follows that the defender cannot competently be sued in an action of damages.

In a case like the present a person aggrieved is not without remedy, but as I have already indicated, it is a different remedy from that which has been chosen. If the pursuer's averments are well founded his remedy is to make complaint to the Lord Advocate, by whom alone a case of the nature alleged can be dealt with.

The result is that the interlocutor of the Lord Ordinary falls to be affirmed.

The Court adhered.

Counsel for Reclaimer (Pursuer)—Dean of Faculty (Sandeman, K.C.)—Moncrieff, K.C. —J. R. Gibb. Agents—Mackenzie & Kermack, W.S.

Counsel for Respondent (Defender)—D. P. Fleming, K.C.—J. M. Hunter. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, May 27.

SECOND DIVISION

[Sheriff Court at Dundee.

TAYLOR & SON *v.* IRONS.

Workmen's Compensation Acts 1906 (6 *Edw. VII, cap.* 58) *and* 1923 (13 *and* 14 *Geo. V, cap.* 42)—*Procedure—Claim by Employers in Virtue of the Act of* 1923, *which Repealed War Addition Acts, to Discontinue Payment of War Additions—Application by Workman to Have the Matter Determined by Arbitration — Competency — Whether Application Barred by Recorded Agreement.*

The employers of an injured workman admitted liability and agreed to pay him compensation as for total incapacity under the Workmen's Compensation Act 1906 and the War Addition Acts 1917 and 1919, and a memorandum of the agreement was recorded. On 21st February 1922 the weekly payments under the 1906 Act were redeemed by payment of a lump sum. On 31st December 1923 the employers discontinued the payments under the War Addition Acts in reliance upon section 1 of the Workmen's Compensation Act 1923, whereupon the workman lodged a minute claiming that the dispute between him and his employers should be determined by arbitration. The employers contended that the minute was incompetent on the ground that all questions outstanding between the parties had been settled by agreement, and that the workman's proper procedure was to charge on the recorded memorandum. *Held* that the minute was competent.

Workmen's Compensation Acts 1906 (6 *Edw. VII, cap.* 58) *and* 1923 (13 *and* 14 *Geo. V, cap,* 42) — *War Additions to Weekly Payments—Liability of Employers to Pay War Additions where Weekly Payments under the Act of* 1906 *Redeemed—Interpretation of Proviso to section* 1 *of the Act of* 1923.

A workman who had been totally incapacitated by accident in the course of his employment was receiving weekly payments both under the 1906 Act and the War Addition Acts of 1917 and 1919. The payments under the former were redeemed on 21st February 1922. After 31st December 1923 the employers discontinued payment of the war addition on the ground that the proviso to section 1 of the Workmen's Compensation Act 1923, continuing in certain cases a workman's right to receive these additions, applied only where the weekly payments were still being made, and not where such payments had been commuted for a lump sum. *Held* that the proviso applied both to cases where the payments under the 1906 Act had been redeemed and to those where they had not, and that where, as here, the accident had happened prior to 31st December 1923, the workman was entitled to receive the payments in question.

The Workmen's Compensation Act 1923 enacts—Section 1—"The Workmen's Compensation (War Addition) Acts 1917 and 1919 shall cease to have effect after the thirty-first day of December 1923, and are hereby repealed: Provided that the addition provided for in the said Acts shall continue to apply to a weekly payment payable to a workman under the Workmen's Compensation Act 1906 (hereinafter referred to as the principal Act) or under any enactment superseded by that Act, in respect of total incapacity arising from an accident which occurred on or before the said thirty-first day of December, so long as the workman remains totally incapacitated, and the addition shall, for all purposes, be treated as if it were part of the weekly payment."

This was a Stated Case on appeal from a decision of the Sheriff-Substitute (MALCOLM) at Dundee in an arbitration under the Workmen's Compensation Acts 1906 and 1923 between G. C. Taylor & Son, sack manufacturers, Jamaica Street, Dundee, *defenders* and *appellants*, and John Irons, calender worker, 130 Alexander Street, Dundee, *pursuer* and *respondent*.

