At advising—

LORD DUNDAS—This appeal must, in my opinion, be refused. I think the matter is concluded by the terms of the Act of 1908. Section 10 (2) provides that "a person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*)" that certain conditions exist, with which we are all familiar, "or (*b*) that he has on such a previous conviction" (these words take one back to (*a*)) "been found to be a habitual criminal, and sentenced to preventive detention." I cannot see that the meaning and effect of the sub-section are materially different from what they would have been if the words had run that "a person shall be found to be a habitual criminal if (but only if) the jury finds on evidence," &c. If this be not so, I am unable to find in the statute any positive criterion by which the jury are to judge the question of fact, whether the person is a habitual criminal or not. It seems to me that the sub-section prescribes and defines the alternative conditions upon proof of which a jury must find that the accused is a habitual criminal. In other words, I read sub-section 2 (*b*) as importing that, if a man has been once duly found by a jury to be a habitual criminal, and if he is thereafter indicted for, and convicted of, crime which the judge considers must be punished by sentence of penal servitude, and he is charged in the same indictment with being a habitual criminal, he falls automatically within the category of habitual criminals. It is plain that the appellant falls under the terms of sub-section 2 (*b*), and that being so I think the learned Judge had no course open to him except to direct the jury (as he did) that by the express provision of the statute they were bound to find that the accused was a habitual criminal. It was urged that if this be the necessary construction of sub-section 2 (*b*) the enactment is a harsh one, or at least might operate harshly in given cases that might arise. It would probably be sufficient to reply that such considerations are for the Legislature and not for the Court, whose sole duty is to administer and not to criticise the enactments of Parliament. But it may be pointed out that the Act appears to have provided against cases of undue hardship. In the first place, I apprehend that the charge of being a habitual criminal does not come into operation—either on the original or on a subsequent indictment—unless the judge is prepared to impose a sentence of penal servitude in respect of the substantive crime libelled and (*ex hypothesi*) proved against the accused. If the judge is not so prepared the "habitual criminal" charge is not proceeded with. In the second place, even if that charge is brought before the jury, and they find it to be established, it is left, section 10, sub-section (1), to the discretion of the judge to decide whether or not as matter of expediency he should pass any sentence of preventive detention.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

The Court dismissed the appeal.

Counsel for the Appellant—Christie, K.C.—Gibb. Agents—Armstrong & Hay, S.S.C.

Counsel for the Respondent—Millar, K.C., A.-D.—Morton, A.-D. Agent—Sir W. S. Haldane, W.S.

COURT OF SESSION.

Saturday, November 18.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WILSONS AND CLYDE COAL COMPANY, LIMITED *v.* BURKE.

JOHN WATSON, LIMITED *v.* QUINN.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, sec.* 16—*Minor Workman—Application by Minor Workman who had Reached his Full Earning Capacity at Date of Accident, to Fix the Rate of Compensation, Founding on Rise in General Rate of Wages.*

A minor workman was injured by accident arising out of and in the course of his employment. At the date of the accident he had reached his full earning capacity. His weekly wages then were 35s. More than a year later he brought an application for review of the weekly payments of compensation. It was proved that if he had not been injured he would at the date of the application for review have been earning about 49s. 6d. per week. His potential ability to earn higher wages was entirely the result of a general rise in the rate of wages. *Held* that the fact that the workman had reached his full earning capacity at the date of the accident did not in itself preclude the arbitrator from exercising the discretion conferred upon him by the proviso in section 16 of the First Schedule of the Workmen's Compensation Act 1906 and awarding, if he thought fit, increased compensation in respect of the increased wage the applicant would probably but for the accident have been earning.

