the words "maintained by statute labour" as meaning "having statute labour actually expended upon them in 1878 or about that time." I read the expression "maintained by statute labour" as meaning that statute labour or the equivalent of it is the fund from which the road falls to be maintained.

I am therefore of opinion that the Sheriff was right in holding that the road in question is a public street within the meaning of the Act of 1903.

LORD ARDWALL—I concur in what has been said by my brother Lord Low.

It is stated in the findings in fact in this case that the road in question was originally a statute labour road, and the question is, has it ever ceased to be so? Now, it is said that there is no way in which a statute labour road can be declared, after certain formal procedure, to be closed in the same way as a turnpike road can be. That may or may not be, but what is now put forward is that it has ceased to be a statute labour road because for a long time no statute labour money has been spent upon it. We have not the case of a road practically disappearing as a carriage road altogether and nothing being left but a footpath, as apparently is the case as regards that part of this road which extends beyond Gannochy farm. But it may be a question whether the public authorities are not, on the demand of parties interested, still entitled, if they see fit, to maintain even that part of the road. The part of the old Perth and Coupar-Angus road with which the case is concerned is not in that position at all. By one person or another the road has been maintained in one way or another all along, and it is at present an existing road, and is available for the use of persons having to go that way with vehicles as well as for foot-passengers. Now, it comes to be a question whether it is still a statute labour road or not? The appellants' answer is that it has ceased to be so because of the failure of the County Authorities for a great number of years to expend money on it. I cannot assent to that. All that can really be inferred from the present condition of this piece of road is that the County Authorities have neglected their duties, or otherwise that there has been so little use of the road that there was no necessity for the County Authorities to spend any money on it. That may be so. We are very well acquainted with roads getting into that condition in various parts of the country—roads where the traffic is slight, and where a few ashes or rubbish may do all that is necessary to keep them going; and therefore I think it is impossible to say that a road ceases to be a statute labour road merely because money has not been expended upon it for a certain period of time, short or long.

But there is a difficulty raised by the definition—although I do not think it is a serious one—of statute labour roads under the Roads and Bridges Act of 1878. There is no difficulty arising when we are dealing with highways, because that expression is defined to include all existing turnpikes and all existing statute labour roads; but the definition of a "statute labour road" says that expression "includes all roads and bridges maintained by statute labour." The appellants' argument is that that includes only such roads as *de facto* were having statute labour money expended on their maintenance at the passing of the Act of 1878. I am unable to concur in this interpretation of the clause. I do not think it is a sound construction. I think it is a very narrow construction, and one which would lead to considerable difficulty and confusion when it might be necessary to apply it to particular roads, because it would lead to all sorts of inquiries with a view to ascertaining whether or not any particular road was or was not in 1878 "maintained by statute labour" within the fair meaning of that very indefinite phrase. It would have been better if the word used, instead of "maintained" had been "maintainable" by statute labour. In my opinion, a road is "maintained by statute labour" within the true meaning of the definition if it is a road on which in 1878 the County Authorities would have been entitled to expend statute labour money with a view to its maintenance. I have no doubt that the road in question is a road of that description, and that therefore it is not a private street within the meaning of section 103 (6) of the Burgh Police (Scotland) Act 1903.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court dismissed the appeal, and of new found that the portion of road in question was not a private street within the meaning of section 103 (6) of the Burgh Police (Scotland) Act 1903.

Counsel for the Appellants — Graham Stewart, K.C.—Sandeman. Agents—Cornillon, Craig, & Thomson, S.S.C.

Counsel for Respondent — Blackburn, K.C.—J. Macdonald. Agents—F. J. Martin, W.S.

Friday, November 13.

SECOND DIVISION.

[Sheriff Court at Ayr.

WILLIAM BAIRD & COMPANY LIMITED *v.* DEMPSTER.

(See *ante*, March 7, 1908, vol. xlv, p. 432, and 1908 S.C. 722.)

