Friday, July 12.

FIRST DIVISION.

[Sheriff Court at Airdrie.

GRAY *v.* SHOTTS IRON COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (15) *and* (16) *— Remit to Medical Referee — Finality of Referee's Report — Wage Earning Capacity—Averments—Relevancy.*

A workman who had received an injury to his thumb and who had been in receipt of compensation from his employers, agreed in terms of section 15 of the first schedule of the Workmen's Compensation Act 1906 to refer the question of his fitness for his former work to a medical referee. The referee having reported that he had recovered and that he was now quite fit to resume his ordinary employment, his employers lodged a minute craving the arbiter to end the compensation. The workman lodged answers in which he averred that, having returned to work he had ascertained that his earning ability had been considerably reduced by the injury, notwithstanding the fact that he had, from a medical point of view, recovered therefrom. The arbiter having terminated the compensation, the workman appealed, and craved leave to lead evidence of his diminished wage-earning capacity.

Held that as the medical referee's report was conclusive in its terms, and as the workman did not aver that he was unable owing to the accident to obtain employment, he was precluded by the terms of the referee's report from leading the evidence proposed, and appeal *dismissed.*

Ball v. *William Hunter & Sons, Limited*, May 13, 1912, 49 S.L.R. 711, 28 T.L.R. 428; and *Davis* v. *Wilsons and Clyde Coal Company, Limited*, May 13, 1912, 49 S.L.R. 708, 28 T.L.R. 431, *distinguished.*

This was an appeal from a decision of the Sheriff-Substitute of Lanarkshire at Airdrie (Glegg) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between John Gray, miner, Shotts, *pursuer and appellant*, and the Shotts Iron Company, Limited, *defenders and respondents.*

The Case set forth—"This is an arbitration under the Workmen's Compensation Act 1906, arising out of a minute by the parties craving the Court under paragraph 15 of the first schedule of said Act to refer the matter as to the pursuer's capacity for his former work as a miner to a medical referee appointed under said Act, including in such reference whether any incapacity from which the said John Gray may now suffer is due to the accident.

"On 15th January 1912 a reference was made to Dr James Barras, Govan, who had previously acted as medical referee between the parties under said Act. On 20th January 1912 the medical referee lodged his *report*, which is in the following terms:—'In accordance with the reference made to me by the Sheriff-Clerk of the Sheriff Court at Airdrie upon the application of John Gray, 25 Tarbothie, Stane, Shotts *v.* Shotts Iron Company, Calderhead Colliery, Shotts, I have on the 18th day of January 1912 examined the said John Gray and I hereby certify as follows—(1) The said John Gray is in good health and his condition is such that he is now quite fit to resume his ordinary employment as a coal miner, having recovered from an accident to his thumb on 17th March 1911, now ten months ago. I reported upon this same case three months ago. Dated this 18th day of January 1912. JAMES BARRAS, M.D., Medical Referee.'

"On 25th January 1912, in view of the terms of said medical referee's report, the defenders lodged a minute in the following terms, viz.—'Craig, for the defenders, stated that the parties agreed to remit the question of the pursuer's fitness for employment to a medical referee, in terms of paragraph 15 of the first schedule of the Workmen's Compensation Act 1906, and on or about 13th January 1912 a joint minute to that effect was lodged in the Sheriff Court of Lanarkshire at Airdrie, and the case was duly remitted to Dr James Barras, one of the medical referees appointed to act for Lanarkshire under the Workmen's Compensation Act 1906; that on 18th January 1912 the said medical referee gave a certificate certifying that the pursuer had recovered from his injuries and was fit to resume his ordinary employment of a coal miner, a copy of which certificate, together with a copy of the joint minute referred to, are hereto annexed; and therefore craves the Court, in view of the terms of the said medical referee's report, to end the pursuer's compensation as at 18th January 1912, and in the event of the pursuer appearing to oppose the crave of this minute to find him liable in expenses. . . .'

"On 2nd February 1912, when the minute for defenders was called in Court, the pursuer lodged answers in the following terms, viz.—'The pursuer objects to the craving of the defender's minute being granted, in respect that he has returned to work, and has ascertained thereat that his earning ability has been considerably reduced from the effects of his injury, notwithstanding the fact that he has from a medical point of view recovered therefrom. Pursuer is prepared to accept compensation at such reduced rate as his earnings justify, and has been willing to do so all along. . . .'