Opinion per Lord Skerrington that it would be unlawful for the arbitrator to refuse to increase the compensation solely on the ground that as the minor had at the date of the accident attained his full earning capacity it was unreasonable he should be in a better position than a workman of full age.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, sec. 16, enacts—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased. . . . : Provided that where the workman was at the date of the accident under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may

be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

Wilsons and Clyde Coal Company, Limited, *appellants*, being dissatisfied with an award by the Sheriff-Substitute at Hamilton (SHENNAN) in an application to determine the rate of compensation payable to Tobias Burke, *respondent*, under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), appealed to the Court of Session by Stated Case.

John Watson, Limited, *appellants*, made a similar appeal in a similar arbitration against them by Michael Quinn, *respondent*.

The *facts* in each case were very similar, and in each the same question was raised. Both cases were dealt with together by the Sheriff-Substitute, and were also heard together on appeal. It is therefore only necessary to refer to the case of *Burke*.

The Case stated—"The following *facts* were admitted or proved:—1. On 29th October 1914 the respondent, when working as a pony driver in the appellants' Clyde colliery, received injury to his right knee by accident arising out of and in the course of his employment with the appellants. He was thereafter totally incapacitated for work in consequence of said injury. 2. The appellants admitted liability to pay compensation to the respondent in respect of his incapacity. His average weekly earnings prior to the accident were 35s., and the appellants paid him compensation of 17s. 6d. per week on account of total incapacity down to 28th February 1916. 3. The appellants were of opinion that the respondent was fit for light work by 28th February 1916. As the respondent maintained that he was still totally unfit for work, the parties agreed to refer the question of his fitness for work to a medical referee under Schedule 1, par. 15, of the Act. On 22nd March 1916 the medical referee certified that the respondent was able to resume work where not much walking or standing in one position is required, and that his condition would be improved by light work. 4. The medical evidence established that the respondent was fit for light work by 28th February 1916. 5. The respondent was born on 11th October 1894, and was thus under twenty-one years of age at the date of the accident. The present proceedings were raised more than twelve months after the accident. 6. At the date of the accident the respondent had attained his full earning capacity as a pony driver or an oncostman. He intended to continue at oncost work. If he was fit for pony driving work or other full oncost work he could have earned about 48s. 2d. per week between 28th February 1916 and 4th April 1916, and about 49s. 6d. per week thereafter. The fact that he could have then earned higher wages than at the date of the accident is due solely to the rise in the rate of wages. His working capacity if he had not been injured would not now have been greater than it was at the time of the accident.

"The respondent *contended* that in the circumstances above stated the proviso to Schedule 1, par. 16, of the Act applied to the case, and that he was entitled to have his rate of partial compensation increased, looking to the weekly sum which he would probably have been earning at this date if he had remained uninjured.

"I was then of opinion that in assessing compensation I was bound to consider the matters pointed to in Schedule 1, par. 16, but that in the case of a workman who had attained his full earning capacity before he was injured I was entitled to refuse to use the power which that paragraph gives. Accordingly on 13th June 1916 I issued an award giving the respondent compensation of 12s. per week from 28th February to 30th May 1916, and of 10s. per week thereafter.

"At the request of the workman (the present respondent) I stated a case on appeal to the First Division of the Court of Session on the question whether I was entitled in assessing compensation not to have regard to the weekly sum which the respondent would probably have been earning at the date of the proof if he had remained uninjured.

"On 19th July 1916 their Lordships of the First Division of the Court of Session answered this question in the negative, recalled my determination of 13th June 1916, and remitted to me to proceed as accords.

"On 12th September 1916 I heard parties further in the arbitration. Neither party desired to lead further proof. Argument was directed solely to the method of applying the judgment of the First Division to the facts as detailed in the former stated case.

"On 16th September 1916 I issued my award, finding the respondent entitled to compensation of 18s. 6d. per week from 28th February 1916 to 4th April 1916, of 19s. 2d. per week from 4th April 1916 to 30th May 1916, and thereafter of 17s. 2d. per week, all in respect of partial incapacity. The rates of 18s. 6d. and 19s. 2d. involved increasing his compensation beyond the rate at which he had been paid in respect of total incapacity. I had in view the fact that the respondent was at the date of the accident, and if he had remained uninjured would now have been, a pony driver or oncostman of full working capacity, and accordingly in assessing partial compensation I had regard (*a*) to the increased wages which a pony driver or oncostman of full earning capacity could earn in the period from February to May 1916 as compared with October 1914, and (*b*) to the wages which the respondent was actually able to earn during the periods dealt with."

