lature did not consider it appropriate that the statutory powers and privileges should be conferred on those by whom they might be improperly exercised.

If then, as I think, the petitioner is not empowered to sell by virtue of the provisions of the Act of 1921, it remains to be considered whether he has made out a case for authority being granted under the prayer of the petition, in virtue of the *nobile officium* of the Court. Such authority is granted only where a sale is necessary, where there is "urgency to avoid loss," or where there is "the highest possible expediency" in granting the power craved—*Lord Clinton*, 3 R. 62; see also *Mackenzie*, 17 D. 314; *Campbell*, 7 R. 1032; *Logan*, 25 R. 51. It is the almost invariable practice of the Court in cases of this nature to remit to a reporter before deciding whether or not authority should be granted. In the present case it is true that the petitioner, by the production of an extract of the foresaid decree in favour of the intestate's widow, has made out, *prima facie* at all events, that it is necessary to sell some part of the heritage. As, however, there ought to be a report as to the two tenements, I suggest to your Lordships that the reporter should be invited to report on all three properties.

LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

"... *In hoc statu* remit to Mr John Cameron, solicitor in Greenock, to inquire as to the value of the three heritable properties mentioned in the petition and to report thereon, and also to report as to the expediency and desirability of the sale thereof."

Counsel for the Petitioner—Chree, K.C. — King Murray. Agent — D. Maclean, Solicitor.

Saturday, March 1.

SECOND DIVISION.

[Sheriff Court at Hamilton.

M'COMBE *v.* BENT COLLIERY COMPANY, LIMITED.

Workmen's Compensation — Partial Incapacity—Change of Grade of Employment — Reduction of Compensation Due to General Rise in Wages—Standing Agreement—Subsequent General Fall in Wages — Right to Increase of Compensation — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (1) (*b*), 3, *and* (16).

A pony driver in a pit, who had sustained an injury by accident, having become fit for light work and obtained employment with his old employers at the picking tables, was paid compensation for partial incapacity. Thereafter for a short period payment of the compensation was suspended in respect that the workman's wages exceeded those earned by him before his accident, but wages having fallen, the workman and his employers agreed that compensation was again payable, and fixed the rate of payment at 4s. 7d. per week. Thereafter owing to a general fall in wages the workman was able to earn only 13s. 4d. per week as a picker. Before the accident he was earning £2, 5s. per week. In an application by the workman for an increase of the compensation, *held* that the arbitrator was entitled to review the compensation and bound to determine to what extent the workman's diminished wage was due to his injury and to what extent to economic causes.

Fallens v. *William Dixon, Limited*, 1923 S.C. 951, 61 S.L.R. 8, and *Quinn* v. *John Watson, Limited*, 1923 S.C. (H.L.) 62, 60 S.L.R. 615, *followed.*

Black v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, 46 S.L.R. 812, and *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905, 58 S.L.R. 588, *distinguished.*

James M'Combe, miner, Bothwellhaugh, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Hamilton (SHENNAN) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between him and Bent Colliery Company, Limited, coalmasters, Hamilton Palace Colliery, Bothwell, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration in an application presented by the appellant on 18th April 1922, for an increase of the compensation payable to him in respect of partial incapacity. The case was called in Court on 2nd May 1922, when process was sisted of consent to await the issue of certain appeals taken in cognate cases. The sist having been recalled, I heard parties on 16th October 1923, when the following facts were admitted:—1. On 26th September 1916 the appellant, who is a pony driver, was seriously injured by accident arising out of and in the course of his employment with the respondents in their Hamilton Palace Colliery. He was totally incapacitated for work. The respondents admitted liability and paid him compensation in respect of total incapacity to 30th September 1917. 2. The appellant shortly thereafter commenced light work with the respondents at the picking tables and is still so employed, this being work suitable to his partially incapacitated condition. The appellant based his claim for review on the following averments:—'Prior to pursuer's accident he was earning £2, 5s. per week. At the work at which he is presently employed he is being paid on an average about 13s. 4d. per week, which is the sum he is able to earn in his injured condition. Pursuer was paid partial compensation at the rate of 13s. 9d. per week from the 30th day of September 1917 until May 1920 (except for a short period of total incapacity between said dates during which he was paid full compensation). His partial compensation was then reduced to 9s. 2d. per week until December 1920, when it was stopped in respect that the abnormal wages paid to workers in or about coal mines

