agree with your Lordship that this case is distinguishable from that of *M'Callum*, 1909 S.C. 227. As regards the case of *King*, 1910 S.C. 43, it too has no application, because although there was a certificate from a medical referee there, all that was held was that it did not bar the workman, when subsequent proceedings were taken by him for an award of compensation in respect of supervening incapacity, from proving that he had become incapacitated as the result of the original accident. Accordingly, that case is entirely consistent with the judgment which we now pronounce.

LORD GUTHRIE—I agree. In the ordinary case the first medical report usually finds incapacity; in this case the first medical report which we have finds capacity. It seems to be clear that when the employer, following on that report, presented an application for review, it was sufficient for him to table that report as proof of capacity existing at its date. The appellant was quite entitled to rejoin that the capacity had subsequently ceased, and that it had ceased on account of some reason connected with the accident. The Sheriff's question assumes that the *onus* lay on the appellant to prove that the capacity referred to in the doctor's report had ceased, and only puts to us the question whether, assuming that *onus* to have been discharged, the further *onus* of proving that the supervening incapacity was due to the accident was also on the appellant. It appears to me, on a consideration of the statute, and in particular of the words of the first section, that the workman is bound, as a condition of claiming compensation, to connect the incapacity from which he suffers with the accident which arose out of his employment, and that this is so whether the question arises when the claim is first made or in subsequent proceedings. I therefore entirely concur in the judgment proposed.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Morison, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

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

Wednesday, June 7.

SECOND DIVISION.

[Sheriff Court at Inverness.

MACGILLIVRAY *v.* THE NORTHERN COUNTIES INSTITUTE FOR THE BLIND.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII. c.* 58), *sec.* 13—*Workman.*

A blind man was injured while employed in the industrial department of an institute for the blind. This department was supported partly by charitable contributions received by the institute. The institute gave the man, in respect of his services, board, lodging, and 5s. a month, and received on his account charitable and parochial assistance which came to a few pounds less than the amount it expended on him. *Held* that the man was a workman within the meaning of the Workmen's Compensation Act 1906.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII. cap.* 58), *First Schedule*, 1 (*b*)—*Compensation—Amount.*

In an arbitration under the Workmen's Compensation Act 1906, when the workman was paid partly in money and partly in kind by a charitable society which received parochial and charitable assistance on his account, the arbitrator stated that there was no evidence as to his weekly earnings save the statement by the officials of the institute that the money payments represented twenty per cent. of the man's earnings. The Court *remitted* to the Sheriff to allow compensation on that basis.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts, sec. 13—"'Workman' . . . means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing. . . ."

First Schedule (1)—"The amount of compensation under this Act shall be—(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months . . . [or] . . . for any less period during which he has been in the employment of the same employer."

John MacGillivray, labourer, Inverness, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the Northern Counties Institute for the Blind, Inverness, the matter was referred to the arbitration of the Sheriff-Substitute at Inverness (GRANT), who assoilized the defenders, and, at the request of the appellant, stated a case for appeal.

The following *facts* were proved—"The respondents are a charitable institution, whose objects are stated in their annual report for last year, and in furtherance of these objects they appeal to the charitable public for subscriptions.

"The second object of the institute is to use suitable means for training the blind in such industries as may promote their self support and for providing those requiring it with regular employment.

"The industrial department of the institute was not self-supporting in the year of the report. The accounts show a deficit of £50, 14s. 5d. on the year's working, which sum had to be met from the other resources of the institute, which are derived from charity. It was proved that this department could not be successfully worked as a commercial undertaking independent of charitable aid.

"There are three classes of workmen employed in this department, and they are graded at the discretion of the foreman. The first, or learners', class receive their board, lodging, and clothing from the institute, and are paid sixpence a week. The second class, who may be compared to apprentices, receive their board, lodging, and clothing, with five shillings a month in money. The third, or journeymen, class consist of those who receive wages (varying at present from 15s. to 20s. a week according to proficiency) and provide their own board and lodging and clothing, and live where they like. There are at present six workmen in this class.