The *question of law* was—"Was I entitled to increase the respondent's compensation, having regard to the increased rate of wages which he would probably have been earning at the periods under review (he having been under twenty-one at the date of the accident), notwithstanding the fact that said increased rate of wages was due exclusively to the general rise in wages?"

The Sheriff-Substitute's *note* appended to

his award referred to his note in *Quinn's* case, which was to the following effect:—"When this arbitration was formerly before me I was of opinion that it was not appropriate to apply the powers given by Schedule I, par. 16, of the Workmen's Compensation Act in favour of a workman who although under twenty-one at the time of the accident had yet attained his full earning capacity. As I understand the judgment of the First Division, they have decided that I was wrong in taking that view, and that I ought to have assessed compensation having regard to the increased wage which the workman could earn at the date of review. Accordingly in the above award I have in assessing compensation considered the wages which the workman could have earned at the date of the proof if he had remained uninjured, and the amount which he was actually able to earn, leaving out of account his average weekly earnings prior to the accident. Owing, no doubt, to the form in which the question of law was put their Lordships seem to have thought that the workman had not had the opportunity of pressing his view that Schedule I, par. 16, is applicable. In my opinion to the former award, however, I say 'I have no doubt that I am bound to consider the matters pointed to in Schedule I, par. 16, in assessing compensation here. But when I find that it is sought to invoke the provision in favour of a workman who had attained his full earning capacity before he was injured, I am entitled to decline to use the power which that paragraph gives me.' The matter was fully discussed and considered when the case was formerly before me, and the question intended to be raised in the Stated Case was whether after such consideration I was entitled not to have regard to the increased rate of wages when the workman at the time of the accident had attained the full working and earning capacity of a man. Looking to what was before the Court in the Stated Case and in the opinion annexed to it, I entertained no doubt that in their Lordships' opinion I was wrong in attaching any significance whatever to the fact that this workman had at the time of his accident attained full working capacity. Accordingly I have disregarded this fact in my present award of compensation. I understand the case came back to me simply to assess compensation on the footing that Quinn, having been under twenty-one at the date of the accident on 20th May 1914, could now had he remained uninjured have been earning a higher average weekly wage than he was earning prior to the accident."

Argued for the appellants — The arbitrator had disregarded the fact that the respondents had at the time of the accident attained full earning capacity. He therein misdirected himself, for he was bound to take that fact into consideration. The question should be answered in the affirmative, and the case remitted back to the arbitrator to take that fact into consideration, and to consider whether it should or should not be given effect to in disposing of the case. *Bryson* v. *Dunn & Stephen, Limited*, 1905, 8 F. 226, 43 S.L.R. 236, and *Malcolm* v. *Thomas Spowart & Company*, 1913 S.C. 1024, 50 S.L.R. 823, were referred to.

Argued for the respondents—The question should be answered in the affirmative, but the case should not be remitted back to the arbitrator. The arbitrator had considered all the relevant facts and had adjudicated upon them. *Bevan* v. *Energlyn Colliery Company*, [1912] 1 K.B. 63, was referred to.

At advising—

LORD PRESIDENT — A regrettable misunderstanding has occurred in connection with these two cases, for which I do not think the learned arbitrator was wholly to blame. It seems to me to have been due in the main to the somewhat unfortunate language in which the question put to us in the first Stated Case was expressed. Happily it is not too late to set the arbitration proceedings once more upon the proper rails.

