

used in the 21st section of the Finance Act 1918 includes the use of lands for the purpose of grazing, and that the appellant has not proved that he was not occupying the lands in question for the purposes of husbandry only, or mainly for these purposes.

The appellant led no proof, and we know nothing of the facts, though the nature of the ground may be inferred from the names of the parishes, Strathdon and Glenmuick. In the argument before us the abstract proposition was maintained that the meaning of husbandry is confined to tillage or working of the ground. It may be that in its origin the word husbandman meant the man who ploughed and planted, as distinguished from the man who owned flocks and herds. No such limited meaning can now be attached to the word, which is thus defined in the Oxford English Dictionary, "The business or occupation of a husbandman or farmer; tillage or cultivation of the soil (including also the rearing of livestock and poultry, and sometimes extended to that of bees, silkworms, etc.); agriculture, farming."

The point is a very short one, and its determination depends not so much on a view of the law as on the meaning to be put in an imperial statute upon a word in ordinary use in the English language. I am of opinion that the determination of the Commissioners was right.

LORD SKERRINGTON—I should concede to the appellant that the term "husbandry" may be and probably originally was applied to the cultivation or labouring of the ground, and in contrast to the use of the land for pasture, but the word is undoubtedly susceptible of a wider interpretation. In choosing between them one must consider the context of the statutes and their subject-matter. It was not argued that there was anything either in the context or in the subject-matter of the Income Tax Acts which favoured the narrower construction, and which would confine the expression "purposes of husbandry" to arable as distinguished from pastoral purposes. For the reasons which your Lordships have explained I think that at the present day the primary and natural meaning of the term "husbandry" as applied to land includes all those uses of it which are commonly described as "farming." The rearing of sheep and cattle and the production of milk are generally recognised as within the province of the husbandman. Some light upon the subject may, I think, be obtained from the statutes passed in the first half of the nineteenth century with regard to servants in husbandry. For instance, by the Act 4 Geo. IV, cap. 34, section 3, servants in husbandry were subjected to imprisonment for breach of contract. On the other hand, they were exempted from the provisions of the Truck Act (1 and 2 Will. IV, cap. 37), section 20. In legislation of that character it would be difficult to suppose that a vital distinction was intended to be set up between the position of a ploughman on the one hand and of a cattleman on the other hand.

Both were farm servants, or servants in husbandry, or agricultural servants, in the wide sense of these phrases. In the case of *Clark v. M'Naught*, (1846), Arkley, p. 33, the suspender had been engaged "as kitchen woman and byre woman," and the question was whether she was to be regarded as a domestic servant, in which case she could not be imprisoned, or as a servant in husbandry, in which case imprisonment was lawful. I notice in the argument for the employer this passage—"Dairy husbandry is a distinct branch of husbandry, and a master may suffer as much loss by desertion from that employment as from any other." The High Court of Justiciary decided that although she worked in the kitchen she must be dealt with as a servant in husbandry, or in the language of the Lord Justice-General (Boyle), Lord Mackenzie, and Lord Moncreiff, as "an agricultural servant." The legislation with which we are now concerned aims at taxing the profits earned by the class of persons who employ servants in husbandry, and I see no room for distinguishing between the return from an arable or a mixed farm and that from a farm which is purely pastoral.

I accordingly agree with your Lordships that the appeal fails.

LORD CULLEN—I am of the same opinion. The distinction sought to be drawn by the appellant does not correspond with the manner in which holdings for farming purposes are in use to be let and occupied, and if it were accepted it would become necessary for the purposes of assessing income tax to treat such holdings and their rental or annual value as divided up between the fields or portions thereof ploughed or planted during the particular year of taxation, and the fields or portions in pasture or not ploughed or planted. It is impossible, I think, to hold that the Legislature intended such a result.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellant—Macmillan, K.C.—A. M. Mackay. Agent—H. Bower, S.S.C.