The Case stated—"This is an arbitration arising by way of minute following on a recorded memorandum of agreement between the parties. The *facts* out of which the question raised by the minute arises are not in dispute, and are as follows:—1. On 20th July 1921 the respondent, who was a calender worker in the employment of the appellants, was injured by accident arising out of and in the course of his employment with them. The injury resulted in the fingers of one of the respondent's hands and the thumb, forefinger, and middle finger of the other hand having to be amputated, whereby he was, and still is, totally incapacitated. 2. By agreement, dated 10th August 1921, the appellants admitted liability to the respondent in compensation under the Workmen's Compensation Acts, and agreed that during his

total incapacity the weekly payments of compensation should be £1 under the Workmen's Compensation Act 1906, and 15s. under the Workmen's Compensation (War Addition) Acts 1917 and 1919. 3. A memorandum of the agreement was recorded in the Register of the Sheriff Court of Forfarshire at Dundee on 31st January 1922. 4. On 21st February 1922, on a minute lodged for the appellants, which stated that the incapacity of the respondent is total and permanent, the weekly payments under the Workmen's Compensation Act 1906 were redeemed by a payment of a lump sum of £506, 16s. 9d. 5. The weekly payments of 15s. under the Workmen's Compensation (War Addition) Acts 1917 and 1919 continued to be paid by the appellants to the respondent until 31st December 1923, after which date they have discontinued payment thereof. On the above agreed facts the case was debated before me on 8th February 1924. The appellants contended that by operation of section 1 of the Workmen's Compensation Act 1923, and the proviso to that section, coupled with the fact that the weekly payments of £1 under the principal Act had been redeemed, the respondent's right to payment of the additional weekly sum ceased as at 31st December 1923. They also contended that in any event the present application by way of minute is incompetent, the respondent's proper procedure being to have given a charge on the recorded memorandum of agreement, on which the question would be tried by way of suspension. I held that the respondent is entitled to payment of the weekly addition of 15s. so long as he remains totally incapacitated, but that as all questions between the parties have been settled by agreement, the present arbitration, being in form one for arbitration, is incompetent, the proper procedure being for the respondent to have given a charge on the recorded memorandum of agreement. I accordingly dismissed the minute. I found the respondent entitled to expenses, on the ground that he was compelled to take proceedings by reason of the appellants' discontinuance of payment of the weekly addition, and that though the application is wrong in form the appellants are in the wrong on the merits of the question at issue, and as the expense of vindicating his right would have been forced on the respondent in any event, it is a minor and technical circumstance that he adopted wrong procedure."

The *questions of law* included the following—"1. Was I right in holding the minute to be incompetent? 2. Was I right in finding the respondent entitled, subsequently to 31st December 1923, and so long as total incapacity due to the accident continues, to payment of the weekly additional sum which was payable to him up to and including that date under the Workmen's Compensation (War Addition) Acts 1917 and 1919?"

The Sheriff-Substitute appended the following *note* to his award:—[*After narrating the facts*]—"Two questions arise—one on the merits and the other on the competency of the application. That on the merits is whether, the weekly payments under the principal Act having been redeemed, claimant's right to the war additions ceases on the repeal of the Acts of 1917 and 1919 by section 1 of the Act of 1923, or is continued by the proviso to that section. The objection taken to the competency is to the effect that in any event the proper procedure for the claimant to have adopted was by way of a charge on the recorded memorandum, following on which the real question would have been tried on a suspension raised by the respondents if so advised.

"It has been repeatedly laid down by the Court of Session as a matter of procedure that the arbitrator should deal at one and the same time with all questions arising in workmen's compensation cases, whether preliminary, such as competency and relevancy, or on the merits, and exhaust the whole case so that the possibility of a multiplication of appeals may be avoided and all questions may be disposed of on one appeal, if appeal there be. I refer to the cases of *Rankine* v. *Alloa Coal Company, Limited*, 1903, 5 F. 1164, and *Ellis* v. *Fairfield Shipbuilding, &c., Company, Limited*, 1913 S.C. 217. I shall accordingly deal with the questions both on merits and competency, and as the latter is to some extent dependent on the merits I take the question on the merits first. By the agreement between the parties claimant was expressly given compensation of £1 weekly under the principal Act and 15s. weekly under the Acts of 1917 and 1919 during total incapacity. Had the 15s. under the two latter Acts not been mentioned, he would still have had a right to it under the Acts so long as total incapacity endured. By the Act of 1917, sec. 1 (2), the additional weekly sum is made part of the weekly payment under the principal Act for the purposes there stated, which include, *inter alia*, the provisions relating to the recovery of weekly payments, and by the same sub-section it is enacted that if the liability to make the weekly payment be redeemed, the additional weekly sum shall continue to be payable as if redemption had not taken place. Redemption of the weekly payment due under the principal Act is thus declared not to affect the right to the weekly payment of war additions, that additional weekly payment is not included in the redemption and is in fact not redeemable, and the right to it therefore remains just as if redemption had not taken place. That right was recognised in the present case, and the weekly additional sum was paid down to 31st December 1923. Respondents, however, contend that the effect of section 1 of the Act of 1923, which provides that the Acts of 1917 and 1919 shall cease to have effect after 31st December 1923 and are repealed, is in the present case to put an end to the right to the additional weekly sum. That would have been true but for the proviso, the general effect of which is to save the right to the additional weekly sum during total incapacity in the case of accidents occurring before 31st December 1923. The combined effect of the section plus the proviso is to put an end to war additions

