only 16s. 7d. a-week owing to a general fall in wages."

On these facts the Sheriff-Substitute awarded compensation at the rate of 1s. 11d. per week.

The *question* for the opinion of the Court was—"Whether it was competent . . . under the statute to award compensation?"

Argued for the appellants—The Sheriff-Substitute had found that the diminution in the respondent's wages was due to a general fall in wages. From that it followed that he was earning the same wages now as if he had never met with the accident. The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule 1 (1) (*b*), and (2) clearly contemplated an award of compensation only when the diminution in the earnings of the workman was brought about by the accident. *Jamieson* v. *Fife Coal Company*, June 20, 1903, 5 F. 958, 40 S.L.R. 704, so far as in point, was in the appellant's favour. In that case it was decided that the rate of compensation for total incapacity could not be reduced on account of a fall in wages during the incapacity. Similarly, compensation for partial incapacity could not be increased, or, as proposed here, awarded on account of a fall in wages.

Argued for the respondent—The statement of facts, though perhaps not so full as it might have been, contained sufficient material on which to found an affirmative answer to the question stated. Impaired capacity resulting in a change of occupation and diminution of earnings were proved, and that was sufficient to justify an award of compensation. Diminution of earning capacity by reason of the injury was the sole test of right to compensation—*Freeland* v. *Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599. In any event, the Court could not find for the appellants on the facts stated. It could not be inferred that a general fall in wages was the sole cause of the diminution in the respondent's earnings. It might be that the employment of the respondent before the accident was not subject to the same fluctuation as the employment he had to accept afterwards. The workman had claimed arrears from 10th January 1900, and that suggested that the decrease in his earnings was not due to the general fall in wages, which was much more recent.

LORD LOW—The statement of facts in this case is not so full or precise as it might have been, but I think there is enough to enable us to dispose of the question of law which is raised. The third finding in fact is that the respondent's "average weekly earnings before the accident were eighteen shillings and sixpence, but that for some time prior to the proof they had been only sixteen shillings and sevenpence a week owing to a general fall in wages."

Now I can only read that as meaning that when the respondent was employed after the accident as a haulage engineman his wages were eighteen shillings and sixpence a week, being the same amount as that which he had earned prior to the accident when he was employed as a waggon shifter, but that for some time—I suppose for some weeks or months—before the proof he had earned only sixteen shillings and sevenpence in wages, owing to a general fall in wages. That implies that the fall in wages had nothing to do with the man's incapacity. It is plain that when he had so far recovered from the accident as to be able to work and the appellants had again employed him in a different capacity at the same rate of wages, he could not, and in fact he did not claim compensation, and that position of matters continued for eight years. Now by the shifting of the rate of wages owing to economic causes, and not because of change in his capacity to earn wages, his earnings have diminished. I am of opinion that that is not a ground on which the Sheriff can award compensation. The respondent is in no worse a position than he would have been in if he had never been injured, but had continued throughout to be employed as a shifter. Further, if instead of falling the rate of wages had risen, as they might have done and may still do, it is plain that the respondent would have reaped the benefit, and, in like manner, the rate of wages having fallen, I think the loss must fall upon him. Of course if the fall in wages had been due to supervening incapacity that would have been a totally different matter.

I am accordingly of opinion that the question of law must be answered in the negative.

LORD ARDWALL and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was presiding at a jury trial.

The Court answered the question in the negative.

Counsel for the Appellants — Horne — Strain. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—J. C. Watt, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

Thursday, June 17.

SECOND DIVISION.

HUGHES *v.* ALLENS.

Expenses — Act of Sederunt, 20th March 1907, sec. 8—Recovery of Less than £50 —One Action against Two Defenders—One Defence—Recovery of £40 from One Defender and £20 from the Other.

The Act of Sederunt of 20th March 1907, enacts—section 8—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be

entitled to charge more than one-half of the taxed amount of his expenses, unless the Judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding two-third parts thereof."