which had been increased by various temporary additions to the day rates payable to such workers had resulted in his wages exceeding his pre-accident earnings. Partial compensation was again resumed on 28th February 1921, at the rate of 4s. 7d. per week on the withdrawal of certain of these temporary additions, which brought his earnings below his pre-accident earnings, said sum being then considered a reasonable proportion of the difference between the amount of his pre-accident earnings and wages which he was able to earn in his light occupation. Said difference amounted to 9s. 2d. per week. Since 18th October 1921 the difference between his pre-accident earnings and his earnings at light work has been largely increased by the withdrawal of all such temporary advances and greatly exceeded said sum of 9s. 2d. and at the date of the raising of this arbitration amounts to £1, 13s. 8d. per week. Said sum of 4s. 7d. is not a reasonable proportion of the difference between the pre-accident wages and the wages which he has since said 18th October 1921 been able to earn. On 18th October 1921 the pursuer called upon the defenders to agree with him on an increased partial compensation and based on the increased difference between pre-accident earnings and the sum which he was actually earning, but the defenders refuse to do so, and the present action has been rendered necessary. The defenders will be entitled to credit at the rate of 4s. 7d. per week from 18th October 1921.'

"On 29th October 1923 I issued my award finding that the appellant was entitled to compensation of 4s. 7d. per week from 18th October 1921. I held that on the facts admitted and averred I had no power to review the agreed-on rate of 4s. 7d., being bound by the decisions of the Court of Session in *Black* v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, and *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905."

The *question of law* was—"On the foregoing admissions and averments was I entitled to proceed to review the appellant's existing rate of compensation?"

The arbitrator appended the following *note* to the Stated Case:—"The workman was injured on 26th September 1916. He was paid compensation in respect of total incapacity to 30th September 1917, and thereafter compensation in respect of partial incapacity till December 1920. Thereafter payment of compensation was suspended till 28th February 1921 because the workman was during that period earning more than his average weekly earnings prior to the accident. At 28th February 1921, wages having fallen, the parties agreed that payment of compensation in respect of partial incapacity should be resumed at the rate of 4s. 7d. per week, and compensation at that rate has been paid since. The workman now claims that the weekly amount should be increased from 18th October 1921 on the ground that owing to a general fall in the rate of wages the sum of 4s. 7d. is no longer a reasonable proportion of the difference between the pre-accident wages and the wages which he has been able to earn.

"If one were approaching this matter of new, the claim would seem within the spirit of the Workmen's Compensation Act. But it seems to me that the cases of *Black* v. *Merry & Cuninghame, Limited* (1909 S.C. 1150) and *Quilter* v. *Kepplehill Coal Company* (1921 S.C. 905) conclude the question so far as Scotland is concerned. Here the only ground stated for review is that since parties agreed on a rate of compensation there has been a general fall of wages in the coal-mining industry. I concede that I cannot reconcile these decisions with the English decision in *Cory Brothers & Company, Limited* v. *Tarr*, [1917] 2 K.B. 774, 10 B.W.C.C. 590, but I must follow the Scots decisions. I find that that case was quoted to the Court in the case of *Quilter*, but it is not referred to in the opinions. In the recent case of *Fallens* v. *William Dixon, Limited* (1923 S.C. 951) I find that Lord Hunter accepts the decisions in *Black* and *Quilter* while the Lord Justice-Clerk quotes with approval a passage from the opinion of Lord Justice Swinfen Eady in the case of *Cory Brothers*, the decision in *Fallens'* case being that the rule of *Black* and *Quilter* only applies where the injured workman is being employed in the same occupation as that in which he was injured. Accordingly I cannot accept the case of *Fallens* as ruling the present case.

