that the pursuer had refused to go to sea.

It was argued, however, that the course adopted by the defender showed that he did not report the pursuer to the Owners' Association because he thought that it was a case which it was his duty to report, but that he did so only because the pursuer brought an action in the Small Debt Court for wages. That argument is founded upon the facts that while the pursuer left the ship upon Friday the 30th of September, and brought his action in the Small Debt Court on the 6th October, the defender did not report the pursuer as a defaulter until the 10th of October. If the defender's delay in reporting the pursuer's conduct had not been satisfactorily explained, the inference might very well have been drawn, that if the pursuer had not brought the small debt action the defender would not have reported him. But it seems to me that the delay has been satisfactorily explained. On the morning of Monday the 3rd of October the defender met Mr Paul, the secretary, and Mr Doeg, a member of the Association, and told them about the pursuer's conduct upon the previous Friday, and Mr Doeg expressed the opinion that the case was one which ought to be reported. The defender then asked Mr Walker, his superintendent engineer, to report the matter to Mr Smith, the superintendent porter at the fish market, who, subject to the secretary's instructions, kept the register of defaulters. Mr Walker, however, forgot to do so, but the defender did not learn that the report had not been made until the 10th of October, when he himself went to Smith, along with Walker, and had the pursuer's name entered in the register. These facts seem to me to leave no room for the inference that, in reporting the pursuer's conduct the defender was actuated by malice against him for having brought an action for his wages.

On these grounds I am of opinion that the Sheriff-Substitute's interlocutor should be recalled, and the defender assoilzied.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact (1) that for about a fortnight prior to 30th September 1904 the pursuer was in the employment of the Icelandic Steam Fishing Company, Limited, of which company the defender is manager, as chief engineer on board their steam trawler 'Princess Melton': (2) that on the said 30th September 1904 the pursuer, without due notice, left the said trawler when she was ready to go to sea, in consequence of which she was detained in harbour for more than a day; (3) that the said Icelandic Steam Fishing Company, Limited, is a member of the Aberdeen Steam Fishing Vessels Owners' Association, Limited; (4) that in or about the month of November 1903 the members of the last-mentioned Association resolved that a 'Register of Defaulting Crews' should be kept, and that if a member of the crew of a steam trawler belonging to a member of the said Association, who was engaged to go to sea in such trawler, should absent himself, or refuse to go to sea, or should come on board in a state of intoxication, the said member of the Association should report to the secretary the name of the said member of the crew, and the offence committed by him, for insertion in the said register; (5) that the defender reported to Mr G. F. Paul, the secretary of the said Association, that on said 30th September 1904 the pursuer had been drunk and had refused to go to sea, and that accordingly the pursuer's name and the said alleged offences were entered in the said register; and (6) that in making the said report the defender was not actuated by malice, and that he had reasonable grounds for believing that the statements of and concerning the pursuer contained in said report were true: In these circumstances finds in law (1) that the defender was privileged in making said report, and in respect that he did not make the report maliciously is not liable in damages to the pursuer for slander; and (2) that the circumstances do not disclose any other ground upon which the pursuer is entitled to claim damages from the defender: Therefore assoilzies the defender from the conclusions of the action, and decern: Find him entitled to expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer (Respondent)—Hunter, K.C.—Wilton. Agents—Henderson & Mackenzie, S.S.C.

Counsel for the Defendant (Appellant)—Ure, K.C.—A. R. Brown. Agents—Alex. Morison & Co., W.S.

Thursday, December 14.

FIRST DIVISION.

(Before the Lord President, Lord M'Laren, and Lord Mackenzie.)

[Sheriff Court at Glasgow.

BRYSON *v.* J. DUNN & STEPHEN, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Sched., secs.* (1) *and* (2)—*Amount of Compensation—Partial Incapacity—Discretion of Arbitrator—All the Circumstances to be Considered which Arbitrator Thinks Relevant—Interlocutor.*

In considering an application under the Workmen's Compensation Act 1897 to vary the weekly payment during partial incapacity, the arbitrator is to have regard to all circumstances which he thinks relevant, as well as to the difference in the wage-earning capacity

before and after the accident, and any payment not wages received from the employer in respect of the injury during the incapacity, both of which he is bound by the statute to consider; but it is not necessary that he should show in a stated case that he has had in view any particular consideration save those required by the statute.