subsequent to 31st December 1923 (after which date a higher scale of compensation under the amended principal Act comes into force), but to save those in existence prior to that date. Respondents combat the applicability of the proviso to this case by an argument based upon its exact phraseology—an argument which seems to me to put upon that phraseology a strained and unduly narrow construction. The proviso says that 'The addition provided for . . . shall continue to apply to a weekly payment payable to a workman under the Workmen's Compensation Act 1906.' Respondents argue that as the weekly payment under the Act of 1906 has been redeemed there is no longer anything in existence to which the addition can 'continue to apply,' that it cannot apply to itself, and that therefore the proviso being incapable of being given effect in the circumstances the right to the addition ceases. That argument is in my opinion untenable for the following reasons:—The additional weekly sum was itself by the Act of 1917 made part of the weekly payment under the Act of 1906 for the purposes specified, including recovery thereof, and it continues to be such. There is no violence to language or meaning therefore in holding that it can continue to apply to itself as a remaining portion of the weekly payment after redemption of the original portion under the Act of 1906 had taken place. The actual language of the proviso is in fact synonymous with 'continue to apply' or 'continue to be payable.' It is conceded by respondents that had redemption not taken place claimant's right to the weekly additional sum would still have remained good. Their argument for the termination of that right therefore makes the act of redemption the circumstance which operates with destructive effect on the weekly addition. But as I have already pointed out, the right to the additional sum was by the Act conferring it expressly reserved from any operative effect of the act of redemption. All that is redeemed is that part of the compensation originally due under the Act of 1906. The remainder, the weekly additional sum, still continues to be payable as an unredeemed part of the weekly payment. The fact of redemption therefore as an element in respondent's case for cessation of the weekly addition must be eliminated, and when that is done they must find the foundation for their contention solely in the terms of section 1 of the Act of 1923 and its proviso, because it is admitted that up to the coming into operation of the Act the right to the weekly addition stood good. But so far from the section plus the proviso favouring their contention, its whole spirit, purpose, and intention are conceived in the opposite direction. The purpose of the section itself is to give higher rates of compensation, and the proviso is an enabling enactment conceived in favour of the workman to preserve to him, in circumstances such as the present where he will not be in right of the higher rates of compensation coming into force under the Act, the weekly additional sum to which he was hitherto entitled. It is not the intention of section or proviso to deprive a workman of compensation hitherto payable. That construction therefore ought to be given to it which favours its intention, so long as it does not run counter to the language used. I quote the following general dictum of Lord President Dunedin in a case whose subject-matter had no relation to that of the present one—*Campbell's Trustees* v. *O'Neill* (1911 S.C. 196)—as illustrating the duty of a court in such circumstances—"It is not very difficult to get at the general idea which was underlying the draughtsmanship, and I think in these cases it is our duty, however inaccurate in terms we may find the Act, to give effect to what we consider the spirit, so long of course as the words used do not absolutely preclude us from doing so.' Here the words used in my opinion perfectly naturally bear the construction which it was practically admitted is the intention of the proviso, that in all cases where the accident occurred on or before 31st December 1923 the weekly additional sum shall continue to be payable so long as total incapacity endures. I think therefore the claimant is entitled under present conditions to payment of 15s. weekly.

"I come back now to the question of the competency of this application. It is in form, by the terms of the crave of the minute, an original application for arbitration or an application for arbitration *de novo*. The authority for arbitration under the Acts is section 1 (3) of the principal Act, the subjects of arbitration being liability to pay, and amount or duration of compensation, but by the terms of the sub-section arbitration is competent on one or more of these subjects only if they have not been settled by agreement. In the present case all three questions have been settled by agreement, which has been recorded, duration of compensation of course being always indefinite in the sense that it depends on incapacity, but the only competent way of affecting it is by an application for review founded on a change in capacity. That a legal question has arisen under supervening legislation, under which respondents deny their liability to continue payments settled by and hitherto due under the agreement, does not affect the fact that all questions have been settled by agreement, and if that be so arbitration is excluded—*Dunlop* v. *Rankin & Blackmore*, 1901, 4 F. 203; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1907 S.C. 1071. Claimant's proper procedure in my opinion was to give a charge for payment, leaving it to respondents to test the question as to whether their liability had ceased by bringing a suspension. I think therefore this minute must be dismissed."

