daily wage, and he was bound to work where he was required, and to quarry such stones as the factor might direct. But we are told that he might employ assistants. No doubt he might, but even if he did they were paid not by him but by the employer, who paid them through him at the rate of 5s. a day.

So far as I can see, the respondent's factor was not bound to find the appellant continuous employment. On the contrary, the appellant was bound to do only such work as the factor might think necessary, and in accordance with the requirements of the estate. On the facts stated I am of opinion that the appellant was a workman in the sense of the Act.

LORD M'LAREN—I agree with the conclusion to which your Lordships have come. At the same time I am not clear that this decision does complete justice between the parties, because I have a strong impression that the respondent is not an undertaker in the sense of the statute. I read the Act as intended to apply solely to commercial undertakings, and I do not wish to be understood to assent to what has been taken as common ground, namely, that a landed proprietor who works a quarry on his own estate for estate purposes is properly described as an undertaker in the sense of the Act. On this point I wish to reserve my opinion.

The only point that arises in this case for decision is, whether the appellant was a workman or a contractor. I agree that the important consideration here is that the Act by no means makes it a condition of a claim for compensation that a contract of service must be proved, because it is stated in the Act that the agreement may be one of "service or apprenticeship or otherwise." It is enough to satisfy the conception of "employment" under the Act of Parliament if work is being performed which is ordinarily done under a contract of service. It would be a serious restriction of the scope of the Act if it were possible by introducing some condition into the agreement to take it out of the category of a pure contract of service, and so to avoid liability under the Act. These words "or otherwise" seem to have been put into the Act for the purpose of preventing this, and appear to me to cover every case where for practical purposes the work done was that of a workman, though not strictly under a contract of service. However, I am far from saying the employment in this case was not under a contract of service. I think the appellant was a servant. He was paid a daily wage, and was liable to dismissal, and though he had the right to employ assistants that did not prevent his being a servant himself. It is quite in accordance with custom for a superior workman to choose his own assistants. An engineer may choose his own fireman or a mason his hodman. But that does not prevent their being servants paid by a common employer.

I also wish to reserve my opinion on the question in the case of *M'Gregor*, 1899, 1 F. 536, as to whether a man can be a workman and a contractor at the same time. There is much force in Lord Young's remarks on that point, but I desire to keep an open mind on the question.

LORD KINNEAR was absent.

The Court recalled the decision of the arbiter *quoad* the second finding, answered the question of law stated in the case in the affirmative, and remitted to the arbiter to proceed in terms of the statute, and decerned.

Counsel for the Claimant and Appellant —W. Thomson. Agents — Macpherson & Mackay, W.S.

Counsel for the Defender and Respondent Campbell, K.C.—Chree. Agents—John C. Brodie & Sons W.S,

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*Tuesday, July* 18.

## FIRST DIVISION.

[Sheriff Court at Dumbarton.

## SINGER MANUFACTURING COMPANY *v.* CLELLAND.

*Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. c.* 37), *Schedule* I, *sec.* 12—*Review of Weekly Payment—Nominal Award—Competency.*

In an application under the Workmen's Compensation Act 1897, Schedule I, section 12, to have the weekly payment reviewed, it is not competent for the arbitrator to suspend the compensation by awarding a nominal sum; but he must consider the facts as existing at the date of the application, and must either end, diminish, or increase the payment — *Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599; and *Ferrier* v. *Gourlay Brothers & Company*, March 18, 1902, 4 F. 711, 39 S.L.R. 453, *reconsidered.*

*Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37)—*Amount of Compensation—Principles of the Valuation of the Compensation.*

*Opinion* (*per curiam*) in a stated case on an application under the Workmen's Compensation Act 1897, Schedule I, section 12, to have the weekly payment reviewed, that it is no answer to the claim for compensation that the workman is at the moment in receipt, possibly from his old employer, of as high a wage as prior to the accident, but the arbiter must, on the facts existing at the time of the application, decide whether, and if so to what extent, the workman has been injured in his wage-earning capacity in the open market.

Principles of the valuation of compensation as stated in *Freeland v. Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599, *approved.*

This was a stated case on appeal in an arbitration under the Workmen's Compensation Act 1897, before the Sheriff-Substitute at Dumbarton (BLAIR), between the Singer Manufacturing Company, Kilbowie, by Clydebank, appellants, and Joseph Clelland, sawyer, Clydebank, respondent.

