in relation to the land. Apart from the provisions of section 41, the only statutory power which the Railway Company possesses in regard to superfluous lands is to sell these lands subject to a right of forfeiture and to a right of pre-emption as prescribed by the statute. But if I am right in my interpretation of the section, then they are now empowered to hold the lands for such length of period as they think proper, to use them as they think proper, to lease them on such terms and for such length of time as they think proper, and to sell them out and out without giving anyone a right of pre-emption. Furthermore, the section expressly says that, notwithstanding anything contained in the Lands Clauses Act of 1845, the Railway Company shall not be required to sell such lands. Now the only lands which the Railway Company is required to sell by the Statute of 1845 are superfluous lands, and accordingly it appears to me that the section in express terms does apply to superfluous lands. The defender says—and this is the ground of his defence—these lands are superfluous. If so, then the 41st section in my opinion applies to them, and the Railway Company are entitled to have the declarator which they here seek.

In accordance with the opinions of the majority of the Court the action will be dismissed.

LORD MACKENZIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuers (Respondents)—Macmillan, K.C.—Watson, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—Hamilton. Agents—Guild & Guild, W.S.

Friday, March 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MULLIGAN *v.* GLASGOW CORPORATION.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (1) (*b*) *and* (16)—*Incapacity—Possibility of Supervening Incapacity—Suspensory Order—Workman Deprived of the Use of One Eye Able to Earn the Same Wages as before Accident.*

A workman was deprived of the use of one eye by accident arising out of and in the course of his employment. The employers paid him compensation for nearly a year; they then ceased to make the weekly payments. The workman brought an arbitration. The arbitrator found that at the cessation of payment the workman was fit for work and had been invited to resume his former work, and that it was not proved that the workman's earning capacity in the open market had been affected. The workman did not move for a suspensory order. *Held* that though in the present state of the labour market the workman might not have lost his earning capacity, in a normal market his wage-earning capacity might be impaired, and the case *remitted* to the arbitrator to consider whether or not a suspensory order should be pronounced.

Dempsey v. *Caldwell & Co.*, 1914 S.C. 28, 51 S.L.R. 16, *followed.*

Owen Mulligan, labourer, Glasgow, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute (MACKENZIE) at Glasgow in an arbitration brought by the appellant against the Corporation of Glasgow, *respondents*, for an award of compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) appealed by Stated Case.

The Case stated—"The following *facts* were established—1. That the applicant is a labourer residing at 277 Gallowgate, Glasgow, and that the respondents are the Corporation of the City of Glasgow. 2. That on 25th June 1915 the appellant was engaged in the respondents' employment as a labourer on the permanent way at Woodlands Road, Glasgow. 3. That on said date, while the appellant was engaged in his said employment, he sustained injuries by accident arising out of and in the course of his employment, viz., injuries to his left eye, which have resulted in blindness in said eye, in consequence of which he was incapacitated for work until 6th May 1916. 4. That the respondents admitted liability for said accident, and paid the appellant compensation under the Workmen's Compensation Act 1906, at the rate of 13s. 4d. per week up to and including the week ending 6th May 1916, since which date they have refused to continue payment of said compensation. 5. That appellant's average wages while in the respondents' employment prior to said accident were 27s. per week. 6. That the appellant is now fit for work and has been invited to resume the work he was formerly engaged in; that he has been so fit since 6th May 1916; that it is not proved that his earning capacity in the open market has been affected by the accident.

"I *found in law* that the respondents were not liable in compensation to the appellant beyond 6th May 1916. I therefore dismissed the application and found the appellant liable to the respondents in expenses."

The *question of law* was—"Was there evidence upon which the arbitrator could competently find that the respondents were not liable in compensation to the appellant beyond 6th May 1916?"

To his award the Sheriff-Substitute appended the following

Note.—"As early as 1st February 1916 the pursuer was reported by Dr Gilchrist as fit to resume his work. The defenders have paid compensation up to 6th May, and looking to the confirmatory certificates granted by Dr Riddell and Dr Gilchrist on 27th July 1916, I think that they are entitled to be relieved of compensation as from 6th

May. The defenders have offered to take the pursuer back to his old work, and there is practically no proof beyond his own statement that he is not able for this. He has apparently made no efforts to get work elsewhere, and there is no proof that his earning capacity in the labour market has been diminished. There is, indeed, proof that one-eyed men are engaged by the defenders in this work. The argument as to danger to the remaining eye is not, I think, tenable on the medical evidence. There appears to be no prospect of the second eye being affected. With regard to the effects of any second accident occurring to the remaining eye, I think I am bound by the view taken in the case of *Law* v. *Baird*, 1914 S.C. 423, 51 S.L.R. 388, however much the effect of that judgment may have been modified by *Burt* v. *East Fife Coal Company*, 1914, 52 S.L.R. 51, and the English case of *Jackson* v. *Hunslet Engine Co.*, 1916, 9 B. 269."