"The case was heard before me on 9th February 1912, when, after hearing parties' procurators, I ended the pursuer's compensation as at 18th January 1912, and

found the pursuer liable to the defenders in the sum of one guinea of expenses."

The *questions of law* were—"(1) Does the said finding of the medical referee preclude the workman from leading evidence to show that as a result of the accident he has not recovered his former earning capacity? (2) In the circumstances stated should I have allowed the pursuer a proof of his averment that the said pursuer had not recovered his former earning capacity?"

Argued for appellant—The appellant was entitled to a proof of his diminished wage-earning capacity. *Esto* that the medical report showed that he had recovered from his injury, it did not show that he was as good a workman as before. The appellant, therefore, was entitled to lead evidence as to his power of effective work for wage-earning capacity and not physical capacity was the true test of the right to compensation—*Ball* v. *William Hunt & Sons, Limited*, May 13, 1912, 28 T.L.R. 429, 49 S.L.R. 711; *Macdonald or Duris* v. *Wilsons and Clyde Coal Company*, May 13, 1912, 28 T.L.R. 431, 49 S.L.R. 708. The question was really one of interpretation of (*a*) the medical report, and (*b*) the pursuer's averments, and if the pursuer could prove—as he averred he could—that his wage-earning capacity had owing to the accident been diminished, then he was entitled to compensation—*Ball* (*cit. sup.*); *Duris* (*cit. sup.*); *Rosie* v. *Mackay*, 1910 S.C. 714 (*per* Lord President at p. 720), 47 S.L.R. 654, at p. 656.

Argued for respondents—The claimant's averments were irrelevant, for where, as here, there was no averment of inability to obtain employment, and where, as here, the medical report was inclusive in its terms, further proof was incompetent. The cases of *Ball* and *Duris* were distinguishable, for in the former there was a relevant averment of inability to obtain employment with visible evidence sufficient to support it, and in the latter the referee's report was qualified in its terms. The case of *Rosie* was also different, for there, as in the case of *Duris*, the medical report was inconclusive. *Carlin* v. *Stephen & Sons, Limited*, 1911 S.C. 901, 48 S.L.R. 862, was referred to.

At advising—

LORD PRESIDENT — John Gray, coal-miner in the employment of the Shotts Iron Company, received an accident to his thumb. Ten months after, the employers and the said John Gray not being at one as to his condition or fitness for employment, agreed, in terms of the second paragraph of Schedule I of the Workmen's Compensation Act 1906, to refer the matter to a medical referee. The medical referee examined John Gray, and issued a certificate as follows—"... [*quotes, v. sup.*] ..."

In view of that report the employers lodged a minute in which they craved that compensation be ended. To that minute the workman lodged an answer in which he said that he objected to the crave "of the defender's minute being granted in respect that he has returned to work and has ascertained thereat that his earning ability has been considerably reduced from the effects of his injury, notwithstanding the fact that he has from a medical point of view recovered therefrom. The claimant is prepared to accept compensation at such reduced rate as his earnings justify." Upon that the learned Sheriff-Substitute as arbitrator ended the compensation, and the question that is asked us is whether he was right in ending the compensation, or whether he should have allowed the workman a proof.

It was strenuously contended for the workman that we were bound to allow him a proof, and that upon the grounds that were laid down by the House of Lords in the cases of *Ball* v. *William Hunt & Sons, Limited*, and *Macdonald or Duris* v. *Wilsons and Clyde Coal Company*.

I am of opinion that in this case the learned Sheriff-Substitute was right, and that no proof ought to have been allowed. I think the case is a complete contrast to the case we have just disposed of—*Arnott* v. *Fife Coal Company, Limited*—and that we are not in any way bound to allow a proof in spite of the cases quoted, which, of course, we should be bound to follow if we thought they ruled the matter.

It is better, perhaps, that I should first examine the cases in the House of Lords. In the first case, which was an English case—the case of *Ball*—the man had met with an accident a great many years ago by which he lost an eye—I mean he lost the sight of an eye. But then the condition of that eye was such that the ordinary beholder would not by looking at the man come to the conclusion that the man was blind in one eye, though in fact he was. And the consequence was that, inasmuch as he was perfectly able to do his work—which I think was that of a moulder—with one eye, and as no employer suspected him of having less than two sound eyes, he got as much wages as anybody else. But then he had another accident in the service of his employer to the blind eye, and the result of this second accident was not of course to make any difference in his sight, because the eye was blind already. The eye had to be removed, and, consequently, anyone could see that he was a one-eyed man.