Counsel for the Respondent—The Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent.—Stair A. Gillon, Solicitor of Inland Revenue.

Friday, November 7.

#### FIRST DIVISION.

#### CAMPBELL v. CAMPBELL.

*Parent and Child—Custody—Female Pupil—Father's Right All Other Things being Equal—Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27).*

In a petition by the father craving the custody of his daughter, who was about two years of age, it was common ground that the spouses were living separate owing to incompatibility of temper. No misconduct was alleged such as to dis-

qualify either parent as a suitable guardian, and there were no facts and circumstances showing that the child's welfare would be affected if its custody was given to the one parent rather than to the other. *Held* that the father's right at common law to the custody of the child had not been displaced by the Guardianship of Infants Act 1886, and decree *granted* in favour of the petitioner.

*Dicta* of Lord McLaren in *Sleigh v. Sleigh*, 1893, 30 S.L.R. 272, at p. 275, and in *Mackellar v. Mackellar*, 1888, 25 R. 883, at p. 885, 35 S.L.R. 483, *approved* and *followed*.

*Dictum* of Lord Herschell, L.C., in *Stevenson v. Stevenson*, 1894, 21 R. (H.L.) 96, at p. 99, 31 S.L.R. 942, *commented on*.

The Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27) enacts—Section 5—“The Court may, upon the application of the mother of any infant, . . . make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father. . . .”

Colonel William McLaren Campbell, M.V.O., *petitioner*, brought a petition against his wife Dorothy Clotilda Campbell, *respondent*, craving the custody of his infant child Anne Elspeth Campbell.

*Answers* were lodged for the respondent.

The *facts* of the case as they appeared from the pleadings were—The petitioner was a domiciled Scotsman. He was born in 1864, and in 1885, after passing through Sandhurst, he was gazetted to the Black Watch. From that date till the date of the petition he had been on service, and his only residence had been the place of his duties. He married the respondent on 6th August 1914, who was then a widow with one daughter of five years of age. Under the will of her first husband the respondent was entitled to reside at Old Warden Park, Biggleswade, Bedfordshire, with her child till it reached majority, and she enjoyed a jointure of £15,000 a-year subject to the condition that she should make her principal residence at Old Warden Park. If she failed to do so her jointure was to be restricted to one-half. After their marriage the parties did not take up house together. The respondent continued to reside at Old Warden Park, and the petitioner as the exigencies of his service permitted stayed with her there on several occasions. Disagreements arose between the parties with reference to matters of domestic management. On 16th August 1917 the respondent gave birth to the child Anne Elspeth Campbell. The disagreements between the parties continued down to the date of the petition in spite of the petitioner's efforts to bring about a reconciliation, and at the date of the petition the parties were living separate. The child of the marriage lived all along at Old Warden Park with the respondent. The petitioner saw his child there occasionally. The respondent on those occasions

absented herself. On the date of the petition the petitioner expected to be shortly demobilised, and he intended thereafter to take a house in Scotland and to make a home there for himself, his wife, and child. He was then in command of the Tay Defences, and had obtained temporarily a suitable residence near his headquarters, to which he invited the respondent to come, bringing the child. The respondent refused to do so, and thus made it impossible for the petitioner to see his child except when on leave. The respondent obtained the issue of a writ from the Courts in England against the petitioner craving that the custody of the child should be committed to her during its minority or until further order.

The petition was partly heard in the Summer Session of 1919 and was continued. At the postponed hearing it appeared from the statement of counsel for the parties that the following additional *facts* and *circumstances* had occurred, *viz.*, that the English Courts had pronounced an order for service of the respondent's writ for custody upon the petitioner, but had recalled that order on discovering that the petitioner was outwith their jurisdiction; that the respondent had thereafter made a settlement upon the child, and that an application had been presented by the child's next friend to have her made a ward in Chancery. It was stated by counsel for the respondent that immediately on presentation of such an application, and pending the hearing on the merits, the child became a ward in Chancery. It was further stated on behalf of the petitioner that he had taken a house at St Andrews, and had invited the respondent to come and reside there with the child, but that the respondent had refused to do so or to give up the custody of the child and had made certain proposals for the settlement of the differences between the parties, but which involved the retention of the custody of the child by her.