The case set forth the following facts:—"This is an arbitration brought under section 12, Schedule First of the Workmen's Compensation Act 1897, at the instance of the Singer Manufacturing Company, above designed, who were pursuers in the Sheriff Court, to review the weekly payments by the pursuers to the defender, and to order the same to be ended. The case was tried before the Sheriff-Substitute at Dumbarton on 29th March 1905.

"The Sheriff-Substitute issued his interlocutor on 6th April 1905, and on the evidence found in fact that the said Joseph Clelland, the workman in this case, is a sawyer by trade and is 43 years of age; that previous to 22nd September 1904 he was employed in the Singer Manufacturing Company at a weekly wage of 28s.; that previous to that date he had already lost the top joint of the thumb of his right hand; that on 22nd September 1904, when in Singers' employment, he lost by accident the first and middle fingers of the right hand; that the said fingers were taken off down to and including part of the knuckles at the base of the fingers; that the wound caused thereby is now healed and well; that on 15th March 1905 he recorded in this Court a minute of agreement; that under said agreement Singers have paid to him a weekly sum of 14s. down to 14th January 1905; that on 16th January 1905 Singers took him back into their employment at a weekly wage of 28s.; that he is still in their employment at that wage; that they are under no obligation to employ him or continue to employ him; that he is able to do the work at present allotted to him, which is of the same nature as he did before. The Sheriff-Substitute also found that Singers had failed to prove that he could earn 28s. per week as a sawyer if he was compelled to find employment elsewhere, and, in respect that supervening incapacity might occur, reduced the compensation payable by Singers to him to the nominal sum of one penny per week until further orders of Court, and found Messrs Singers liable to the defender in expenses."

The following questions of law were submitted for the opinion of the Court:—"Whether under the circumstances the appellants are entitled in law to have their liability in respect of the respondent's injuries ended as craved in the petition? or, was the Sheriff-Substitute right in making the award of one penny per week?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), schedule 1, section 12, enacts:—"Any weekly payment may be reviewed at the request either of the employer or the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall in default of agreement be settled by arbitration under this Act." Section 13—"Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled in default of agreement by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned."

Argued for the appellants—The judgment of the Sheriff-Substitute was wrong. His duty was to increase, diminish, or terminate the weekly payment, but not to suspend the compensation. Reading the Act and its schedule together, it was plain that the arbitrator, either in an original application or in an application for review, had to consider whether there was existing incapacity for work, according to the criterion prescribed in the schedule, and to fix the amount of liability or declare that there was none. Alternatively, if a nominal award was competent it was only so for six months, at the end of which period the employer could demand to have his weekly payments commuted for a sum down in terms of section 13 of the schedule. The statute did not contemplate in any of its provisions a nominal award being made. Moreover, such a system tended to produce complications, as there might be supervening disease unconnected with the accident or a change in the market rate of wages. The practice of making a nominal weekly payment had arisen in the case of *Irons* v. *Davis & Timmins, Limited*, L.R. [1899] 2 Q.B. 330, and was done in that case on the suggestion of the employers. In the case of *Chandler* v. *Smith*, L.R. [1899] 2 Q.B. 506, a declaration of liability was made, but that left no basis for commutation after six months, to which remedy the employer was entitled, and such a proceeding was contrary to the statute. These English cases had, it was true, been followed in *Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599; and *Ferrier* v. *Gourley Brothers & Company*, March 18, 1902, 4 F. 711, 39 S.L.R. 453, but in the last case Lord Young dissented. *Pomphrey* v. *Southwark Press*, L.R. [1901] 1 K.B. 86, and *Jamieson* v. *The Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704, showed that the criterion of liability was to be strictly adhered to, and therefore if the wage-earning capacity of the injured man at the date of the application was, as here, equal to the wage-earning capacity before the accident as proved by the wages *de facto* earned, there was no liability. As illustrating the employer's right to commute for a sum down—*Castle Spinning Company* v. *Atkinson*, L.R. [1905] 1 K.B. 336. The cases of *Geary* v. *Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; *Husband* v. *Campbell*, July 15, 1903, 5 F. 1146, 40 S.L.R. 822, were also cited.

