The minute for the appellants is confined to a crave that the compensation awarded to the respondent as from 23rd April 1912 should be ended or diminished as at 24th September 1912. There is no alternative that the compensation should be suspended because of alleged obstruction on the part of the workman preventing his medical condition from being ascertained. On this footing it was conceded that the arbiter has correctly applied the decision in the case of *Donaldson*, and as that decision is binding on this Court there is nothing for us to do but to answer the first question stated by the arbitrator in the negative.

We were informed that the purpose of the appellants in bringing their appeal was to pave the way for a further appeal to the House of Lords with a view to having the decision in *Donaldson's* case reconsidered. As the Court of Appeal in England, in *Charing Cross Railway Company* v. *Boots*, [1909] 2 K.B. 640, expressed views differing from the judgment in *Donaldson's* case, it is eminently desirable that this conflict of authority should be set at rest. Unless there is anything in the language of the Act itself which precludes the Court from doing so, it would seem proper that the arbitrator should have power to end compensation to a workman as at the date of his complete recovery, and prevent him from continuing to receive benefits to which he has no just claim up till the date when a formal application for review can be lodged. In most cases an interval of time, longer or shorter according to the amount of information at the employer's disposal, must necessarily elapse after complete recovery has in fact taken place until proceedings to terminate the compensation can be instituted. The present case seems a very suitable one in which to raise this important general question. The arbitrator, who is final on the facts, has found that the respondent

had recovered complete capacity for work on 24th September 1912, and yet he has felt himself constrained to allow full compensation to the respondent from that date till 8th November, although during the whole of that period the workman was earning wages equal to and for some weeks largely in excess of those which he had received while in the appellants' employment. If such an anomaly results from the terms of the Act, the injustice to employers might reasonably demand a statutory remedy, but the existence of the anomaly cannot be affirmed until the opinion of the Supreme Court of the United Kingdom has been delivered to that effect.

LORD GUTHRIE—It is admitted that the case is ruled by the case of *Donaldson* unless the element of obstruction can be founded on as making a difference. In the end it appeared clearly that that could not be maintained before us, not having been at issue before the arbitrator at an earlier stage. As to the case of *Donaldson*, we have not heard any argument on the question involved in that case, and I express no opinion upon it.

The LORD JUSTICE-CLERK was not present.

Their Lordships, with expenses to the respondent, answered the first question in the negative.

The appellants (G. Gibson & Company) appealed to the House of Lords. They referred to *Morton & Company, Limited* v. *Woodward*, [1912] 2 K.B. 276; *Upper Forest and Western Steel and Tinplate Company, Limited* v. *Thomas*, [1909] 2 K.B. 631; *Charing Cross, Euston, and Hampstead Railway Company* v. *Boots*, [1909] 2 K.B. 640; *Hosegood & Sons v. Wilson*, [1911] 1 K.B. 30, as containing dicta adverse to *Donaldson Brothers* v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920. They also referred to *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665.

At delivering judgment—

LORD CHANCELLOR—[*Read by Lord Atkinson*]—The main facts out of which the question to be decided in this appeal arises may be stated briefly.

On 23rd April 1912 the respondent, who was a dock labourer in the employment of the appellants, sustained an injury by accident arising out of and in the course of his employment. On 5th August the Sheriff-Substitute made an award under the Workmen's Compensation Act 1906, under which he decided that the respondent was totally incapacitated, and was entitled to compensation at the rate of 14s. a-week from and after the date of the injury. The appellants paid this compensation up to 24th September 1912, but after that date they paid nothing. On 4th November they applied under the First Schedule to the statute for review of this compensation, and asked that it might be ended as from 24th September on the ground that the respondent had then completely recovered, and had since been earning wages at the ordinary rate.

The Sheriff-Substitute found that this was so, and ordered the compensation to end as from 4th November, the date of the application for review. He stated that he would have ordered it to end as from 24th September had it been competent for him to do so, but that he considered that the law did not enable him to disturb a decree of the Court as at a date when there was no application to enable this to be done. The question is whether this decision was right.

The answer to this question must depend on the proper interpretation of the terms in which the Act of Parliament has set up the jurisdiction—a jurisdiction which is new and is the creature of the statute.

The learned Judges of the Second Division were of opinion that the Sheriff-Substitute, who stated the question of law for their decision, had no power to end the compensation as from a date antecedent to the application for review. They agreed with the Sheriff-Substitute in thinking that the point had been disposed of by a case which bound them—*Donaldson* v. *Cowan* (1909 S.C. 1292). In that case the First Division, with three consulted Judges of the Second Division, construed the statute as meaning that it was not competent to end compensation at a date antecedent to that of the application for review, notwithstanding that it was proved that incapacity had ceased at an earlier date. They held that the proper date of ending was that of the presentation of the application to review.

The basis of their decision was, in the words of the Lord President (Lord Dunedin), that "when compensation is once fixed, the only way to alter it is that provided by the statute—an application to vary." Lord Dunedin went on to indicate that he differed from the view which had been suggested in certain decisions of the Court of Appeal in England. The Master of the Rolls (Lord Collins) said in *Morton* v. *Woodward* (1902, 2 K.B. 276) that "the scheme of the Act is that compensation is to be given during the period of incapacity—that is, incapacity of the workman to earn his wages. Therefore when a dispute arose as to the man's incapacity for work, the essential question was his condition, not when the Court was able to give its attention to the matter, but when the dispute was formulated as to whether the man's incapacity had ceased or not." This view received varying degrees of countenance from the Judges of the Court of Appeal in *Upper Forest and Western Steel Company* v. *Thomas* (1909, 2 K.B. 631); *Charing Cross, Euston, and Hampstead Railway Company* v. *Boots* (1909, 2 K.B. 640); and *Hosegood* v. *Wilson* (1911, 1 K.B. 30).

The language of the statute on which depends the solution of this conflict between these judicial opinions leaves a good deal to be desired in point of precision. But after some hesitation I have come to the conclusion that the interpretation placed on it by the appellants is the true one. Section

1 of the First Schedule provides that the amount of compensation, where total or partial incapacity for work results from the injury, is to be a weekly payment during the incapacity. The jurisdiction to award the weekly compensation is thus limited to the period of the incapacity. The arbitrator is to decide that there is incapacity, but he cannot make an award which will carry the compensation beyond that period.

By section 14 the workman receiving weekly payments is to submit himself, if so required, from time to time to examination by a doctor provided by the employer. By section 15, if as the result an agreement is not reached as to the workman's condition, the question may be referred by the officer of the Court to a medical referee, whose certificate is to be conclusive. Section 16 contains words which taken by themselves are ambiguous. It provides that "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." At first sight these words suggest that the right to payment up to the date of the review being a right arising from the previous decree, that decree and the title arising under it can only be got rid of by a second decree, that effecting the review, and only as from the date of the second decree and not retrospectively.

