should be determined by comparing the value of the land *per se* as originally ascertained with its value *per se* as ascertained subsequently, I do not clearly see why the factor for the purposes of comparison should not have been the statutory "full site value." For that is the value of the land *per se*, regarding it as divested of buildings or other heritable accessions and as free from all encumbrances, charges, or restrictions. To illustrate this by reference to the figures in the present case—if by appreciation in the value of the land *per se* to the extent of £100 the referee's *minus* quantity were to rise from – £545 to – £445, the full site value, were it available for purposes of comparison, would show a similar increase. As it is, however, the statutory factor for comparison is not the value of the land *per se* (full site value) but the assessable site value. This represents the position in point of value of the loaded site. The Commissioners' valuation roll is not to be a roll showing the value of the land in itself; and it is the loaded site apparently which has to appreciate in value before increment value duty becomes exigible. Now if words are to be used in their ordinary sense, I do not very well see how in the hands of the landowner who is to be taxed the loaded site can be said to appreciate in "value" until it comes to have at least some positive value. Until then any appreciation in the value of the land *per se* will accrue to the holder of the excessive feu-duty or other fixed charge by enhancing the value of his security, and consequently the value of the fixed charge. The site owner, *qua* site owner, will continue bankrupt. The holder of the feu-duty or other fixed charge is not, however, brought under taxation by the statute in respect of such a betterment of his property. The respondent's contention is that the owner of the site falls to pay for the betterment, which does not provide him with a valuable asset, but only goes to relieve to some extent his bankrupt state. This is, *a priori*, an improbable scheme of taxation, inasmuch as it involves that one man shall be taxed in respect of an increment in the value of property which so far as any positive worth goes accrues wholly to another; and while I am sensible that the construction of the statute under consideration is attended with much difficulty, I have been unable to extract from it this anomalous result.

I accordingly agree in the conclusion at which your Lordships have arrived.

The Court found (1) that the first or principal decision of the referee was wrong, and recalled the same in so far as it fixed and determined that the original assessable site value of the subjects mentioned in the Stated Case was *minus* £545; and (2) that the second or alternate decision of the referee was right, and affirmed the same in so far as it fixed and determined that the original site value of the subjects was *nil.*

Counsel for the Appellants—Clyde, K.C. —Hon. W. Watson. Agents—Connell & Campbell, S.S.C.

Counsel for the Respondents—Sol.-Gen. Anderson, K.C.—J. A. T. Robertson. Agent —Sir Philip J. Hamilton Grierson, Solicitor to Inland Revenue.

HOUSE OF LORDS.

Monday, May 13.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Atkinson, and Lord Shaw.)

MACDONALD OR DURIS *v.* WILSONS AND CLYDE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (8 *Edw. VII, cap.* 58), *Schedule I* (16) — *Weekly Payment—Review—Partial Incapacity—Inability to Find Suitable Work—No Change in Physical Condition.*

The Workmen's Compensation Act 1906, Schedule I (16), enacts—"Any weekly payment may be reviewed at the request . . . of the workman, and on such review may be . . . increased. . . ."

A workman, by showing that owing to his condition, resulting from the accident, he is unable to get suitable work, is entitled to a review and increase of the weekly payment, payable to him under an agreement with his employer as compensation for partial incapacity, even though there is no change in his physical condition.

Boag v. *Lochwood Collieries, Limited*, 1910 S.C. 51, 47 S.L.R. 47, *overruled.*

Thomas Macdonald or Duris, coal miner, Castle Street, Hamilton, *appellant*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (HAY SHENNAN) at Hamilton refusing an application by Duris for review of weekly payments under a memorandum of agreement between him and the Wilsons and Clyde Coal Company, Limited, his employers, *respondents.*

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, raised on the 9th day of February 1911, in which I was asked by the appellant to review the weekly payments of 16s. 11d. of partial compensation agreed to be paid by the respondents to the appellant under memorandum of agreement, recorded in the Hamilton Sheriff Court on 11th January 1911, in respect of injuries by accident sustained by him while employed as a miner at No. 1 Pit, Clyde Colliery, Hamilton, belonging to the respondents, on 16th February 1909, and to increase said weekly payments to the sum of 20s. in terms of section 16 of the First Schedule to the said Workmen's Compensation Act 1906. The appellant averred as the ground of his