Argued for the defenders and appellants—The Sheriff-Substitute was right in dismissing the minute as incompetent. As all questions at issue here had been settled by agreement, arbitration was excluded—*Dunlop* v. *Rankin & Blackmore*, 1901, 4 F. 203, 39 S.L.R. 146; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1907 S.C. 1071, 44 S.L.R. 750. The Sheriff-Substitute

had erred in giving an opinion on the merits; for, since he had dismissed the application as incompetent, these were not properly before him. In any event, the weekly payments under the 1906 Act were commuted prior to the passing of the 1923 Act, and so the proviso of section 1 of that Act did not apply. For on a correct interpretation of that proviso, where the weekly payments had been commuted prior to the date of the Act, the result was to deprive a workman of the additional payments under the War Additions Act, these Acts having been repealed by the 1923 Act. An Act of Parliament had to be construed strictly, and in view of the explicit words of the section the claimant could not succeed—Maxwell's Interpretation of Statutes, 6th ed., p. 26; *Vickers, Sons, & Maxim, Limited* v. *Evans*, [1910] A.C. 444, *per* Lord Loreburn at p. 445; *Thomson* v. *Gould*, [1910] A.C. 409, *per* Lord Mersey at p. 420.

Argued for the respondent—This was a question of liability under the Act of 1923. It did not arise under the War Addition Acts, because these had been repealed, and were now relevant for comparison merely when they were referred to by the Act of 1923. It followed that the agreement did not, and could not, refer to that Act for the reason that it was arrived at before the Act was passed. That being so, the present dispute was clearly not covered by the agreement, and ought to be determined by arbitration in the usual way. The alternative procedure that was suggested—charging upon the recorded memorandum of agreement—was an extremely clumsy one, and a workman ought not to be compelled to have recourse to it, unless the language used by the Legislature made that absolutely essential—*Kane* v. *Stein & Company*, 1915 S.C. 863, *per* Lord Skerrington at p. 866, 52 S.L.R. 689, at p. 690. Moreover, as the War Addition Acts had been repealed, it was doubtful whether a charge was competent—Graham Stewart on Diligence, p. 292. As regards the question on the merits, the Sheriff-Substitute had found in favour of the respondent, and his judgment on that point ought not to be disturbed. Section 1 of the 1923 Act, which repealed the War Addition Acts of 1917 and 1919, contained a saving clause expressly reserving the addition granted in cases of total incapacity, where the accident had occurred prior to the passing of the Act. And it could not be said that an addition, allowed in respect of a payment made week by week, was lost merely because the weekly payments were commuted for a lump sum. Such an interpretation was both unjust and entirely inconsistent with the intention of the Act. *Campbell's Trustees* v. *O'Neill*. 1911 S.C. 188, 48 S.L.R, 115, was an authority for the proposition that the underlying intention of the statute must be given effect to, unless the actual words used made that impossible—see opinion of Lord Dunedin in that case at p. 196, 48 S.L.R. 119. On a correct interpretation of the proviso, the workman was entitled to succeed in his claim, and the judgment of the Sheriff-Substitute on the merits ought to be affirmed.

LORD JUSTICE-CLERK (ALNESS)—This is a Stated Case in an arbitration under the Workmen's Compensation Acts of 1906 and 1923 between an employer and his former employee. The Sheriff-Substitute has rehearsed the facts which he found proved, and I do not detain your Lordships by repeating them in detail.

Of the two questions which were argued before us, the first was whether the minute, which had been lodged by the respondent (the workman), was competent or not. The argument against the competency of the minute was twofold. In the first place, it was maintained that it was incompetent to arbitrate on the matter, because the sum of 15s. which had been awarded under the War Addition Acts to the respondent was automatically added to the weekly sum to which he was held entitled under the principal Act, and was not part of the compensation which he received but was really a bonus and nothing else. It appears to me that the answer to that contention is to be found in the last two lines of the proviso of section 1 of the Workmen's Compensation Act of 1923, which says in terms that the addition—that is, the addition under the War Addition Acts of 1917 and 1919—shall for all purposes be treated as if it were part of the weekly payment. That statutory provision, in my opinion, destroys the argument presented by the appellants on the point to which I have referred.