But I do not, on consideration, think that this construction is consistent with the provision, to which I have already referred, limiting the compensation to the period of incapacity. If on the review it is decided that payment of compensation ought to cease, on the ground that the workman in fact ceased to be incapable at a date previous to the application, I do not see how, this being a judicial review of the state of health subsequent to the previous decision, and the result of that decision having been limited to the period of incapacity, the workman can claim that payments should be made to him after he must be taken to have ceased to be incapable. What is brought under review is the continuance and duration of the incapacity.

In the case before us no question arises as to repayment to the appellants of money obtained from them after the incapacity ceased. In point of fact they paid nothing after 24th September. Had they paid, and were they now seeking to recover the money, another question would arise upon which I express no opinion. The weekly payments would have been made under a decree which was on the face of it valid, and which was not reviewed in any proceeding in the nature of an appeal, but stood until its effect was terminated by the exercise of a subsequent and original jurisdiction. It may be that what had been paid under the first decree could not have been recovered. As to this I say nothing, for no such point arises.

The only question is whether the words in the schedule to which I have referred enabled the Sheriff-Substitute to pronounce that the incapacity had ended before the application to review, in this case on the 24th September. I think that they did. The alternative construction would allow the workman to claim payment notwithstanding that incapacity had ceased. I think the intention of the Act is to give compensation only during incapacity. If it has ceased and the employer has not availed himself of his right to apply for review, it may be, as I have already said, that he cannot recover what he has paid while the first decree remained uninterrupted in its operation. But that would not involve the further conclusion that the judicial authority was precluded from subsequently determining the real date when the incapacity during which alone the first decree could properly continue undisturbed to operate had come to an end.

It appears to me that the words "on such review may be ended, diminished, or increased" must, having regard to the provisions of section 1 of the schedule, be read as enabling a review to be made retrospectively. No doubt such a review is not in the nature of an appeal or a re-hearing. Its character is, as I have already said, rather that of an original application. But I see no reason why the words should be read without reference to their context in the earlier provisions of the schedule, and I think that so read they import the construction I have indicated.

I am therefore of opinion that the appeal must be allowed.

There is one further observation which I wish to make. There are differences between the procedure in Scotland and the procedure in this country which the statute recognises and provides for. I have had the advantage of reading the judgment of my noble and learned friend Lord Shaw, and I concur in the suggestion made at the end of that judgment as to the practical method of conforming to the requirements of Scottish procedure. It is important that on a point like this we should not introduce confusion about well-settled principles.

LORD ATKINSON—This case came before the Court of Session on a Case stated by the Sheriff-Substitute. The respondent was, by an award of the arbitrator dated the 5th of August 1912, awarded compensation, fixed at 14s. per week, from the date of the injury he had sustained, under the Workmen's Compensation Act of 1906, in respect of his total incapacity due to an injury by accident arising out of and in the course of his employment. This award has not been printed in the Case, but it is clear from the provisions of the first section of the statute, coupled with those of paragraph 1, head (*b*), of the First Schedule annexed to the Act, that the arbitrator, the Sheriff-Substitute in this case, had only jurisdiction to direct the weekly payments to be made during the respondent's incapacity. It must therefore be assumed, at least in the absence of the Order, that it was in conformity with these enactments, and was expressly or impliedly qualified so as not to be *ultra vires*.

On the 4th of November 1912 the appellants presented an application for the review of those weekly payments under the provisions of the sixteenth paragraph of the

First Schedule. In that application they averred, as a fact, that the respondent had by the 24th of September 1912 completely recovered from the effect of the accident, and had since that date been working in England and earning the ordinary rate of wages there. They accordingly claimed that the weekly payment should for these reasons be ended as from that date.

The appellants had refused to make, and did not make, any weekly payments to the respondent since the 24th of September 1912. So that the question of the right of an employer to recover back from a workman weekly payments made after incapacity had in fact ended, but before review, does not arise in this case at all. Whenever it does arise much may turn on the special facts of the case in which it arises, and I therefore advisedly abstain from expressing any opinion upon a point which is not raised, and could not be raised, in this case, and has necessarily not been argued. The Sheriff-Substitute has found as a fact that on the 24th of September 1912 the respondent had recovered complete capacity for work. He states that he ended the compensation as at the 4th of November 1912, the date at which the appellants presented their application for review, but that he would have ended it on the 24th of September 1912 had he considered it was competent for him to do so. And the questions of law which he submitted for the opinion of the Court of Session are the following:—"(1) Was it competent for me to end the respondent's compensation on the 24th of September 1912. (2) Ought I to have ended the compensation on that date." These are the only questions before your Lordships' House for decision, and the answers which should be given to them must, in my view, depend entirely on the proper construction of the statute and the schedules attached to it, and on that alone.

Now the first section of the Act runs thus—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule of this Act." On referring to the First Schedule, paragraph 1 (*b*), coupled with paragraph 3, it is clear that what was aimed at was, by the payment of weekly sums during incapacity, total or partial, to compensate the workman for the loss of the power to earn wages. But as this incapacity, whether total or partial, might diminish or cease altogether, and as partial incapacity might develop into total incapacity, it was necessary to provide machinery for the adjustment, in the interest of employer and workman alike, of the weekly payments according to the changing condition of the workman subsequent to the first award. Accordingly it is provided that any workman receiving weekly payments under the Act must, if required by the employer, from time to time submit himself for examination by a medical man, and elaborate provisions are made for the reference of the question of the workman's fitness for employment to a medical referee.

Paragraph 16 deals with the review of these weekly payments, not a review in the nature of an appeal from the award made in the first instance, by the arbitrator, who decides on the existence of incapacity when he makes his award, but a review directed to the question whether owing to changed conditions these weekly payments should be increased, diminished, or made to cease. It is a review, moreover, which may be effected under paragraph 16 by the agreement of the parties, and would more properly be styled a re-estimation or reversion of the amount of compensation awarded rather than a review of the award itself. It is only when the parties fail to review by agreement that the matter is to be settled by arbitration. It was suggested in argument that the award of an arbitrator, whether original or made on a review under paragraph 16, is in the nature of a judgment of a County Court. That this is an error is, in my view, clear from the provisions of paragraph 29 of the Second Schedule. By that paragraph the same effect is given to a memorandum embodying the terms of the agreement of the parties as is given to a memorandum embodying the decision of an arbitrator. The memorandum when recorded is in either case no doubt enforceable as a judgment of the County Court, but that is a very different thing from saying that on registration it in England becomes a judgment of a County Court.

The Judge of the County Court is not *functus officio* when he makes his award in the first instance. Should the parties fail to agree to review the weekly payment, he is brought into touch with the matter again, and can himself do that for them, increasing or diminishing or making the payments to cease as to him shall seem necessary to meet the justice of the case. For myself I may say that I utterly fail to see upon what principle of justice a workman is, under a decision awarding to him weekly payments during his incapacity, entitled to receive a single payment after his incapacity has ceased, or that when proceedings for review have been properly instituted the employer is not entitled to have the weekly payments ended from the time the incapacity is proved to have ended, at all events where as in the present case the employer has by his application given the date when he alleges incapacity has ended in fact, and claims to have the payments ended from that date.