It appears that both respondents at the date when the accident befell them were in minority, but nevertheless both had attained their full earning capacity. In these circumstances the learned arbitrator considered when he first came to deal with the case that he was precluded from applying the proviso in paragraph (16) of the First Schedule appended to the Act—that the fact that the lads were earning a miner's full wage barred him from applying that paragraph — and accordingly he assessed compensation just as if no such proviso were to be found in the statute. We at all events interpreted his award as meaning that. We may have been wrong in so interpreting it, but having in view the opinions delivered on the 19th July last there can be no doubt that we did so interpret it. Accordingly we remitted to him to reconsider the question of compensation, telling him that notwithstanding the fact that the lad was in minority but was earning miner's full wages, he was not debarred from applying the proviso in paragraph (16) if he in his discretion thought fit. In short, we told the arbitrator that his discretion was in no way fettered by the fact that each of the lads had attained his full earning capacity at the date of the accident.

When the case returned to the learned arbitrator, however, he seems to have conceived that the meaning of our judgment was that he was to apply the proviso in paragraph (16) whether he thought it applicable or not. It appears from the Stated Case before us that on the first occasion when the case was before him he took the same view as we did, and considered that it was within his discretion to apply the proviso or not as he thought fit, but that in the circumstances he thought it to be inapplicable. Accordingly when we remitted the case to him on the 19th July last he conceived it to be his duty to refrain from exercising his discretion, and to apply the proviso in paragraph (16) to the case, and so, on that footing, to assess compensation.

That appears very plainly from the opinion which he expressed at the time, in which he says—"I understand the case came back to me simply to assess compensation on the

footing that Quinn, having been under twenty-one at the date of the accident on 20th May 1914, could now had he remained uninjured have been earning a higher average weekly wage than he was earning prior to the accident." And again—"Looking to what was before the Court in the Stated Case and in the opinion annexed to it, I entertained no doubt that in their Lordships' opinion I was wrong in attaching any significance whatever to the fact that this workman had at the time of his accident attained full working capacity. Accordingly I have disregarded this fact in my present award of compensation."

Now that shows a complete misapprehension of the meaning of our remit and the effect of our judgment on the 19th July last, and accordingly I think we should once more remit to the arbitrator to consider the question of compensation, with a finding to the effect that notwithstanding the fact to which I have alluded—that the lads were earning their full miner's wage at the date of the accident—he may if he thinks fit apply the proviso in paragraph (16). In short, his discretion is absolutely unfettered by the fact to which I have alluded, and he is not precluded from applying the proviso if in the whole circumstances of the case he considers this the proper course to adopt in assessing the compensation due.

I see no objection before we do remit to our answering the question put to us in the Stated Case in the affirmative. In short, both parties are agreed it may be so answered, and I propose that we should, answering the question in the affirmative, remit to the arbitrator with a finding somewhat to the following effect — That in assessing the amount of compensation due to the respondent the arbitrator was entitled in his discretion to give or deny effect to the proviso contained in paragraph (16) of the First Schedule appended to the Act, and remit to him of new to consider and determine the amount of compensation.