Argued for the petitioner—Admittedly no attack could be made on the suitability of either parent as guardian. The cause of quarrel was simply incompatibility of temperament. In those circumstances the case raised a perfectly general question; and it was also pleaded that the Scottish Court was not *forum conveniens*. Upon the latter point the Scottish Court was not only *forum conveniens* but the only competent court. The question was one of status, *viz.*, the permanent custody of an infant child of Scottish domicile. The only competent *forum* in such a case was that of Scotland, the *forum* of the father, the mother, and the child—*Barkworth v. Barkworth*, 1913 S.C. 759, 50 S.L.R. 504; *Westergaard v. Westergaard*, 1914 S.C. 977, 51 S.L.R. 781; *In re Willoughby (an Infant)*, 1885, 30 Ch. D. 324, *per Kay, J.*, at page 329. The Scottish Courts could, no doubt, exercise a jurisdiction over all *incapaces* found within Scotland, but that arose purely *ex necessitate*, and was of a purely protective and interim character. If the English Courts had any jurisdiction at all, it could only be of that protective and interim character.

The general question was whether the father or the mother, in the absence of any question of suitability as guardian, was entitled to determine the custody and place of residence of the child in question. At common law the father was the head of the household, with the right to the society of his wife and the custody of his children and the right to determine where they should reside. It was not for the wife, as she endeavoured to do in the present case, to dictate the place of residence of the family—*Fraser, Husband and Wife* (2nd ed.), p. 877. In the present case the respondent's jointure was not imperilled, for the petitioner disclaimed demanding from her any such adherence to him in Scotland as would cause Old Warden Park to cease to be her principal residence. At common law the Scottish Courts had always considered the whole circumstances of each case, even before the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), which applied to England as well as to Scotland. The father, if it would not harm the child to live with him, had the legal right to its custody at least after weaning; and if the mother chose, as she did here, to live apart from him for reasons which did not entitle her to separation, she had no claim to the custody of the children, for it was in her power at any moment to end the separation, and it was her legal duty to adhere to her husband. The Act of 1886 did not alter the common law; it left the father the head of the household, and re-enacted the circumstances which in Scotland had always been considered by the Court in such applications—*Mackellar v. Mackellar*, 1898, 25 R. 883, per Lord M'Laren at p. 885, 35 S.L.R. 483; *Sleigh v. Sleigh*, 1893, 30 S.L.R. 272, per Lord M'Laren at p. 275. Even where the child was of tender years and there were facts against the father, so long as those facts did not render him likely to cause detriment to a child entrusted to his care, he was entitled to the custody both before and after the Act of 1886—*A C v. B C*, 1902, 5 F. 108, 40 S.L.R. 87; *Rintoul v. Rintoul*, 1898, 1 F. 22, 36 S.L.R. 21; *Bloe v. Bloe*, 1882, 9 R. 892, 19 S.L.R. 595; *Lilley v. Lilley*, 1877, 4 R. 397, 14 S.L.R. 281; *Nicolson v. Nicolson*, 1869, 7 Macph. 1118, 6 S.L.R. 692. *Stevenson v. Stevenson*, 1894, 21 R. 430, 31 S.L.R. 350 and 500, 21 R. (H.L.) 96, 31 S.L.R. 942, was in the petitioner's favour, and the remarks therein only applied when the spouses were living together. If a wife disregarded the father's testamentary directions with regard to the children, that was a circumstance which might cause her to lose the custody. The prayer of the petition should be granted.

