here that he only earned what was paid him, less the cost of the explosives used by him. But I agree that the question is concluded by authority. Three cases were quoted to us from England—two of them decided by the House of Lords under the earlier Act of 1897, where, however, the words for construction are the same. These were *Houghton* v. *Sutton Heath Collieries Company*, [1901] 1 K.B. 93; *Abram Coal Company* v. *Southern*, [1903] A.C. 306; and *Midland Railway* v. *Sharpe*, [1904] A.C. 349. Though I might attempt to distinguish the present case from these in matter of detail, I think that on a fair reading of the opinions of the learned Lords who decided the two last cases the broad ground of their judgment is that the use of the word "earnings" in the schedule is a rough way of getting at the sum to be paid for compensation, and that what the company actually pay is to be treated as earnings in the sense of the schedule, without examining closely what it costs the workman to realise such payment, whether such cost is directly out of pocket or indirectly by way of retention by his employer. To do otherwise would, it is indicated, in the many differing circumstances which must occur, involve a refinement of consideration which the statute did not contemplate.

The provision in section 2, sub-head (*d*), of the schedule, to which your Lordship has adverted, confirms the construction so put upon section 1. It is new, and was enacted after, and no doubt in view of, the decisions to which I have referred.

I therefore concur in your Lordship's opinion that the second question of law submitted should be answered in the negative.

LORD M'LAREN was absent.

The Court answered the first question of law in the affirmative, and the second question in the negative, recalled the determination of the Sheriff-Substitute as arbitrator appealed against, and remitted to him to proceed as accorded.

Counsel for the Appellant—Hunter, K.C. —J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Morison, K.C. —Russell. Agent—J. Mullo Weir, S.S.C.

Saturday, October 30.

SECOND DIVISION.

[Sheriff Court at Airdrie.

UNITED COLLIERIES, LIMITED *v.* KING.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, par.* 15—*Certificate by Medical Referee that Incapacity had Ceased—Supervening Incapacity—Competency of Arbitration Proceedings—Bar.*

A having been injured in the course of his employment, was paid compensation by his employers under agreement until 20th October 1908, when payments were stopped. On 3rd December 1908 a remit was made to a medical referee under paragraph 15 of the First Schedule to the Workmen's Compensation Act 1906. The referee reported that incapacity ceased at 20th October 1908. The workman acquiesced in non-payment until 8th May 1909. He thereafter made application to the Sheriff as arbitrator for compensation as from that date, on the ground of supervening incapacity. The employers maintained that the medical referee's certificate was conclusive, and barred the workman's claim.

Held that the certificate did not bar his application for arbitration.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (15), enacts—". . . In the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment [the Sheriff-Clerk] . . . may refer the matter to a medical referee. The medical referee to whom the matter is so referred shall . . . give a certificate as to the condition of the workman and his fitness for employment, specifying, when necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified."

This was an appeal by way of stated case from the judgment of the Sheriff-Substitute (GLEGG) at Airdrie, in an arbitration under the Workmen's Compensation Acts 1897 and 1906 between George King (*respondent*) and the United Collieries, Limited (*appellants*).

The case as stated by the Sheriff-Substitute set forth—"This is an arbitration under the Workmen's Compensation Acts 1897 and 1906, in which the Sheriff is asked to ascertain and fix the weekly sum of compensation payable to the pursuer, and to grant an award against the defenders in favour of pursuer, finding him entitled to payment of 13s. 2d. per week, beginning the first payment on 8th May 1909 for the week preceding that date, and so on weekly thereafter until the pursuer is again able to earn full wages, or such weekly payments are varied by the Court, with expenses. The pursuer avers that he was injured while working as a stripper in the employment of the defenders on 25th February 1907, and that under agreement he was paid compensation at the rate of 15s. 7d. per week until 20th October 1908. Payments were then stopped, and on 3rd December 1908 the parties applied to the Sheriff-Clerk for a remit to a medical referee, under paragraph 15 of the First Schedule to the Workmen's Compensation Act 1906. The referee reported that incapacity ceased at 20th October 1908. The workman admittedly acquiesced in non-payment until 8th May 1909. The workman now says that incapacity recurred then, and asks payment of compensation

as from that date. The defenders plead that the report of the medical referee is conclusive—First Schedule, 15—and bars the present claim.

"I repelled this plea and allowed a proof."

The *question of law* for the opinion of the Court was—"Does the said certificate of the medical referee bar the pursuer's application for arbitration?"