"The agent for the workman relied on the case of *Quinn* v. *John Watson, Limited*, 1923 S.C. (H.L.) 62. In that case compensation had also been suspended owing to the high wages ruling, but the essential difference between it and the present case is that there had been no subsequent agreement fixing a partial rate. Indeed the employers in *Quinn's* case resisted all liability for payment of compensation. This is purely a claim to vary an agreed-on rate on the ground that wages have fallen, and on the Scots authorities I have no option but to hold that the claim is not well founded in law.

"I have thought it a convenient course to make an award in terms of the agreement."

The appellant argued that the question should be answered in the affirmative, and referred to the following authorities—*Quinn* v. *John Watson, Limited*, 1923 S.C. (H.L.) 62, 60 S.L.R. 615; *Fallens* v. *William Dixon, Limited*, 1923 S.C. 951, *per* Lord Justice-Clerk (Alness) at p. 953, 61 S.L.R. 8; *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905, 58 S.L.R. 588; *Tarr* v. *Cory Brothers & Company*, [1917] 2 K.B. 774, *per* Bankes, L.J., at p. 780; *Black* v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, 46 S.L.R. 812.

The respondent argued that the question should be answered in the negative, and referred to the following authorities—*Quinn* v. *John Watson, Limited* (*cit.*); *Fallens* v. *William Dixon, Limited* (*cit.*); *Quilter* v. *Kepplehill Coal Company* (*cit.*); *M'Neill* v. *Woodilee Coal and Coke Company*, 1918 S.C. (H.L.) 1, *per* Lord Dunedin at p. 3, 55 S.L.R. 16; *Tarr* v. *Cory Brothers & Company* (*cit.*).

At advising—

LORD JUSTICE-CLERK (ALNESS)—This Stated Case relates to an unsuccessful attempt made by an injured workman before the arbitrator to obtain a review of the compensation payable to him by his employers in respect of his incapacity. The story of the appellant's vicissitudes since the date of his accident is short and simple. He was a pony driver in the employment of the respondents when on 26th September 1916 he sustained such serious injury, arising out of and in the course of his employment, that the respondents paid him compensation as for total incapacity till 30th September 1917. The appellant shortly after that date having become fit for light work obtained employment with the respondents at the picking-tables, and they paid him compensation as for partial incapacity till December 1920. Payment was then suspended till 28th February 1921 in respect that during that short period the wages of the appellant exceeded those earned by him before his accident. Wages, however, fell, and at the latter date, 28th February 1921, the appellant and the respondents agreed that compensation was again payable. It was fixed at the rate of 4s. 7d. a-week. These payments continued to be made to the appellant till 18th October 1921, when he sought for a review of compensation on the ground that owing to a general fall in wages the sum of 4s. 7d. no longer represented a reasonable proportion of the difference between his pre-accident wages and the wages which he was then able to earn. The appellant in point of fact avers that whereas before his accident he was earning £2, 5s. a-week as a pony driver, he is now only able to earn 13s. 4d. a-week as a picker. In these circumstances the appellant claimed an increase in the compensation payable to him by the respondents in respect of his partial incapacity.

The learned arbitrator says in his note—and I agree with him—that "the claim would seem to be within the spirit of the Workmen's Compensation Act." He, however, considered that he was disabled from giving effect to that view by reason of the decisions in *Black* (1909 S.C. 1150) and *Quilter* (1921 S.C. 905), and he accordingly found the appellant entitled only to compensation at the agreed-on rate of 4s. 7d. a-week from 18th October 1921. It appears to me, with all respect to the learned arbitrator, that he has misconceived the application of these decisions to the present case. In *Black* it is clear from Lord Low's opinion that the Court proceeded on the view that the post-accident earnings of the workman in normal times were the same as his pre-accident earnings, and that the sole operating cause of the diminished earnings which formed the basis of his claim was a general fall in wages. To that state of affairs the workman's accident and resulting incapacity had no relevancy, and accordingly his claim to review was refused. Again, in *Quilter's* case the sole foundation of the claim of the workman to review was a general fall in the rate of wages. There was no other relevant consideration. There was no averment to the effect that in consequence of the fall in wages the workman had suffered an increased loss which was at anyrate partially attributable to his accident. The Court accordingly held that his claim was irrelevant and negatived it.