According to the rules to which your Lordships' attention has been called, the practice prescribed in England when an employer raises as a defence against the enforcing of the payment of a weekly sum on the ground that incapacity has ceased, is apparently to make the order for payment but to stay the execution of it until the employer has had an opportunity of making a proper application for review, on the terms, however, that the amount awarded should be paid into court.

This would appear to me to be a most convenient and proper course. My noble friend

Lord Shaw has dealt with the Scotch practice. I am clearly of opinion that both the questions submitted by the Sheriff-Substitute for the opinion of the Court should be answered in the affirmative. With all respect to the learned and distinguished Judges who decided the case of *Donaldson Brothers* v. *Cowan* (1909, S.C. 1292), I am not quite sure that the peculiar nature of the awards of compensation under this statute was steadily kept in view.

It may well be that as a general rule judgments of courts of law stand until they are reversed, and that when the right is claimed to modify them, the relief when given should only operate either from the time it is claimed or from the time it is granted, according to the circumstances of the case, but where, as in this case, something is by an award directed or ordered to be done during the continuance of a certain state of circumstances or until the happening of a certain event, then that judgment or order by its very terms directs that this thing need not be done when those circumstances have altered in the way contemplated or that event has occurred. And all questions of laches or acquiescence apart, I can see no reason why where in a proper proceeding the fact that the particular state of circumstances has ceased, or the particular event has occurred when the thing directed should cease to be done, the arbitrator should not be entitled to make an order in truth only carrying into effect the first order, and direct that this thing need not be further done.

Though it is not necessary for the decision of this case to determine whether any different rule or principle should apply where it is merely claimed that the weekly payments should be diminished or increased, still I may say for myself that the inclination of my present opinion is that the same general principle should apply to the one case as to the other, and that the weekly payments should be varied from the time the circumstances justifying the change are shown to have occurred. I think the judgment appealed from was erroneous and should be reversed, and this appeal be allowed but without costs.

Lord Shaw—This appeal arises out of an arbitration under the Workmen's Compensation Act. The arbitration was in a process of review of a weekly payment made under a previous award. The facts must be taken as they are set forth in the Stated Case. They have been already fully adverted to.

From that Case it appears that the respondent was on 5th August 1912 found by the Sheriff to be totally incapacitated for work. It is also "found as a fact that on 24th September 1912 the respondent had recovered complete capacity for work." Not only so, but since that date, or rather since 25th September, it is found that the respondent has been fully employed and earning wages.

In these circumstances the respondent claims that the weekly payments awarded to him during incapacity should be continued to him after his incapacity has ceased and he has been earning wages elsewhere. I think that this claim cannot be defended on any principle of common honesty. Nor do I think that it can be justified on any principle of law. For this reason I humbly agree that the judgments appealed from should be reversed.

The proceedings for review of the weekly compensation began on 4th November. It is clear that the learned arbitrator felt that to say that the cessation of incapacity then began was erroneous. The incapacity had ceased two months before. Quite correctly, however, interpreting the decision in *Donaldson Brothers*, he felt himself prevented from getting back to the true date, or nearer thereto than the date of the petition for review. The judgment of the Court below in the present case also followed that of *Donaldson*.

The case is not complicated by any payments having been made since the incapacity ceased. Where payments are in fact made and repetition is demanded there may be various considerations for and against such repetition, and pleas of bar, closed account, laches, and the like might come to be discussed. I humbly agree with the views on that subject expressed in the opinion of the noble and learned Lord Chancellor. These may be exceptional cases. But it may in general be said that when both parties to an award do act in terms thereof they will be presumed to do so on the footing of admitting that the conditions of the award were fulfilled and applied. It appears to me that so far as proceedings under the Act are concerned—for I exclude other remedies grounded upon allegations of concealment, fraud, or the like—they ought not to be utilised so as to rip up concluded transactions.

In Scotland the effect of the recording of the award—an effect making it by the Act "enforceable" as a decree-arbitral—appears to some extent to have been emphasised at the expense of the consideration that the weekly payment was to be made during the continuance of the incapacity. I humbly look upon all the provisions as to procedure for review of the award to be provisions to enable courts and arbitrators to get back to that cardinal point to prevent compensation during incapacity being turned into compensation during capacity, and so to readjust awards of total or partial incapacity as to square with the facts.

An instance of what I mean is the judgment in the two cases of *Steel* (5 Fr. 247) and *Pumpherston Oil Company* (5 Fr. 963). A process of review may be lengthy, and judgment in it for many reasons may be much delayed. But these cases held that until final judgment in the review was given the old award (although proved to have been long out of accord with the facts) stood. This was never law in England, and is of course not now law in Scotland.

A great advance in Scotland was made by *Donaldson*. This carried the change in liability a long step nearer to the change in the facts, and dated the former, not from the judgment in the application for review, but from the application itself.

And I confess that, while I entirely agree that the case of *Donaldson* was erroneous in not going further, I feel some of the difficulties alluded to in the Court of Session by Lord Dunedin.

It is of course not of real assistance, however, that the award or even the recorded agreement of parties "shall be enforceable" as a decree of Court. For the enforceability cannot affect the liability for or the existence of the quantum of the debt. Assume, however, an award made and recorded, the practical question is, how is it to be treated after a dispute arises? By this I mean, not in the sense of a legally formulated dispute, but in the sense of an actual difference between the parties as to whether the condition of incapacity continues. The parties differ. In one case the workman alleges that his partial incapacity has now become total incapacity, and that the award should be increased. In another case the employer alleges that the incapacity ceased as at a certain date and that the compensation should cease then, and he in fact has stopped on that account all further payments. The latter instance is the present case. But assume that in such an instance the workman denies any change of circumstances, and that accordingly a charge for payment in execution of the award is made. In my opinion the duty of the employer in such circumstances is instantly to institute proceedings for review by the arbitrator under the statute. He cannot bring a suspension of the charge in the ordinary sense so as to review the disputed circumstances in that process; but if the charge is persisted in he may *pro forma* bring a suspension, and in the suspension table his application to the arbitrator for review, and the Court would at once suspend and sist all procedure to enable the proper and statutory review to proceed. This in my opinion is the sensible course. It is a course which is suitable in Scotland, and it is in substance analogous to the procedure in England.

I agree with your Lordships that the appeal should be allowed, and that the questions stated by the learned arbitrator should both be answered in the affirmative.

