any kind in this case. The jury was asked to award what was a reasonable compensation to this man, in this situation in life, for the loss of his only son, six months old.

In awarding the full sum claimed in the summons the jury were, in my opinion, giving what is known in our law as an excessive award. When I say so I adopt, as many of our predecessors have adopted, the standard laid down in the case to which we have been referred, and to which Courts have often been referred — the case of *Landell* v. *Landell*, 1841, 3 D. 819. I cannot express my view of the law better than it is done in the joint opinion of Lords Fullerton, Mackenzie, Jeffrey, and Murray, where they say—"It is clear that in order to warrant the application of the term 'excessive' the damages must be held to exceed, not what the Court might think enough, but even that latitude which in a question of amount so very vague any set of reasonable men could be permitted to indulge. The excess must be such as to raise on the part of the Court, the moral conviction that the jury, whether from wrong intention or incapacity or some mistake have committed gross injustice, and have given higher damages than any jury of ordinary men, fairly and without gross mistake exercising their functions, could have awarded." Or to use the language in subsequent cases we are not entitled to set aside the jury's verdict on the ground of excessive damages unless the damages awarded are "palpably extravagant and unreasonable," unless they are "outrageous," unless "a palpable hallucination had come over the jury" (as Lord Jeffrey put it), or the award is "altogether so extravagant that no other jury would repeat it," or unless we think "the verdict ought not to have been for more than one-half of the sum awarded."

Now in this case I do not think the award should be for more than one-half the sum awarded. In short, I think that half the sum awarded would have been an extravagant verdict. But counsel for the defenders here have offered £100 as reasonable, and as we think this verdict cannot stand, counsel for the pursuer agreed in that event to accept £100. I think we should be doing justice here, and giving what is a reasonable award in the circumstances — and it is always a jury question what that is—if in respect of that offer and acceptance we fix £100 as a reasonable sum in this case. And in that view we shall not direct a new trial.

LORD MACKENZIE—I am of the same opinion. Applying the law as it has been laid down in a series of cases, and especially as put by Lord President Inglis in the case of *Young* v. *Glasgow Tramway and Omnibus Company, Limited*, 1882, 10 R. 242, 20 S.L.R. 169, I am of opinion that the sum of £250 in the circumstances of this case is altogether so extravagant as that no jury would repeat it; that the jury in no view was entitled to return a verdict for more than one-half that sum having regard to the rank in life of the pursuer, to the wages he was earning, to his age, to the family that he had, and to the circumstances of the accident.

What exactly should be the sum to represent the *solatium* we might have a difficulty in fixing, but we have been relieved from the necessity of estimating the amount in consequence of the offer of £100 which has been made by Mr Sandeman on behalf of the defenders—an offer which was accepted by counsel for the pursuer conditionally upon our taking the view that the amount awarded was excessive.

LORD CULLEN—I entirely concur.

LORD ANDERSON—I also agree.

LORD SKERRINGTON was absent.

The Court discharged the rule and refused to grant a new trial, of consent applied the verdict, and in respect of a joint minute for the parties assessed the damages at £100 in the place of £250 contained in the verdict, and decerned against the defenders for payment to the pursuer of the said sum of £100.

Counsel for the Pursuer—J. A. Christie—E. O. Inglis. Agents — Manson & Turner MacFarlane, W.S.

Counsel for the Defenders — Sandeman, K.C.—Garrett. Agents—Campbell & Smith, S.S.C.

Saturday, March 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

NEILSON *v.* THE FARME COAL COMPANY (1915), LIMITED.

Master and Servant—Workmen's Compensation — Remit — Competency—Termination of Compensation—Omission to Apply for Suspensory Order—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (1) (*b*) *and* 16.

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, in respect that the appellant's incapacity, due to injuries resulting in the loss of his left eye, had ceased, terminated the compensation. In a stated case for appeal he stated that no evidence was led before him to the effect that the workman's wage-earning capacity in the open market would be prejudicially affected on account of the injury sustained by him, and that no motion was made for a suspensory order. At the hearing on the appeal the appellant moved the Court to remit the case to the arbitrator in order that he might submit to his consideration the propriety of pronouncing a suspensory order. The Court (*dub.* Lord Cullen), on condition of the workman paying the expenses of the stated case within eight days, remitted the case to the arbitrator to consider whether in view of the fact that the workman was a one-eyed man, the compensation ought to be ended or suspended.