Under those conditions he applied for compensation, because, he said, "the result of my accident has been to injure my earning capacity." Now the decision which the House of Lords had to review in that case was a decision which said that, inasmuch as the particular accident here had not altered the physical capacity of the man, because he was a one-eyed man before the accident and he was an efficient one-eyed man after the accident, that therefore there could be no compensation. The House of Lords reversed that decision, because they said that if the accident was the cause of a diminution of wage-earning capacity, whether that diminution was due to what may be called direct physical deterioration or not, he was entitled to compensation. That comes perfectly

clearly from what the Lord Chancellor said. In the ordinary and popular meaning which he attached to the language of the statute he "thought there was incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work where such defect makes his labour saleable for less than it would otherwise fetch." And Lord Shaw of Dunfermline said—"It was necessary to keep clearly in view in such cases the distinction between inability to obtain work arising as the result of the injured or disfigured condition of the workman and inability to obtain work arising from the state of the labour market. It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-employment which is owing to general economic causes." But he considered in the other case that where his inability to obtain work was the result of his injured and disfigured condition, then he might have compensation. And accordingly what their Lordships did there was to remit the case for proof to see whether the man's averment could be substantiated—that now, as an obviously one-eyed man, he had a less earning capacity in the market than he had before his accident.

The other case was the case of *Macdonald or Duris* v. *Wilsons and Clyde Coal Company*. That was a case in this Division of the Court where no judgment had been pronounced upon the merits, because, when the case came before your Lordships you were told by counsel, or they admitted, it was ruled by the case in the Second Division of *Boag*, and they brought it here in order to take it to the House of Lords, and this Division pronounced a formal judgment following the case of *Boag*, so that what was being reviewed was not the case itself but the case of *Boag*.

In that case a workman was injured, and after the injury he had been taken into employment by his old employers to do light work, not to do his own work, and paid at a certain rate per week. After a time they discharged him, and then he asked an opportunity of proving that his applications for work had been unsuccessful, and that his want of success had not been due to the state of the labour market but to his incapacity and to the very limited type of work which was now within his powers. It was held in this Court that there was no case for review, because the workman did not aver any physical change in his condition. That was held to be wrong, and the case was held to be covered by the case of *Ball*. The man says—"I am in an injured condition, and I offer to prove that the effect of my injury is that when I go into the market I cannot get the wages which I otherwise would."

Now the present case is not a case like that of *Duris*, where a change of circumstance is averred, and the question is whether there should be a proof allowed in order that there may be a review of the compensation, because this is a case where there has been a reference to a medical referee. It is very important to see what the statute precisely says about these references to medical referees. There are references of more than one kind. This case is one dealt with in the first part of Schedule I, section 15, which, after providing for periodical examinations of an injured workman, goes on to say that 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 registrar of a County Court, on application being made to the Court by both parties, may, on payment of a certain fee, refer the matter to a medical referee. Your Lordships will notice first of all that this reference can only be of consent. There is no possibility of forcing a workman to go to a referee, and if he does not consent then there must be a proof in the ordinary way. If he does consent, the schedule goes on to say—"The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified." It is quite obvious that the view of the statute is that there is to be finality as to the matters referred. Of course one must then take the report of the medical referee and see what it says. And the case of *Arnott* v. *Fife Coal Company*, which we have just decided, is a very good instance of a case in which the report of a medical referee is not entirely conclusive, does not end the matters but still leaves them open, because there the medical referee did not affirm the fitness of the man for the particular class of work which he had been engaged in before the accident, but only said he was as fit as any other one-eyed miner was fit, leaving us to discover what that fitness came to, and this could only be discovered in a proof. We accordingly directed proof to be led in that case.

But here what the medical referee says is that the man is in good health and quite fit to resume his employment as a coal miner, having recovered from the accident to his thumb. Now that report, like everything else, must be read fairly, and read in the light of common sense, and not read in any extravagant sense that the words might possibly bear. Read in the light of common sense it is perfectly plain that this medical man says that the man had an accident to his thumb, but that it is completely well and has no effect upon his condition at all, and that the accident is merely historical. If I thought that the real meaning of the report was anything else I should come to a different conclusion, but I am quite certain that that is the meaning of the report.