LORD MACKENZIE—The rules to be applied in fixing the compensation payable under the Act of 1906 to a workman who is partially incapacitated, whether he be an adult or a minor, are contained in the First Schedule (1) (*b*) and (3). The operation of these rules is explained by Fletcher Moulton, L.J., in the case of *Bevan* v. *Energlen Colliery Company*, [1912] 1 K.B. 63, at p. 70. The First Schedule, paragraph (16), provides for review, and the first portion of it deals with adults and minors. The proviso introduces a protection in the case of minors which was not contained in the Workmen's Compensation Act of 1897. This proviso remedies the injustice suffered by minors under the previous Act, as evidenced by the case of *Pomphrey* v. *Southwark Press*, [1901] 1 K.B. 86. In that case the minor was earning 10s. 6d. a-week before the accident and 11s. 2d. after it. He was incapacitated from skilled labour by the accident. The Court —A. L. Smith, Collins, and Stirling, L.J.J. —held that under the Act of 1897 the maximum amount which the injured workman could claim was to be measured by the difference between his earnings before the accident and what he could earn after the accident. The injustice is obvious in the case where the minor, as in *Pomphrey's* case (*cit.*), had not attained his full earning capacity before the accident. He was in that event in a worse position than the adult. The arbitrator under the 1897 Act had no power to remedy this injustice. Now he has such a power under First Schedule (16) of the Act of 1906. The reason why he was given that power is explained by Lord Kinnear in the passage from *Malcolm* v. *Thomas Spowart & Company*, 1913 S.C. 1024, 50 S.L.R. 823, quoted by the arbitrator. In the present case there has been an unfortunate misunderstanding, arising, I think, out of the way in which the question in the original case was put. As put it only admitted of being answered in one way. Speaking for myself I may say that I put one construction upon the words "to have regard to," while the learned arbitrator had put another. It may be that sufficient attention was not paid to the body of the case; at all events, I am far from placing the blame upon the arbitrator. The result has been that the arbitrator has disposed of the case upon his view of what was previously decided, and that view I entirely disclaim. The view I held, and hold, would be expressed in a finding that the arbitrator was bound to consider the matters set out in the First Schedule (16), but was not bound to exercise the power thereby conferred on him.

The result is that in my opinion the case should go back.

LORD SKERRINGTON—When the matter of the review of the weekly compensation payable to these two workmen came before this Court for the first time in appeals at their instance on stated cases, the question of law which we were asked to answer was as follows, viz.—"In assessing the rate of compensation due to the appellant in respect of partial incapacity under the circumstances stated, was I entitled not to have regard to the weekly sum which the appellant would probably have been earning at this date if he had remained uninjured?" The stated cases contained a finding to the effect that owing to a general rise in the rate of miners' wages the workmen if they had remained uninjured could at the date of review have earned a weekly wage—49s. 6d. in the one case, and 60s. in the other—which was much more than their average wage at the time of the accident—35s. and 44s. In the case of one of the workmen—Michael Quinn—the arbitrator found that he had recovered sufficiently to earn about 26s. a-week. The other workman—Tobias Burke—was stated to be fit for light work, though I do not think that the case mentioned what wage he was capable of earning. The cases further stated that although these workmen satisfied the conditions of the proviso in paragragh (16) of the First Schedule to the Workmen's Compensation Act 1906, in respect that they were under twenty-one years of age at the time of the accident, and that the review took place

more than twelve months thereafter, it was nevertheless, in the opinion of the learned arbitrator, "not appropriate to apply this provision" in the case of workmen whom he held, upon the evidence, to have attained their full earning capacity at the date of the accident. After hearing counsel we in each case answered the question in the negative, recalled the determination of the arbitrator, and remitted to him to assess the weekly payments of new. He did so, and in each case has awarded an increase, which he arrived at by keeping in view, among other considerations, the wages which the workmen would probably have been earning at the date of the review if they had remained uninjured. Against these determinations appeals have now been taken at the instance of the two employers. The question of law in each case is substantially the same, viz.—"Was I entitled to increase the respondent's compensation, having regard to the increased rate of wages which he would probably have been earning at the periods under review—he having been under twenty-one at the date of the accident—notwithstanding the fact that said increased rate of wages was due exclusively to the general rise in wages?"

