Wednesday, February 5.

FIRST DIVISION.

[Lord Hunter, Ordinary.

DON BROTHERS, BUIST, & COMPANY, LIMITED *v.* ANDERSON AND OTHERS.

Insurance—Rate of Contributions—Determination of Commissioners—Reduction—National Insurance Act 1911 (1 *and* 2 *Geo. V, c.* 55), *sec.* 66 (1).

The National Insurance Act 1911 sec. 66 (1), enacts—"If any question arises . . . (*c*) as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively, the question shall be determined by the Insurance Commissioners in accordance with regulations made by them for the purpose."

A firm of employers brought an action for reduction of a determination of the Commissioners fixing the rates of contributions payable by the pursuers and one of their employees respectively, under Part I of the National Insurance Act 1911. It was not averred that the Commissioners had refused to hear parties, or that they had acted otherwise than in good faith in determining the question.

Held that the Court had no jurisdiction to interfere with the decision of the Commissioners, and action *dismissed.*

On 29th October 1912 Don Brothers, Buist, & Company, Limited, jute manufacturers, Dundee, *pursuers*, brought an action against Jessie Anderson, 17 Dallfield Walk, Dundee, *defender*, and also against The Scottish Insurance Commissioners, Edinburgh, for their interest, in which they sought reduction of a decision of the Commissioners, dated 21st October 1912, determining that in respect of the pursuers' employment of Jessie Anderson the contributions payable under Part I of the National Insurance Act 1911 were 4d. per week by the pursuers and 1d. per week by the defender.

The pursuers pleaded—"The rate of remuneration of the defender being 2s. 1½d. for each working day, and the contributions to National Health Insurance for a female employee where the working day's remuneration exceeds 2s. but does not exceed 2s. 6d. being fixed by the National Insurance Act at 3d. for the employer and 3d. for the employee, the pretended finding of the Commissioners that the said contributions are 4d. a week by the pursuers and 1d. a week by the defender is contrary to the provisions of the statute, and should be set aside."

The Commissioners, who alone lodged defences, pleaded, *inter alia*—"(1) The Commissioners having in good faith and *intra vires* determined the question raised by the pursuers under section 66, subsection (1) (*c*) of the Act, the Court has no jurisdiction to set aside the said determination, and the action should accordingly be dismissed."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 13th December 1912 sustained the Commissioners' first plea-in-law and dismissed the action.

Opinion.—"The pursuers are a firm of jute spinners and manufacturers at Dundee. The defender is one of their female employees, but the Scottish National Insurance Commissioners, who alone have put in defences, are called for their interest. The action concludes for reduction of a decision of the said Commissioners under which it was determined that in respect of the employment by the pursuers of the defender the contributions payable under Part I of the National Insurance Act 1911, are 4d. per week by the pursuers and 1d. per week by the said defender.

"Under the provisions of the Insurance Act 1911, the contributions payable by employer and employed in the case of employed contributors vary according to the rate of the remuneration of the employed. By Part I of the Second Schedule it is provided that if the rate of remuneration of a female employee exceeds 1s. 6d. but does not exceed 2s. per working day, the contribution to be paid by the employer is 4d. per week, and that to be paid by the employee is 1d. Where the rate of remuneration exceeds 2s. but does not exceed 2s. 6d. per working day, the contribution is 3d. from the employer and 3d. from the employed respectively.

"According to the averments of the pursuers, questions arose between them and the defender as to the rate of contribution to be paid by them in respect of the defender, and as to the proportion recoverable by them from her, and the following questions were submitted to the Scottish Insurance Commissioners:—'Whether the value of stamp to be affixed by employer is 6d., and the amount recoverable from the worker 3d., as the rate of remuneration is 2s. 1½d. for a working day of ten hours, being the period of employment for each day except Saturday, fixed in accordance with the Factory and Workshops Act 1901, sec. 24 (1).'

