In an appeal from the Sheriff Court at Dumbarton in an arbitration under the Workmen's Compensation Act 1897 between James M'Groarty, holder-on, 3 Burnbank Place, Yoker, appellant, and John Brown & Company, Limited, engineers and shipbuilders, Clydebank, respondents, the stated case gave the following facts as proved:—"1. That the appellant entered the employment of respondents on Monday, 18th September 1905, and wrought on the night-shift till Friday, 22nd September 1905.

"2. That the appellant is a holder-on, and during that time was engaged on the ss. 'Carmania,' then in course of construction.

"3. That on the night of 22nd September 1905 the appellant worked on the night-shift from 6 o'clock till 9·30 p.m., when he left the yard. He returned to the yard shortly before 10 p.m. the worse of drink.

"4. That his condition was observed as he passed through the check office by the respondents' foreman Shields, part of whose duty it was to watch the men coming in.

"5. That Shields immediately reported appellant's condition to his under foreman Davis, and directed him to follow the appellant.

"6. That the foreman Davis immediately followed the appellant and came up with him on board the ss. 'Carmania' at the place where he had been working, and just as he was about to resume work.

"7. That the foreman Davis thereupon ordered the appellant to leave his work, and told him to go home in consequence of his drunken condition.

"8. That the appellant was drunk and unfit to work.

"9. That the foreman Davis acted rightly in ordering the appellant to leave.

"10. That the appellant thereupon left the place where he had been working previously, and proceeded to go home.

"11. That a few minutes later the appellant was found injured at the bottom of a ladder on board the ss. 'Carmania.'

"12. That such injury took place after the appellant had been ordered to discontinue his work.

"13. That the ladder in question was quite safe and suitable for the ordinary use of sober workmen.

"14. That the accident to appellant happened solely through appellant being drunk and unfit to work, and was not attributable to the negligence of the respondents."

The Sheriff-Substitute (BLAIR) held on these facts that the appellant having been injured in consequence of his being drunk and unfit to work, that was serious and wilful misconduct on his part within the meaning of the Act, and assoilzied the respondents with expenses.

The following question in law was submitted for the opinion of the Court:—"Whether the fact of the appellant being drunk and unfit to work, and the accident having happened in consequence thereof, constitutes serious and wilful misconduct within the meaning of the Act."

Argued for the appellant—The appellant had worked from 6 p.m. to 9·30 p.m., and during that time he was perfectly sober. The arbiter had made no findings as to what had happened to the appellant during his absence. Facts might have been proved which would have excused him. There were various degrees of intoxication, and such facts might have shown that the appellant's conduct was excusable and did not constitute serious and wilful misconduct in the sense of the Act.

Counsel for respondents were not called on.

LORD PRESIDENT—I have no doubt in this case. It has been found by the Sheriff-Substitute that the appellant came to his work the worse of drink, and that the accident happened solely from his being drunk and unfit for work. It was argued that the Sheriff ought to have inquired as to what happened between the time the appellant left his work at 9·30 and his return at 10 o'clock. But I think the Sheriff was right in not doing so. The main fact that the man was drunk and unfit for work and that the accident happened solely owing to his condition, was enough to disentitle him to compensation under the Act.

LORD M'LAREN—I am of the same opinion. It is only necessary in this case to consider whether drunkenness is "serious and wilful misconduct." Of course there are degrees of intoxication, but in this case the appellant was dismissed for being drunk and unfit for work. I cannot doubt that drunkenness to the extent of unfitting a man for his work is "serious and wilful misconduct," and disentitles the applicant to compensation under the Act of Parliament.

LORD KINNEAR and LORD PEARSON concurred.

The Court answered the question in the affirmative.

Counsel for the Appellant—Hunter, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondents—M'Clure, K.C.—Macmillan. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, May 23.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

ALLAN *v.* THOMAS SPOWART & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1, *sec.* 12—*Application for Review—Power of Arbiter to Declare that the Compensation Payable to the Workman shall Cease at a Future Date.*

In an application to have the compensation payable to an injured miner ended or diminished, the arbiter, on a

report by a medical referee to the effect that the miner's wage-earning capacity would be completely restored after three months' work on the surface, directed that the compensation should cease after a certain future date, giving effect to the report.