LORD PARKER—[*Read by Lord Shaw*]—I agree. The liability imposed on the employer by section 1 (1) of the Act of 1906 is a liability to pay compensation in accordance with the First Schedule to the Act, that is, in the case of total or partial incapacity resulting from the injury, to pay a weekly sum during the incapacity. By section 1 (3) any question as to the amount or duration of the compensation is in default of agreement to be settled by arbitration. Any question as to the duration of the compensation must therefore in reality be a question whether the incapacity during which it is payable did or did not exist at the particular *punctum temporis* at which it is alleged that the compensation ceased to be payable.

In the present case the accident resulted in the total incapacity of the workman, and by the award of the Sheriff-Substitute dated the 5th August 1912 the compensation payable was fixed at 14s. a-week. The precise terms of this award are not in evidence, nor indeed do they appear to be material, for the duty of the Sheriff-Substitute was merely to fix the amount of the weekly sum payable. He had no jurisdiction to determine prospectively—indeed, it would be impossible to determine prospectively—the duration of the weekly payment which depended on the duration of the incapacity.

The weekly sum payable under the award was paid until the 24th September 1912. As from that date the employer refused to pay it on the ground that the incapacity had then determined. There thus arose a dispute as to the duration of the compensation, and the parties having failed to come to an agreement this dispute was referred as provided by the Act. The Sheriff-Substitute found that the incapacity had ceased on the 24th September 1912. Logically, therefore, it followed that the weekly sum ceased to be payable on and after that date. The Sheriff-Substitute, however, felt himself constrained to hold, on the authority of *Donaldson Brothers* v. *Cowan* (1909 S.C. 1292), that the weekly sum did not cease to be payable until the 4th November 1912, being the date upon which the arbitration proceedings in which his award was given were initiated. In this he was upheld by the Order of the Second Division now appealed from.

The decision in *Donaldson Brothers* v. *Cowan* turned on the true meaning and effect of the provisions of clause 9 of the Second Schedule and clause 16 of the First Schedule of the Act. By the first of those clauses it is provided that any agreement or award determining the amount of the compensation is to be recorded as therein mentioned, and when recorded may be enforced as a County Court judgment in England, and as a recorded decree-arbitral in Scotland. This provision may be somewhat inaccurately worded, but its meaning is clear. The agreement or award determining the amount of compensation is not in any sense a judgment or decree, nor does it create any liability. The liability is imposed by the Act, and the agreement or award determines its amount. When, however, the agreement or award is recorded the liability may be enforced as though it were a liability under a judgment or decree. Now where the liability is to pay a weekly sum, not for any definite period, but during incapacity, it could not, even if embodied in a judgment of the County Court in England, be enforced without some further proceeding in which the Court could be satisfied as to the amount actually due. If in this further proceeding it were alleged by the employer that nothing was due as from a particular date, because on that date the incapacity had determined, it would be the duty of the Court to grant an adjournment so that the dispute as to the duration of the compensation could be referred. If on such reference the arbitrator found that the incapacity had in fact determined on the date alleged it would be the duty of the Court to refuse to enforce the weekly payment after that date

It appears from the judgment of Lord Shaw, which I have had the advantage of reading, that though the procedure for enforcing or suspending a decree-arbitral in Scotland is somewhat different, the same results would follow. There is therefore nothing in clause 9 of the Second Schedule in any way at variance with the earlier provisions of the Act.

Passing to the 16th clause of the First Schedule, it provides that 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 thereinbefore provided, and the amount of payment is, in default of agreement, to be settled by arbitration. This clause contemplates (1) that the weekly sum payable has already been ascertained by agreement or arbitration; (2) that notwithstanding such ascertainment, a dispute has arisen as to the amount payable under the Act; (3) that this dispute will be itself settled by a new agreement or arbitration; and (4) that the settlement of the dispute may involve the weekly payment originally agreed or awarded being ended, diminished, or increased. The process by which the last-mentioned result is to be effected is called a review, but there is, I think, no magic in the word.

In the present case 14s. a-week was the original amount awarded. Subsequently there was a dispute as to whether it had not ceased to be payable on the 24th September 1912, by reason of the incapacity during which alone it was payable having wholly ceased on that date. This dispute was in due course referred, and the arbitrator found that the incapacity had in fact wholly ceased on the 24th September 1912. The result seems to be that the weekly payment wholly ceased on the 24th September 1912. There has been a review, with the result that the liability to make the payment was ended on that date. If it had been a case of partial incapacity, and the workman had alleged a total incapacity as from the 24th September 1912, and claimed 16s. instead of 14s. a-week, and the arbitrator had found in his favour, can it be doubted that the 16s. a-week would have been payable as from the 24th September 1912? I think not. It would be clearly inequitable and contrary to the true intent of the Act so to hold, and it seems to me to be equally inequitable and contrary to the true intent of the Act to hold that a weekly payment continues after the incapacity during which it is payable has wholly ceased. With great respect to the learned Judges who were parties to the decision in *Donaldson Brothers* v. *Cowan*, it appears to me that they took too technical a view of the ninth clause of the Second Schedule and the sixteenth clause of the First Schedule to the Act. They treated the award by which the amount payable was originally settled as though for all purposes, and not only for the purposes of enforcement, it was a judgment or decree, and as if the subsequent arbitration proceedings were in the nature of an action to set aside or vary such judgment or decree, whereas in truth the arbitration tribunal set up by the statute is a tribunal for determining and adjusting from time to time, as circumstances alter, the extent and duration of the employers' liability under the Act.

I agree, therefore, that the appeal ought to be allowed.

LORD SUMNER—[*Read by Lord Parmoor*]—I agree, and would add nothing if it were not that your Lordships are reversing part of a unanimous decision, now five years old, of Seven Judges of the Court of Session without having had the advantage, since the respondent does not appear, of any argument in support of it. Out of deference to those learned Judges I think that I ought to state my reasons for differing from them.

The Sheriff-Substitute of the Lothians and Peebles had before him an application by an employer, under paragraph 16 of Schedule I of the Workmen's Compensation Act 1906, dated 4th November 1912, to review, by terminating them as from the 24th September previous, the weekly payments awarded to the workman under the original award. He found as a fact that the workman's incapacity had completely ceased on that day, and in fact also the employers had disputed the workman's right to be paid thereafter by the sufficient process of stopping their payments as from that day. The original award, though it is not before your Lordships, may be presumed to have been correctly worded, and so to have provided that the weekly payment was "to continue during the total or partial incapacity of" the respondent, "or until the same be ended, diminished, increased, or redeemed in accordance with the provisions" of the Act. The Case states that "a decree of Court" was made thereon, but does not give any date or particulars.

The Sheriff-Substitute stated in the Case two questions of law — "(1) Was it competent for me to end the respondent's compensation at 24th September 1912? (2) Ought I to have ended the compensation at that date?" And he adds that but for the authorities as to the effect of the decree of Court he would have done so.

The Judges of the Second Division, following the case of *Donaldson* (1909 S.C. 1292), said "No" to the first question and nothing to the second. The appellants submit, and I think rightly, that the answer to both is "Yes."