In my judgment this question admits of only one answer, viz., in the affirmative. It was, no doubt, laid down in the case of *Malcolm* v. *Thomas Spowart & Company*, 1913 S.C. 1024, 50 S.L.R. 823, that a workman who was under twenty-one at the time of the accident was not entitled to an increase of wages merely because there had been a general rise of wages since the date of the accident. As Lord Kinnear observed in his opinion in that case (p. 1031)—"It is plain enough that a rise in the general rate does not necessarily involve an increase in the amount earned by a particular workman or boy." In the present case, however, there is an express finding by the arbitrator that the workmen, if they had not been injured, would probably have been earning a specified wage much in excess of what they earned at the time of the accident. The legal result of this finding seems to me to be perfectly clear and certain. The workmen have been deprived by the accident of the probable chance of earning wages at the rate of 49s. 6d. in the one case and 60s. in the other. They are accordingly in a much more favourable position than if they had been of full age at the time of the accident, because in that event the statute would have made it necessary to assess their compensation on the basis of the loss of the chance of earning a much smaller sum—35s. or 44s.—which was their average wage at the time of the accident. It seems to me, further, to follow that an arbitrator would fail in his duty if, having to review the weekly payments of a workman who was under age at the time of the accident, he thought fit for any reason to shut his eyes to this fact and to treat the applicant in exactly the same way as if he had been of full age when he was injured.

If the question of law now put to us is answered in the affirmative, the *prima facie* result is that the appeals at the instance of the employers must fail. It was, however, stated by the appellants' counsel that when the cases were first before us we misunderstood the grounds upon which the arbitrator had proceeded; that by recalling his awards we in our turn caused a misunderstanding to arise in his mind as to our reasons; and that we thus led him to abandon a view of his rights and duties which was perfectly sound, and caused him to adopt in its place another view which was erroneous in law, and upon which we did not intend him to act. While I unreservedly accept the explanations which the arbitrator has made to us in the present stated cases in regard to the reasons which led him to pronounce his first awards, I am not satisfied that when the matter was last before us I was under any misunderstanding as to the legal view upon which he had proceeded. Further, I am disposed to think that in pronouncing his second awards the arbitrator correctly interpreted the view upon which I thought that his first awards ought to be recalled. But it is of no importance whether my memory is correct or not as to this matter, because there undoubtedly appears to have been some misunderstanding so far as your Lordships are concerned. In these circumstances the only just course is that the important legal question which was argued before us should be decided by us on its own merits without reference to our former judgment or to the question put to us in the stated cases now before us. While, however, justice to the employers demands that the awards shall be set aside if the arbitrator was led to pronounce them by some erroneous legal view as to his rights and duties, justice to the workmen demands no less imperatively that if the awards in their favour are to be set aside this shall be done only upon the condition that the error of law into which the arbitrator fell, and also the correct legal view applicable to the circumstances, shall be clearly defined by this Court.

The best record of the legal view upon which the arbitrator proceeded when the question of review came before him for the first time is to be found in the note to his first award in the case of Michael Quinn. After reciting the proviso to paragraph (16) of the First Schedule (which I think it unnecessary to quote), he proceeds—"Observe that there is no imperative direction to increase. It is a power which is given to the arbitrator, to be exercised in accordance with what is reasonable in the circumstances. It is pointed out by Lord Kinnear in *Malcolm* v. *Spowart & Co.* (*cit.*) that 'the only reason of any difference being made between his case and that of other workmen is that which is very clearly brought out in the paragraph, that because he was a boy at the time of the injury, *and had not yet attained his full earning capacity*, the arbitrator . . . may take into account what he might reasonably have been expected to earn if he had been allowed to grow up without injury.' The words which I have underlined seem to me to form the essential ground of any claim under this paragraph, and

this consideration explains why the direction in the paragraph is permissive and not imperative. The workman is to receive this special consideration not simply because he is under twenty-one years of age, but because he has not until that age in all probability attained his full earning capacity. But where, as in this case, a workman of twenty has attained full earning capacity, the grievance which the paragraph was designed to remedy does not exist. I have no doubt that I am bound to consider the matters pointed to in Schedule 1, paragraph 16, in assessing compensation here. But when I find that it is sought to invoke the provision in favour of a workman who had attained his full earning capacity before he was injured I am entitled to decline to use the power which that paragraph gives me."