Held that the arbiter had exceeded his power, inasmuch as his function in assessing compensation was to have regard to the workman's present state, and not to pronounce a judgment, the validity of which would depend on his condition at a future date.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule 1, section 12, 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. . . ."

In an arbitration under the Workmen's Compensation Act 1897, raised in the Sheriff Court at Dunfermline by John Allan, miner, Wellwood, who had received injuries to his back, against Thomas Spowart & Company, Limited, Lassodie Colliery, Dunfermline, in which the claimant had obtained compensation at the rate of 18s. 6d., subsequently reduced to 15s. 6d. per week, the respondents on 15th November 1905 lodged a minute in process craving the Court to end or diminish the compensation "in respect that the circumstances of defender are now changed, and that he is fit for work."

Answers were lodged in which continuing partial incapacity was pleaded. On 8th December 1905, of consent, the Sheriff-Substitute (HAY SHENNAN) remitted to the medical referee, Dr Sturrock, who on 12th December reported—"That John Allan has sufficiently recovered from the effects of the accident and is fit for work, there being no ankylosis of (fixed union between) the vertebræ, no symptoms of any injury of the spinal cord, nor any wasting of the muscles of the back, nor any degeneration in them. As John Allan has not worked since July 1901, in my opinion he should have work above ground for the first three months." On a further remit by the Sheriff-Substitute, who was in doubt whether the medical referee meant that after three months' work on the surface Allan's wage-earning capacity would be completely restored, or merely that he would then be able to work underground without his recovery being complete, the medical referee stated his meaning was "that three months on the surface was all that was needed to restore completely Allan's wage-earning capacity."

Thereafter on 27th February 1906 the Sheriff-Substitute pronounced an interlocutor in which he directed "that the weekly compensation to the respondent be reduced as from 31st December 1905 to the sum of nine shillings and eightpence, and that the said compensation be ended from and after 31st March ensuing."

Allan appealed.

The stated case, *inter alia*, set forth the above-mentioned facts and submitted the following question of law for the opinion of the Court—"(2) Whether the Sheriff-Substitute had power, under the Workmen's Compensation Act 1897, to direct that the compensation payable to the appellant should be ended as at 31st March 1906, the date of the Sheriff-Substitute's judgment being 27th February 1906?"

Argued for appellant—The arbiter had no power to declare that the compensation should end at some future time. His only ground for doing so was a medical forecast that by that time the appellant would have completely recovered. A medical certificate to that effect was no evidence as to the state of his earning capacity at that date. There must be as at that date either a proof or, at all events, a remit as to his then earning capacity—*Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239; *Johnstone* v. *Cochran & Company, Annan, Limited*, June 30, 1904, 6 F. 854, 41 S.L.R. 644.

Argued for respondents—The medical referee had reported that the appellant had completely recovered. The fact that his muscles were stiff and needed to be relaxed was not inconsistent with his having completely recovered. That being so the arbiter had power to declare the compensation ended as from 31st March 1906.

LORD PRESIDENT—The appellant in this case was injured at a time when his average weekly earnings were 37s. 4d. After a period during which he was paid fifty per cent. of his wages, on 30th January 1904 the respondents, his employers, presented an application in the Sheriff Court at Dunfermline craving that the compensation should be ended or diminished in terms of section 12 of the Workmen's Compensation Act.

At that time a proof was led and the Sheriff-Substitute found that the appellant was still suffering from the effects of the injury, and awarded him compensation at the reduced rate of 15s. 6d. per week. On 15th November 1905 the respondents lodged a minute craving that the compensation should be ended or diminished. Proof was ordered, but, of consent, the parties agreed to a remit being made to a medical referee, Dr Sturrock. The medical referee reported that the appellant had sufficiently recovered from the effects of the accident and was fit for work, but that as he had not worked since July 1901 he should have work above ground for the first three months.

At the hearing on the report the appellant's agent moved to be allowed to lead evidence as to the appellant's wage-earning capacity. The Sheriff-Substitute refused the motion for proof and remitted to Dr Sturrock to supplement his report as to the appellant's recovery. In answer the medical referee reported that three months on the surface was all that was needed to restore completely the appellant's wage-earning capacity. On that report an interlocutor was pronounced reducing the compensation as from 31st December 1905 and ending it from and after 31st March 1906. That interlocutor was pronounced on 27th February 1906.