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*Personal Bar—Partial Incapacity and Acceptance by Workman of Less Remunerative Employment under Same Employers—Subsequent Claim of Compensation.*

A workman who had sustained injury by accident on 1st March 1899 received,

in virtue of an unrecorded agreement, compensation at the maximum rate under the Workmen's Compensation Act 1897 till 21st May 1900, when he accepted employment from the same employers less remunerative than formerly but giving more than the compensation, and he remained therein till 1st April 1907. During that time he, on various occasions, requested his employers to make up to him the deficiency in his weekly earnings, but his requests were not complied with. *Held* that he was barred *personali exceptione* from subsequently claiming compensation in respect of partial incapacity between 21st May 1899 and 1st April 1907.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37) *Schedule I* (1) (*b*)*—Compensation—Incapacity — Award of Lump Sum — Competency.*

The Workmen's Compensation Act 1897 Schedule I (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. . . ." In arbitration proceedings raised after incapacity had ceased, *held* incompetent to award a lump sum.

In an arbitration in the Sheriff Court at Ayr under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) between Alexander Dempster, who had sustained injury on 31st March 1899 by an accident arising out of and in course of his employment in a mine, and William Baird & Company, Limited, his employers, the following *facts* were admitted or proved —"(1) That, as the result of the said injuries received by him, the said Alexander Dempster was totally incapacitated from his work as a miner from the said 1st day of March 1899 till 21st day of May 1900; (2) that his average weekly earnings in the employment of the said William Baird & Company, Limited, during the twelve months previous to the date of said accident, were twenty-eight shillings and eightpence; (3) that it is averred on record by the said Alexander Dempster, and admitted by the said William Baird & Company, Limited, that an agreement was entered into between them, by which the said William Baird & Company, Limited, agreed to pay the said Alexander Dempster compensation under the Workmen's Compensation Act 1897, at the rate of fourteen shillings and fourpence per week from the 15th day of March 1899; (4) that no memorandum of said agreement was sent to the Sheriff-Clerk of Ayrshire, or recorded by him in the special register, but that under said agreement compensation at said rate of fourteen shillings and fourpence per week was paid to the said Alexander Dempster from the said 15th day of March 1899 till the 21st day of May 1900; (5) that on said last-mentioned date the said agreement was terminated, and on or about that date a new and second agreement was entered into between the said Alexander Dempster and the said William Baird & Company, Limited, by which they agreed to give him, and he agreed to accept from them, work as a 'pit bottomer,' which is lighter work than that of a 'miner,' but that it was not, by said new agreement, agreed that the said Alexander Dempster, in respect of his employment by the said William Baird & Company, Limited, as a 'pit bottomer,' departed from any claim for compensation in respect of his said injury, which he might have against the said William Baird & Company, Limited; (6) that the said Alexander Dempster worked for the said William Baird & Company, Limited, as a 'pit bottomer,' from the said 21st day of May 1900 till the 1st day of April 1907, and during that period earned an average weekly wage of one pound, two shillings and ninepence, being five shillings and elevenpence per week less than he earned prior to his said injury; (7) that during the said period when he was working as a 'pit bottomer,' he on various occasions requested the now deceased William M'Culloch, the said William Baird & Company's manager, to make up to him the deficiency in his weekly earnings, but that his requests were not complied with; and (8) that on the said 1st day of April 1907 the said Alexander Dempster, in consequence of his said injury, became totally incapacitated for any work, and that a new and third agreement was entered into between him and the said William Baird & Company, Limited, by which they again agreed to pay him his full compensation of fourteen shillings and fourpence per week, and that they have paid him said sum from the said 1st day of April 1907 till the present date."

On these facts the Sheriff-Substitute (SHAIRP) found William Baird & Company liable to Alexander Dempster for the loss of earnings sustained by him during the period between 21st May 1900 and 1st April 1907, in consequence of his injury; which loss the Sheriff-Substitute assessed at the sum of £100, and decerned against the said William Baird & Company for payment of the same.

At the request of William Baird & Company, the Sheriff-Substitute stated a case for appeal, in which the foregoing facts were set forth.

The *questions of law* for the opinion of the Court were—"(1) Was the said Alexander Dempster, in the circumstances before narrated, and in view of the fact that he had not earlier taken legal proceedings to recover compensation, barred *personali exceptione* from claiming compensation, under the Workmen's Compensation Act 1897, from the said William Baird & Company, Limited, for the period between the 21st day of May 1900 and the 1st day of April 1907? and (2) Could the arbitrator, in awarding compensation in a lump sum of one hundred pounds to the said Alexander Dempster, rightly have regard to his diminished weekly earnings

during the period between 21st May 1900 and 1st April 1907?"