The respondents argued—The medical referee had certified that incapacity had ceased as at 20th October 1907. The certificate was conclusive evidence as to the man's condition at the time—Workmen's Compensation Act 1906, First Schedule, par. 15; *M'Avan* v. *Boase Spinning Company*, July 11, 1901, 3 F. 1048, 38 S.L.R. 772; *Ferrier* v. *Gourlay Brothers*, March 18, 1902, 4 F. 711, 39 S.L.R. 453. When the workman's incapacity was declared at an end by the medical referee, the liability of the masters ceased, and they were absolutely entitled to apply to an arbitrator for an order ending the weekly payments—First Schedule of Workmen's Compensation Act 1906, par. 16. The arbitrator would have been bound to pronounce such an order, and the matter could not have been kept open by the award of a nominal sum per week—*Clelland* v. *Singer Manufacturing Company*, July 18, 1905, 7 F. 975, 42 S.L.R. 757. Once an order "ending" the weekly payments had been made, no further compensation could be claimed in respect of the accident—*Nicholson* v. *Piper*, [1907] A.C. 215. There having been a statutory reference to a referee, and the referee having granted a certificate that incapacity had ceased, it was not now open to the pursuer to apply for an award on the ground of supervening incapacity. The certificate came in place of an agreement, and if the matter was settled by agreement, or by something that came in place of agreement, then arbitration was excluded—*Dunlop* v. *Rankine & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146. *Dempster* v. *Baird & Company, Limited*, 1908 S.C. 722, 46 S.L.R. 119, was distinguishable. *Colville & Sons, Limited* v. *Tigue*, December 6, 1905, 8 F. 179 (Lord Low at 189), 43 S.L.R. 129, was also referred to.

Argued for respondent—(1) The certificate here was not in statutory form, because it addressed itself to the question of incapacity prior to the date of granting the certificate. If the certificate did not fall within the provision of the statute, the respondent was not barred thereby, and was entitled to raise the question again—*Allan* v. *Thomas Spowart & Company, Limited*, May 23, 1906, 8 F. 811, 43 S.L.R. 599; *Morton* v. *Woodward*, [1902] 2 K.B. 276. (2) In any view, the certificate was only conclusive of the fact that at the time payments ceased the pursuer was fit for employment. It was not fatal to an arbitration under section 1, sub-section 3, of the Act. There was here invoked for the first time a statutory tribunal. Though a nominal award was no longer possible—*Clelland* v. *Singer Manufacturing Company, sup. cit.*—there was nothing in the cases to prevent the pursuer, on recurrence of incapacity, from going to arbitration unless the matter had been settled by agreement or payments terminated by order of Court. In *Dempster's* case (*sup. cit.*) it was held that as there was no subsisting agreement arbitration proceedings were competent.

LORD ARDWALL—An arbitration under the Workmen's Compensation Acts 1897 and 1906 was in this case commenced in the ordinary way before the Sheriff, and the proceedings are met *in limine* by a plea of bar, and the Sheriff is asked not to proceed with the arbitration on the ground that the medical referee, under paragraph 15 of the first schedule to the Workmen's Compensation Act 1906, reported that incapacity in the case of this workman ceased on 20th October 1908. But after that nothing was done upon that report. The workman acquiesced in non-payment until 8th May 1909. The matter went to sleep, so to speak, just as happened in *Dempster* v. *Baird & Company, Limited*, 1908 S.C. 722, and no application was made by the employers to have the compensation ended.

Now, if they had made such an application the Sheriff might or might not have ended the compensation. It was pleaded to us that necessarily he must have done so. I do not think that there is anything that can be predicated as necessarily certain to happen under this Act or in any proceedings under it. At all events the application was not made, and accordingly there is no judicial finding, award, or judgment showing that the compensation was ended. We have simply the medical referee's report, and to hold that arbitration proceedings otherwise competent and lawful can be barred by a medical referee's report (which is only a piece of evidence) seems to me to be a proposition which cannot be maintained under this Act or otherwise. I accordingly consider that the Sheriff's judgment here is perfectly right, and that we should answer the question submitted for decision in the negative.

LORD LOW—I am of the same opinion. The right of a workman who is injured is under sub-sec. (6) of sec. 1 of the First Schedule of the Act of 1906 to have weekly payments during incapacity resulting from an injury, and it may quite well be that a workman may temporarily recover from the injury so as to be able for a time to do the same work as formerly, but that the incapacity arising from the injury may recur. In such a case the fact that the workman has recovered for a certain time will not prevent him, if the incapacity again supervenes, from claiming weekly compensation during its continuance. No doubt the employer can in certain circumstances get rid of the risk of supervening incapacity by adopting the procedure provided by the Act. For example, he may, if he has continued a weekly payment for six months, redeem the liability therefor by paying a lump sum. Or he may make an application for review of the

weekly payments. If he shows in that application that the workman has recovered he may get a decree from the arbiter ending the weekly payments; and if such decree is given no weekly payments can ever again be claimed from him even although supervening incapacity should result.