Argued for the respondent—The Scottish Court was *forum non conveniens*. The child in question had lived all her life in England and her mother was English. Her sole relation to Scotland was one of law not of fact. Prior to the present proceedings the question of her custody had been raised in the English Courts in a competent process, and as the result of the proceedings in Chancery the child was a ward

in Chancery—*Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, per Lord Lyndhurst, L.C., at p. 84; *The Guardianship of the Marquis of Bute*, 1861, 4 Macq. 1. Admittedly no question was raised as to the suitability of either spouse as guardian. Prior to 1886 the father was the head of the household, and all other things being equal was in law entitled to prevail in a question of the custody of the children, but by the Act of 1886 both parents had been placed on an equal footing and the father's right no longer preponderated—*Stevenson v. Stevenson* (*cit.*); *Reid v. Reid*, 1901, 3 F. 330, 38 S.L.R. 237; *Robertson, Petitioner*, 1911 S.C. 1319, 48 S.L.R. 994; *In re A and B (Infants)*, [1897], 1 Ch. 786, per Lindley, L.J., at p. 790, and Rigby, L.J., at p. 794. The cases cited by the petitioner in so far as they did not follow *Stevenson's case* (*cit.*) were not well decided. No doubt the conduct of the parties towards each other as well as to the child must be considered—*Stevenson's case* (*cit.*), per Lord Herschell, L.C., at p. 99—but here there was nothing to choose between them. In those circumstances the result would be that the custody must be equally divided between the spouses. But in the present case the child was a female of tender years who had always lived with her mother. In those circumstances the respondent was entitled to her custody, for she was the natural and proper guardian of such a child—*Stevenson's case* (*cit.*), per Lord Herschell, L.C., at p. 99. Further, there was the consideration that if the respondent made her home elsewhere than at Old Warden Park her jointure would be substantially reduced.

At advising—

LORD PRESIDENT—This is a petition by a father for the custody of his child, a girl about two years of age. The child is now, and since her birth has been, resident with her mother in England. The mother declines to surrender the custody of the child and asks us to refuse the petition. I am wholly at a loss to understand on what ground she rests her refusal, save that her wish is to retain the custody. Manifestly that is not a sufficient answer to her husband's demand. No question of jurisdiction is now raised. The father is confessedly a domiciled Scotsman. The child confessedly takes her father's domicile. Her welfare, which is the paramount consideration in the case, it is not disputed, will be safe in the father's hands. His conduct is unimpeached; his ability to provide a suitable home for the child is not questioned. He has taken a house at St Andrews, to which he invites his wife to come, and with her the child. She refuses, and insists upon living at Biggleswade, for no other reason than that she wills it shall be so. The health of the child is not advanced as an objection to the petitioner's claim for custody. These being the undisputed facts of the case, I can see no good answer to the demand of the father as the legal custodian of the child.

It was argued to us on behalf of the respondent that the Guardianship of Infants Act 1886 made a material change in the

common law of Scotland, that this change had not been adequately appreciated by the Scottish Courts, and warranted us in throwing out this petition solely on the ground of the mother's wishes—her conduct, too, being unimpeached and her ability to secure the child's welfare unquestioned. I cannot agree. The meaning of the Act has never been in doubt, nor does it make any such change as is suggested in the law of Scotland. In an interlocutory observation which fell from the Lord Chancellor in the course of the discussion in the case of *Stevenson* (21 R. (H.L.) 96 at p. 99, 31 S.L.R. 942) is to be found what I take to be an excellent general statement of the purpose and effect of the fifth section of the Act—"the rights of the husband, the father, are no longer to be absolute, but if he has misconducted himself he should not be entitled to the custody as an absolute right, but the Court should consider the mother as well as the father, and consider above all the interests of the children." To the same effect are the views expressed by Lord M'Laren in the cases of *Sleigh* (30 S.L.R. 272) and *Mackellar* (25 R. 883, 35 S.L.R. 483), and reflected in the decisions pronounced by this Division of the Court. In the former case Lord M'Laren points out that "while the statute gives to the Court a large discretion according to what appears to be the interest of the children, it does not alter the position of the father as head of the family. We therefore approach a case of this class with this fact to begin with, that the father is the guardian, and cannot be displaced from that position except on sufficient legal grounds." Confessedly, no grounds at all are to be found in the present case for displacing the petitioner from his position as the legal guardian of his child. Keeping fully in view all the considerations set out in the statute, I come without hesitation to the conclusion that this application ought to be granted. So far as in this domain of law one case can be said to rule another, the case of *Mackellar* appears to me to be a precedent directly in point. With a slight variation appropriate to the circumstances I adopt the words of Lord M'Laren there and say that there being no conduct alleged on the part of either party such as to disqualify either parent from having the custody of the child, and no considerations affecting the welfare of the child to lead to either party being refused the custody, I think that the father, who is by law the guardian of the child during the joint lives of the spouses, cannot be displaced from his position as the guardian.

