to females, should be for their own separate use and benefit, and exclusive of the *jus mariti* and right of administration of any husband they had married or might respectively marry, and that the same should not be subject to the debts or deeds of such husbands, or liable to the legal diligence of their creditors, but that it should be competent for such female legatees or beneficiaries by themselves alone, and without the consent of their husbands, to discharge these said legacies or provisions. The trustees of the said David Hargrieve accordingly, by disposition dated 23rd March, and recorded in the Division of the General Register of Sasines applicable to the County of Edinburgh, 3rd May, both in the year 1895, conveyed to the said Margaret M'Allister in liferent, and to the petitioner and her heirs and assignees in fee, the said heritable property in Loanhead called Grasmere Cottage. The said Margaret M'Allister died on 26th April 1895. The disposition contained no declaration that the conveyance to the petitioner is exclusive of the rights of any husband she might marry.

"4. The petitioner has one child, a boy of fourteen years of age, and she is thrown upon her own resources to earn a livelihood for herself and her boy. She proposes in the meantime to borrow a sum of £200 upon the security of her said property of Grasmere Cottage, and to sell the same, if a purchaser at a suitable price can be found. Being a married woman, she is unable to grant a bond and disposition in security in the ordinary way, or to sell and convey her heritable property without the consent of her husband, unless she is authorised by the Court to do so, and the present petition is therefore rendered necessary."

The petitioner in Single Bills moved the Court to grant the prayer of the petition and cited the case of *M'Lennan* v. *M'Lennan*, 1908 S.C. 164, 45 S.L.R. 167.

The Court granted the prayer of the petition.

Counsel for the Petitioner — Forbes. Agents—T. & J. C. Sturrock, S.S.C.

Friday, November 12.

SECOND DIVISION.

[Sheriff Court at Airdrie.

BOAG *v.* LOCHWOOD COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. I, secs.* 2, 12—*Weekly Payment—Review—Partial Incapacity—Inability to Find Suitable Light Work—No Change in Physical Condition.*

A workman who was in receipt of 6s. a-week from his employers as compensation under the Workmen's Compensation Act 1897 in respect of partial incapacity resulting from an accident arising out of and in the course of his employment in May 1907, presented in 1909 an application for review of the weekly payments, in terms of section 12 of Schedule I of the Act. The workman did not aver any change in his physical condition, but maintained that he must be held in law to be totally incapacitated in respect that his employers were unable to give him suitable light work, and that he was unable to find light employment elsewhere.

Held that the workman had failed to state any grounds on which the arbiter would be entitled to review the compensation, and application *dismissed.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, sec. (2), enacts—"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. . . ."

Sec. 12—"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 in the Sheriff Court at Airdrie under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), between Robert Boag and Lochwood Collieries Limited, the Sheriff-Substitute (GLEGG) refused an application by Boag for review of the weekly payments under a memorandum of agreement between the parties, and at the request of Boag stated a case for appeal.

The case gave the following narrative—"This is an arbitration under the Workmen's Compensation Act 1897, in which the arbitrator is asked by the appellant to review the weekly payments of 6s. of partial compensation agreed to be paid by the said Lochwood Collieries, Limited, to the said Robert Boag in respect of injuries by accident sustained by him in the course of his employment as a miner in the employment of the Lochwood Collieries, Limited, at their Lochwood Colliery, Bargeddie, on 23rd May 1905, and to increase said weekly payments by such amount and from such date as the arbitrator may think fit in terms of section 12 of the 1st Schedule of the Workmen's Compensation Act 1897. The appellant avers that he is entitled in law to be held as totally incapacitated for work in respect that the said Lochwood Collieries, Limited, are unable to give him suitable light work and he is unable to obtain light employment elsewhere.

"The respondents plead that the ground of review is incompetent, and in any event the respondent's earning capacity is such that he is not entitled to any greater weekly payment of compensation than 6s."

The Sheriff-Substitute found that no relevant grounds were stated for reviewing the weekly payments under the recorded

memorandum of agreement between the parties, and refused the application for review.