application for review that '. . . owing to his condition he is unable to obtain work in the district, and the said Wilsons and Clyde Coal Company, Limited, are unwilling or unable to supply him with same.' The relevancy of the appellant's averment above quoted for an increase of his compensation was disputed, and a debate was heard before me, when the following facts were agreed on between the parties, viz.—(1) The appellant obtained light work with respondents in May 1909 at the picking tables; (2) while at said light work in September 1910 the parties remitted the question of appellant's fitness for work to a medical referee under Schedule I, section 15, of the Workmen's Compensation Act 1906, who reported that the appellant was fit for light work such as he was at that date engaged in; (3) that the appellant was dismissed from his employment with respondents on 6th December 1910; (4) that appellant's physical condition had not changed in any way since the date of the said medical referee's report. In these circumstances, founding on the case of *Boag* v. *Lochwood Coal Company, Limited*, 1910 S.C. 51, I found that the appellant had set forth no relevant grounds for reviewing the weekly payment."

The *question of law* was—"Was I right in holding that the appellant's averments disclosed no relevant grounds for review of his compensation?"

On 28th June 1911 the First Division of the Court of Session, without calling on counsel for respondents, pronounced an interlocutor answering the question in the affirmative and refused the appeal.

Duris, the appellant, appealed to the House of Lords, and in a supplementary statement set forth—"This appeal raises a question upon which the Judges of the First Division of the Court of Session did not see their way to pronounce an independent decision. The appellant admitted he could not distinguish his case from *Boag* v. *Lochwood Coal Company, Limited*, and their Lordships in respect of the decision pronounced by the Second Division of the Court in that case refused the appeal *simpliciter*. The appellant submits that, so far as it establishes a general rule and so involves the determination of the present case, the case of *Boag* was wrongly decided. . . . The result of the decision of the Court in Scotland has been that no inquiry whatsoever has been held as to the effect of the appellant's physical incapacity on his wage-earning power, and that their Lordships have proceeded upon presumptions from the medical report without ascertaining or taking steps to ascertain whether or not in consequence of his condition the appellant is in fact unable to obtain work. The appellant is prepared to prove that he has made repeated applications in the district for work of a class which, in his impaired condition of health, he might be able to undertake. All these applications have been unsuccessful, and the appellant is prepared to show that his want of success has not been due to the state of the labour market, but to his incapacity and also to the very limited type of work which is now within his powers. He has been refused employment on the ground that, having regard to his obviously injured condition, employers would not employ such a workman. The appellant is not earning, nor is he able to earn, any wages whatsoever, and his injured condition precludes him from obtaining employment at any suitable employment or business at which he could earn wages. The result of the accident has been and continues to be total incapacity on the part of the appellant." He further set forth as the question which it was desired to have settled "that the question of whether the condition of a workman prevents his obtaining work is always one upon which he is entitled to lead evidence, and upon proof of which he is entitled to compensation as for total incapacity, whether on an original application or on an application for review." Reference was made to *Sharman* v. *Holliday & Greenwood, Limited*, L.R., [1904] 1 K.B. 235; *Clark* v. *The Gas Light and Coke Company*, 21 T.L.R. 184; *Radcliffe* v. *Pacific Steam Navigation Company*, [1910] 1 K.B. 685; and *Proctor & Sons* v. *Robinson*, [1911] 1 K.B. 1004.

The following *reasons* for *reversal* were, *inter alia*, set forth—"1. Because the question of the appellant's capacity to earn wages is a question of fact material to the assessment of compensation, upon which no evidence was before the arbitrator and upon which the arbitrator refused to hear evidence. 2. Because the appellant has made a relevant averment of continuing incapacity to earn wages. 4. Because the appellant is not earning or able to earn any sum in any suitable employment or business."

The respondents stated—"The question presented for decision in this case is whether the term 'incapacity for work' in the Workmen's Compensation Act 1906, Schedule I (1), includes, in the case of a workman partially incapacitated, inability to obtain employment in the district where he lives? . . . It has been decided that no application for review of weekly payments can be entertained where there has been no change in circumstances since the weekly payments were awarded. The only change in circumstances which the appellant can point to is that he avers that he is unable now to find employment in the district. This, it is submitted, is an irrelevant ground of application for review." They founded on the cases of *Boag* v. *Lochwood Collieries, Limited* (*cit. sup.*), and *Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009, *per* Fletcher Moulton, L.J., at p. 1020, and further referred to the cases of *Crossfield & Sons* v. *Tanian*, [1900] 2 Q.B. 629; *Dobby* v. *Wilson Pease, & Company*, July 22, 1909, 2 Butt. W.C. 370; *Carlin* v. *Alexander Stephen & Sons, Limited*, June 9, 1911, 48 S.L.R. 862; and *Black* v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, 46 S.L.R. 812.