Now if that is so, I ask what is left to prove. The claimant does not say that he cannot get work, but he says that he has

gone to work and he has ascertained thereat that his earning ability has been considerably reduced, notwithstanding the fact that he has from a medical point of view recovered therefrom. That, I think, is a perfect contradiction in terms. Supposing we allowed a proof, what would the pursuer prove? I suppose he would prove that whereas his earnings before the accident had been so and so he had as a matter of fact been paid rather less since the accident. Why is he paid less? I suppose that he would show that whereas he filled so many hutches in a day before the accident he filled rather fewer hutches since the accident, and therefore did not get so much. Why? There is one very good reason why—a possible reason, because he did not choose to work so hard. There is the possible reason also that he had not such a good thumb. But he cannot say he has not got such a good thumb, because he has consented to referring the question of the condition of his thumb to somebody else whose pronouncement upon that matter is to be conclusive. As a practical matter I ask whether, if we are bound to allow a proof here, it would not be simply opening the door wide to malingering? What possible evidence could the employers lead? If it is the fact that a man has not worked so hard, the employers could not contradict the fact that the man had not turned out so many hutches since the accident. They could get evidence, doubtless, of doctors to say "We do not believe this man when he says that his thumb is weaker, because we can see it is as good as ever it was." But that would be perfectly useless, because they have got the certificate of the medical referee, who by the statute is made final upon that matter, to say that that is so. Therefore it seems to me that it would be entirely wrong to allow the workman a proof of the fact that he is getting less wages when the underlying reason for that fact would be a matter which it was entirely impossible to get at the real truth of, namely, that his diminution in working capacity was due to the workman's own laziness.

Not only must the report be read to ascertain what it really means to say, but it must also be remembered that there are accidents and accidents. If the accident is of the sort that occurred in *Ball's* case, where the man is a one-eyed man, then there is a continuing injury even although the man in one sense of the word has recovered. The term "recovery" is in one sense an ambiguous term. You may be recovered from an accident and yet you may not be exactly the same man as you were before. On the other hand, you may recover from an accident, and then you may be exactly the same man as you were before—the accident is really historical. Now wherever the accident is of a character where it leaves you after immediate recovery what we may call a different sort of man, then there is always a question whether in the market your earning capacity is not different, and illustrations of these two cases are given in the House of Lords cases which I have just quoted. Another illustration was given in the case of *Rosie* v. *Mackay* (1910 S.C. 720), where there is a sentence in the judgment which I humbly think is precisely in accordance—although it was our decision that was upset in *Duris*—is entirely in accordance with what the House of Lords said. In *Rosie* v. *Mackay* the principal question was the penny question, but, incidentally, I happened to say something about the accident there. That was a case of rupture. The man had completely recovered from the immediate effects of the rupture and he could work; but the rupture was there—it would never be cured. At any moment, either by carelessness in not wearing a truss or from some other and additional strain, the rupture might become strangulated and give him very severe trouble; and, what is more, if he had to answer to an employer as to his physical condition, if he had to confess himself a ruptured man and that he was now wearing a truss, the employer might say, "Well now, I don't want you; I would sooner have a man perfectly sound who has not the chance of breaking down with rupture." And accordingly I said this—"The report of the medical referee on the agreed-on remit was conclusive as to the man's physical condition, and that condition was a condition of capacity to do what he had done before the accident. It was not, however, conclusive as to what has been conveniently called his wage-earning capacity, and in my judgment it would have been perfectly proper for the workman, had he so wished, to have tendered evidence to show that the wage-earning capacity of a ruptured man was less than the capacity he had before the accident—in other words, that he was not now worth so much in the labour market as he had been—and on that evidence the Sheriff might have come to a conclusion."

Well, that was a good proposition in that case, but it is a bad proposition here, because the claimant does not and cannot aver that the fact that he had in the past an accident to his thumb was such as to incapacitate him in the labour market from getting employment that he otherwise would have got. He does not say there is any employer on seeing his thumb who would say "No, I won't take you." All he says is, "I say I do not earn as much as I could and did before." But if that is not due to his own idleness it can only be due to his thumb not being as strong as it was; but he is barred from saying that because he has excluded himself by taking a reference to another person, who has conclusively, in terms of the statute, said his thumb was as good as ever it was before.

Accordingly I am of opinion that the judgment of the learned arbitrator here was right when he ended the compensation and refused further proof.