The appellants (William Baird & Company) argued—(1) The respondent was barred *personali exceptione* from making the present claim. The appellants had suffered prejudice by the delay of the respondent in making the claim. They had lost the opportunities provided by the statute for medical examination or for review. In any event, the acceptance by the respondent of employment from the appellants completely barred his claim for compensation—*Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113; *Nimmo & Co., Ltd.* v. *Fisher*, 1907 S.C. 890, 44 S.L.R. 641; *William Baird & Co., Ltd.* v. *M'Whinnie*, 1908 S.C. 440, 45 S.L.R. 338. (2) The award of a lump sum was incompetent. The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) provided for such an award in only two cases, where death resulted—Schedule I. (1) (*a*), and where weekly payments were, after six months, commuted—Schedule I (13). The scheme of the Act negatived the view that an award of a lump sum was competent in any other case. The payments under the Act were in the nature of alimentary provisions—they were not attachable for debt—Schedule I (14). It was again incompetent for the Sheriff to decern for payment. He was authorised to settle the amount—section 1 (3)—and special means were provided for recovery—Schedule II (8). In any event it was not competent to decern for arrears—*Colville & Sons, Ltd.* v. *Tigue*, December 6, 1905, 8 F. 179, 43 S.L.R. 129, *per* Lord Kyllachy. The Sheriff was not entitled to find an average weekly sum due in respect of the partial incapacity. He must find in regard to the actual circumstances of each week, the actual sum due for that week. Regard must be had to the average amount the workman was able to earn after the accident—Schedule I (2). The Sheriff here, in arriving at the sum due, had not applied the methods contemplated by the Act. If these methods were, in the circumstances, not possible, that demonstrated the incompetency of entertaining the present claim and considering liability for arrears.

Argued for the respondent—The question whether the present claim was barred was a question of fact which had been decided by the Sheriff in the respondent's favour. Assuming that the question was one of law, the respondent was not barred. Mere delay was insufficient unless it caused the appellants to alter their position to their prejudice. No prejudice had resulted here. The respondent was in the employment of the appellants during the whole period in question, and the whole circumstances surrounding his present claim were thus within their knowledge. (2) There was nothing incompetent in the award of a lump sum. It would have been perfectly competent for the Sheriff to award a certain sum for work for the whole period of incapacity—Schedule I (2). It could not make the award incompetent that the Sheriff had added up the weekly sums and given decree for the total, subject to modification. It was equally competent for the Sheriff to find a sum due in respect of arrears—*Dempster* v. *William Baird & Company, Limited*, 1908 S.C. 722, 45 S.L.R. 432. If the claim was not barred by the delay, and could competently be made now as the Act contemplated where no prejudice had arisen—section 2—it necessarily followed that arrears could be awarded.

LORD LOW—The first question stated in the case is whether the respondent (who is now deceased) was barred *personali exceptione* from claiming compensation for the period from 21st May 1900 to 1st April 1907. That question is stated by the learned Sheriff-Substitute as a question of law, and I think it was rightly stated as a question of law, because the question whether a person is or is not barred is not a pure question of fact but a question of the legal inference to be drawn from the facts. Now the facts from which the inference is to be drawn are these—The respondent was injured on 1st March 1899, and for a time was totally incapacitated for work. An agreement was entered into under which the appellants agreed to pay to the respondent compensation at the maximum rate from 15th March 1899, that is, a fortnight after the accident. That agreement was not recorded. In terms of the agreement payment of compensation at the maximum rate was made from 15th March 1899 until 21st May 1900. Then the Sheriff finds as a fact that on that date the agreement was terminated, and in lieu thereof another agreement was entered into by which the appellants agreed to give the respondent work as a pit bottomer. Now, of course, the second agreement was not an agreement under the Act, but it was an agreement which terminated the first agreement, and it was accepted in that sense by the respondent. In pursuance of this agreement the respondent was employed as a pit bottomer, and received wages until 1st April 1907, a period of seven years. He then again became incapacitated in consequence of his injuries, and a third agreement was entered into whereby the employers again agreed to pay the maximum amount of compensation from that date (*i.e.*, 1st April 1907). The only question is whether the respondent is entitled to claim compensation for the seven years from 21st May 1900 to 1st April 1907, when the respondent was at work and was receiving wages from the appellants. There is only one finding in fact which could suggest that he is so entitled, and that is the seventh, where it stated "that during the said period when he was working as a pit bottomer he, on various occasions, requested . . . the said William Baird & Company's manager, to make up to him the deficiency in his weekly earnings, but that his requests were not complied with." Now that is a very vague finding in fact, but the important matter is that these requests were refused, and the refusal was acquiesced in. The agreement to pay compensation had been terminated by agreement, there was a subsisting agree-