The foregoing statement by the learned arbitrator seems to me to be absolutely clear, and it properly gives rise to the question of law which was put to us in the original stated cases. The arbitrator did not hold that it was incompetent for him to give to the applicants the benefit of the proviso in paragraph (16). But he did hold —erroneously as I thought, and still think —that it was competent for him to exclude a workman from the benefit of the proviso upon no other ground except that his case did not fall within what the arbitrator supposed to have been the policy of the enactment. It is important to notice that when the arbitrator came to reconsider the workmen's applications solely upon their merits and without reference to any such theory, he came to the conclusion that they had suffered a loss which necessitated a substantial increase in their compensation. In appearance the increase was not great, but in reality it was substantial, because the compensation had been originally fixed on the basis of total incapacity, whereas at the time of the review the workmen were only partially incapacitated. In the note to his second award he states—"Looking to what was before the Court in the stated case, and in the opinion annexed to it, I entertained no doubt that in their Lordships' opinion I was wrong in attaching any significance whatever to the fact that this workman had at the time of his accident attained full working capacity. Accordingly I have disregarded this fact in my present award of compensation. I understand the case came back to me simply to assess compensation on the footing that Quinn having been under twenty-one at the date of the accident on 20th May 1914, could now, had he remained uninjured, have been earning a higher average weekly wage than he was earning prior to the accident." In this statement by the arbitrator I can discover no trace either of a misunderstanding or of a legal error. Of course his words must be construed with reference to the facts of the particular applications with which he was dealing. The applicants did not base their claim for an increase of the weekly payment upon the ground that it was unfair that a man's compensation should be measured by the wages of a stripling. The arbitrator had found that the applicants had attained their full working capacity at the date of the accident. It was proper, and indeed necessary, for him to inquire into and decide as to the basis on which the compensation had been originally assessed. The topic was highly relevant, but its relevancy disappeared as soon as it had served its purpose, which was to show that one excellent reason for an increase of compensation was wanting. Obviously, however, there might exist other and different reasons equally cogent. For example, in the case of any workman, whether of full age or under age at the time of the accident, I imagine that an arbitrator would consider favourably an increase of the weekly payment if a general rise had taken place in the cost of living, provided of course that he could grant an increase without exceeding the legal maxim appropriate to the particular applicant and without otherwise exceeding his powers. I altogether fail to appreciate the learned arbitrator's original view to the effect that it is reasonable and legitimate to refuse to an applicant a benefit expressly conferred upon him by the statute merely because some other applicant who falls under a different category has no claim to the same benefit. In the case before us it appears that the arbitrator increased the weekly payments in view of the fact that the applicants had been deprived of the chance of earning the higher wages now current. If the applicants had been over instead of under twenty-one at the date of the accident, the arbitrator could not have granted this increase. That is perfectly true, but also perfectly irrelevant. It was not suggested that this experienced arbitrator for a moment supposed that our decision on the former occasion was intended to interfere with his legitimate discretion as to whether any, and if so what, increase should be awarded; or that it required him to assess the compensation at a sum in excess of the loss which in his judgment had been truly suffered by the applicants. Further, it was not suggested that the sum awarded was larger than the arbitrator considered to be proper compensation for the actual injury sustained. We heard a good deal in the course of the argument about the absolute discretion which the statute has committed to the arbitrator. No one disputes it. But an arbitrator is not entitled under the guise of exercising his discretion to refuse to exercise it in favour of particular workmen or classes of workmen who fail to comply with some arbitrary standard for which no warrant is to be found in the express or implied directions of the statute. It is true that the proviso to paragraph (16) is expressed in language which is discretionary and not imperative, but the same may be said of the first part of the paragraph. Could an arbitrator legally act upon the view that the Workmen's Compensation Act was not intended to encourage idleness on the part of workmen, and that an increase of compensation in a case

otherwise suitable might be refused on the sole ground that the workman being able to work preferred not to do so?

I have sufficiently indicated the grounds upon which I hold that the first awards were bad and that the second awards are good. I need only add that the legal view upon which the arbitrator proceeded in his first awards does not seem to me to derive support from the observation of Lord Kinnear in the passage cited. His Lordship did no more than state what he considered to have been the reason which led Parliament to differentiate between minor workmen and all others.