"These Commissioners are a statutory body appointed under the Insurance Act, to whom very ample powers, both of an administrative and of a judicial character, are entrusted by the Legislature. *Inter alia*, section 66 (1) of the Act provides that 'If any question arises—(*a*) As to whether any employment or any class of employment is or will be employment within the meaning of this part of this Act, or as to whether a person is entitled to become a voluntary contributor; or (*b*) as to the rate of contributions payable by or in respect of any insured person; or (*c*) as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respec-

tively—the question shall be determined by the Insurance Commissioners in accordance with regulations made by them for the purpose.' In virtue of the proviso which follows, provision is made for appeal in special form so far as a question under (*a*) is concerned, and the Commissioners may allow a question under (*b*) to be determined by an approved society. Nothing, however, is said in qualification of the absolute right of the Commissioners to decide a question under (*c*), and, as the decision now challenged was pronounced under that sub-section, it is maintained in defence that the Court has no jurisdiction to set aside the determination of the Commissioners.

"The pursuers say 'the said Commissioners fixed a hearing to take place at Dundee on 2nd October 1912. At said hearing the pursuers were represented and the defender was present. Witnesses were examined, and it was proved by evidence, which was not contradicted, and it is in accordance with fact, that the said defender's employment with the pursuers was liable to be terminated without previous notice by either party; that when working full time the defender was employed for fifty-five hours in each week; that the said full working week was made up of ten hours in each day of the week from Monday to Friday, and five hours on Saturday, being the statutory maximum in terms of the Factory and Workshops Act 1901; that the defender's remuneration in any one week depended upon the number of hours which she might work, and was calculated at the rate of 11s. 7d. for 55 hours; that when the defender worked the full 55 hours in each week she was entitled to receive, in addition to the said 11s. 7d., a bonus of 3d.; and that if the defender should be absent from her employment or not working during any part of any week she was not entitled to the said bonus of 3d., and her remuneration for that week suffered a diminution calculated on the time during which she might not be working at the said rate of 11s. 7d. for 55 hours.'

"On 21st October 1912 the Commissioners issued the decision which is now challenged, and which is in the following terms:—'That in respect of the employment by the applicants of Jessie Anderson, 17 Dallfield Walk, Dundee, the contributions payable under Part I of the National Insurance Act are as follows:—4d. a week by the employer and 1d. a week by the employee.'

"It is not said that the Commissioners refused to hear any evidence or argument tendered to them, or that they did not act in good faith in determining the question submitted to them as they did. As I understand the pursuer's case, it is maintained that the Commissioners had to consider (first) what was an ordinary working day of the defender, and (second) what remuneration she in fact received for such a day. So considered they say that the working day of the said defender was a day of 10 hours and that her remuneration was 2s. 1¼d. For the Commissioners to take any other view of the facts as proved was to act perversely and in excess of the powers entrusted to them by the statute.

"I do not find that the statute has prescribed any regulations for determining what in any particular case is the rate of remuneration per working day. It is obvious that where the employee works for different periods of time on different days and earns different sums in respect of each day's work the rate of remuneration per working day will, or may have to, be arrived at by some system of averaging. It appears to me to be quite possible to construe the words of the statute in the case of the defender's employment by taking as her rate of remuneration per working day the amount which she earns upon an ordinary working day, or by taking the whole amount which she in fact earns during the 6 days which she works and dividing by 6. Now it appears to me that, if two constructions of the language of Part I in the Second Schedule are possible, the Legislature has entrusted the Commissioners with the duty of interpreting the language, and it is not for me to interfere even if I were of opinion that they had reached a wrong conclusion. In a recent case, *Board of Education* v *Rice*, 1911, A.C. 179, the Lord Chancellor, at page 182, made, with reference to the powers of the Board of Education to determine questions under the Act, a number of remarks which appear to me to be applicable to the powers of the Commissioners under the Insurance Act. *Inter alia*, his Lordship said—'The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise and as they arise between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact.' I do not see how I can decide in the pursuer's favour without reviewing the determination of the Commissioners, upon an actual difference which had arisen between the pursuers and the female defender, under section 66 (1) (*c*) of the Insurance Act. As I hold I am not entitled to do so, I sustain the first plea for the Commissioners and dismiss the action."