In sharp contrast to these two cases stands the case of *Fallens*, 1923 S.C. 951. There the workman, who had been a miner, was constrained by reason of his accident to accept employment as a clerk to an education authority at a lesser wage, and a reduction having been made in the wages of the officials of that authority, while no change had been made in the rate of wages which he would have been able to earn as a miner had he been uninjured, he was held entitled to have his weekly payment of compensation reviewed. The case of *Quinn* (1923 S.C. 6, *aff.* 1923 S.C. (H.L.) 62) is to the same effect. There a miner, who was disabled by accident from following his vocation as a miner, obtained employment at a lesser wage as a surface worker. Wages having fallen and his incapacity having remained the same, he sought for review and was held entitled to obtain it.

The question in this case is, Does the appellant fall within the ambit of *Black* and *Quilter* or within the ambit of *Fallens* and *Quinn?* That question appears to me to admit of but one answer, viz., that it falls within the ambit of the latter two cases. Here the wages of the appellant before and after the accident were different, and the difference arises from the accident. Before the accident he was a pony driver earning high wages. After the accident he was a picker earning low wages. Had he not been injured the appellant might obviously not have been affected to the same extent by the slump in wages, for the datum line of his previous and his subsequent occupation is different. *Non constat* that to-day despite the fall in wages the appellant would not have been earning higher wages as an uninjured pony driver than he is now able to earn as a maimed picker. It is true that the appellant's avocation before the accident in this case was not different from his avocation after the accident, as it was in *Fallens'* case, for here both before and after his accident the appellant was employed in a mine. The learned arbitrator from what he says in his note seems to think that conclusive. I do not agree. In this case the appellant's grade of employment before the accident was different from his grade of employment after the accident and his wages were higher, and these considerations with the consequences which follow in their train seem to me to equiparate this case in principle to the cases of *Fallens* and *Quinn*, and to exclude it from the *ratio decidendi* of *Black* and *Quilter*. In *Fallens'* case it was not the difference in avocation which availed the workman in claiming review, but the higher wages which his former avocation involved. If the wages of a workman before and after accident remain the same, the mere fact that a fall in wages has occurred during the latter period will not entitle him to review. But if on the other hand his wages after the accident

are lower than they were before the accident and that by reason of the accident, then a fall in wages may well entitle him to review; and that for this reason, but for the accident he might despite the slump be earning higher wages after his accident than he is in point of fact doing. I do not for a moment say that economic causes may not play a part, and an important part, in the assessment of the amount of compensation to which the appellant in this case may be found entitled—to the effect, indeed, of reducing it from the amount to which apart from these causes he might be entitled. The arbitrator must dissever the two causes as best he can, and determine to what extent the appellant's diminished wage is due to his injury and to what extent it is due to the operation of economic causes. But I do say that economic causes are not in this case the sole factor which determines and accounts for the worsened position of the workman. Where economic causes are the sole cause of reduction there is no right to review. Where economic causes plus the injury by accident combine to bring about the reduction there is always a right of review. This case falls within the latter category, and I accordingly think that there must be inquiry, and that the question put to us falls to be answered in the affirmative.

LORD ORMIDALE—In this case the arbitrator has held that on the facts admitted and averred he had no power to review the rate of 4s. 7d. agreed on by the parties on 28th February 1921, holding that he was bound by the decision in *Black* v. *Merry & Cuninghame* (1909 S.C. 1150) and *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905.

The facts are substantially as follows:—[*His Lordship narrated the facts of the case and the averments of the appellant, and continued*]—Both of the cases referred to by the arbitrator appear to me distinguishable from the present. In *Black* the workman was no doubt employed prior to the accident as a waggon-shifter and, on resuming work after the accident, as a haulage engineman, but his wages before and after the accident were the same, and the ground of the decision of the Court was that his earning capacity was in no way affected either by his injury or by the fall in wages on which he founded. Lord Low says—"The respondent [*i.e.*, the workman] 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." In *Black* there had been an inquiry into the facts. *Quilter* was a decision on relevancy, and the case was thrown out because the only averment made by the workman was the bald and bare statement that there had been a general reduction in wages. Whatever he may have intended to imply he said nothing to indicate that this fall in wages in any way affected his wage-earning capacity, not even that the difference between his pre-accident wages and his present earnings was increased thereby, or that the loss attributable to his accident had in any other way been enhanced. I think therefore that the arbitrator was in error in holding that he was barred from entertaining the present application by the decision in *Quilter's* case.