LORD KINNEAR—I agree with your Lordship. I think that what was decided in the case of *Ball* we may take, as your Lordship takes it, from the judgment of the Lord Chancellor. Now in that case it was

alleged that the result of the second accident, by which the man was obliged to submit to the entire removal of an eye, was that his disfigurement prevented him from obtaining work; and the ground of the decision stated by the Lord Chancellor is that his injury did not prevent him from being able to work, but it did reduce him to a physical condition which prevented him from getting work suitable in the circumstances. Of course it remained for the workman to prove that the physical condition of which he complained was due to an injury caused by an accident. That is the assumption of the Lord Chancellor's judgment, and upon that assumption he says if the man as a consequence of the accident is reduced to a physical condition which prevents him getting work, then his earning capacity is so far diminished.

The question therefore seems to me, in the application of this case, to be whether we can find that this workman undertakes to prove that his physical condition consequent upon the accident prevents him from getting work. I think the conclusive answer to that is what your Lordship has given — that he himself agreed to submit that question to a referee whose deliverance upon it is final and conclusive in terms of the statute. The question to be referred to the referee, according to the terms of the statute, is as to the workman's condition and fitness for employment, specifying where necessary the kind of work, or whether he is unfit for work. To that the referee says he is now quite fit to resume his ordinary employment as a coal miner.

I do not think we can allow that question to be reopened without going directly against the provision that the referee's decision is to be final. The advantage to both workman and employer of this form of procedure is obvious. But at all events when people agree that a question between them shall be settled by the final decision of a referee, they must be bound by his decision when it is given. I quite agree that if the workman could have said, "Notwithstanding my fitness, the condition to which I have been reduced by the accident is such that people will not give me employment," I have no doubt that would be a good case for inquiry. But he does not say so. I cannot read his statement as meaning that in fact he is not able to obtain work. He says he has obtained work. All he says about it is that he has not been able to earn as much, which, I presume, means that he is not able to do as much work since the accident as he was before it. That would have been a very material point for him to prove if the question had been still open, but that is just the question he agreed to submit to the medical referee and upon which the medical referee's judgment is final.

I am therefore unable to see any ground for disregarding these decisions.

LORD JOHNSTON—The real question in this case is—What is the effect and value of the answer of the medical referee on the points which the schedule provides may be put to him? Upon that point I concur in the judgment of your Lordships, and I would not venture to add anything but that I desire to state my views of the relation of this question to certain decisions in the House of Lords.

The peculiarity of the situation created by these decisions is this—that one of them proceeds in a case where there was no reference to a medical referee; the other proceeds in a case where there was such a reference, and yet they are treated by the House of Lords as if they raised the same question. In the case of *Ball*, which is the leading case of the two, there had been no reference. Equally in the case of *Boag*, decided in the other Division, and which was commented on in *Ball's* case, there had been no reference; and therefore the case of *Ball* may be taken as an implied reversal of the case of *Boag*. On the other hand, in the case of *Duris* there had been a reference, and yet the same law and the same reasoning was applied to the case of *Duris* as to the case of *Ball*. Therefore one is led to ask how that is to be reconciled. It appears to me that it can only be reconciled in this way, viz., by noting that the medical referee's answer to the reference may be absolute or it may be qualified; and that where it is qualified, as it certainly was in the case of *Duris*, there is left practically the same situation as if there had been no reference at all. But whereas here the reply of the medical referee is absolute the case is different, and there would be no value whatever in the finality clause if the workman was to be entitled, not to explain away a qualification, but to meet by a direct counter the absolute finding of the medical referee. For these reasons I think that this case raises a totally different question than that which was before the House of Lords in the cases of *Ball* and of *Duris*, and that it is open to us to consider it as such.

LORD MACKENZIE—I am of the same opinion. The difficulty in the case is as to the construction of the report by the medical referee and what effect is to be given to it. The argument on behalf of the workman was that that report was conclusive so far as regarded the medical aspect of the case, but that there remains over another and further question with which the medical referee could not deal, namely this, whether the man's earning capacity after the accident was as great as it was before. Now it appears to me that that is not a fair way to deal with the report of the medical referee, I think the effect to be given to the report is that it certifies that the man had recovered his fitness for his work.

If there had been in this case any averment on the part of the workman that, notwithstanding the facts being as set out by the medical referee, yet he was left as the result of the accident with a misshapen thumb or with some visible external injury which handicapped him when he went into the labour market from getting employment on equal terms with his competitors,

then that would have raised a different question. But there is no suggestion in this case of anything of that kind. Accordingly, once the report of the medical referee is construed in the way I have indicated, the rest follows as has been said by your Lordship in the chair, and I agree with what your Lordship has said.