The *question of law* for the opinion of the Court was—"Whether the arbitrator was correct in dismissing the application in respect that no relevant grounds for reviewing the weekly payments were set forth?"

Argued for the appellant—The Act provided that in fixing the amount of the weekly payment regard should be had to the difference between the average weekly earnings prior to the accident and the average amount which the workman was able to earn after the accident—Workmen's Compensation Act 1897, Schedule I, section 2. In estimating the amount which the workman was able to earn after the accident two elements had to be taken into consideration, viz.—(1) the physical condition of the workman, (2) the probable effect of that condition on his chances of finding employment. The second element was purely speculative, and the Court were entitled to review in the light of experience an agreement proceeding on that speculation. If it could be shown that the effect of the workman's condition on his chances of employment had been incorrectly estimated, he was entitled to have the payment reviewed. It was not necessary that there should be any change in the workman's physical condition—*Clark* v. *Gas Light and Coke Company*, 1905, 21 T.L.R. 184; *Sharman* v. *Holliday & Greenwood*, [1904[1 K.B, 235. The appellant here had averred that in consequence of the accident he could not find work suitable to his diminished capacity, and that, if proved, was sufficient to justify review. Otherwise it would follow that in estimating compensation nothing could be considered except the amount which the workman was physically able to earn, and that was not the law—*per* Lord President in *Clelland* v. *Singer Manufacturing Company*, July 18, 1905, 7 F. 975, at page 980, 42 S.L.R. 757, at page 760. The case of *Crossfield & Sons, Limited* v. *Tanian*, [1900] 2 K.B. 629, was not inconsistent with the appellant's contention. The application for review was there refused because the evidence tendered might have been brought in the original arbitration but for a mistake in procedure.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK—I have formed a very clear opinion on this case, and I think your Lordships agree that it is not necessary to hear further argument. All that is before us is that the parties having come to an agreement by which a certain sum per week was to be paid to the present appellant in respect of partial incapacity, he appears and asks that the payment should be reviewed and increased, maintaining that he is now to be held in law as totally incapacitated on two grounds—one, in respect that the employers are unable to give him suitable light work, and the other that he is unable to obtain light employment elsewhere. It does not appear to me that either of these is a ground for reviewing the compensation at all. As I read the Act of Parliament and relative schedule the question to be decided in an application to assess compensation or under an application for review of weekly payments is the question of the man's *physical* capacity to work. Now in this case it had been decided by agreement that the workman was partially capable for work. Is it any reason for reviewing the payment to say that the employers cannot find him suitable work for his capacity, or that he has not been able to find such work himself? If the appellant means that his averments if proved would of themselves be a sufficient ground for saying that compensation must be increased to the full allowance under the statute, I should certainly not for myself yield for one moment to any such demand. I take it that the whole question is that of "capacity to work," which cannot be decided merely by the fact that the workman has not got work, but only by such evidence as satisfies the Court whether or not he is able to work. I here quote from Collins, M.R., in the case of *Sharman* v. *Holliday & Greenwood, Limited*, [1904] 1 K.B. 235, at p. 239, where he says with reference to the case of *Crossfield & Sons* v. *Tanian*, [1900] 2 Q.B. 629—"That was not the case of an application to review the weekly payment on evidence of actual subsequent experience, disproving the correctness of mere speculative opinion." If in any case it is proved by experience that there has been a change of circumstances, then the matter may be re-opened if the arbitration is still in existence, but proof of such a change is not to be allowed merely on the allegation that the man cannot get work. The ground of judgment in the case of *Sharman* was that evidence had been tendered to show that by subsequent experiment the decision of the medical experts had proved erroneous, the nature of the evidence being that since the previous hearing the workman had repeatedly applied for employment and had been refused on the ground that he was not fit to work; and that on one occasion on which he had been able to find employment he had been discharged as being incapable to do the work on account of his condition arising from the accident. Lord Justice Matthew says—"I can see nothing in the Act itself which forbids further inquiry if after the original inquiry fresh symptoms develop or further incapacity for work is shown to have arisen." Now with that I entirely concur, but I am quite unable to concur with the idea that in this case there was anything before the Sheriff to have justified him in re-opening the matter.