Argued for the appellant—Compensation should not have been terminated. The appellant as the result of the accident was a one-eyed man. He was at present able to earn his former wage, and upon that fact the arbiter had proceeded in terminating compensation. But the true test was not how was the appellant affected as to his *de facto* earnings but as to his earning capacity. There was no finding in fact as to how the appellant's earning capacity was affected. The fact that he was earning the same wages as before the action was no criterion, for the labour market was in an abnormal state, and in a normal market the appellant's earning capacity might well be affected. That, however, could not be tested at the present time, but could only be tested when the market was normal. The same course should be followed as was adopted in *Dempsey* v. *Caldwell & Company, Limited*, 1914 S.C. 28, 51 S.L.R. 16, *i.e.*, the case should be remitted to the arbiter to consider whether the termination of compensation should be permanent or temporary. *Hargreave* v. *Haughhead Coal Company*, 1912 S.C. (H.L.) 70, 49 S.L.R. 474, was distinguished, for it was decided on the fact that in a nominal market the workman's earning capacity was found to be unaffected. *Law* v. *Baird*, 1914 S.C. 423, 51 S.L.R. 388, was modified by *Burt* v. *Fife Coal Company*, 1914, 52 S.L.R. 51, and *Jackson* v. *Hunslet Engine Company*, 1916, 9 B.W.C.C. 269. It was immaterial that the appellant had not moved in the arbitration for a suspensory award, for there were no findings in fact to support the present decision. The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), 2nd Schedule, section 17 (*e*), was referred to.

Argued for the respondents—The present case was completely covered by *Hargreave's* case (*cit.*). That was the view of Lord Johnston in *Dempsey's* case at p. 35. Here the appellant had completely recovered from the accident, and accordingly the arbitrator had rightly terminated compensation—*Law* (*cit.*), *per* Lord President Strathclyde at p. 426. If the present state of the labour market was to be made a ground for a suspensory award, every award ought to be suspensory, for earning capacity always depended on the fluctuations of the labour market. No motion for a suspensory award was made to the arbitrator; it was too late now to raise that question. [LORD MACKENZIE referred to *Duris* v. *Wilsons and Clyde Coal Company*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708.]

LORD PRESIDENT—As the result of an accident arising out of and in the course of his employment, the appellant was deprived entirely of the use of his left eye. He thus became a permanently maimed man. He seeks compensation from his employers under the recent statute, and the learned arbitrator has found that he is now fit for work and has been invited to resume the work he was formerly engaged in, that he has been so fit since 6th May 1916, that he has not proved that his earning capacity in the open market has been affected by the accident; and accordingly the application stands dismissed.

I do not for a moment doubt that the arbitrator is final upon the question of fact which is thus raised in the sixth of his findings. It may very well be that in the present condition of the labour market the appellant, although a permanently maimed man, has not lost the wage-earning capacity which he possessed prior to the accident. But it may equally well be that when the abnormal condition of the labour market has passed away he may find himself as a permanently maimed man severely handicapped in his search for employment. He may find it difficult, if not impossible, to dispose of his labour at his former rate of wages, and his wage-earning capacity may be seriously impaired as the direct result of the accident. In short, a change of circumstances may occur under which he, maimed in consequence of this accident, may possibly, although perhaps not necessarily, find his wage-earning capacity materially impaired. This aspect of the case does not seem to have been presented to the learned arbitrator, and, so far as I can judge from the statements in the Stated Case, it was not present to his mind when he dismissed the application. He appears, in short, to have had before him only the two alternatives—to grant the application or to dismiss the application, leaving out of view altogether that there was a *via media*.

Now I think that the arbitrator ought to have the opportunity at all events of considering the question whether or no the proper order in this case might not be meanwhile to suspend proceedings and not to dismiss or to grant. In short, I think that this is a case in which we may very well pronounce an interlocutor in the same terms as were pronounced in the case of *Dempsey*, 1915 S.C. 28, 51 S.L.R. 16. I do not agree with my brother Lord Johnston's opinion in that case when he says that the result of the course which we then took would be that in every case in which the man has received an injury of the permanent class, to which he then referred, "you must suspend and cannot possibly end his compen-

sation whatever his present wage-earning capacity may be." I do not think that result follows at all from the form of order which was there pronounced. My view of the effect of the order is expressed in that part of my opinion where I say—"I propose to your Lordships that we should remit to the learned arbitrator to reconsider his opinion, having in view the fact, as he himself has found, that permanent injury has been suffered by this man in consequence of the accident which befell him, and to consider whether or no in view of that finding he should pronounce a suspensory order as I have called it, or, if he thinks proper, repeat the finding which he has already given."