On the other hand I think that the cases of *Fallens* v. *William Dixon, Limited* (1923 S.C. 951) and *Quinn* v. *John Watson, Limited* (1922 S.C. 6, 1923 S.C. (H.L.) 60), in both of which in this Court *Quilter* was distinguished, are authorities which support the appellant's contention. I refer particularly to *Quinn's* case in which the judgment of this Court was affirmed by the House of Lords because the facts, save in one matter, are very similar to the facts in the present case. The injured workman had, owing to accident, become disabled for the ordinary work of a miner and fitted only to undertake light labouring work at wages considerably less than his pre-accident wages. He was awarded partial compensation. Thereafter, owing to an abnormal rise in wages his earnings for light work came to exceed his pre-accident wages as a miner and his right to compensation became suspended. A general fall in wages having taken place his actual earnings came again to be less than his pre-accident wages, and he applied for payment of the compensation formerly awarded him. His claim was held to be well founded. Now, the only difference between the facts in the present case and *Quinn* appears to be that in the present case there is a standing award made subsequently to the date when the appellant's earnings had again fallen below his pre-accident wages, and it is said in effect that apart from some increase in the appellant's physical incapacity that award must fix for all time the maximum, though not the minimum, partial compensation to which he can be found entitled. The difference between the cases appears to me to be one of circumstance rather than of principle.

In determining the amount of compensation to which a particular incapacitated workman is entitled regard must be had not only to the actual wage he is capable of earning but to the amount of that wage in relation to his pre-accident wages. The Workmen's Compensation Act 1906, Schedule I (3), provides that "in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning . . . after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

It seems to me that when owing to a fall from whatever cause the amount a workman partially incapacitated is competent to earn has become substantially less than it has hitherto been, thereby increasing the difference between it and the wage which he would have been able to earn but for his injury, there has been such a change of circumstances as to entitle him, if he can, to prove that a part, if not the whole, of this increased difference is due to his partial incapacity. The difference, when 4s. 7d. of compensation was awarded, was 9s. 2d. and it is now £1, 13s. 8d. In my opinion he

is entitled to prove that that very large increase of difference is not entirely due to economic causes.

In coming to this conclusion I have not omitted to note the distinction referred to by Lord Dunedin towards the conclusion of his judgment in *Quinn* between that case and cases where there is a standing award, but a consideration of the opinions expressed in *M'Alinden* v. *James Nimmo & Company* (1919 S.C. (H.L.) 84, [1920] A.C. 39) to which his Lordship also draws attention, appears to me to warrant the result I have reached. The circumstances which existed at the date of the standing award are not the circumstances which exist now. There is some additional and different matter which ought now to be taken account of. Accordingly I agree that the question should be answered in the affirmative and a remit made to the arbitrator to review.

LORD HUNTER—[*After narrating the facts of the case*]—On 18th April 1922 the appellant applied to the arbitrator for an increase in the amount of compensation payable to him in respect of partial incapacity. According to the statement made by him in his claim for review his earning capacity had fallen to a sum that amounted to £1, 13s. 8d. per week less than his pre-accident wages. According to the narrative in the case the appellant's application was called in Court on 2nd May 1922, and was then sisted to await the issue of certain appeals taken in cognate cases—*Murray*, 1923 S.C. 6, 60, (H.L.) 62. On 29th October 1923 the arbitrator held on the facts admitted and averred that he had no power to review the agreed-on rate of 4s. 7d., being bound, as he thought, by the decisions of the Court of Session in *Black* v. *Merry & Cuninghame*, 1909 S.C. 1150, and *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905.