[*The Lord President after dealing with the first question, on which the case is not reported, continued*]—The second question is whether the Sheriff-Substitute had power to end the compensation as from 31st March 1906, the date of the judgment being 27th February 1906.

In pronouncing this interlocutor the Sheriff-Substitute seems to have introduced a new practice which I think ought not to be encouraged. The meaning of the medical referee's report seems to have been that the appellant had recovered in this sense, that the injured parts were healed, but that he had not recovered from that weakness which is inseparable from long disuse of the muscles. The Sheriff-Substitute allowed modified compensation for three months, after which it was to be ended. I am not surprised that the Sheriff-Substitute did so, for Dr Sturrock had said that after three months' work on the surface the appellant's muscles would have regained their former vigour, and so, as there was no longer any physical injury, the appellant would then be just as good a man as he had been before the accident. But the Sheriff-Substitute has, to a certain extent, pronounced judgment beforehand on a future event. The function of the Sheriff in assessing compensation is to have regard to the man's present state, and he is not entitled to pronounce a judgment beforehand, the validity of which depends on his condition at a future date. I think, therefore, the case must be remitted to the Sheriff-Substitute to satisfy himself either by remit or by proof as to the appellant's condition on 31st March 1906, whether he had completely recovered at that date or not, and as to his condition up to the present time. The Sheriff will then be in a position to declare that the compensation was, or was not, rightly ended as at 31st March, and also to dispose of the case.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the second question in the negative and remitted to the Sheriff as arbitrator to ascertain the appellant's condition on 31st March 1906, and since then, and to proceed in the arbitration.

Counsel for Appellant — Watt, K.C. — Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents — Solicitor-General (Ure, K.C.)—Horne. Agents—W. & J. Burness, W.S.

Thursday, May 24.

SECOND DIVISION.

[Sheriff Court of Ayrshire at Ayr.

RUSSEL *v.* M'CLYMONT.

Master and Servant — Wages — Implied Contract—Services Rendered by Niece to Aunt—Presumption.

A niece in impoverished circumstances came to live with an elderly aunt, occupying the position of an adopted daughter. During her aunt's last illness, extending over several years, she performed all the duties of a sick-nurse. She, along with other relatives, obtained certain benefits under her aunt's will, which had been made prior to her illness. *Held* that she was not entitled, in the absence of a contract to that effect, to remuneration or wages for the services she had rendered.

This was an action for the sum of £300, brought in the Sheriff Court at Ayr by Miss Sarah Catherine Russel against James Templeton, Mrs Isabella Davidson or Dick's testamentary trustee, to which Mrs Elizabeth Murdoch Davidson or M'Clymont, who along with the pursuer was Mrs Dick's residuary legatee, had been sisted as a defender. The sum sued for represented, according to the pursuer's contention, reasonable remuneration for services rendered to Mrs Dick over a period of several years.

The facts of the case are sufficiently apparent from the interlocutor and note of the Sheriff-Substitute (CAMPBELL SHAIRP), and the excerpts from the correspondence and evidence *infra*.

On 28th October 1902 the Sheriff-Substitute pronounced this interlocutor:—". . . Finds in fact — 1. That the late Mrs Isabella Davidson or Dick, mentioned in the petition, died at Waterloo Villa, Ayr, on 29th November 1899, and that for three years prior to her death she had been in such a state of bodily and mental weakness as necessitated constant attendance and nursing; 2. That during said period of three years she was most efficiently attended to and nursed by her niece the pursuer; 3. That such nursing and attendance was given by the pursuer out of family affection for her aunt the said Mrs Isabella Davidson or Dick, and that in return for it she received her clothes and a home in her aunt's house; that there was no express contract that any wages should be paid to the pursuer, and that she was content at the time such services were rendered to look for no further remuneration for such services except such as she might receive in the shape of bequests under the said Mrs Isabella Davidson or Dick's will at her good pleasure: Finds in law that in the above circumstances any presumption that wages are due to the pursuer for her attendance on Mrs Dick has been rebutted: Accordingly assoilzies the defenders from the conclusions of the action. . . ."