Counsel for the respondent argued—The decision of the Sheriff-Substitute was right and was supported by the case of *Freeland* v. *Macfarlane, Lang, & Company, ut supra*. In that case it was laid down (1)

that the statutory test was earning capacity, and if there was less after the accident than before the injured person might have a claim for compensation though he was in fact receiving the same wages at the two periods; and (2) that a nominal award or a declaration of the continuing liability of the employer might be made by the Sheriff-Substitute. The terms of section 12, Schedule I, of the Act showed clearly that review might take place at any time. But even if that were not so, *Lysons* v. *Andrew Knowles & Sons*, L.R. [1901], App. Cas. 79, had decided that the schedule must give way to the Act in the event of ambiguity arising, and that the Act was to receive a liberal interpretation, the Court, if necessary, interposing machinery to give effect to its provisions. *Chandler* v. *Smith, ut supra*, settled that a declaration of continuing liability was in accord with the spirit of the Act, and if that were so held in the present case the nominal award might be dispensed with. But whatever course was adopted, section 1 (1) of the Act vested in the injured man who complied with the requirements of the Act, as had been done here, an absolute right to compensation which continued through life, though the incapacity might not be permanent or might not be even apparent after the accident and might be intermittent—*Powell* v. *Main Colliery Company*, L.R. [1900], App. Cas. 366. Having in view this correct estimate of the character of the right, the arbitrator was entitled to give judgment in favour of the workman without fixing the compensation, and *quoad ultra* to continue the cause. The case of *Fraser* v. *Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 653, was also cited.

At advising—

LORD PRESIDENT—This is a stated case in an appeal from the Sheriff Court of Stirlingshire, &c., at Dumbarton, and the question proposed in law for your Lordships' determination is whether the learned Sheriff-Substitute was right in making an award of a penny per week.

The circumstances of the case were these —That the appellant, who was a sawyer by trade, was in the employment of the Singer Manufacturing Company at the weekly wage of 28s. While in that employment, on 22nd September 1904, he lost by an accident the first and middle fingers of the right hand. The Singer Company, while he was laid up with this serious accident, paid under agreement a weekly sum of 14s., and this payment went on till 14th January 1905. By that date the wound was completely healed, by which I mean that it was no longer in the state of an open sore, and that his hand was restored to the complete use that any hand can have which is minus two fingers.

But the point that I ask your Lordships' attention to is that the injury was of a class which by this time had, so to speak, fully developed. There is no reason to suppose that his hand will ever be any worse, while on the other hand it is impossible to suppose that his hand will ever be any better. On 16th January the Singer Company took back this man into their employment at his old wage of 28s., and the Sheriff-Substitute tells us that as a matter of fact he is able to do the work at present allotted to him, which is of the same nature as he did before. In these circumstances the Singer Company made this application to the Sheriff-Substitute in order to have the payments ended. The Sheriff-Substitute having taken evidence, in which he elicited the facts as I have detailed them to your Lordships, found that Singers have failed to prove that the appellant could earn 28s. per week as a sawyer if he were compelled to find employment elsewhere, and in respect that supervening incapacity might occur reduced the compensation payable by Singers to him to the nominal sum of a penny per week until further orders of Court; and that is the finding that is really submitted to your Lordships for review.

Now, as I shall presently have occasion to say, I do not in any degree wonder that the Sheriff-Substitute should have made this finding, looking to the state of the authorities which I shall examine; but at the same time I must call attention at once to the fact that I rather think that the learned Sheriff-Substitute has misunderstood the meaning of "supervening incapacity." When he uses the words "in respect that supervening incapacity might occur," he means not any change of circumstances in the man but a change of circumstances in respect of the employment he might secure. In other words, he really changes the use of the words "supervening incapacity" by failing to see that the case is not *in pari casu* with the other cases where that phrase has been used, where "supervening incapacity" meant incapacity arising from a different state of the man's health, the ordinary instance being the case of a possible development of disease in one eye quite well at the time, but where, the other eye being injured, it is quite possible to say that disease might supervene, truly attributable to the accident which had occurred. Here, as I have pointed out to your Lordships, there can be no further development of this injury. We know now as well as we shall ever know how much the man has been injured.