But there has been no application of that sort in this case. What happened was this. There had been an agreement, which was never recorded, between the workman and the employers fixing the compensation during incapacity at 15s. 7d. per week. On 20th October 1908 the employers stopped making that payment upon the ground that the incapacity had ceased. I gather that the workman did not agree with that; and accordingly the parties joined in asking the Sheriff-Clerk to make a remit to the medical referee. What was remitted to the medical referee was the workman's condition or fitness for employment at the time. The referee reported that at 20th October, when the weekly payments ceased, the workman was no longer incapacitated. Of course, that settled the question of fact and justified the employers in stopping the weekly payment upon 20th October.

Now the workman comes forward and says—I accept all that, but in May of the following year 1909 I again became incapacitated owing to the original accident. Why is he not to be entitled, under the section of the Act to which I have referred, to weekly payments during that incapacity? The obligation of the employers to give him weekly payments during incapacity has never been terminated in any way whatever. All that has been settled by the report of the medical referee is that at a certain date he was not incapacitated. That being so I am clear that the Sheriff-Substitute was right in holding that the certificate of the medical referee did not bar the application for the resumption of the weekly payments upon the incapacity again supervening. Accordingly I think that the question in the case should be answered as Lord Ardwall suggests.

LORD DUNDAS concurred.

LORD JUSTICE-CLERK—I am of the same opinion. I think it requires to be noted that a referee's report is nothing beyond conclusive evidence upon certain matters. Now, evidence upon any question is a very different thing from a decision of that question, although it may well be that a question must inevitably be decided in a certain way if the evidence is conclusive and the party who desires the decision takes the proper proceedings for obtaining effect to the evidence. In this case the employers, founding on the certificate of the medical referee, might, under section 16 of the first schedule, have applied to have the compensation "ended" in terms of the Act. They did not do so, and there is accordingly no ground upon which it can be held that the compensation "ended" under the Act. I am accordingly of opinion that the question falls to be answered in the negative.

The Court answered the question in the negative.

Counsel for Pursuer (Respondent)—Constable, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders (Appellants)—Cooper, K.C.—Strain. Agents—W. & J. Burness, W.S.

Wednesday, November 3.

FIRST DIVISION.

[Sheriff Court at Inverness.

INGLIS' TRUSTEES *v.* MACPHERSON.

Sheriff—Process—Removing—Caution for Violent Profits—Failure to Instantly Verify Defence—Discretion of Sheriff—Sheriff Courts (Scotland) Act 1838 (1 *and* 2 *Vict. c.* 119), *sec.* 12—*A.S.* 10*th July* 1839, *sec.* 34—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, c.* 51), *First Schedule, sec.* 121—*Heritable Securities (Scotland) Act* 1894 (57 *and* 58 *Vict. c.* 44), *sec.* 5.

In an application by the holders of a bond and disposition in security for warrant to eject the defender, the proprietrix, in virtue of section 5 of the Heritable Securities (Scotland) Act 1894 from a dwelling-house which formed part of the security subjects, the Sheriff-Substitute, in respect that the defender had failed to instantly verify her defences, ordained her, in terms of section 34 of the A.S. of 10th July 1839, which is imperative in its terms, to find caution for violent profits, and on appeal the Sheriff adhered.

Held that as the Sheriff Courts (Scotland) Act of 1838, on which the A.S. of 10th July 1839 depended, had been repealed by the Sheriff Courts (Scotland) Act of 1907, the A.S. of 10th July 1839, on which the Sheriffs had proceeded, was no longer in force, and that as the Sheriff Courts (Scotland) Act 1907, First Schedule, section 121, supposing that that section could have been made applicable to a petition for warrant to eject the proprietrix, was not imperative, but left the matter to the Sheriff's discretion, which discretion had not here been exercised, the judgment appealed from was wrong and must be recalled. *Held* further that the section could not be made to apply.

The Sheriff Courts (Scotland) Act 1838 (1 and 2 Vict. cap. 119), section 12, provides with regard to summary removings "that the Sheriff shall in all such cases, where the defences cannot be instantly verified, ordain the defender to find caution for violent profits."

The A.S. 10th July 1839, section 34, enacts —"In actions of removing, and in summary applications for ejection, the defender shall come prepared with a cautioner for violent profits at giving in his defences or answers, unless he instantly verify a defence excluding the action."