Mulligan v. *Corporation of Glasgow*, 1917 S.C. 450, 54 S.L.R. 352, *followed.*

James Neilson, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Glasgow (CRAIGIE) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between the appellant and the Farme Coal Company (1915), Limited, *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted:—1. That the appellant James Neilson, aged forty-eight, is a miner, and that he as such was prior to 22nd December 1917 in the service of the respondents, who are coalmasters and work the Farme Colliery, Rutherglen, his average weekly earnings being £3, 5s. 2. That on 22nd December 1917 the appellant sustained an injury to his left eye by accident arising out of and in the course of his employment with the respondents at said colliery. 3. That in respect of said injury the respondents paid the appellant compensation at the rate of £1 per week up to and including 7th May 1918, in respect of his total incapacity for work, and thereafter at the rate of 15s. per week up to and including 6th August 1918 in respect of partial incapacity, since which latter date the respondents have ceased to make any payment to him.

"I further found it proved—4. That the appellant has excellent vision in his right eye, and although he is not altogether blind in his left eye, still he falls to be regarded as a one-eyed man, and as such fit for work below ground like any other one-eyed miner. 5. That the appellant resumed work as a miner in the end of July 1918, but worked at the coal face so irregularly that he gave himself no fair chance of getting rid of any inconvenience he might have had at first in working with one eye. 6. That the appellant does not suffer from nystagmus. 7. That there was no cause, physical or mental, attributable in any way to his injury, why the appellant should not have worked regularly underground after he resumed work in the end of July 1918, and that if he had done so he would have been able by 6th August 1918 to have done the full work of a miner, and his incapacity as the result of his injuries would have ceased not later than that date. 8. That no evidence was led before me to the effect that the wage-earning capacity of the appellant in the open market would be prejudicially affected on account of the injuries sustained by him on 22nd December 1917, and that no motion was made that in the event of my refusing to award compensation to the appellant I should pronounce a suspensory order.

"I therefore refused the prayer of the petition and ended the compensation payable by the respondents to the appellant as at 6th August 1918."

The *question of law* was—"Was there evidence upon which the arbitrator could competently end the compensation payable to the appellant as at 6th August 1918?"

Argued for the appellant—The case should be remitted back to the arbitrator to pronounce a suspensory order. The respondents had merely discharged the *onus* upon them to the extent of showing that no compensation should be paid now, but they had also to show that the cessation of compensation should be permanent. The arbitrator's decision was issued when the parties were not present, and accordingly they could not be held barred for failure to ask for a suspensory order. The cases of *Dempsey* v. *Caldwell & Company, Limited*, 1914 S.C. 28, 51 S.L.R. 16, and *Mulligan* v. *Corporation of Glasgow*, 1917 S.C. 450, 54 S.L.R. 352, were exactly in point and should be followed. The present question was one of procedure on which English authorities were no guide, but in any event they supported the appellant's motion—*Wright* v. *Sneyd Collieries, Limited*, 1915, 8 B.W.C.C. 537; *Chapman* v. *Sage & Company, Limited*, 1915, 8 B.W.C.C. 559.

Argued for the respondents—There was no general rule that a one-eyed miner was always entitled to a suspensory award; such a rule would be inconsistent with *Hargreave* v. *Haughhead Coal Company, Limited*, [1912] A.C. 319, 49 S.L.R. 474. The question of whether a suspensory order should be pronounced or not was one of circumstances for the arbitrator to decide. It was a question of fact, on which the arbitrator's decision was final—*Jones* v. *Anderson*, 1914, 8 B.W.C.C. 2; *M'Ghee* v. *Summerlee Iron Company, Limited*, 1911 S.C. 870, 48 S.L.R. 807. Evidence should have been given before him, and a motion such as the present made. If that was not done before the arbitrator, it was incompetent to raise the question in the Appeal Court—*Harlock* v. *Owners of s.s.* "*Coquet*," 1914, 7 B.W.C.C. 88; *Henshaw* v. *Fielding*, 1914, 7 B.W.C.C. 650. [LORD MACKENZIE referred to *Jackson* v. *Hunslet Engine Company, Limited*, 1915, 8 B.W.C.C. 584, 9 B.W.C.C. 269.]

At advising—

LORD PRESIDENT—The sole question submitted to the arbitrator in this case was whether the compensation payable by the respondents to the appellant should be continued or should be permanently ended. The arbitrator decided that it should be permanently ended, and the question we are asked in this Stated Case is whether there was evidence on which the arbitrator could competently end the compensation. That question admits of only one answer—it must be answered in the affirmative.