But while I say so I do not wonder that the Sheriff-Substitute has been led into the interlocutor he has pronounced by the state of the authorities, because undoubtedly there have been two cases in your Lordship's Court where this finding of a penny per week and continuing the case until further orders were sanctioned. The first is the case of *Freeland* v. *Macfarlane, Lang, & Company*, 2 F. 832. Now in that case undoubtedly the Lord President says that it would be right to adopt the course taken in *Irons* v. *Davis & Timmins, Limited*, of making a nominal award of a penny per week, and then he goes on to point out what he thinks was also the course followed in the case of *Chandler* v. *Smith*, and the interlocutor in that case declared "that the

fact that the weekly wage which the appellant is at present earning is not less than the weekly wage which he earned before the accident would not necessarily or *per se* preclude any claim under the Act." And that view was followed in the case of *Ferrier* v. *Gourlay Brothers & Company*, 4 F. 711, in which the other Division of the Court (but with the dissent of Lord Young) remitted the case to the Sheriff to reduce the compensation to a penny per week until further orders of Court.

But in this case the Singer Company, who are the appellants, object to that course, and your Lordships I think will find it necessary to reconsider whether this plan of granting a penny per week and continuing the case is a method that is really sanctioned by the statute.

I am bound to say that when I look into the supposed origin of the device—for it is nothing else—the basis on which it rests is very slight. In the case of *Irons* v. *Davis* it was really a course that rested upon the agreement of the parties, and the Court, as very often is the case, did not make any objection to sanctioning what both parties were agreed should be done. And in the case of *Chandler* v. *Smith*, so far from following the penny a-week procedure, Lord Justice Williams particularly pronounces against that, because he says that it would be much better to postpone the fixing of the amount of compensation until the facts are ascertained, and he concludes—"I prefer this course to that of awarding a weekly payment of a penny and then applying the provisions of clause 12 of Schedule 1." Accordingly, so far as the Lord President based his judgment in that first case of *Freeland* on the English practice, I do not think it was a very firm substructure.

I therefore proceed to the Act itself. Now, compensation under the Act is due for personal injury by accident arising in the course of the employment. That is in section 1. When we go to the schedule which determines the scale and conditions of compensation, we find that under section 1 (*b*) the compensation under the Act shall be where total or partial incapacity for working results from the injury, a weekly payment during the incapacity; and then in the same schedule, section 12, we find that "any weekly payments may be reviewed at the request either of the employer or workman;" and in section 13 "where any weekly payment has been continued for not less than six months the liability" may be redeemed by a slump sum.

All that seems to me to point excessively clearly to the idea that this is a proceeding which has to take place at once and to be done with and not to be prolonged after the period of six months. The six months' period I think is taken as a rough estimate of the time during which, if I may so use the expression, the result of the injury will have settled down and it will become apparent whether it has been really only temporary or is permanent, and as soon as it has settled down then any liability may be got rid of by one payment.

All that seems straight in the teeth of any idea of making a sort of fictitious award—for it is nothing else—in order to prolong the period of suspense long beyond the period which is in the view of the statute. Indeed, if the matter was absurdly dealt with, it is quite clear that all cases might be hung up, because there is no injury of any serious character as to which medical men would not say that there was some chance at least of a supervening incapacity developing late in life. I am quite aware that presumably the Court would not use the device in that way, but that argument seems to go also against the idea of this procedure.

Accordingly, I come to be of opinion that this settling of the compensation at the sum of a penny *contra renitentem* is not a proceeding that is sanctioned under the Act. It seems to me that an injured workman is entitled to come to the Court and say—"Assess me now my compensation and find out what I am the worse for the accident." The Act gives us some light on this inquiry, because article 2 of the same schedule says—"In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." The amount is not to be absolutely conclusive, because it is only "regard is to had." But still that, no doubt, always will be the leading consideration.

At the same time, therefore, a workman who has been injured in a permanent way has right to say—"I shall now have my compensation assessed, and the figure to which I am entitled to have it assessed is the difference of the wage-earning capacity which I had before the accident and which I have now." The Court must arrive at that in the best way it can, always having in view the wages paid, but not taking the weekly wages payable at the present moment as synonymous with the wage-earning capacity if it thinks that the present wages are due to the kindly consideration of an old employer.

I ought also to say that I think the principles of the valuation of compensation were exceedingly accurately stated by this Division of the Court in the case of *Freeland*, 2 F., and I entirely adhere to all that was there said.