"The appellant in this case was a member of the second, or apprentice, class, and received his board, lodging, and clothing, and five shillings a month in money. The whole value of the board, lodging, clothing, and money provided by the respondents for the appellant amounted on an average to 15s. a week.

"The workmen in all three classes in so far as *sui juris* are free to enter and to leave the institute's industrial department, and the institute has the power of dismissing them as it thinks fit, and of selecting who shall be their workmen.

"At the time of the accident the respondents were receiving from the Parish Council of Kilmonivaig (whose pauper the appellant was) for the maintenance of the appellant the sum of 4s. a week, and also that Parish Council refunded to the institute the cost of the appellant's clothing, which amounted to £4 per annum. The respondents also received from the Donald Fraser Bequest for the benefit of the Blind in the County of Inverness a grant of £20 annually specifically on the account of the appellant."

The Sheriff-Substitute further stated —"On these facts, I held that in respect that the appellant was in receipt of parochial and charitable relief he was not a workman in the sense of the Act founded on."

The *question of law* was — "Was the appellant a workman in the sense of section 13 of the Workmen's Compensation Act 1906?"

The case was heard on 9th March 1911, and on 18th March 1911 the Court remitted to the Sheriff-Substitute for further findings in fact.

The Sheriff-Substitute reported as follows —"(2) In the case of the first and second classes of men engaged in the industrial department, the men receive industrial training in the institute; and the institute boards them out, supplies them with clothing, and makes a pecuniary allowance as pocket-money. In both cases the aggregate value of the work done by the recipients is less than the sum expended on them, including the value of instruction, but there was no evidence of the individual work done by the appellant. When a blind workman is, in the judgment of the respondents' officials of their industrial department, able to support himself by his earnings, he is transferred to the third or journeyman class. (3) . . . Arrangements for contributions from the Parish Council of Kilmonivaig and from the administrators of the Donald Fraser Bequest were made, were subsisting at the date of the accident, and were continuing at the date the evidence was led, viz., 7th July 1910. (4) There was no evidence of the average weekly earnings of the appellant beyond the statement by the respondents' officials that the sum of 5s. a month paid to each of the second or apprentice class was supposed to represent 20 per cent. of the average earnings of each member of that class."

The following additional *question of law* was added—"(2) If the first question be answered in the affirmative, do the average weekly earnings upon which compensation to the appellant falls to be assessed consist of (*a*) the whole amount paid by the respondents to or for behoof of the appellant, or (*b*) the said amount less the contributions received by the respondents for behoof of the appellant, or (*c*) the average earnings as calculated by the respondents' officials, viz., 6s. 3d. a week.

Argued for the appellant—(1) The contract between the parties was clearly one of service. The defenders carried on an industrial department, and one of their objects was to make the blind self-supporting. The present case was *a fortiori* of *Gilroy* v. *Mackie*, 1909 S.C. 466, 46 S.L.R. 325, and the essentials of a contract of service, freedom of contract, payment, and power of selection and dismissal, were present here. (2) Earnings in the sense of the statute meant gross earnings. In any event, the Sheriff had found as a fact that the man's earnings were 6s. 3d., and that finding was final.

Argued for the respondents — (1) The relationship between the parties was one of charity, and not of master and servant. The institute did not carry on a trade or business in the sense of the statute, and the appellant was not a workman earning wages. The appellant's status was that of an inmate of a charitable institution entitled to certain privileges and bound to perform certain duties. There was no proper *locatio operis*. The respondents

received payments on behalf of the appellant, which came to within a few pounds of the amount expended on him—*Burns* v. *The Manchester and Salford Wesleyan Mission*, July 21, 1908, 99 L.T. 579. (2) If the first question was answered in the affirmative, the amount so received should be deducted from the amount expended upon the claimant, and compensation should be fixed upon this basis.