In connection with the review of an award of weekly compensation there are four occurrences the dates of which are or may be material—(1) the alteration or cessation of the workman's incapacity in fact; (2) default of agreement to deal with the compensation accordingly, which involves a contention actually raised *inter partes* as to the continuance of the original or any payment and the absence of any agreement determining that contention; in point of time either of these occurrences may precede the other; (3) an application duly made to have the weekly payments reviewed; (4) an actual decision upon that application. Where by that decision a weekly payment has been varied or terminated, a memorandum thereof must be sent under paragraph 9 of Schedule II to the Registrar of the County

Court, and when it has been registered "the memorandum shall for all purposes be enforceable as a County Court judgment" or in Scotland as a "recorded decree-arbitral." Not until this has been done has the review resulted in any adjudication. Until this has been done the original award, if duly recorded without stay or suspension, is a judicial act still in force.

The application for review does not of itself affect or suspend the operation of the award, and it has been laid down in Scotland, though it is otherwise in England, that "if a workman registers a memorandum, and by that means gets power of execution, then the only proper way of getting out of the liability which that memorandum imposes is for the employer to end it in the way provided by the statute, viz., by a petition under section (16), and that he cannot get out of it by any other process such as suspension"—*per* the Lord President in *M'Ewan* v. *Wm. Baird & Company* (1910 S.C. at p. 440). The same proposition in substance is to be found in *Fife Coal Company* v. *Lindsay* (1908 S.C. 431), *Lochgelly Iron and Coal Company* v. *Sinclair* (1909 S.C. at p. 930), and in *Wilson & Clyde Coal Company, Limited* v. *Cairnduff* (1911 S.C. at p. 650). On the other hand, if no memorandum has been recorded, and it is proved that the workman has acquiesced in a discontinuance or variation of the payments, then, as was held in *Lochgelly Iron and Coal Company* v. *Sinclair* (1909 S.C. 922), suspension of the payments may be granted.

What, then, is the relation of the tribunal of review to the original recorded award? To what date, if any, prior to the date of its actual decision may its order relate? "Review" here does not of course mean appeal, for the review may be effected by the parties consensually, and there is, besides, a separate provision for an appeal against the original award. For the purposes of review the arbitrator who decides the second issue has co-ordinate jurisdiction with the arbitrator who decided the first, and often, as in the present case, is the same person. A review is a further arbitration, and as such involves a submission which at the same time confers and limits jurisdiction.

Under the Workmen's Compensation Act 1897 it was held some years ago that the tribunal of review can discontinue or vary the prior payment only as from the date of its actual decision—*Steel* v. *Oakbank Oil Company* (5th Ser. Ct. Session Cases, p. 244), and *Pumpherston Oil Company* v. *Cavaney* (*ibid.* p. 963). The ground was "that the judgment still subsisted, notwithstanding an application to review it, until it was reviewed and a judgment in the review pronounced, and ought to have been obeyed, notwithstanding the application for review, so long as it remained unreviewed and unaltered"—(*per* Lord Young, case of *Steel*, at p. 247). "It is not stated" (in paragraph 12 of Schedule I of the Act of 1897, to which the present paragraph 16 corresponds) "at or from what time the ending, diminution, or increase of the weekly payments is to be made, but it appears to me that upon a sound construction of the section it cannot be presumed to have been intended that the review should take effect at any time prior to the judgment upon the application"—(*per* the Lord President, *Pumpherston* case, *ibid.* at p. 966).

This view never was taken in England. Before either of these cases had been decided, *Morton & Company* v. *Woodward* (L.R. 1902, 2 K.B. 276) in the Court of Appeal had laid down the contrary rule, and the decision in the case of *Donaldson* in 1909 definitely abandoned the principle of these two cases. The first question therefore is whether they were rightly overruled.

Morton's case was decided on the principle that the function of the tribunal of review is to arbitrate upon such disputes as may be duly brought before it. Hence the arbitrator is not limited in his jurisdiction to deciding the existence or extent of the workman's incapacity at the date of his award, but may, and, if either party desires it, must decide it on the date "when the matter was first initiated before the Court," that is, at the date of the application to review, provided that a dispute as to the workman's then condition is then distinctly formulated. As Cozens-Hardy, L.J., tersely puts it (p. 282)—"The matter which was referred to the learned County Court Judge, and which he was competent to deal with, was whether at the date of the initiation of these proceedings the incapacity to work had ceased." The argument for the employers in that case did not make it necessary for the Court to consider whether there was jurisdiction to review the weekly payments as at any date anterior to that of the application to review.

Two cases on this subject came before the Court of Appeal in 1909—*Upper Forest and Western Steel and Tinplate Company* v. *Thomas* (1909, 2 K.B. 631) and *Charing Cross, Euston, and Hampstead Railway* v. *Boots* (1909, 2 K.B. 640). In both the arbitrator terminated the weekly payment on review as from a date anterior to that of the application for review. In neither did the application state a date for the workman's alleged recovery. In the first case, on the workman's application to record, the County Court Judge finding that it was opposed on an allegation that the incapacity had ceased, recorded the memorandum but stayed execution to give time for an application for review. No exception seems to have been taken to this in the Court of Appeal, and the cases of the *Fife Coal Company* and of the *Lochgelly Company* were not cited. The Court of Appeal unanimously decided that on the form of the application to review the arbitrator had exceeded his jurisdiction, for "it was not referred to him to ascertain what was the state of the injured man at a previous date." The earliest competent date was therefore the date of the initiation of the review. The question whether, if the matter had been duly referred, he could have decided that the incapacity had ceased at a previous date was deliberately left open. In the second case the Court, now some-

what differently constituted, adhered to its former decisions that the arbitrator on a review cannot go outside the submission, and that he can review as from a date anterior to that of his own decision. Cozens-Hardy, M.R., intimated distinctly the opinion that "if there is a formulated dispute as to a workman's incapacity at a particular date, it is competent to the arbitrator to decide that dispute" (page 645). He did not expressly put the case when the date particularised is anterior to the application for review itself, but there can be little doubt that his opinion was meant to cover that case. Kennedy, L.J. (page 650) was also favourably inclined to that jurisdiction. Here again the County Court Judge when recording the memorandum had simultaneously stayed execution pending an application to review, and the majority of the Court of Appeal expressing no doubts of its propriety found authority for this course in paragraph 9 (*b*) of the Second Schedule. Buckley, L.J., held that the order to record the agreement ought to have been made, but so that the record should not be enforceable as a judgment under Schedule II, paragraph 9. In other words, an order "that execution of the order for registration of the agreement be stayed" is right; an order "that execution of the judgment for enforcement of the judgment shall be stayed" would be wrong. He further considered that the facts sufficiently raised the question of the arbitrator's jurisdiction to terminate as from a date prior to that of the application to review, and that the form of the application also was adequate. Accordingly he held definitely that as from such prior date there was jurisdiction to decide that the workman was entitled to nothing. He expressly says "There is nothing in the statute to prevent it" (page 648)—an opinion in which I concur.