The pursuers reclaimed, and argued—It was for the Court, not for the Commissioners, to determine the meaning of the words "working day," for the pursuers were entitled to have that judicially determined. The Commissioners had not only gone out of their way to decide that question, but had decided it wrongly, inasmuch as they had failed to observe the statutory factors for fixing it prescribed by Part I of Schedule II annexed to the National Insurance Act 1911 (1 and 2 Geo. V, c. 55). Their decision therefore was *ultra vires* and should be reduced—*Caledonian Railway Company* v. *Glasgow Corporation*, July 19, 1905, 7 F. 1020, *per* the Lord President at p. 1027, 42 S.L.R. 773; *Rex* v. *Board of Education*, [1910] 2 K.B. 165, *per* Farwell, L.J., at p. 177, *aff.* [1911] A.C. 179.

Counsel for respondents were not called on.

LORD PRESIDENT—I confess I think this is an exceedingly plain case. The National Insurance Act of 1911 provides for certain contributions being made by employers and employees, and those contributions vary according as the rate of remuneration exceeds eighteenpence and does not exceed two shillings a working day, or exceeds two shillings and does not exceed two shillings and sixpence. By section 66 of the Act it is provided that if any question arises—(*a*) and (*b*) I leave out—(*c*) "As to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively, the question shall be determined by the Insurance Commissioners." Then there is a proviso giving a certain limited appeal in the cases of (*a*) and (*b*), but not in the case of (*c*).

Now a question did arise between the pursuers in this action, who are jute spinners, and one of their hands, as to whether the contribution should be in respect of remuneration at a rate between eighteenpence and two shillings or at a rate between two shillings and two shillings and sixpence; and accordingly the present pursuers made an application to the Commissioners with a view to the determination of the question which had arisen.

The actual form of the question that they put to the Commissioners was, if I may say so, absolutely futile, because it contained its own answer and did not raise in its terms the question that had to be decided at all. It asked "whether the value of stamp to be affixed by employer is sixpence, and the amount recoverable from the worker threepence, as the rate of remuneration is 2s. 1½d. for a working day of ten hours. Well, if that question is to be answered, it is really asking if two and two make four. But although the question was put in that futile form, there was no real doubt between the parties as to what their dispute was about, because they had a hearing before the Commissioners and examined witnesses on both sides. In that inquiry they went into the whole question of how much the employee was paid, and how she was paid, in order to raise the real question, namely, what was the true meaning of the working day in the Act of Parliament, the trouble being that the employee was employed for a ten hours' day on five days a-week, and a five hours' day on the sixth, and the real question between the parties being whether the rate of remuneration per working day was to be taken on what she got for a full working day of ten hours or what she got upon what we may call the average working day, which day you arrive at by adding the five days at ten hours to the sixth day at five hours and then dividing by six.

Now upon that the Commissioners gave a determination that the working day here gave a rate of remuneration at less than two shillings, and that in respect of that the employers had to contribute fourpence a week and the employee a penny per week. In other words, they determined just the question that had arisen in terms of the Act "as to the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively." The Commissioners having done so, I am quite unable to see how this Court is entitled to touch their determination. It may be very unfortunate that an appeal was not given upon this matter, because it may be that the Commissioners have taken a wrong view of how the working day ought to be struck, but it seems to me that when the Act of Parliament said that they were to fix "the rates of contributions payable in respect of an employed contributor by the employer and the contributor respectively," it handed over to the Insurance Commissioners a question which may be of pure fact, but may be of fact and of law also in so far as a question of construction is always a question of law. In other words, I think it is exactly the same as if that determination had been on a question arising in a private contract, and referred to arbitration. This Court could not have interfered with the arbiter however grossly wrong they thought him. I have quoted again and again the case of *Holmes Oil Company* v. *Pumpherston Oil Company*, (1891) 18 R. (H.L.) 52, 28 S.L.R. 940, which was a case of as wrong a determination by the arbiter as might well be, but the Court could not interfere.

Here I think also we cannot interfere, because if that is the question which is meant by the Act of Parliament to be determined by the Commissioners, undoubtedly they have not acted *ultra vires*. There is no complaint that they did not hear parties, or departed from the rules of justice in any way. Consequently I think there is no real case made out for reduction of their award. I think therefore that the Lord Ordinary's judgment was right and ought to be adhered to.