At delivering judgment—

LORD CHANCELLOR—In this case the appellant asked for a review of a certain

agreed weekly payment of 16s. 11d. under the Workmen's Compensation Act upon the ground that "owing to his condition he is unable to obtain work in the district, and the said Wilsons and Clyde Coal Company, Limited, are unwilling or unable to supply him with the same." In fact it was agreed that he was fit for light work such as is done at the picking tables, and was so employed by the respondents for some 18 months after the accident, and still is so fit, but was dismissed by the respondents in September 1910, and thereupon applied for a review under Schedule 1, section 16. The learned Sheriff ruled that the appellant's averments disclosed no relevant grounds for review of his compensation, and in this view the First Division upheld him.

I am not able to arrive at the same conclusion, and I think the English cases cited to us proceed upon the sound view. The purpose of the Act as declared in the first section is to compensate for injuries. The measure of the compensation is given in the First Schedule, sections 1 to 3 inclusive. Ought we to say that if a man, though physically fit for some work, is prevented by the consequence of the injury from obtaining it—in other words is disabled from earning wages—that nevertheless he is "able to earn" wages and is not under any incapacity for work? He is under an incapacity if his condition makes his labour unsaleable or saleable only at a less wage.

In regard to the averment that he is "unable to obtain work in the district," I think it must be understood in the sense that he cannot get work suitable for his condition in any place within reasonable access. The arbitrator must say what a man can fairly be asked to do in order to obtain employment and so maintain himself wholly or in part in order not to be a burden upon others. This is only one of the numberless difficulties in applying this Act, but it is a difficulty of fact not of law.

LORD MACNAGHTEN—I entirely agree.

LORD ATKINSON—I concur.

LORD SHAW—In this case the appellant sustained an injury by accident arising out of and in the course of his employment. He became totally incapacitated and received compensation of 20s. per week, and a memorandum of agreement was recorded on the 27th May 1909. The respondents provided him with light work at the picking tables till December 1910, and during that period his compensation was reduced by agreement, and thereafter continued to be paid at the rate of 16s. 11d. per week. In September 1910 a report was obtained from a medical referee to the effect that the appellant was fit for the light work such as he was then engaged in, namely, at the picking tables. On the 6th December 1910 the respondents, who were reducing the number of their workmen, dismissed him. The appellant maintains that the circumstances are now different from those which existed when he agreed to accept 16s. 11d. per week, because he has entered the open labour market, and there, notwithstanding all his efforts, he is unable, on account of his injuries, to obtain any employment. He asks an opportunity of proving that his applications have been unsuccessful and that his want of success "has not been due to the state of the labour market, but to his incapacity, and also to the very limited type of work which is now within his powers."

I am of opinion that this is a relevant claim for inquiry. The question of law put for the opinion of the Second Division by the learned Sheriff-Substitute was—"Was I right in holding that the appellant's averments disclosed no relevant grounds for review of his compensation?" The Second Division, following *Boag* v. *Lochwood Coal Company*, 1910 S.C. 51, 47 S.L.R. 47, answered the question in the affirmative. I am of opinion that it should have been answered in the negative, that the case of *Boag* was wrongly decided, and that the case put forward by the workman was one suitable for investigation. It should be explained that the appellant's averment as the ground of his application for review that "owing to his condition he is unable to obtain work in the district" was, by a very proper agreement between the parties who desired to have the more general question decided, held equivalent to an averment not confined to the particular district or small locality in which he had been working, but was held equivalent to a proposition that he was unable to obtain suitable work.

In the case of *Ball* v. *Hunt* (*v. infra, following case*) I have to-day had occasion to deal with the law of England and Scotland upon this subject, and with the difference which has arisen between the two; and I referred to the present case as following that of *Boag*, decided by the Second Division of the Court of Session. I need not, accordingly, recapitulate my views. For the reasons there stated by me, I am of opinion that this appeal should be sustained.

Their Lordships sustained the appeal with expenses and remitted to the Sheriff to adjudicate accordingly.

Counsel for the Appellant—Lord Advocate (Ure, K.C.) — Moncrieff — Keith. Agents—Hay, Cassels, & Frame, Hamilton — Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Counsel for the Respondents—D. F. Scott Dickson, K.C.—Beveridge. Agents—W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge, Greig, & Company, Westminster.