Geary v. *William Dixon, Ltd.*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; and *Parker* v. *William Dixon, Ltd.*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663, *commented on* and *approved.*

The Workmen's Compensation Act 1897, First Schedule, sec. (1), enacts that the amount of compensation shall be "where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings" before the injury, "such weekly payment not to exceed £1."

Sec. (2) enacts—"In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

This was an amended stated case on appeal from the Sheriff Court of Lanarkshire at Glasgow in an arbitration under the Workmen's Compensation Act 1897, brought by William Bryson, miner, 16 Graham Street, Tollcross, Glasgow (the respondent), against J. Dunn & Stephen, Ltd., coalmasters, 21 Bothwell Street, Glasgow (the appellants).

The case as amended stated — "This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow at the instance of the respondent, in which the Sheriff was asked to grant a decree against the appellants ordaining them to pay to the respondent the sum of 18s. 4d. sterling weekly, beginning the first payment as on 23rd July 1901, with expenses. The case was heard and proof led before Mr Sheriff-Substitute Strachan on 28th October 1901, when the following facts were admitted or proved:—

"(1) That the respondent had been a miner in the employment of the appellants at their Foxley Colliery, near Tollcross.

"(2) That on 26th March 1900, while in said employment at Foxley Colliery aforesaid, of which the appellants were undertakers within the meaning of the Workmen's Compensation Act 1897, and while in the ordinary course of his employment, the respondent received injury by accident, in consequence of which his left leg was amputated above the knee.

"(3) That the average weekly earnings of the respondent had been 36s. 8d.

"(4) That the appellants had admitted the respondent's claim for compensation under said Act, and paid him compensation at the rate of 18s. 4d. per week, being one-half of his average weekly earnings as aforesaid to 16th July 1901, but that further compensation was refused on the ground that the respondent was then fit for light employment.

"(5) That the respondent was not at the date when said compensation was stopped, nor at the date of the Sheriff-Substitute's judgment, in a fit condition to work or to earn any wages.

"The Sheriff-Substitute, Mr Strachan, therefore awarded respondent the sum of 18s. 4d. per week from 23rd July 1901 until the further orders of Court, with expenses.

"On 14th October 1904 the appellants lodged in process a minute craving the Court to review and end or diminish the weekly payments decerned for, in respect that the circumstances of the respondent were then changed, and that he was fit for employment.

"Said application for review was heard before me, and proof led on 20th January 1905, when I found (1) that the respondent having then been offered and accepted employment by the appellants as a night watchman at a wage of 17s. per week, his compensation might be reviewed; (2) that his wage of 17s. per week, coupled with the compensation at present payable (18s. 4d. per week) would not amount to the wage previously earned by him, viz., 36s. 8d. per week; and (3) that no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable appeared from the evidence, and in which state of matters I found that these facts furnished no sufficient ground for reducing the weekly payment of which the respondent was in receipt, and awarded him the same sum as heretofore, viz. 18s. 4d. per week till the future orders of Court. I also found him entitled to expenses."

The question of law for the opinion of the Court was—"Whether, where a workman is in receipt of 18s. 4d. of compensation (his former average earnings having been 36s. 8d. per week), and can earn, and is in fact earning, 17s. per week, his employer, in the absence of any other facts or circumstances affecting the issue, is not entitled to have the said maximum rate of compensation reduced."

(The case as originally stated was remitted by the First Division to the Sheriff-Substitute in order that he might "state specifically what the question of law was on which the opinion of the Court was desired." In it the third finding of the Sheriff was—"(3) That no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable appeared from the evidence, in which state of matters I found that the respondent was entitled to the same sum as heretofore, viz., 18s. 4d. per week till the future orders of Court"; and the question of law was—"Whether in the circumstances above set forth the arbiter was right in refusing to order a reduction in the sum previously found due as compensation.")