I propose that we pronounce an order to the effect that the respondent be ordained to give up the custody of the child to the petitioner within twenty-one days, reserving of course to the respondent right of access to the child on making application to the Court. When I speak of "access" I do not of course mean that the mother shall be permitted merely to visit the child, but that she shall have the child to live with her for considerable periods each year.

LORD MACKENZIE — The petitioner is domiciled in Scotland, and has a settled

residence in St Andrews. He has asked his wife to reside with him there, and to bring the only child of the marriage, a girl born on 16th August 1917. She refuses, and it was matter of admission at the bar that the ground of her refusal is incompatibility of temper. This petition has been before the Court since May of this year. No allegations are made by either spouse against the other, nor was there any suggestion that it would be prejudicial to the welfare of the child that she should live with her father at St Andrews. The respondent's position is that she is the natural guardian of her daughter, who is of tender years; that she has asked her husband to come and live with her at her residence in Bedfordshire, a place which belonged to her first husband; that she has instituted proceedings to have the child made a ward in Chancery. She refuses to go to St Andrews, or to allow the child to go there; she says her wishes are to rule, and that therefore the petition should be refused.

It was contended that she is entitled to take up this position in consequence of the provisions of the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27), section 5. I refer to what was said about this Act by Lord M'Laren in the case of *Sleigh*, 1893, 30 S.L.R. 272 — "Now while the statute gives to the Court a large discretion according to what appears to be the interest of the children, it does not alter the position of the father as head of the family." In the subsequent case of *Mackellar*, 1888, 25 R. 883, 35 S.L.R. 483, the leading opinion was delivered by Lord M'Laren, who said — "There being no such misconduct proved as to disqualify either parent from having the custody of the children, and no considerations affecting the welfare of the children to lead to either parent being refused their custody, I think that the father, who is by law the guardian of the children during the joint lives of the spouses, cannot be displaced from his position as their guardian."

I do not overlook what Lord M'Laren says further on in the same opinion that in the case of a child of very tender age it might be right to give the custody to the mother. I interpret that as meaning that if the child is of such an age that his or her welfare would suffer if the father were given the custody instead of the mother, then the child should be left with the mother. It is because I am unable to find sufficient grounds in this case to warrant this conclusion that I think the petitioner is entitled to what he asks. The case of *Stevenson*, 1884, 21 R. (H.L.) 96, 31 S.L.R. 942, was founded on by the respondent, but the remarks by the Lord Chancellor which are reported as having been made in the course of the argument expressly recognise that *prima facie* it is the father who has right to the custody of the children. There were allegations against the father in that case which were held sufficient to displace that *prima facie* right. So also in the case of *Reid*, 1901, 3 F. 330, 38 S.L.R. 237. The case of *Robertson*, 1911 S.C. 1319, 48 S.L.R. 994, was one in which, on the petition of the

father, when intimation and service was moved for, the Court refused to grant warrant to messengers-at-arms to take a girl two years of age into their custody and to deliver her to him. The English case of *In re A and B*, [1897], 1 Ch. 786, was referred to as showing that the Act is regarded as having made an alteration on the common law rights of a father in England. Upon this I again refer to the opinion of Lord McLaren in *Sleigh's case*—"I think that in laying down for us this principle" (that the guiding consideration is the interest of the children) "the statute has not at all displaced the common law as interpreted in the decisions, because it is a matter very clear in the historical development of the law of this subject that the interest of the children has been treated as the ruling consideration."