When the averments made by the appellant in his application, which has been held to be irrelevant, are examined it appears that the great drop in his wages, shown by contrasting his wages at 18th April 1922 with those earned when the compensation was agreed at 4s. 7d., arose from the withdrawal of certain temporary advances that had been made owing to war conditions. If, however, these averments are further examined it also appears that as those temporary advances were put on to wages, the amount payable to the appellant as compensation was reduced. There would appear, therefore, to be something anomalous in allowing temporary advances to reduce the amount of compensation but refusing any restoration of compensation on the withdrawal of such advances. Do the decisions referred to by the learned arbitrator justify such a result? If they do, are they not inconsistent with the decisions of the House of Lords, *i.e.*, *Murray*, *&c.*, to which I have already referred, and *M'Alinden*, 1919 S.C. (H.L.) 84, subsequently dealt with?

In *Black's* case a workman who had lost a hand by an accident received compensation under the Workmen's Compensation Act 1897 from his employers until he was again taken into their employment at a wage of 18s. 6d. per week, the wage he had received before the accident. Subsequently, owing to a general fall in wages, he received only 16s. 7d. It was held that he was not entitled to compensation in respect of the diminution in his earnings. The ratio of that decision is that the workman was not receiving less wages because of any incapacity brought about by the accident but solely on account of economic causes. As was explained by Lord Low, the respondent was in no worse a position than he would have been in if he had never been injured but had continued throughout in his employment. The decision appears to me to afford no authority for the course taken by the arbitrator in dismissing the appellant's application as irrelevant. The case of *Quilter* causes more difficulty. According to the rubric in that case a miner who was in receipt of compensation in respect of partial incapacity at a rate which his employers were willing to continue claimed an increase of the rate, stating as the sole basis of his claim that there had been a general reduction in wages to the extent of at least 2s. per shift. In giving his decision the Lord Justice-Clerk said (at p. 907)—"It is clearly settled in our procedure under this Act that the arbitrator is not only entitled to determine a question of relevancy but, if the point is quite sharply raised, ought to answer a question of relevancy so as to save needless expense which might result if proof were allowed." So far as I can see from the report the earlier case of *Rankine* v. *Alloa Coal Company* (5 F. 1164) was not referred to in the discussion. In that case the Judges of the First Division of the Court (Lord Adam, Lord M'Laren, and Lord Kinnear) expressed the opinion that as proceedings under the Workmen's Compensation Act were intended to be of a summary character it was inadvisable to have separate discussions and decisions upon preliminary pleas. For my own part I think the cases in which it is expedient to have applications either for awards or alteration of awards determined upon a plea of relevancy must be extremely rare. What, however, is the effect of the decision in *Quilter's* case? If it means that under no circumstances can a general fall in wages justify any alteration upon an award made in favour of a partially incapacitated workman, the decision is in direct conflict with the decision pronounced by the English Court of Appeal in *Tarr* v. *Cory Brothers & Company*, [1917] 2 K.B. 774. According to the headnote in that case, upon an application to review a weekly payment in a case of partial incapacity, the fact that since the last award there has been a substantial alteration in the rate of wages common to the trade in which the workman is employed is one which the arbitrator is not only entitled but bound to take into consideration. Such an alteration is a change of circumstances which gives jurisdiction to entertain an application to review. Assuming such a discrepancy between a Scots and an English case and no indication of opinion by the House of Lords I should be bound to follow the decision of the Scots

Court, at the same time indicating my personal preference for the views expressed in the English Court. It has, however, to be kept in view that *Quilter's* case was a decision on relevancy and therefore binding only in so far as the facts in the present case are similar. Between the two cases there is this distinction that the alleged general reduction in wages in *Quilter's* case was only 2s. a shift, while in the present case the drop was much greater. In the former case the workman was receiving in respect of partial incapacity as much as 15s. a-week, in the present case he is only receiving 4s. 7d. It might be argued that, in view of the slight diminution of wages and the amount of compensation being paid, there was no justification for any increase, but I confess that I do not care for a distinction based upon such a difference. Even in the 2s. drop there may have been room, after discounting loss due to drop in the market rate of wages, for increasing to some extent the previous award in consequence of increased incapacity as that falls to be determined under the statute.