It is to be noted that the unanimous judgment of the Court continued the stay imposed in the County Court, which, whatever its form, effectually prevented the workman from getting payment as from the date on which his incapacity was alleged to have ceased until the date of the employer's application to review, without making a further application for its removal, on which application cessation of incapacity prior to the date of the application to review could be alleged in answer and proved by the employer.

The conflict between the English and the Scotch decisions had attracted such attention that already in 1908 the question was mooted of bringing it before the full Bench in order to decide whether the cases of *Steel* and of *Pumpherston* should stand (see *Southbrook Fire-Clay Company* v. *Loughland*, 1908, S.C.C. 831), but all that was then decided was that if no memorandum had been recorded, but mere voluntary payments had been made, there was nothing in the nature of an operative decree to stand against the fullest exercise of the power of review, and here the Court appeared to recognise that, in terms, paragraph 16 itself does not limit that exercise at all. This was the state of the authorities when *Donaldson's* case fell to be decided.

The dates in that case are important. The workman got the agreement recorded on 5th October 1908. On 24th October 1908, as the Sheriff-Substitute found, his incapacity entirely ceased. As from that date the employers had made no payment, and when on December 28 the workman charged them to make payment they on 30th December brought a suspension of this charge. The Lord Ordinary refused the note of suspension and the employers reclaimed. Meantime the Sheriff-Substitute had heard the employers' application to review, which also was dated 30th December, and had stated a Case with this question of law for the opinion of the Court—"Should the compensation payable to the respondent have been ended on the date of my judgment, viz., 23rd February 1909, or on the date on which the incapacity of the respondent had ceased, viz., 24th October 1908?" The Stated Case and the reclaiming note in the suspension were heard together.

Upon the reclaiming note the Court, following the case of *Lochgelly*, held that the suspension was rightly refused by the Lord Ordinary. The Court further, overruling the cases of *Steel* and *Pumpherston*, held that the date of the Sheriff-Substitute's judgment was not the date at which the payment should have been terminated, but instead of finding in terms of the question of law stated, directed that the compensation should have been ended as on the date of the application to review, and so remitted the case to the Sheriff-Substitute to proceed as accords.

Part of the reasoning of the Court appears to have been that until the application to review is made there can be no "formulation of a dispute," to use the phrase which originated with Collins, M.R., in *Morton* v. *Woodward*, except in a sense so wide that it would include a mere case of cessation of payment by an employer, which, unless the workman acquiesces in it or the employer acts from carelessness or want of money, shows of itself that the parties are in difference about it; that this would amount to the employer's "determining at his own hand" when incapacity ceases, by taking the law into his own hands and disregarding the terms of a recorded memorandum; and that he is bound to continue to pay in accordance with it at his peril unless and until on an application to review he gets the weekly payments altered.

It is to be regretted that the Court of Session only had the *Charing Cross* case before it in the form in which it is reported in the Times Law Reports, xxv., 683—a form which, while stating the reasons of the Master of the Rolls at length, fails to report the other judgments at all, and gives a most meagre and unsatisfactory note of their effect. It is evident that the learned Judges of the Court of Session felt some difficulty in apprehending the reasoning of the Court of Appeal in that case, and I cannot but think that a full report, and particularly the observations of Buckley, L.J., at page

648 of the Law Reports, 1909, 2 K.B., might probably have led them to a different conclusion.

So far as the decision in the case of *Donaldson & Company* v. *Cowan* overruled the cases of *Steel* and of *Pumpherston*, and held that the review might go back to a date anterior to the decision on the review, it seems to me that it was indubitably right, and that *Morton* v. *Woodward* too was rightly decided. There is a marked difference between the scheme of the Workmen's Compensation Acts 1897 and 1906 and the Employers' Liability Act 1880. Section 1 of the latter provided that "where . . . personal injury is caused to a workman . . . the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman." That right was to be asserted and those remedies pursued by action brought in the County Court. The Workmen's Compensation Act provides otherwise. Section 1, while keeping alive an employer's pre-existing civil liability, declares that "if personal injury is caused to a workman . . . his employer shall be liable to pay compensation," and sub-section (3) provides that "if any question arises in any proceedings" not only as to liability but also "as to the amount or," mark this, "duration of compensation under this Act, . . . if not settled by agreement it shall be settled by arbitration under Schedule II." As my noble and learned friend Lord Kinnear says in the case of *Pumpherston* (p. 970)—"Procedure under the Workmen's Compensation Act is not ordinary litigation, or, indeed, litigation at all. The right given to the workman is a new and statutory right to be expiscated by arbitration and not by an action-at-law, and we must consider what the statute says with reference to the way in which it may be determined or modified."

Now although there is provision for giving effect to the arbitrator's various decisions as if they were judgments of a court, the awards themselves are not judgments, and a special paragraph (9 of Schedule II) is required to enable them after being duly recorded to be enforced as if they were. That enforcement in its turn is effected by the provision for review. The statute does not contemplate a judgment for a sum of money recovered once and for all as compensation for the cause of action, in which judgment the cause of action merges. In the case of an injured workman it creates a right in the workman and a liability in the employer to receive and make respectively a weekly payment during incapacity, which weekly payment may be reviewed, and on such review be ended, diminished, or increased. This right persists instead of merging in the award when made, as it would do in a judgment when recovered upon an ordinary cause of action, and the employer continues liable not simply to perform that award but to pay compensation during the workman's incapacity. Again, the right to the weekly payments does not belong to the workman without restraint as his general *choses in action* would do. This right is dependent on continued residence in the United Kingdom, subject to one exception, and it cannot be assigned, charged, or attached, nor does it pass by operation of law (paragraph 19 of Schedule I). So far does this go that although the workman can agree with his employer for the redemption of the weekly payments by a lump sum, that lump sum itself he can neither assign nor charge. It is therefore plain that the ordinary incidents of a judgment in an action do not attach to the decree-arbitral on the original award, nor, in so far as concerns the fluctuations in the condition of the workman's health from time to time, does the original award operate as *res judicata* to estop either party from claiming to re-open it after a change of circumstances and on fresh materials (*Sharman* v. *Halliday and Greenwood*, 1904, 1 K.B. 235). The question how long and how far the prior decree continues to be "operative" and "subsisting" depends entirely on the construction of paragraph 16. To ask how the decree or review can divest the vested right to payments, which are due, overdue, or payable under the original award, is only a different way of stating the same thing. There is nothing in the mere language of that paragraph to limit the power of review in respect of the date at which the decision on the review may begin to operate. The object of the power of review obviously is to enable the tribunal to adjust the payment to the incapacity from time to time, so that as far as possible and for the sake of justice to both parties the amount payable may increase or diminish as the incapacity increases and diminishes, and so that both may terminate together.