A brought an action of damages for assault against B and C, concluding against B for £150, and against C for £75, and against them jointly and severally, or severally, for expenses. The averment was that on one occasion B, and on another B and C acting together, had assaulted the pursuer. B and C made one defence. The case having been tried before a jury, the jury awarded £40 of damages against B and £20 against C.

Held that, there having been one action with one defence, in which £60 had been recovered, the Act of Sederunt did not apply, and the pursuer was entitled to recover her full expenses.

Mary Hughes, domestic servant, residing at the Manse, Fossoway, brought an action of damages for assault against William Allen, M.D., Glasgow, and against his brother James B. Allen, also resident in Glasgow. She averred that she had been assaulted on 31st August 1908 by Dr William Allen, and that later on the same day she had been assaulted by Dr Allen and his brother James B. Allen. She concluded against William Allen for £150 and against James B. Allen for £75. She also concluded against the two defenders jointly and severally, or severally, for expenses. On 13th March 1909 the case was tried before Lord Ardwall and a jury. The jury returned a verdict for the pursuer against both defenders, and assessed the damages against William Allen at £40, and against James B. Allen at £20. The defenders thereafter applied for a new trial, but this application was refused. The pursuer thereupon moved for full expenses, but the defenders objected thereto, and maintained that section 8 of the Act of Sederunt of 20th March 1907 applied.

Argued for the pursuer—The test put by the Court in section 8 of the Act of Sederunt in order to qualify for an award of full expenses was the amount recovered. In this case the pursuer was not in the position of having recovered less than £50. She had brought only one action and had had compensation awarded to her to the extent of £60. Here there was only one set of expenses on the part of the defenders. Said section 8 tried to regulate the type of case that was to come into the Court of Session, and was not applicable here.

Argued for defenders—Section 8 of the said Act of Sederunt applied to this case. As the pursuer had not recovered £50 from either defender she was not entitled to more than half her taxed expenses, or in any event to two-thirds thereof, if the presiding Judge should grant a certificate to that effect. Here there was no joint and several conclusion. There were separate conclusions against the defenders, and there were separate issues. The defender James B. Allen had nothing to do with the first assault. It was only by putting the two separate conclusions into one action that the pursuer was able to bring this action into the Court of Session. The jury had considered that her claim against William Allen amounted to £40, and against James B. Allen to £20. On their estimate of the action it should not have been brought in the Court of Session, as the Sheriff Court had privative jurisdiction in causes under £50 value—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 7.

On 5th June 1909 the Court pronounced an interlocutor applying the verdict and reserving meantime the question of expenses.

At advising (on the question of expenses)—

LORD JUSTICE-CLERK—The question we have to decide is whether the pursuer in this case is entitled to receive her full expenses, or whether, in view of section 8 of the Act of Sederunt of 20th March 1907, she is only entitled to one-half of the taxed amount, or, in the discretion of the Judge who tried the case, to a sum not exceeding two-thirds thereof.

The provisions of the section are as follows:—". . . (*quotes v. sup. in rubric*). . ."

The question arises thus:—The pursuer brought an action in which in one summons she concluded for decree against William Allen for £150, and against James Allen for £75. The jury in their verdict awarded £40 against the former and £20 against the latter. The contention of the defenders' counsel was that the Act of Sederunt applied, inasmuch as the pursuer had not got £50 from each defender. The question is a novel one, and we thought it right to consult the Judges of the First Division before giving our decision. The conclusion at which we have arrived is that this is not a case to which the Act of Sederunt applies. The pursuer brought one action only, and there was only one defence. In that action she recovered £60, and I do not therefore think that it can fairly be said that she has recovered less than £50 within the meaning of the section. I accordingly propose to allow the pursuer her full expenses.

LORD LOW and LORD ARDWALL concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel and considered the question of expenses reserved by the preceding interlocutor, find the pursuer entitled to full expenses."

Counsel for Pursuer—Constable, K.C.—Pringle. Agents—Constable & Sym, W.S.

Counsel for Defenders—Morison, K.C.—Macmillan. Agents—Webster, Will, & Company, S.S.C.