The Court answered the first question of law in the case in the affirmative and the second question in the negative, and dismissed the appeal.

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

Counsel for Respondents—Cooper, K.C.—Strain. Agents—W. & J. Burness, W.S.

Friday, July 12.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

WOOLFE *v.* COLQUHOUN.

Master and Servant—Workmen's Compensation Act (6 *Edw. VII, cap.* 58), *sec.* 7 (2) *—Fisherman—Remuneration by Shares in Profits or Gross Earnings.*

A claimant under the Workmen's Compensation Act 1906 was employed as a member of the crew, in the capacity of a fisherman, on board a steam trawler. He was paid a weekly wage of 30s., and received in addition a payment of 2d. per pound sterling on the gross value of the fish landed from the trawler, under deduction of the cost of carriage of the fish.

Held (*diss.* Lord Dundas) that he was not "remunerated by shares in the profits or the gross earnings of the working" of the trawler, and was therefore not excluded by section 7 (2) of the Workmen's Compensation Act 1906 from claiming compensation under the Act.

The Workmen's Compensation Act 1906, section 7 (2), enacts—"This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

Joseph Walter Woolfe, 9 Henderson Street, Leith, *respondent*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from John Colquhoun, 132 Bridgegate, Glasgow, owner of the steam trawler "Gloxinia," *appellant*, in respect of personal injury sustained by him on board the "Gloxinia" in the North Sea. The Sheriff-Substitute (ORR) allowed a proof and stated a Case for appeal.

The Case stated, *inter alia*—"The *facts* admitted, and the *averments* of parties which raise the question of law hereinafter referred to, are as follows—The appellant is a fish merchant, carrying on business in Glasgow, and is the registered owner of the steam trawler "Gloxinia." The respondent is a trawl fisherman, and on 15th January 1912, while employed as a member of the crew in the capacity of a fisherman on board said trawler, sustained injury by accident arising out of and in the course of his employment. The respondent made, *inter alia*, the following averment—'The pursuer (respondent) is a trawl fisherman and resides at 9 Henderson Street, Leith. He is a workman in the sense of the Workmen's Compensation Act 1906. The defender (appellant) is a fish merchant, carrying on business in Glasgow. He is the registered owner of the steam trawler "Gloxinia," and was, in the sense of said Act, the employer of the pursuer at the work at which he was engaged when he sustained the after-mentioned injuries.' To this averment the defender made the following answer—'Denied that the pursuer is a workman and that the defender was his employer within the meaning of the Workmen's Compensation Act 1906. *Quoad ultra* admitted.' The respondent further averred—'The pursuer had been for a week prior to 15th January 1912 in the employment of the defender on board the said steam trawler under a contract of service entered into between the master of the said trawler on behalf of the defender and the pursuer, under which contract the pursuer was engaged to act as second fisherman on board said trawler, and was to be remunerated for his services as follows, viz., by payment of the sum of thirty shillings a week in cash,' and 'by payment of a commission or percentage or poundage known as "fish money" of two pence per pound sterling on the gross value of the fish landed each week from the said trawler under deduction of cost of carriage of the fish. During the week the pursuer was employed by the defender the gross value of the fish landed under the deduction foresaid amounted to at least £42, and the pursuer's poundage thereon amounted to at least 7s.' The appellant's answer to this averment was as follows—'Admitted that the pursuer's weekly wage amounted to 30s., and that he received in addition a share of 2d. in the £1 on the amount of the gross earnings of the said steam trawler "Gloxinia" after deduction of the cost of carriage of the catch of fish.'

"For the purpose of this case the parties admitted that at the date of the accident the respondent's weekly earnings consisted of 30s. of wages and 7s., being 2d. per £1 on the gross value of the fish landed from the 'Gloxinia' under deduction of the cost of carriage of the fish.

"The appellant stated the following pleas-in-law among others—(1) The pursuer's averments being irrelevant, the action should be dismissed with expenses. (2) The pursuer not being a workman within the meaning of the Workmen's Compensation Act 1906, the present action should be dismissed with expenses. And (3) *separatim*, the pursuer, being a member of the crew of a fishing vessel remunerated by shares in the profits or gross earnings of such vessel within section 7 (2) of the Act,