In my judgment the question of law as put to us in each of the two stated cases ought to be answered in the affirmative, and the determinations of the arbitrator ought not to be interfered with. As, however, your Lordships are of opinion that the awards are vitiated by an error of law which is not disclosed in the question of law as it has been put to us, it becomes necessary in justice to the parties and also to the law that we should ourselves formulate the question which in ordinary circumstances, and but for a misunderstanding, the appellants' legal adviser would have asked the arbitrator to insert in the stated cases. I venture to submit the following—"Would it have been lawful for me to refuse to increase the applicants' weekly payment as authorised by the proviso in paragraph (16) of the First Schedule to the Act solely upon the ground that as he had attained his full earning capacity at the time of the accident I considered it unreasonable that he should be in a better position than an ordinary workman?" That, as it seems to me, is the question of law which your Lordships are prepared to answer in the affirmative and which I am prepared to answer in the negative.

LORD JOHNSTON was not present at the hearing and advising.

The Court pronounced this interlocutor—

"Of consent of parties, answer the question of law in the case in the affirmative: Recal the arbitrator's award of compensation of 16th September 1916: Find that in assessing the amount of the compensation due to the respondent the arbitrator was entitled in his discretion to give or to deny effect to the proviso contained in section (16), Schedule 1, appended to the Workmen's Compensation Act 1906: Remit to the arbitrator of new to consider and determine the amount of said compensation, and decern."

Counsel for the Appellants — Watson, K.C.—W. T. Watson. Agents — W. B. Rankin & Nimmo, W.S.

Counsel for the Respondents—Moncrieff, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Saturday, November 18.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

WALKER *v.* KERR.

Landlord and Tenant—Smallholder—Removing — Summary Ejection — Competency—Small Landholders (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap* 49).

A statutory small tenant made application to the Land Court for further renewal of tenancy, which application was refused, the Court consisting of only one member. The tenant appealed to a quorum of the Land Court, but before appeal was taken the landlord brought an action for warrant of summary ejection on the ground that the tenant had no right or title to occupy the farm. *Held* that the tenant had a title of possession, and that ejection by summary process was *incompetent.*

William Hamilton Walker, *pursuer*, brought an action in the Sheriff Court at Dumfries against Joseph Kerr, *defender*, for declarator that the defender had no right or title to the further occupation of the farm of Old Moss-side, of which the pursuer was proprietor, and for warrant summarly to eject him therefrom.

The pursuer pleaded, *inter alia*—"(2) The defender's application for a renewal of his tenancy as from Whitsunday 1915 having been refused, he has ceased to be a statutory small tenant of the said farm of Old Moss-side. (3) The defender having no right or title to possession of said farm, decree should be granted as craved."

The defender pleaded, *inter alia* — "(1) The action is incompetent, and should be dismissed with expenses."

The Sheriff-Substitute (CAMPION), sustaining the first plea-in-law for the defender, dismissed the action.

Note.—"On or about Whitsunday 1904 the defender became tenant under the pursuer of the farm of Old Moss-side. No formal lease was entered into, and the defender, who was still in the occupation of the holding at 1st April 1912, then became a statutory small tenant till Whitsunday 1914 by virtue of the Small Landholders (Scotland) Act 1911. The defender applied for and was granted a renewal of said tenancy till Whitsunday 1915. On 5th April 1915 the defender made application to the Land Court for further renewal of tenancy, which application was refused.

"The pursuer now craves this Court to find that the defender has no right or title to occupy said farm of Moss-side, and to grant warrant summarily to eject him, and to interdict him from again entering upon the same. The question is whether, looking to the circumstances of this case, such a crave is a competent one.

"The defender cannot be said to be in possession by force, fear, or mere tolerance, or as Professor Rankine puts it in his work on Leases, with "no shadow of a title." Further, as to what constitutes a case for