One feature of this case which should be adverted to is that under the will of her first husband the respondent is entitled to continue in residence at Old Warden Park with the child of her first marriage until the said child comes of age, and a jointure of about £15,000 a year has been provided to her by her first husband. This jointure is subject to the condition that she makes her principal residence at Old Warden Park, and should she not continue so to do her said jointure is restricted to one-half.

The petitioner disclaims any intention of insisting on the respondent quitting Old Warden Park for such a period in each year as to incur a forfeiture. I am of opinion that the petitioner is entitled to the finding he asks, and that the question of access by the mother can only be considered by the Court when some definite proposal is made on her behalf. By "access" is meant not that the mother must go to St Andrews. It means that she should have the child to live with her for a substantial part of the year.

**LORD SKERRINGTON**--The respondent now admits that she cannot prove the allegation which she caused to be added to her pleadings to the effect that her husband is a domiciled Englishman. The result of that statement has been to delay the course of justice in this petition, and to procure for the respondent the exclusive custody of the child for some months.

When the argument was resumed a few days ago it was maintained, in the first place, that the English Court was a more convenient *forum* in which to decide the present dispute, but the able counsel who represented the respondent failed to show why it was either convenient or just in the circumstances of the present case that the questions at issue should be tried by any Court except the tribunal which is familiar with the law determining the family rights of the parties to this petition and their child.

The next point argued by the respondent's counsel was that in view of the tender age of this child the mother was entitled to its custody. In every question of custody the child's age is material—and very often it is the crucial and determining factor—in com-

bination with other facts such as its delicate health. It is, however, noteworthy that although this case has been in Court for five months the respondent has never suggested and does not allege that there is any special reason which would make it detrimental to this child that it should be separated from its mother. Counsel's argument was a purely general and abstract one, founded on the proposition that the mother is the natural custodian of a very young child. With that I entirely agree, but I would add to it the proposition that it is equally natural for a child to enjoy the care and affection of both parents. The fallacy of the argument was that it asked us to ignore the conduct of the respondent, and the fact that she did not attempt to justify her refusal to live in family with the petitioner.

Lastly, the respondent's counsel argued that section 5 of the Guardianship of Infants Act 1886 removed the father from his position as sole guardian of his infant children and constituted him a joint guardian along with his wife, with this result, that if the two guardians differed the Court had no alternative except to cut the life of the child into two equal parts and to assign to each of the guardians the custody during six months of every year. This contention finds no support in the language of the section, which assumes that the father remains the sole guardian, but indicates certain circumstances in which his power over the person of his child may be lost or restricted. Amongst other things the Court was directed to consider a point of view which had not always received the attention which it merited, viz., that a man might be an excellent parent but might nevertheless by his unkindness towards his wife or by some other breach of his conjugal duty make it necessary or reasonable for her to leave the family home where her children resided.

**LORD CULLEN**--I concur.

The Court pronounced this interlocutor--

" . . . Find and declare that the petitioner is entitled to the custody of his child Anne Elspeth Campbell mentioned in the petition: Decern and ordain the respondent . . . to deliver up to the petitioner, or to those having his authority, the said child at Old Warden Park, Biggleswade, in the county of Bedford, and that within twenty-one days from the date of intimation to her of this order, to remain the said child in the petitioner's custody subject to such arrangements as may hereafter be made by or with the approval of the Court in regard to access by the respondent: Further recommend all courts, magistrates, and officers of law within whose jurisdiction furth of Scotland the said child may happen to be, to give their aid and concurrence in carrying this order into effect: Authorise execution to pass on a copy of this deliverance and order certified by the Clerk of Court."