The application of these views to the case in hand seems to me to be this, that we should tell the Sheriff-Substitute that he had no right, although as I have already explained it is not at all to be wondered that he should have acted as he has done, to fix the compensation at a penny per week, and that the case must go back to him in order that, in view of the principles I have laid down, he should consider how much this man has been injured in his wage-earning capacity by the loss of these two fingers. I do not think he has considered the case from that point of view, and therefore I do not think that we ought to try to spell out a result from those findings which he has given. The Sheriff

will keep in view that the man can do certain work, and will not necessarily be bound down to the amount at present received. I am therefore of opinion that the question ought to be answered in the view that I have stated, and the case sent back to the Sheriff.

LORD ADAM—On 22nd September 1904 the respondent Clelland, when in the appellants' employment as a sawyer, met with an accident by which he lost the first and middle fingers of his right hand.

Previous to the accident Clelland had been earning a weekly wage of 28s., and after the accident the appellants, under an agreement, paid him a weekly sum of 14s. down to 14th January 1905. On the 16th January 1905 the appellants took him back into their employment at the same wage as he was earning before the accident. We are told that the wound caused by the accident is now healed and well, and that he is able to do the work at present allotted to him which is of the same nature as he did before; that he is still in their employment at that wage, but that the appellants are under no obligation to employ him. The Sheriff further found that the appellants had failed to prove that Clelland could earn 28s. per week as a sawyer if he was compelled to find employment elsewhere.

The present proceedings originated in an application to the Sheriff under section 12 of the first schedule of the Act, and on 29th March 1905 the Sheriff, in respect that supervening incapacity might occur, reduced the compensation payable by the appellants to him to the nominal sum of one penny per week until further orders of Court.

The question argued to us was whether such an award was competent under the Act.

Looking to the previous procedure which has taken place in such cases—for example in *Irons* v. *Davis*, and *Freeland* v. *Macfarlane*—I am not surprised that the Sheriff should have decided the case as he did—in fact I do not see how he could have done otherwise. But certainly this is the first time the competency of the course has been challenged before us, or as would rather appear in any previous case.

Now section 12 says that any weekly payment may be reviewed at the request of either party, and on such review may be ended, diminished, or increased, or I suppose the application may be refused. I think that means that the weekly payment is to be reviewed and dealt with according to the state of facts existing at the date of the application. In this case, however, the weekly payment has neither been ended, diminished, or increased as the Act directs, but the consideration of the case has been suspended for an indefinite time in respect that some supervening incapacity might occur. It appears to me that the Act does not warrant the weekly payment being suspended for a time and then resumed. The 13th section of the first schedule for example gives to the employer, where weekly payments have been continued for not less than six months, a right to have his liability therefor redeemed by payment of a slump sum. This clause appears to me clearly to indicate that it was not intended that an employer's liability under the Act should continue for an indefinite time, but that he should be able to get rid of it by payment of a slump sum at the end of six months. But it appears to me that the device of suspending the weekly payments and substituting therefor the payment of a nominal sum of 1d. would render that clause practically inoperative. It was admitted on both sides that the payment of the nominal sum of a penny could not be treated as a weekly payment under the Act. If that be so, then in this case, for example, in which the weekly payments ceased at the end of four months, if the appellants were to apply to have their liability under the Act redeemed by payment of a slump sum they would be met by the plea that the weekly payments had not been continued for the necessary period of six months. I see no answer to that plea, with the result that the appellants' liability under the Act would be continued indefinitely. I think that the Act assumes that the weekly payments are to be continuous, and if at the end of six months an application is made by an employer to an arbiter for redemption of his liability by payment of a slump sum, the arbiter must apply his mind to the facts as then existing and determine the amount of that sum to the best of his ability. So I think that when an application is made to an arbiter under the 12th section to review a weekly payment he must apply his mind to the facts as they exist at the time, and either diminish, increase, or end the payment, but that he has no power under the Act to suspend it.

I am accordingly of opinion that the second alternative question should be answered in the negative.

The Sheriff seems to have thought that the only other alternative to following the course he did was to end the weekly payment, and no doubt he came to that conclusion because the wound caused by the accident was healed and well; that Clelland had been taken back into the appellant's employment, and that he was earning the same wages as before the accident. That, no doubt, might be quite sufficient evidence to have entitled the Sheriff to come to the conclusion, if he had done so, that Clelland's incapacity had ceased. It appears to me, however, that the true question under the Act is whether Clelland is able to earn in his maimed state as much in the open labour market as he was before the accident. It does not appear to me that the fact that Clelland had been taken back by his employers and is earning as much as formerly necessarily furnishes a conclusive answer on that point. I do not think the Sheriff has applied his mind to that view of the case, and I think the case should be remitted to him for his reconsideration.