Upon the second question I think the case of *Donaldson* cannot be supported. The Court apparently thought that the Legislature meant the injured workmen to get his payments regularly. So I should think it did. It was then thought that a retrospective review, not restricted to the date of the application, would encourage the employer to stop the payments as soon as he suspected that the workman's health had mended, and would be inconsistent with the decision in the case of *Lochgelly* above stated.

The first reason assumed that a payment once made could not be recalled, however far the review might relate back, and that an employer would be tempted to stop payments at once, since otherwise, though he might succeed on the review, some part of his success would be barren. The second assumed that the paragraph which provides the right of review was concerned with the means of enforcing a recorded award—a matter for which the statute makes adequate provision elsewhere. As to the latter, if the workman fails to get the award registered, and then to enforce it, he must abide the consequences of his own want of diligence. Those consequences are not to be cured by attaching to the right of review a restriction which is not expressed. In the former case the employer could always arrive at the same result by making his

application to review synchronise with his cessation of payment; and thus the construction adopted in *Donaldson's* case achieves nothing. For my part I think there is here no question for decision either of the employer's right to recover from the workman sums paid between the date of his restoration to health and that of the employer's application for review, or of the exact procedure to be adopted in order to regularise the cessation of such payments pending a decision on review. Regard must be had in England to the practice established as to County Court judgments, and in Scotland to the special incidents of procedure which attach to the "decree-arbitral" as a "recorded decree." I am glad to think that a procedure may be adopted which in effect will leave the working of the Act identical and uniform in both countries, and I am clearly of opinion that both the scheme and the language of the Act itself suffice to prevent any inference adverse to the full retrospective effect of the review being drawn from the provision that the award is to have the force of a "recorded decree-arbitral." So too I think your Lordships are not now concerned with the other assumption that the employer can never recover from the workman payments once actually made. On that topic contrary expressions of opinion are to be found—on the one hand, by the President and Lord Adam in the *Pumpherston* case (pages 966 and 968), on the other by Cozens-Hardy, M.R., and Moulton and Farwell, L.JJ., in *Hosegood & Sons* v. *Wilson* (1911, 1 K.B. 30). I have no opinion to express about it, though I apprehend that the ordinary rules about money paid voluntarily, or under compulsion of law, or under mistake of fact will suffice to decide the point.

When the language of the Legislature is clear, suppositions as to the policy of the Act can rarely assist in its interpretation. Here, however, the *argumentum ab inconvenienti* is not in favour of, but overwhelmingly against, the decision on this point in *Donaldson's* case. If the decision stands, workman as well as employer must in self-defence apply for review at the first inkling of any change in the former's incapacity. Each will await the effect of time and resort to repeated examination or prolong observation at his peril. Each will recoil from negotiating with a view to a settlement of the dispute by consent for fear of prolonging the interval during which the original award must be rigorously implemented, no matter how the workman's health may have altered for better or for worse in the meantime. Each will hasten to claim a review as early as possible in order that the fruits of success may be as ample as possible. It is to be presumed that the Legislature foresaw and provided for these contingencies. One would expect the power of review to be expressed without limitation in order that the workman's incapacity, on which his right to compensation depends, may be followed as closely as possible in its fluctuations by an award for an adequate payment, and so it is. In my opinion the power is so expressed.

The problem is not a new one, though the expression "review" is, I think, new in this kind of legislation. Under the Matrimonial Causes Acts 1866, 1878, and 1884 various provisions were made for weekly or other periodical payments by a husband to a wife, and it was foreseen that the circumstances of either parties or both might so change as to require those payments to be from time to time increased, diminished, or suspended. To effect this object, power was given to the Court which ordered the payment, to vary it by further order as under the circumstances should be just. So here the Legislature has dealt with a similar necessity in a similar way, and making the changes incidental to arbitration, it gives to the arbitrator full control over the weekly payments by means of review. How the dispute is to be formulated, how the absence of agreement to settle it is to be proved, how it is to be submitted to arbitration, and how it is to be notified to the other side, are questions belonging to a different category altogether which need not now be discussed.

I think that in the present case the arbitrator had full power to terminate the payments as from the date at which he found that incapacity had ceased, that the appeal should be allowed and the judgment below should be set aside, that the questions in the case stated should both be answered in the affirmative, and that the case should be remitted to the Sheriff-Substitute to proceed as accords.

LORD PARMOOR—I agree. The facts in this case are simple. The question for decision is the construction of certain statutory provisions under the Workmen's Compensation Act 1906. The respondent in May 1912 was awarded under the Act a sum of 14s. per week in respect of injuries by accident arising out of and in the course of his employment as a dock labourer with the appellants. In accordance with this award the appellants paid compensation to the respondent up to September 24th, 1912, at which date a dispute arose and the payments were discontinued.

On November 4th, 1912, the appellants presented an application for reviewing the compensation payable to the respondent, averring, *inter alia*, that the respondent had completely recovered from his incapacity by the 24th September 1912, and asking, *inter alia*, that the payment of compensation should end as from that date. The Sheriff-Substitute found as a fact that on the 24th September 1912 the respondent had recovered completely from his incapacity for work, but held that it was not competent for him to end compensation at that date, since by doing so he would be disturbing a decree of the Court as at a date when there was no proper application enabling this to be done. Had it been competent for him to do so he would have ended the compensation at the date at which the incapacity of the respondent had ceased. The questions of law for the opinion of the Court are—(1) Was it competent for the Sheriff-Substitute to end the respondent's compensation on September 24th, 1912? (2) Ought the Sheriff-Substitute to have ended the compensation at that date?

The case came on for hearing before the Second Division of the Court of Session. The first question of law was answered in the negative. No answer was given to the second question, and the determination of the Sheriff-Substitute was affirmed. From this interlocutor the appellant appealed. The Second Division of the Court of Session in giving their decision held that they were bound by the case of *Donaldson Brothers* v. *Cowan* (1909 S.C. 1292), which it was not possible to distinguish. The question therefore is whether that case was rightly decided.

The general scheme of the Workmen's Compensation Act, in cases where total or partial incapacity for work results from injury, is to be found in section 1 (1) and Schedule I (*b*). In such cases a weekly payment is provided as compensation during the incapacity of the workman—that is to say, during the period of time for which the workman is disabled from earning wages, either wholly or in part. For all ordinary cases an applicable form of award is given in Appendix B. This form, following the scheme of the Act, orders that the weekly payment for compensation shall continue during the total or partial incapacity of the workman, or until the same shall be ended, diminished, increased, or redeemed in accordance with the provisions of the Act. In the present case it was said that the award was in the ordinary form, so that under the terms of the award the weekly payment as compensation would only be payable during the total or partial incapacity of the respondent, but if a dispute arises whether and at what date total or partial incapacity has ended, this can only be determined under the statutory procedure in the Act. This procedure was put into operation at the instance of the appellants.