LORD PRESIDENT—This is a demand for compensation under the Workmen's Compensation Act 1906, at the instance of a man who was in the Northern Counties Institute for the Blind, Inverness. The Institute for the Blind is a charitable institution, whose objects are stated in their constitution, viz., "to promote the temporal and spiritual wellbeing of blind persons residing in the Northern Counties," and in furtherance thereof to "use suitable means for training the blind in such industries as may promote their self-support, and for providing those requiring it with regular employment." The case as stated by the Sheriff-Substitute sets forth that there is, in accordance with the objects which I have read, an industrial department of the institute. This department is not in itself self-supporting, but requires support from the charitable contributions which the institute receives. The Sheriff goes on to state that there are three classes of workmen employed in this department—(1) learners, who receive their board, lodging, and clothing from the institute, and are paid sixpence a week, (2) those receiving board, lodging, and clothing with five shillings a month in money, and (3) a journeyman's class, consisting of those who receive wages and provide their own board and lodging and clothing and live where they like. The appellant in the case was a member of the second class, and while with the institute admittedly met with an accident by which his right hand was very badly injured. Now the learned Sheriff, as arbiter, has set forth in detail various forms of charitable assistance which the institute receives, and also that the Parish Council of Kilmonivaig, the relieving authority in respect of the appellant, who before he entered the institute was a pauper, gave the institute four shillings per week and also paid for the cost of his clothing £4 a year. He further sets forth the fact that the institute received a grant of £20 annually, specifically on account of the appellant, from a certain Donald Fraser Bequest fund. He then went on to hold, in respect that the appellant was in receipt of parochial and charitable relief that he was not a workman in the sense of the Act, and therefore dismissed the application. I think there is no doubt that, viewed as a universal proposition, this is not sound, and inasmuch, therefore, as the judgment as it stood could not be supported, your Lordships thought it better to remit the case to the Sheriff in order that he might consider and report upon certain additional statements suggested in a note for the respondents, and pronounce such findings in respect to these matters as should seem consistent with the evidence led before him. We have now received the Sheriff's report and the case has been argued on it. The first question is--Was the appellant a workman? I think he was. I am of opinion that the case follows that of *Gilroy* v. *Mackie*, 1909 S.C. 466, decided in this Division. I think, applying to this case the criteria that we applied there, that there is no doubt that this man was a workman. He was employed under a contract of service. He was not bound to go to the institute, and the institute was not bound to receive him. He stipulated that he would give his services for what they were worth to the institute, and they, in return, stipulated that they would give him board, lodging, and clothing, and five shillings a month in money. Accordingly the initial question must be answered in the affirmative, and therefore the appellant is a workman.

But there remains the question as to the basis on which his earnings are to be estimated. Strictly speaking, this is not a question for us but for the Sheriff; but in his report the Sheriff has already given what is equivalent to a finding on this matter. In answer to a demand on him to state what the appellant's weekly earnings were, he has answered—"There was no evidence of the average weekly earnings of the appellant beyond the statement by the respondents' officials that the sum of five shillings a month paid to each of the members of the second or apprentice class was supposed to represent twenty per cent. of the average earnings of each member of that class. On this assumption the monthly earnings of the appellant would be £1, 5s., and his weekly earnings 6s. 3d." I think that is equivalent to a finding that his weekly earnings were 6s. 3d. Of course under the statute where there is a weekly wage you are bound to take it as the basis of estimating compensation. Now in this case two facts are clear—(1) that the man was clearly paid partly in money and partly in kind, and (2) that what he got was not the equivalent of his earnings, because part of it was charity. It is quite certain that his work was not worth all the benefit that he got. That being so I think that we have got before us all that there is to know as to what his earnings were. We may, therefore, take the Sheriff's statement as a finding that the appellant's weekly earnings were 6s. 3d. Fifty per cent. of that is the compensation allowed by the statute, that is, 3s. 1½d., and I think we should remit to the Sheriff to allow compensation to that amount.

LORD KINNEAR and LORD MACKENZIE concurred.

LORD JOHNSTON, who was absent when the case was first called, gave no opinion.

The Court answered the question of law in the Stated Case, and branch (*c*) of the additional question of law, in the affirmative.

Counsel for Appellant—Munro, K.C.—A. A. Fraser. Agent—Allan E. Ker, W.S.

Counsel for Respondents — Constable, K.C.—W. Wilson. Agents--Bonar, Hunter, & Johnston, W.S.