LORD M'LAREN—At the conclusion of the argument your Lordships were all of opinion that the question of a nominal award under the Workmen's Compensation Act ought to be reconsidered, and I agree with your Lordships in the result of that reconsideration. I may say for myself that, although in deference to the supposed authority of some English cases, and having regard to possible convenience, I assented to the previous decision of this Division for making a nominal award, I was never a convinced adherent of that method of applying the Act, and indeed never could find out for myself that there was any warrant for such a proceeding. It is, I may say, a perfectly futile proceeding for the purpose specified, because at the expiration of six months from the date of the accident the employer has an absolute right to capitalise his liability, or to insist upon a lump sum being substituted for a weekly payment. How the capital value of a penny a-week is to do any good to the injured workman I am unable to see. But I think that it is not really necessary to make a nominal award. The cases in which that has been done have resulted, as I venture to think, from inattention to the provisions of the statute in this respect, that because a workman was receiving from his employer a sum equal to the wages that he earned before the accident it was assumed that that was the man's wage-earning capacity, and therefore that there was no ground for making a substantial award of compensation. Now that is not the intention of the statute at all. What the arbiter has to consider is not what the man is receiving whether under the name of wages or charity from his employer, but what could he earn in the open market after the accident had happened as distinguished from what he actually earned in the open market before the accident. If his wage-earning capacity—the wage that he could earn in the open market—is less than what he earned before, it is an absolutely irrelevant consideration to take into account that the master is paying full wages. The workman is then entitled to have an award of compensation. What the master is to do is for him to consider. He may or may not continue the payment he has been hitherto making *ex gratia*. When the statute is applied according to my reading of it, by taking into account only the wage-earning capacity of the man at the time when the application to the Sheriff was made, whether for the original award or for variation of award, all difficulty disappears. It is quite true that at the end of six months the result may be that the employer's liability comes to an end, but I have no conception that the Legislature intended that this liability should hang like a millstone round the employer's neck during the whole of his life. Six months was the time fixed, because it was supposed that by that time the arbiter would be able to make a fair estimate of the probable loss to the workman and of the principle upon which assessment should be made. If unfortunately a man whose eye was injured and had healed again should suffer a relapse (it might be glaucoma, which could be proved to arise from the accident) that cannot be helped. In so far as this is not foreseen and allowed for at the expiry of six months, that is just the workman's misfortune, for it was never intended that he should be put in the same position as before the accident, but only that he should receive compensation under the conditions and limitations prescribed by Act of Parliament.

LORD KINNEAR concurred.

The Court answered the second alternative of the question of law in the negative, and remitted to the Sheriff-Substitute to proceed in accordance with their finding.

Counsel for the Appellants—Younger, K.C.—Constable. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Respondent—Campbell, K.C.—Gunn. Agents—Mackay & Young, W.S.

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*Tuesday, July* 18.

## FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Stormonth Darling, Ordinary.

## LORD ADVOCATE *v.* M'LAREN.

*Revenue—Income-Tax—Exemption—Untrue Declaration—Penalties—"Treble the Duty Chargeable"—Income-Tax Act* 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 166.

The Income-Tax Act 1842, sec. 164, provides for the making of the claim by a party claiming exemption on the ground of smallness of income, which claim shall be accompanied by a declaration setting forth all the sources of the claimant's income; and sec. 165 for the granting of a certificate with a view to repayment where the claimant is entitled to exemption but has already paid by way of deduction.

Section 166 enacts—"If any person shall be guilty of any fraud or contrivance in making any such claim, or in obtaining any such exemption, or any such certificate as aforesaid, or shall fraudulently conceal or untruly declare any income or amount of income, or any sum which he may have charged or been entitled under the authority of this Act to charge against any other person, or which he may have deducted or retained, or have been or be entitled as aforesaid to deduct or retain, from or out of any payment to which such person claiming exemption as aforesaid may be or become liable, or if any such person shall fraudulently make a second claim for the same cause, every such person so offending in any of the cases aforesaid shall forfeit the sum of twenty pounds and treble the duty chargeable in re-