When an award of compensation has been made, a memorandum thereof is required to be recorded under Schedule II (9) of the Act. In the present case a memorandum of the weekly payment due to the respondent was duly recorded, and thereupon such memorandum became enforceable as a recorded decree-arbitral. In the same way a memorandum of variation in any weekly payments can be recorded, but to obtain such variation the statutory requirements must be followed. The Sheriff-Substitute in refusing to end the compensation on the 24th September 1912, at which date he found that the respondent had recovered complete capacity for work, based his decision on the ground that to do so would be to disturb a decree of Court at a date when there was no proper application to enable this to be done.

In my opinion there is no ground for holding that the recorded memorandum is a decree of Court incapable of retroactive alteration by the Sheriff-Substitute. Whether the recorded memorandum is to be regarded as a decree, or simply as a record of the term of payment enforceable as a decree of Court, it is by express statutory provision open to variation and review under statutory procedure if conditions change.

The statutory requirements to be followed when it is desired to review any weekly payments ordered to be paid in a recorded memorandum are to be found in Schedule I (16). It is enacted that in default of agreement the ending, diminishing, or increasing of weekly payments shall be settled by arbitration under the Act. In the present case a dispute had arisen as to the continuance of the incapacity of the respondent, the appellants alleging that the incapacity of the respondent had ended on the 24th September 1912, and ceasing to make payment from that date. There may be a difficulty in some cases in deciding at what date a dispute has arisen so as to determine the ambit of the jurisdiction of the arbitrator, but I think it is clear that such dispute did arise in the present case at the cessation of the weekly payment. No agreement was made, and in default thereof the appellant applied to the Sheriff-Substitute, averring that the respondent had at the 24th September 1912 completely recovered from his accident, and asking that the weekly payment should be ended as from the 24th September 1912. It was clearly within the jurisdiction and duty of the Sheriff-Substitute to determine the dispute as to the date at which the incapacity of the respondent had ceased, and on this point he found in favour of the appellants. The further question is whether, having found the date in favour of the appellants, it was competent for him to alter the recorded memorandum in accordance with the finding. This further issue was undoubtedly submitted to him in the application to review. In my opinion it was within his power and jurisdiction to entertain it, and he had competent authority to alter the time of the recorded memorandum by ending the compensation payable on September 24th 1912, this issue having been properly submitted to him under the statutory procedure. There is no limitation of time expressed in the statute, and no reason why such a limitation should be inferred. I apprehend that the question is simply one of construction, and that considerations based on policy are irrelevant. I agree with the opinion expressed by Lord Justice Buckley in the case of *Charing Cross, Euston, and Hampstead Railway Company* v. *Boots* (1909, 2 K.B. 640), that there is nothing in the statute which would prevent the Sheriff-Substitute going back to the relevant date, and that the question is only one of what are the issues which have been presented to the tribunal in the case in which the decision is invited.

In the case of *Donaldson Brothers* v. *Cowan*, a case of great authority, which was heard by Seven Judges, it was held that the Sheriff-Substitute had a power of retroactive decision, but limited to the date of the application to him. This limitation is adopted on the ground that when compensation is once fixed the only way to alter it is that provided by the statute—an application to vary. No doubt the only way to alter compensation is by the statutory procedure, but the tribunal to which the application is made is not thereby placed under any disability to determine the whole dis-

pute referred to it, including the alteration of the recorded memorandum so as to accord with its determination on questions of fact. Assuming, as the Court of Session held, that there may be retroactive alteration in a memorandum for all purposes enforceable as an absolute arbitral-decree I am unable to find any ground for limiting the period for retroactive alteration to the date of the application to review, although differing with hesitation from so authoritative a judgment. In England the recorded memorandum under the Act is enforceable as a County Court judgment, but this difference does not, in my view, in any way affect the power of the arbitration tribunal to which the application for review is made.

I desire to express no opinion on questions of procedure which do not arise in the present case. In my view both questions should be answered in the affirmative, and the appeal allowed.

Their Lordships allowed the appeal without expenses, and answered both questions of law in the affirmative.

Counsel for the Appellants—Macmillan, K.C.—Alexander Neilson. Agents—Boyd, Jameson, & Young, W.S., Edinburgh—Botterell & Roche, London.

COURT OF SESSION.

Friday, March 20.

SECOND DIVISION.

[Sheriff Court at Falkirk.

COOK *v.* BONNYBRIDGE SILICA AND FIRECLAY COMPANY, LIMITED.

(*Reported ante*, vol. xlviii, p. 243, 1911 S.C. 177.)

Sheriff—Process—Master and Servant—Appeal—Competency—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 13 *and* 14.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 13. ". . . Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable." Section 14—"In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the Sheriff Court and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the Second Schedule to this Act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this Act shall apply."

A father brought an action against the employers of his deceased son at common law and under the Employers' Liability Act 1880 for damages for the son's death.

Held (*following* the dicta in *Lawrie* v. *Banknock Coal Company, Limited*, 1912 S.C. (H.L.) 20, 49 S.L.R. 98) that the action was one "by a workman against his employer" within the meaning of section 14, and could not be appealed to the Court of Session otherwise than by appeal on a question of law.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—[*quoted in rubric*].

Alexander Cook, labourer, Grangemouth, *pursuer*, brought an action in the Sheriff Court at Falkirk against the Bonnybridge Silica and Fireclay Company, Limited, *defenders*, for damages for his son's death while working in the defenders' employment, laid at £500 at common law and £200 under the Employers' Liability Act 1880.

After the procedure narrated in the previous report the Sheriff-Substitute (MOFFAT) on 6th October 1911 pronounced an interlocutor assoilzieing the defenders.

The pursuer appealed to the Sheriff (LEES), who adhered to the interlocutor of the Sheriff-Substitute.

The pursuer appealed to the Court of Session in common form.

Argued for the respondents (defenders)—The appeal was incompetent. By section 13 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) the action was brought within the provisions of section 14, and by section 14 it could only be appealed to the Court of Session by a stated case on a question of law—*Lawrie* v. *Banknock Coal Company, Limited*, 1912 S.C. (H.L.) 20, 49 S.L.R. 98.

Argued for the appellant (pursuer)—The appeal was competent. The provisions of section 14 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) did not apply to the action, because the pursuer was not a workman within the meaning of the section. The provisions of section 14 related to a matter distinct from workmen's compensation, and therefore they were unconnected with and unaffected by section 13.

At advising—

LORD SALVESEN—[*After dealing with the merits and holding that the judgment appealed from was right*]—I have dealt with the appeal on the merits on the footing that it is a competent appeal. I reserve my opinion on this point, for as the same question can probably never arise again it is unnecessary to pronounce upon it. All I say is that the grounds of the decision of the First Division in *Lawrie's* case appear to me inconsistent with the views of several of the noble and learned Lords who considered the appeal.