It was said that evidence of a man's capacity to work was speculative. Of course it must necessarily be speculative. You can say that a man is incapacitated, but to a certain extent the effect of that incapacity can only be ascertained by experience. Even in the ordinary case of an accident where there is liability at common law and where an action of damages has been raised, a great deal of the evidence must be speculative. Doctors

on one side say one thing and doctors on the other side will say something else as to what will happen six months after. The jury must judge of that, and in that case their verdict is final. In cases under the Workmen's Compensation Act the matter is not final so long as a payment is being made, but it can only be re-opened on the ground that the opinion arrived at before was wrong, because the man is now incapacitated to a different extent from that which was found to exist at the time when the compensation was assessed. I could never hold that it was a sufficient test of this for a man to come forward and say merely that he has not succeeded in finding employment. I therefore think that the Sheriff was right.

LORD LOW—I am of the same opinion. It appears that the appellant was partially injured by an accident, and by an agreement, which he entered into with his employers and of which a memorandum was recorded, the amount of compensation, which was agreed upon as the proper amount in view of the partial incapacity which had resulted from the accident was six shillings a-week. The appellant now presents an application to the Sheriff for review of the weekly payments, and apparently he asks that the weekly payments should be increased to the maximum amount allowed by the statute, on the ground that he should now be held as totally incapacitated. Of course if the incapacity resulting from the accident had increased since the date of the agreement that would be a perfectly competent application. But the peculiarity of the case is that it is not suggested that his physical incapacity has increased at all, so we must assume that it remains, at all events, not greater than it was when the agreement was entered into, and the sole ground of the application is that he is unable to find such work as he is capable of doing. I have no doubt that that is not a ground on which he is entitled to have the weekly payments reviewed at all. The matter is still ruled by the recorded memorandum of agreement. Therefore I am of opinion that the Sheriff-Substitute was perfectly right in dismissing the application.

LORD ARDWALL concurred.

LORD DUNDAS was sitting in the First Division.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Constable, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

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

HIGH COURT OF JUSTICIARY.

CIRCUIT COURT, GLASGOW.

Tuesday, August 31.

(Before Lord Ardwall.)
(Before Lord Johnston.)

H. M. ADVOCATE *v.* LAVELLE.
H. M. ADVOCATE *v.* BONNAR.

Justiciary Cases—Habitual Criminality—Proof—Preventive Detention—Previous Convictions of Crime—Extract Conviction with Schedule Containing Prior Previous Convictions — Prevention of Crime Act 1908 (8 *Edw. VII, cap.* 59), *secs.* 10 (2) (*a*) *and* 17 (3)—*Criminal Procedure* (*Scotland*) *Act* 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 67.

An indictment charged the accused with theft aggravated by previous conviction of dishonest appropriation of property, and continued "and you are a habitual criminal." In the list of productions was an extract conviction of theft with a schedule of a number of previous convictions. The accused having been convicted of the main charge the jury was re-sworn as provided by the Prevention of Crime Act 1908, sec. 17 (3), to try the question of habitual criminality.

Held that the extract conviction produced, although containing a number of previous convictions, was not a sufficient basis upon which to prove the three previous convictions necessary to establish habitual criminality, and a verdict of not proven on that charge directed to be returned.

Per Lord Ardwall—"I think that the two charges are separable and separate."

Per Lord Johnston—"I think that though the previous convictions may be proved in the shorthand way provided by section 66 [Criminal Procedure (Scotland) Act 1887] and previous sections of the Act, it is not enough that a mere extract of one previous conviction with a schedule of others annexed be produced; extracts of all the convictions should be produced, and should be open to examination by the panel and by the jury, and, moreover, should be available to the Court of Appeal."

The Prevention of Crime Act 1908 (8 Edw. VII, cap. 59), sec. 10, enacts—"(1) Where a person is convicted on indictment of a crime committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the