It appears that the effect of the accident was to deprive the appellant entirely of the sight of his left eye, so that he is now a one-eyed miner. And accordingly it was competent to him, had he been so minded, to submit to the arbitrator the question whether the compensation, instead of being permanently ended, ought not to have been temporarily ended. In other words, he might have, had he chosen, submitted to the arbitrator's consideration the propriety of pronouncing what has been called a suspensory order. But it was explained to us that owing to an oversight he omitted to submit that question, and we were moved to give him now an opportunity of doing so. It is very late in the day to make this motion, but I think it may be granted. The case of *Mulligan*, 1917 S.C.

450, 54 S.L.R. 352, appears to me to be an authority directly in point, but inasmuch as it was for the appellant and not for the respondents to raise the question whether the compensation should be ended only *in hoc statu*, I think the appellant must pay all the expenses incurred in connection with the Stated Case as a condition of being granted this indulgence. I propose to your Lordships, therefore, that upon fulfilment of that condition we should remit to the arbitrator to give the appellant an opportunity of raising the question which, confessedly, it was open to him to raise and which the arbitrator may now be in a position finally to determine.

LORD MACKENZIE—I have had considerable difficulty in this case arising from the fact that only a limited jurisdiction has been conferred on this Court by the terms of the Act of Parliament.

It was apparent from the argument addressed to us on behalf of the workman that there had been an omission before the arbitrator, and in that view it is evident that unless the course which your Lordship proposes is adopted the workman here will be prejudiced. It appears to me, on the statement of the case to us, that those representing the workman were themselves entirely to blame for the omission to take the point, which they now desire the arbitrator to consider, at the proper stage. But on condition that the workman pays the whole expenses down to date I think that an order similar to that pronounced in the cases of *Dempsey*, 1914 S.C. 28, 51 S.L.R. 16, and of *Mulligan*, 1917 S.C. 450, 54 S.L.R. 352, may be made.

It is evident that if the findings had concluded with the 7th article in the case the answer to the question could only be one way. My difficulty has arisen because there is this difference between the case of *Mulligan* and the present—in *Mulligan's* case we proceeded upon the view that the arbitrator had before him only two alternatives, viz., to grant the application or dismiss it, and that he did not have in view at all the *via media* of the suspensory order. The learned arbitrator in this case, in the 8th article, has plainly shown that the *via media* was not absent from his consideration, because he specially adverts to it for the purpose of stating that there was no evidence and no motion made before him in order to get his judgment upon the question whether there should be a suspensory order. The question whether or not there should be a suspensory order is a question of fact for the arbitrator. But I think that in all cases where there is, as here, a one-eyed man it is highly desirable that there should always be an express finding, yes or no, whether in the opinion of the arbitrator, in consequence of his physical injury, the man's earning capacity in the open market has been affected or not.

LORD CULLEN—The appellant admits that the Stated Case before the Court is one which is in all respects duly and completely stated with reference to the proceedings before the arbitrator and the questions of law arising therefrom which it presents for determination. He does not maintain that the findings of fact require elucidation or that they are incomplete and require to be supplemented. Nor does he maintain that the arbitrator refused or wrongly omitted to consider and determine any question which he was asked to consider and determine. Accordingly as the question stated is a competent question, the way would seem to be clear for the Court proceeding now to answer that question in exercise of its statutory jurisdiction. And I think that the question, if answered, could be answered only in the affirmative.

The appellant, however, moves that the Court should avoid or suspend its statutory function of adjudicating on this question duly presented, and instead thereof should remit the matter back to the arbitrator in order that the appellant may supplement the case he formerly made by presenting for the arbitrator's determination a question which he did not formerly raise, namely, whether it is not suitable to the circumstances, when more fully ascertained, that there should be a suspensory order instead of a final determination of his right to compensation. In the proceedings before the arbitrator, out of which the Stated Case arises, the appellant, in opposition to the employer's claim that the compensation should be finally determined, confined himself to maintaining that it should be continued. He did not lead evidence which he might have led, and now considers he should have led, directed to the particular question of the propriety of a suspensory order being made in the event of the arbitrator negativing his claim for a continuation of compensation, nor did he raise at all the topic of such an order. He pleads no mistake or excuse for his omission. He desires, however, an opportunity of correcting that omission, including the leading of new evidence before the arbitrator directed to found his hitherto unstated contention, which evidence his counsel stated he would offer in the event of a remit being made.