LORD JOHNSTON—This question raises, undoubtedly, a matter of wide application and of considerable importance to employers and employed, and it is unfortunate that the question being one of the construction of a schedule which is made part of the statute, it is impossible to obtain the judgment upon that question of a judicial tribunal. What is meant by "a working day" is not a matter of the Commissioners' discretion, but of the Legislature's intention as disclosed by the provision of the schedule. It is difficult to understand why a question such as that should have been withheld from the Court, looking to the sort of question which is referred to it, namely, the question whether any employment, or any class of employment, is employment within the meaning of the Act. That does not seem to me to be so much a question of law as the question raised in this case. But I agree with your Lordship that the terms of the statute preclude that question being raised in the form in which it has been raised before this Court.

LORD MACKENZIE—I agree with your Lordships. I do not think that we can say that anything that the Commissioners have done here is *ultra vires.*

LORD KINNEAR was absent.

The Court adhered.

Counsel for Reclaimers — Sandeman, K.C.—Hon. W. Watson. Agents—Alex. Morison & Company, W.S.

Counsel for Respondents — Solicitor-General (Anderson, K.C.)—T. G. Robertson. Agent—James Watt, W.S.

Tuesday, December 17, 1912.

EXTRA DIVISION.

[Lord Dewar, Ordinary.

NELSON *v.* WILLIAM CHALMERS & COMPANY.

Sale of Moveables — Contract — Breach — Transference of Property — Delivery — Right to Reject — Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 17, 18, *and Rule* 5 (1), 35, *and* 53 (5) — *Ship Disconform to Contract.*

A contract for the building of a yacht provided, *inter alia*, (1) that the workmanship was to be of the highest order, all to designer's or owner's satisfaction, (2) that in course of construction it was to be superintended by the designer or his inspectors, and (3) that the property in the yacht was to pass on payment of the first instalment of the price. The purchaser paid the first instalment, but two months afterwards, after having complained on various occasions of the quality of the work being done, rejected the boat as disconform to contract.

Held that the property had passed on payment of the first instalment of the price, but subject to the condition that the completed work should turn out to be conform to contract; that the Sale of Goods Act 1893, while making it possible to transfer property without delivery, had not abrogated the common law right of rejection, and that in fact the yacht had been rejected timeously.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 11 (2)—"In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." Section 17—"(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." Section 18—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer." Rule 5 (1)—"Where there is a contract for the sale of an ascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made." Section 35—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Section 53, which gives the remedy for breach of warranty, enacts—"(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

On 7th November 1911 Ian Theodore Nelson of Glenetive, *pursuer*, brought an action against William Chalmers & Company, Limited, shipbuilders, Rutherglen, *defenders*, in which he craved the Court to ordain the defenders—"(First) to make payment to the pursuer of the sum of £131, 5s. sterling with interest thereon at the rate of 5 per centum per annum from the 24th day of August 1911 until payment; (second) to deliver to the pursuer within such short time as the Court may fix (*a*) the forty B.H.P. two-cylinder 'Bolinders' direct reversible crude oil marine engine with silencer and spares complete in packing case; (*b*) Manganese bronze shafting, steel half coupling, gun metal propeller, and brass stern tube; (*c*) bilge pump fitted on engine; (*d*) strainer for circulating water inlet; (*e*) galvanised iron tank; (*f*) No. 0 Wellcox quad. acting pump with copper pipe connections; (*g*) copper service tank fitted with gauge glass, two fuel cocks, and two hand pumps, all the property of the pursuer and presently in the possession or under the control of the defenders, and all as specified in the account produced herewith; and, in the event of the defenders failing so to deliver the said articles, to make payment to the pursuer of the sum of £526, 6s. 9d. sterling, with interest thereon at the rate of 5 per centum per annum from the 24th day of August 1911 until payment; and (third) to make payment to the pursuer of the sum of £150 sterling, with interest at the said rate from the date of citation to follow hereon until payment."

The following *narrative* is taken from