Counsel for the Petitioner—Macmillan, K.C.—Graham Robertson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—Constable, K.C.—MacRobert. Agents—Pringle & Clay, W.S.

Tuesday, November 25.

## SECOND DIVISION.

[Sheriff Court at Airdrie.

### M'KINSTREY v. AUCHINLEA COAL COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation—Amount of Compensation—“Weekly Payment not to Exceed One Pound”—Workman, Partially Incapacitated through Injury by Accident, Drawing Full Compensation in respect of Injury by Second Accident—Suspension of Compensation Payable in respect of First Accident—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) sec. 1 (1), and First Schedule, sec. 1 (b).*

A workman sustained an injury by accident resulting in the loss of his left foot. He was paid compensation by his employer at the maximum rate of one pound weekly, which payment was continued in respect of partial wage-earning incapacity after he had obtained employment with a new employer. While in his new employment he met with a second accident, resulting in injury to his left hand, and became again totally incapacitated. In respect of this accident he received from his second employer compensation at the full rate of one pound weekly. *Held* that the payment by the first employer fell to be suspended in respect that the workman was receiving from the second employer the maximum compensation to which he was entitled under the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (1), enacts—“If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.”

The First Schedule, section 1, enacts—“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, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.”

George M'Kinstrey, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Airdrie (LEE) in an arbitra-

tion under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by the Auchinlea Coal Company, Limited, *respondents*, against him, appealed by Stated Case.

The Case stated—“The case was heard before me . . . when the following facts were admitted:—(1) That on 13th August 1918 the claimant and appellant sustained an injury, resulting in the loss of his left foot, by accident arising out of and in the course of his employment with the respondents as a brusher, earning average wages of £4, 17s. 6d. weekly. (2) That as the result of said injury the claimant and appellant was totally incapacitated until 4th June 1919, and was paid compensation by the respondents in terms of the Workmen's Compensation Act 1906, at the maximum rate of £1 weekly. (3) That on said 4th June the claimant's and appellant's said total incapacity ceased, and he undertook employment with another employer at a weekly wage of £2, 4s. (4) That it was agreed by the claimant and appellant and the respondents that on 4th June 1919 the claimant and appellant was still partially incapacitated by the injury sustained on 13th August 1918, and that in respect of and during the continuance of said partial incapacity he should be paid compensation at the rate of £1 weekly by the respondents. (5) That said compensation was paid from 4th to 13th June 1919. (6) That on 13th June 1919 the claimant and appellant was totally incapacitated by an injury to his left hand. (7) That in respect of his total incapacity resulting from the said injury on 13th June 1919 the claimant and appellant has since said date received, and is presently receiving, from his last employer compensation under the Workmen's Compensation Act 1906, at the rate of £1 weekly, together with the increment of 5s. under the War Addition Act 1917; and (8) that it is not maintained by the respondents that the claimant's and appellant's partial incapacity arising from the injury of 13th August 1918 has ceased or been diminished since 4th June 1919.

“On these facts I found in law that as the claimant and appellant was presently receiving from another employer the maximum compensation provided by the Workmen's Compensation Act 1906 to be paid to a workman incapacitated for work by injury by accident, his claim under said Act to any payment of compensation by the respondents fell to be suspended. I therefore ended until further order the weekly payment by the respondents to the claimant and appellant as on 13th June 1919.”

The *questions of law* were—“(1) Was I right in holding that the weekly payments of compensation to the claimant and appellant by the respondents falls to be suspended in respect that he is presently receiving from another employer the maximum compensation provided by the Workmen's Compensation Act 1906? (2) Whether on the facts stated I was right in suspending the claimant's and appellant's compensation?”

Argued for the appellant—The statute gave a right to compensation for injury by