ment that the respondent should work as a pit bottomer, and that the appellants should pay him wages, and for seven years that agreement was acted on. Now it seems to me, applying the ordinary rules of fair dealing between man and man, that it is plain that the respondent can claim no additional compensation for that period of seven years. Having taken the employment and accepted the wages he cannot claim compensation in addition.

That is sufficient for the disposal of the case, but there was a second question which was argued to us, and on which it is desirable that we should express our opinion. In the case it is put in this way—"Could the arbitrator in awarding compensation in a lump sum of one hundred pounds to the said Alexander Dempster rightly have regard to his diminished weekly earnings during the period between 21st May 1900 and 1st April 1907." Now it is plain that the learned Sheriff-Substitute assumes that in acting as arbitrator he is entitled to award compensation in a lump sum. I think it is clear that he has no power to do anything of the sort. The statute gives him power to award compensation in the shape of weekly payments. What the Sheriff-Substitute has done is to put himself in the position of a jury assessing a claim for damages. It is quite plain that that is incompetent, and it is equally plain that the Sheriff has no power to pronounce a decree for a lump sum.

The question was also argued to us, supposing that the respondent had a claim, what was the proper way of arriving at the amount? It was argued that the amount should be arrived at by taking an average of the respondent's weekly wages during the period of seven years, as compared with his earnings prior to the accident. On that point I wish to express no opinion, as it is not necessary for the decision of this case.

LORD ARDWALL—I concur, but I should like to make one observation, because if this case should be reported, it would appear on one matter to be inconsistent with the previously reported part of the same case. I find that the rubric in that case (1908 S.C. 722) correctly sets forth that it was held "that there was no subsisting agreement between the parties, and that consequently arbitration proceedings were competent." I was rather surprised to find it stated in the present case that there was a subsisting agreement at the time the arbitration proceedings were raised. This, of course, is totally incorrect. I suppose that the Sheriff-Substitute by what he states must mean, not that there was an agreement in the ordinary legal sense, but merely that the appellants offered the respondent work at a wage which was larger than the amount of the compensation he was receiving up to 21st May 1900, and that the respondent accepted the work and no compensation was paid to him for nearly seven years. That is what was done, and that is enough to raise a plea of personal bar against the workman, because if he accepted employment and received wages from the parties who otherwise would have been paying him compensation, that implied that he was claiming nothing more than these wages for the period in question. I think that the respondent here is barred from going back on the period during which he accepted wages from the appellants without reservation, these wages, be it observed, being larger than the sum he had been receiving as compensation for his injury.

LORD DUNDAS concurred.

LORD LOW—With reference to the previous case, I should like to add that in that case it was stated as a fact that William Baird & Company refused to pay compensation from 21st May 1900. That is inconsistent with the statement now made as to the third agreement, but it justifies the manner in which the former case was disposed of.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the affirmative and the second in the negative.

Counsel for the Appellants—Hunter, K.C. —Horne. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Respondent—Watt, K.C. —Spens. Agent—Jas. A. Kessen, S.S.C.

Thursday, November 19.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

HUTCHISON *v.* HUTCHISON.

(See also 45 S.L.R. 783, 1908, S.C. 1001.)

Husband and Wife—Divorce—Desertion—Privy Remonstrance—Conjugal Rights (Scotland) Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 11.

There cannot be desertion by a spouse whom the other spouse does not wish to return; but if in a process of separation a formal offer is made by the husband to take back the wife, that by itself is enough—unless something else follows—to show that her absence is not approved of by him. The effect, however, of that offer may be got over either by showing that the offer was not genuine, or by showing that notwithstanding that offer there had afterwards been a change of disposition on the part of the husband, *i.e.*, that the offer did not remain a standing offer.

John Patterson Hutchison, sometime photographer, 47 High Street, Hawick, then residing at 150 Dundee Street, Edinburgh, raised an action of divorce for desertion against Mrs Agnes Forrest Stevenson or Hutchison, his wife, residing at 11 West Campbell Street, Glasgow.