Argued for appellants—An arbiter was bound to consider each case on its merits, but keeping in view the terms of section (2)

of the First Schedule. There was no such rule (as the Sheriff-Substitute seemed to think there was) that where the compensation and the secondary wages did not amount to more than the original wage, the compensation was not to be interfered with. The arbiter had evidently regarded the words "regard shall be had" . . . as equivalent to a direction, and as setting forth the only element to be considered, whereas it was merely one of the elements. Regard was to be had not only to "the difference" but also to any relevant circumstance, including any payment not being wages received by the workman during his incapacity. This the Sheriff had apparently not done. For example, he apparently had not considered that the wage now being earned together with the proposed compensation was much more than enough to support the man. That was a relevant consideration. The case should at least be remitted back to find out if it had been taken into account. The following authorities were referred to—*Geary* v. *William Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; *Parker* v. *William Dixon, Limited*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663; *Corbet* v. *Glasgow Iron and Steel Co., Limited*, May 14, 1903, 5 F. 782, 40 S.L.R. 601; *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113; *Webster* v. *Sharp & Co., Limited*, [1904] 1 K.B. 218. Money paid by way of compensation was to be distinguished from wages—*Gibb* v. *Dunlop & Co., Limited*, July 9, 1902, 4 F. 971, 39 S.L.R. 750.

Argued for respondent—It was in the arbiter's discretion to award the full amount of compensation allowed by the limits specified in the Act. The arbiter had applied his mind to the whole circumstances of the case. The appellants were in error in thinking that he had only regarded one element. That was apparent from the fact that he had not awarded the full amount of the difference between his former and his present wages—*Illingworth* v. *Walmsley*, [1900] 2 Q.B. 142. An interlocutor similar to that pronounced in *Parker* v. *William Dixon, Limited* (*cit. supra*), ought to be pronounced here.

LORD PRESIDENT—This is a stated case under the Workmen's Compensation Act 1897. The facts of the case are these:—The respondent, who was in the employment of the appellants as a miner, was working at an average weekly earning of 36s. 8d. sterling to the time he met with the accident. For the time he was totally incapacitated by his accident he received from the appellants 18s. 4d. per week, being fifty per cent. of his wages. After a certain time, however, he accepted employment from the appellants as a night-watchman at a wage of 17s. a-week, and on that the appellants made an application to the Court and asked for a review of the payment. The case came up before your Lordships at the end of last Summer Session upon a stated case, and the condition of the stated case at that time was that, after setting forth the fact of the workman accepting employment, the Sheriff went on to say as follows—"(2) That his wage of 17s. per week, coupled with the compensation at present payable (18s. 4d. per week), would not amount to the wage previously earned by him, viz., 36s. 8d. per week; and (3) that no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable appeared from the evidence, in which state of matters I found that the respondent was entitled to the same sum as heretofore, viz., 18s. 4d. per week till the future orders of the Court." The question of law which was then set out was—"Whether in the circumstances above set forth the arbiter was right in refusing to order a reduction in the sum previously found due as compensation?"

Your Lordships having heard that case remitted it to the Sheriff, and for this reason, that the various phrases used by the Sheriff were obviously capable of double interpretations. He had found the respondent entitled to the same sum as before, but that might mean that he was entitled as by right of law, in which case, as it concerned the interpretation of the Act, your Lordships would be in a position to review that finding, and it was not obscurely intimated by Lord Adam in giving judgment in that case, that if that was a question of law the Sheriff had arrived at a wrong conclusion. But the other view was that the Sheriff had merely found that in the circumstances of the case the man was entitled to this amount of compensation. That would be a finding in pure fact, and so not subject to your Lordships' review. The case was accordingly remitted to the Sheriff for further particulars.

The case has now come back, and I am bound to admit that the question of law is most unhappily stated; because the question of law now put instead of the old one is this—"Whether, where a workman is in receipt of 18s. 4d. of compensation (his former average earnings having been 36s. 8d. per week), and can earn, and is in fact earning, 17s. per week, his employer, in the absence of any other facts or circumstances affecting the issue, is not entitled to have the said maximum rate of compensation reduced?" The criticism which one is forced to make on that is, that if the question was answered by the Court in the affirmative or in the negative, it would almost baffle the wit of man to discover what was the result. But at the same time, although I do think the question of law is in fault, as I have pointed out, the learned Sheriff did amend the case to a certain extent, and did so with respect to the sentence from his findings which I read before. The sentence formerly read—"In which state of matters I found that the respondent was entitled to the same sum as heretofore, viz., 18s. 4d. per week till the future orders of the Court." It now runs thus—"In which state of matters I found that these facts furnished no sufficient ground for reducing the weekly payment of which the respondent was in receipt, and awarded him the same sum as heretofore."