In *M'Alinden* v. *James Nimmo & Company* a miner who was partially incapacitated owing to an injury to three of his fingers was awarded compensation. Ten weeks later he applied for review of the weekly payment. It was proved that the applicant was able for light work only, that there had been no change in his physical condition since the date of the former award, but that he had on several occasions applied for work without success, either, because there was no vacancy in the works at which he made application or because employers gave a preference to those injured in their own employment. The House of Lords, reversing the decision of the Second Division of the Court, held that there was evidence upon which the compensation could competently be increased by the arbitrator. Viscount Finlay said (at p. 85)—"It appears to me that the amount of an award may be reviewed, either if there has been a change of circumstances or if further events have put a different complexion on the case." He then proceeds to point out that one of these events may be the state of the labour market. In the case of *Murray* it was held that where payment of compensation to a partially disabled workman has been discontinued because of the fact that owing to a general rise in wages he earns more than his average earnings before his accident, and where subsequently owing to a general fall in wages the wages earned by him again fall below the average wages he earned before the accident, his right to receive compensation in respect of his partial incapacity revives. Between those cases and the present there is undoubtedly the distinction that here there is a standing award which it is sought to alter simply upon the ground that the wages in respect of partial employment have fallen. The principle upon which the decision is based, however, appears to me to be ample to cover the present case.

The statute itself gives the workman his right to compensation, and the rules under which the amount is to be calculated are set forth in the First Schedule to the Act. They are referred to in detail in Lord Dunedin's opinion in the case of *Murray* to which I have referred. It is sufficient to say that, in the case of partial incapacity, a discretion is given to the arbitrator limited in two respects, first, that the amount shall not exceed the difference between the workman's average pre-accident wage and the amount which he is earning or is able to earn in some suitable employment; second, that it shall not exceed £1. Between the case of a man earning £1, 6s. 10d. per week and one earning 13s. per week, even though the drop is caused by the condition of the labour market and not by increased physical incapacity, there is surely such a change of circumstances as would or might justify an arbitrator in increasing an award of 4s. 7d. per week. Some part, at all events, of the workman's diminished earnings is or may be ascribed to his incapacity and not to economic causes. I do not think that the arbitrator was justified in dismissing the application without inquiry.

The question put ought, in my opinion, to be answered in the affirmative, and the case remitted to the arbitrator to take a proof and to allow such increased compensation, if any, as he considers the circumstances justify.

LORD ANDERSON — When the appellant was injured in 1916 he was employed as a pony driver. Since his accident he has only been able to do light work at the picking-tables of the mine. Prior to 18th October 1921 he was in receipt of compensation as for partial incapacity at the rate of 4s. 7d. per week. This was an agreed-on proportion of 50 per cent. of the difference of 9s. 2d. between the wages he was then earning and his pre-accident wages. The appellant, by the present application, craves increased compensation as from 18th October 1921, on the ground that the difference between the wages he now earns and his pre-accident wages has increased since he agreed to accept 4s. 7d. per week. The difference is now said to amount to £1, 13s. 8d. per week. The arbitrator has, in effect, dismissed the application as irrelevant, holding that he was bound to pronounce this judgment on the authority of the cases of *Black*, 1909 S.C. 1150, and *Quilter*, 1921 S.C. 905. In my opinion the point at issue is not ruled by these cases, but by the more recent decisions of *Fallens*, 1923 S.C. 951, and *Quinn*, 1923 S.C. (H.L.) 62. The cases of *Black* and *Quilter* were distinguished from *Quinn* in the opinions delivered in the Court of Session in *Quinn's* case, 1923 S.C. 6. The facts in the present case resemble those in *Fallens*, the important circumstance being that the appellant is, by reason of his incapacity, unable to work at his pre-accident avocation and is compelled to do work which brings him a lower wage. It may be that a part of the said difference of £1, 13s. 8d. is due to a general fall of wages, affecting his pre-accident avocation as well

as that in which he is now employed. In so far as the difference is due to this general economic cause, the cases of *Black* and *Quilter* decide that it is not to be made a ground for an increased award of compensation. But a part of the difference must also be due to the incapacity of the appellant which was caused by his original injury, and it is the arbitrator's duty, as was determined by *Quinn* and *Fallens*, to ascertain what compensation is due on this ground. The arbitrator suggests that this matter is concluded by the agreement to take 4s. 7d. per week as partial compensation. I do not regard that agreement as binding the appellant to take this specific sum during all the time he may be partially incapacitated. The agreement, as I understand it, was to accept one-half of the difference between present and pre-accident wages. Change of circumstances, it is said, has increased the amount of that difference, and the sum due is therefore larger now than it was when the matter of compensation was last considered in February 1921.