I move your Lordships, therefore, in this case not to answer the question meanwhile but to remit to the arbitrator in the terms suggested.

LORD MACKENZIE—I agree with your Lordship.

LORD SKERRINGTON—I also agree.

LORD JOHNSTON was not present.

The Court pronounced this interlocutor—

"The Lords having considered the Stated Case on appeal and heard counsel for the parties, *hoc statu* recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit to him, in view of the finding that the claimant has permanently lost the sight of his left eye, to consider and decide whether the ending of the payments should be permanent or temporary."

Counsel for the Appellant—Chisholm, K.C.—Gibb. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondents—Moncrieff, K.C.—M. P. Fraser. Agents—Simpson & Marwick, W.S.

Wednesday, March 7.

SECOND DIVISION.

[Sheriff Court at Glasgow.

J. HAY & SONS *v.* OCEAN STEAMSHIP COMPANY, LIMITED, *et e contra.*

Expenses — Ship — Collision — Nautical Assessor's Fee—No Expenses Found Due to or by Either Party.

In conjoined actions of damages arising out of the collision of two ships the appellants' vessel was found to have been in fault by the Sheriff-Substitute, and they were ordained to pay the nautical assessor's fee out of money consigned by them. On appeal the Court recalled the Sheriff-Substitute's interlocutor except in so far as it fixed and authorised payment of the nautical assessor's fee in the Sheriff Court, and found that the collision was equally contributed to by the fault of both vessels, and that no expenses were due to or by either party either in the appeal or in the Sheriff Court. The appellants thereafter presented a note craving the Court to ordain the respondents to pay one-half of the nautical assessor's fee in both Courts. Without pronouncing an interlocutor the Court *directed* that each party should pay one-half of the nautical assessor's fee in the Court of Session.

Observed that the question of liability for the nautical assessor's fees in both Courts ought to have been raised at the conclusion of the case when the question of expenses was discussed and determined.

On 9th November 1915 Messrs J. Hay & Sons, *pursuers and respondents*, sued the Ocean Steamship Company, Limited, *defenders and appellants*, in the Sheriff Court at Glasgow for £2200, being the damage sustained by the s.s. "The Marchioness" in a collision with the s.s. "Peleus," of which the defenders were the owners. On 23rd November 1915 the defenders raised a counteraction against the pursuers claiming £5000 as damages, and the actions were conjoined. Each vessel alleged fault on the part of the other.

On the motion of the defenders the Sheriff-Substitute (CRAIGIE) on 6th April 1916 appointed Captain Wood to act as Nautical Assessor at the trial of the cause, and appointed them to consign in the hands of the Clerk of Court the sum of £20 to meet his fee and expenses.

After proof the Sheriff-Substitute found on 28th June 1916 that the defenders, were liable to the pursuers for the loss, injury, and damage suffered by them through the said collision, and granted leave to appeal. He fixed the fee and expenses of the Nautical Assessor at the sum of £16, 16s., and authorised the Clerk of Court to pay over said sum out of the amount consigned in his hands.

On 7th July 1916 the defenders appealed to the Second Division of the Court of Session, and thereafter lodged a note craving the Court to direct a nautical assessor to be summoned to attend the hearing on the appeal. The Court appointed Captain P. W. Tait, Leith, as Nautical Assessor.

On 9th, 10th, 11th, 12th, and 16th January 1917 the appeal was heard before the Second Division (the LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE), along with Captain Tait as Nautical Assessor, and on 16th January the Court pronounced an interlocutor sustaining the appeal, recalling the interlocutor of the Sheriff-Substitute appealed against except in so far as it fixed and authorised payment of the Nautical Assessor's fee and expenses in the Sheriff Court, and affirming such portion of the interlocutor finding that the collision was equally contributed to by the fault of both vessels and that the damage fell to be distributed accordingly, and further finding neither party entitled to expenses either in the Court of Session or in the Court below.

Captain Tait's account amounted to £17.

On 7th March 1917 the appellants presented a note to the Court asking that the respondents should be ordained to pay one-half of the Nautical Assessor's fee and