If it is proper to make the remit which the appellant asks, it seems difficult to avoid the conclusion that in every case where a party to a duly presented Stated Case under the statute, which is accurate and complete in its findings of fact and affords no ground for saying that the arbitrator has erred in refusing or wrongly omitting to deal with any question presented for his determination, finds himself out of Court because he has not presented some possible head of his case, in evidence or contention, before the arbitrator, it is proper to repone him by a remit which will afford him an opportunity of making good his omission, somewhat on the analogy drawn from ordinary actions of allowing amendments of the record and such new procedure as the amendments may lead to.

I am unable to avoid a doubt whether under the jurisdiction given to the Court to determine questions of law duly presented in stated cases, it is competent to the Court, instead of determining a question which has been duly presented, thus to

initiate by a remit new proceedings before the arbitrator in order to allow a party to the stated case to open up a new matter which the proceedings out of which the stated case arises did not embrace, and to which the stated case is quite properly not directed.

The appellant, however, founds on the case of *Mulligan* v. *Corporation of Glasgow*, 1917 S.C. 450, 54 S.L.R. 352, which followed the case of *Dempsey* v. *Caldwell & Company*, 1914 S.C. 28, 51 S.L.R. 16. I am unable to find any material distinction between the case of *Mulligan* and this one with reference to the present question. Accordingly, subject to the doubt which I have ventured to express, I recognise that the case of *Mulligan* forms a precedent for making the remit which your Lordships propose.

LORD SKERRINGTON was absent.

The Court pronounced this interlocutor—

"On consideration that the appellant intimates to the respondents within eight days that the whole expenses of the Stated Case on appeal will be paid by him, *hoc statu* recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit to him, in view of the finding that the claimant 'although he is not altogether blind in his left eye, still he falls to be regarded as a one-eyed miner, and as such fit for work below ground like any other one-eyed miner,' to consider and decide whether the ending of the payments should be permanent or temporary. . . ."

Counsel for the Appellant — Chisholm, K.C.—Gentles. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, May 30, 1918.

OUTER HOUSE.

[Lord Ordinary in Exchequer Causes.

COLQUHOUN'S TRUSTEES *v.* LORD ADVOCATE.

Revenue—Estate Duty—Settled Property—Aggregation—Power of Appointment—Finance Act 1900 (*63 and 64 Vict. cap. 7*), *sec.* 12 (2)—*Finance Act* 1907 (*7 Edw. VII, cap.* 13), *sec.* 16.

The Finance Act 1900 enacts—Section 12 (2)—"Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act, under a disposition made by a person dying before the commencement of part 1 of the Finance Act 1894, and such property would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, the aggregation of such property with other property passing upon the first-mentioned death shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

By a marriage contract entered into in 1837 a husband conferred on his wife a power of appointment over certain trust funds to be exercised in favour of the children of the marriage. The wife exercised the power by conferring, with the consent of a son of the marriage, a liferent of part of the fund on that son, and the fee on his children. The original donor of the power died prior to the commencement of part 1 of the Finance Act 1894, his wife in 1897, and the son in 1916. In a question with the Crown, *held* that as the appointment by the wife would have been invalid but for the son's consent, the son must be regarded as the settlor of the fund in question, and that the fund appointed must be aggregated with the rest of his estate for the purposes of estate duty.

The Finance Act 1900 (63 and 64 Vict. cap. 7), section 12 (2), is quoted *supra in rubric.*

The Finance Act 1907 (7 Edw. VII, cap. 13), section 16, enacts—"In the case of persons dying on or after the nineteenth day of April Nineteen hundred and seven, any settled property which would under subsection (2) of section twelve of the Finance Act 1900 be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself."

Major Kenneth Mackenzie Drummond and Lieutenant-Colonel Julian Campbell Colquhoun, D.S.O., trustees under the indenture or deed of marriage settlement of Mr and Mrs William Lawrence Colquhoun of Clathick, Perthshire, presented a petition to the Court for recal of certain assessments made in respect of estate duty on the estate of Captain William Campbell Colquhoun, a son of the marriage.

The petition stated, *inter alia*—"1. That by indenture or deed of marriage settlement in the English form dated 5th April 1837, entered into between William Lawrence Colquhoun of Clathick, in the county of Perth, and Lousia Locke of Rowdeford House, in the county of Wilts, the former transferred to the trustees therein mentioned £5625 stock of the Royal Bank of Scotland, and the latter transferred £7500 3 per cent consolidated bank annuities, and also assigned all acquirenda of which she might become possessed during the subsistence of the marriage above a certain value. 2. The trusts of the said settlement provided, *inter alia*, (1) that the said funds should be held by the trustees to pay thereout yearly a sum of £100 'to such person or persons, and for such intents or purposes, as the said Louisa Locke shall from time to