The statement of Lord Dunedin in *Quinn* (at p. 67) appears to be exactly in point and to negative the views expressed by the arbitrator in his note. Lord Dunedin says —"The features are (first) partial incapacity found and compensation awarded; (second) suspension of the payment of compensation owing to the wages actually earned exceeding the pre-accident wage; and (third) wages actually earned falling below the pre-accident wage. The right to receive compensation for partial incapacity then revives, and the amount due in respect thereof necessarily involves inquiry as to what the man is competent to earn."

I am therefore of opinion that the question of law in this and the other stated cases which it rules should be answered in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Fenton, K.C. —Keith. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents — Dean of Faculty (Sandeman, K. C.) — Marshall. Agents—W. & J. Burness, W.S.

Tuesday, February 26.

SECOND DIVISION.

COMMISSIONERS OF INLAND REVENUE *v.* FORREST.

Revenue—Income Tax—Capital or Income — Purchase of Shares with Dividend Accrued to Date—Whether Dividend Declared Formed Part of Income—Income Tax Act 1918 (8 *and* 9 *Geo. V, cap.* 40), *sec.* 5 (3) (*c*).

A contract for the sale of shares in a limited liability company was contained in letters passing between the purchaser and the seller, in terms of which the purchaser accepted an offer by the seller to sell the shares "at £1050, the odd £50 being to cover the portion of the dividend accrued to date." In computing the income of the purchaser for income tax purposes the purchaser claimed that the dividend subsequently paid in so far as it had accrued at the date of the purchase, having been purchased by him with his capital, did not fall to be included in the computation. *Held* that the whole of the dividend fell to be included.

The Commissioners of Inland Revenue having expressed their dissatisfaction with a determination of the Commissioners for the Special Purposes of the Income Tax Acts at Glasgow, as being erroneous in point of law, in an appeal by William Forrest of Knockinlaw, Kilmarnock, under the Income Tax Act 1918, the Special Commissioners stated a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case set forth, *inter alia*:—"At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at Glasgow on 4th December 1922, for the purpose of hearing appeals, Mr William Forrest, of Knockinlaw, Kilmarnock (hereinafter called the respondent) appealed against an assessment made upon him to super tax on the sum of £2343 for the year ended 5th April 1922, under the provisions of the Income Tax Acts relating to super tax.

"1. The following *facts* were admitted or proved:—(1) On 25th November 1919 the respondent purchased 100 shares of £10 each in William Forrest & Company, Limited for £1050, the odd £50 being paid to cover the portion of the dividend on the shares accrued prior to the purchase. (2) The offer to sell the shares was contained in a letter, dated 19th November 1919, from the secretary of the Royal Bank of Scotland to Messrs MacRobert, Son, & Hutchison, the respondent's solicitors. That letter is in the following terms:—'*Late Robert Forrest's Judicial Factory.*—Dear Sirs—We have your letter of the 17th inst. We shall be prepared to sell another 100 of the shares of William Forrest & Company, Limited, at £1050, the odd £50 being to cover the portion of the dividend accrued to date.' (3) The acceptance of that offer was contained in a letter, dated 25th November 1919, from Messrs MacRobert, Son, & Hutchison to the secretary of the Royal Bank of Scotland. That letter is in the following terms:—'*Wm. Forrest & Co., Ltd.* —Dear Sir—We are in receipt of your letter of 19th inst., and accept the offer therein contained. We shall be glad if you will send us the scrip to enable us to draw the transfer of the 100 shares which will be sold *cum* dividend.' (4) The yearly accounts of the company of William Forrest & Company, Limited, are usually made up to the 28th February in every year, and were so made up for the year ended 28th February 1920. (5) Upon the accounts of the company as so made up a dividend of 10 per cent. free of income tax was declared on