Now, it seems to me that that is sufficient to enable us to dispose of this case without being reduced to the necessity, which one would regret, of sending the case back to be amended again. The difference in the two sentences which I have read consists in this, that in the first version of the case the respondent was said to be entitled, which of course might mean legally or of right entitled, whereas the learned Sheriff now puts it that the respondent's right is based on his finding as to the sufficiency of the facts. In other words, it is dependent on the whole circumstances of the case. The law upon the matter seems to me to be already completely settled by the decisions and dicta in the two cases which were cited, viz., the case of *Geary* (4 F. 1143) and the case of *Parker* (4 F. 1147), both in 4 Fraser. While I cannot add anything to what was said by Lord Robertson in the case of *Geary*, I may recapitulate the propositions deducible from the decisions and dicta in these cases. They seem to me to be four in number. An arbiter, either in the original application to settle the weekly payment to be made as compensation during incapacity, or in an application to vary the compensation—(1) must have regard to the difference in the wage-earning capacity between the position before the accident and the position at the time of the application, as evidenced by the wages *de facto* earned before the accident and the wages being earned at the date of the application; (2) must keep in view any payment other than wages which the employer gave to the workman during the period of incapacity; (3) may take into view any other circumstances which he may consider relevant to the question of the proper compensation to allow; and (4) may, having considered the matter under the foregoing conditions, award what sum he pleases, provided only that such sum does not exceed 50 per cent. of the average wages at the time of the accident (such wages being calculated as regards an average in the way prescribed by the statute), and does not exceed £1 per week, the claimant not being entitled as of right to any particular sum whatever.

Applying these propositions to the present case, I find that the arbiter has complied with proposition (1), because he has set out the facts in that relation as having been considered by him. The same may be said of proposition (2), because no one has suggested that any payment has been made by the employer other than the 18s. 4d. a-week. As regards proposition (3), I think that this statement in the case, "that there were no other circumstances of any sort which could weigh with an arbiter in estimating the compensation payable," is equivalent to a finding that there were no other circumstances which he held relevant. Finally, the operative conclusion the Sheriff came to, viz., continuing the payment of 18s. 4d., does not transgress either of the elements set forth in proposition (4). Therefore I think that the finding of the learned Sheriff as arbiter must clearly be supported. Mr Guthrie, for the appellants, argued that the arbiter had set forth that the compensation of 18s. 4d. and the wage of 17s. did not amount to the former wage of 36s. 8d.; but that he had not set forth that they did amount to 35s. 4d., and he asked a remit to the Sheriff in order to make it quite certain that the Sheriff had considered that view of the matter, the sum of 35s. 4d. being more than ample to support the man. I am not going into the question as to whether payments which would support a man—or what is sometimes called a living wage—could ever possibly be a relevant consideration for an arbiter or not. I can only say that I see no trace of it one way or another in the statute. At the same time I do see this under the statute, that there is no limit to the considerations which arbiters may have before them, and it is not for us here to set up a sort of model code for arbiters as to what they ought to think about. The crave, however, of Mr Guthrie for a remit for that purpose is clearly inadmissible, because it would really come to this, that this question having once been mooted, the case is not perfect unless the arbiter sets forth all the various considerations which some people might think relevant in order to assure the Court that he has had them before his mind and has rejected them. All that they can possibly ask the arbiter is that he should show that he has not forgotten those things which he was told by the statute he must consider, and which I have embodied in propositions (1) and (2), and that he has had before him the whole facts which were relevant to these considerations. The rest of the matter must be left entirely to him, the statute being silent upon what other considerations are relevant and what are not. Therefore I think that, deserting the question put, we should give a finding that the award of the arbiter ought not to be disturbed.

LORD M'LAREN—On a first reading this question would rather suggest that the topic of inquiry was, what is the right of a workman earning 17s. a-week, leaving out of consideration what would be the case of a workman earning 18s. 4d. Of course that is not really the question put, and from the argument I gather that what we are asked to consider is whether there is any legal ground or rule which would interfere with the discretion of the arbiter in awarding any sum which he might think proper within the statutory limits. I am unable to find that there is any such rule, and it is a complete fallacy to say that, because 18s. 4d. a-week was adequate compensation when the man was receiving no wages, therefore he must be taken to be overcompensated when he is getting 17s. a-week of wages, because the answer is that very likely the arbitrator would have given him more than 18s. 4d. if he had had the power to do so, and that he gave him that particular sum, not on the theory that the man would thereby be fully compensated, but because that was all the compensation which the statute allowed the arbitrator to give. If that were so, it would be quite consistent

for the same arbitrator to hold that, notwithstanding that the man was in receipt of wages, still he was not fully compensated, because the two payments together did not amount to the wages he had been earning before the accident occurred. I do not think that an arbitrator is compelled to make an abatement of the weekly payment merely because the workman happens to be earning a certain wage. I think that that suggestion is contrary both to the spirit and the words of the statute. The completeness of recovery, the resultant incapacity, and many other things, might enter into the consideration of the arbiter. There is only one rule fixed with regard to such a circumstance, and that is, that in an application for reconsideration of a weekly allowance it would not be consistent with the provisions of the statute for an arbitrator to award a sum which would, when added to the wages being earned, give the workman a larger weekly income than he was earning before the accident. I think that this is well settled, and on obvious and sufficient grounds. But when the compensation and the wages added together do not amount to as much as the workman was earning before the accident, I see no legal rule to lead us to interfere with the award that the arbiter has made. I therefore agree that the interlocutor should be such as your Lordship has suggested.

LORD MACKENZIE concurred.

LORD KINNEAR and LORD PEARSON were absent.

The Court pronounced this interlocutor—

"Find in answer to the question of law stated in the amended case that the award of the arbitrator is in conformity with the terms of the Workmen's Compensation Act 1897: Therefore dismiss the appeal, affirm the award of the arbitrator, and decern."

Counsel for the Appellant—Guthrie, K.C.—A. Moncreiff. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Johnston, K.C.—M. P. Fraser. Agents—W. & W. Finlay, W.S.

Tuesday, January 9, 1906.

SECOND DIVISION.

[Lord Dundas, Ordinary.

MUIR *v.* MUIRS.

Arbitration—Clause of Reference—Contract—Construction—Contract of Copartnery for Watchmaking Business—Disputes "in any way relating hereto" Referred to Arbitration—Dispute whether Proposed Additions Amount to a Different Business Held to Fall under Clause of Reference.

A contract of copartnery for the carrying on of a watchmaker's and jeweller's business provided, *inter alia*, "Any disputes that may arise between the partners, or between the heirs of a deceasing partner, in any way relating hereto, shall be referred to the amicable decision of an arbiter to be mutually chosen, whose decision shall be final."

A question having arisen as to whether certain proposed additions to the business fell within the scope of a watchmaker's and jeweller's business, for which alone the copartnery existed, *held* that the question was one relating to the construction of the contract, and fell accordingly under the clause of reference.

Thomas Muir, Airdrie, brought a note of suspension and interdict against his sons, Henry Muir and James Muir, watchmakers and jewellers, Glasgow, in which he sought to interdict them "from entering into an agreement with Simon L. Goodman, optician and sight tester, 182 Argyle Street and 1 Union Street, Glasgow, or with any other person, whereby the firm of Muir & Sons, carrying on a joint business as retail watchmakers and jewellers, 182 Argyle Street and 1 Union Street, Glasgow, agrees to carry on the business of opticians and sight testers in the firm's premises, 182 Argyle Street and 1 Union Street, Glasgow, or in any premises they may occupy, and also from in any way carrying on, as part of the business of the said firm of Muir & Sons, the business of opticians and sight testers."

The facts of the case sufficiently appear from the following narrative, which is taken from the opinion of the Lord Ordinary:—"The question which I have to decide is whether or not a dispute which has arisen between the complainer and the respondents falls within a clause of reference which is contained in their contract of copartnery. By that contract, which is dated 2nd July 1900, the complainer, as first party, and the respondents (and John Muir, since dead), his sons, as second parties, agreed to be copartners in carrying on a joint business as watchmakers and jewellers at 182 Argyle Street and 1 Union Street, Glasgow, for seven years from 26th January 1900, under the firm name of 'Muir & Sons.' By article *Seventh* it was provided that the sons should devote their whole time and attention to the business and management thereof, and should 'do their utmost to extend and promote the business'; but while the father should 'have the entire and uncontrolled oversight of the business and all its concerns,' he should not be bound to give any particular or stated time or attention thereto, his duties 'being merely those of supervision for the interest in and welfare of himself and his copartners.' Article *Eighth* provided that 'None of the partners shall, during the currency of the copartnery, directly or indirectly be engaged in any other business, profession, trade, or occupation, without the previous consent of the others in writing.' By article *Ninth* it was, *inter alia*, provided that the partners should conduct