But the appellants proceeded to argue that the procedure adopted by the workman in this case was wrong inasmuch as the question between the parties had already been determined by agreement between them. It was argued that the respondent had chosen a wrong remedy, and that the only remedy open to him was to charge upon the agreement which, at a prior date, had been reached between the employer and his employee, with the result that a suspension of that charge might then have followed. I ventured to say at an early stage of the discussion—and I cannot forbear from repeating what I said—that I cannot see what interest the appellants have to maintain that contention. What does the contention involve? It involves that, instead of the question between the parties being disposed of with brevity and convenience by the arbitrator in the present proceedings, the respondent should be remitted to the necessity—as I have already indicated—of charging upon his decree, followed by a suspension of the charge; that an appeal would then be open to this Court, and from the decision of this Court that an appeal would be open to the House of Lords. In that connection I entirely adopt what was said by Lord Skerrington in one of the cases which was cited to us—that I should be very slow to reach that result unless driven to do so either by the Act of Parliament or by express decision. I do not think that is necessary. I do not think either the Act of Parliament or any case cited to us constrains us to reach a conclusion so inconvenient as that which the alternative presented by the appellants involves.

It is proper, in the first place, in this connection to look at the agreement which was reached between the parties. It was "agreed that during his total incapacity the weekly payments of compensation should be £1 under the Workmen's Compensation Act 1906, and 15s. under the Workmen's Compensation (War Addition) Acts 1917 and 1919." The present question it seems to me was not even mooted in that agreement, for the question which has now arisen is a question solely under the Act of 1923, which was not passed at the date when the agreement was entered into. What is the question between the parties under that Act? It is whether or no that Act has stopped the right of compensation which the respondent would otherwise have enjoyed. That, it appears to me, is a question involving the liability of the appellants to make the compensation which is now claimed, the duration of the payment, and the amount of the payment. The agreement, in short, has no reference to the Act of 1923, and the dispute which has arisen has no substantial relation, it seems to me, to the agreement which was then made. The substratum of that agreement, in my opinion, dropped out when the Acts upon which it was partly based were repealed. If the respondent had proceeded to record and charge upon the agreement of 10th August 1921, it is at least conceivable that the employers would have maintained that the Acts upon which the agreement was in part based had been repealed. At any rate I suggest to your Lordships that the proceedings in the case disclose a dispute which has arisen between the parties, and which at this moment is unsettled by any agreement which has been arrived at between them. And having regard to the provisions of section 31 (2) of the Act of 1923, and to the provisions of section 1 (3) of the Act of 1906, I think that arbitration between the parties was competent; that the minute which was lodged competently raised the dispute which now exists between the parties; and that the Sheriff-Substitute as arbitrator was accordingly wrong in holding that the minute was incompetent.

I therefore suggest to your Lordships that, so far as the first question is concerned, it should be answered in the negative.

That leaves for consideration the question upon the merits. The appellants maintain that the effect of section 1 of the Act of 1923 and the proviso adjected to it was to disentitle the respondent in the future to receive the 15s. weekly to which, under the War Addition statutes, he had been found entitled—that on a true reading of the proviso, the right to that sum has now been forfeited by the respondent. It is admitted by the appellants, as I understand, that if there had been no commutation of the weekly compensation the respondent's right would have remained entire. It would seem to be involved in the argument, on the other hand, that if there was commutation the right was destroyed. On that I make two preliminary observations. The first is that I respectfully adopt a passage from Lord President Dunedin's opinion in *Campbell's Trustees* v. *O'Neill* (1911 S.C. 188, at p. 196), which is referred to by the arbitrator, and which, I think, is much in point—"It is not very difficult to get at the general idea which was underlying the draftsmanship, and I think in these cases it is our duty, however inaccurate in terms we may find the Act, to give effect to what we consider the spirit, so long of course as the words used do not absolutely preclude us from doing so." For myself I have no doubt at all that the respondent's claim is entirely in accord with the spirit of this statute, and that the appellants' contention would do violence to the spirit of the Acts with which we are here concerned. I would go further and say that for my part I should regard the appellants' argument, if it were held to be sound, as involving this—that gross and unintelligible hardship and injustice were done to the respondent and other persons in the same position as he by the terms of the proviso in question; and if that argument were sound, then, as I said in the course of the debate, there could be no doubt at all that commutation would become an exceedingly popular process with employers in the future. But I can find nothing in the statute, when I come to survey its precise language, to force us to reach a result so unjustifiable and unjust. The section says that the provision "in the said Acts shall continue to apply to a weekly payment payable to a workman under the Workmen's Compensation Act 1906." For my part I should be prepared to construe that section as involving that the condition should apply to a weekly payment whether it was commuted or not commuted, and that the words used in the statute are tantamount to the words "continue to be payable." That there was at one time such a weekly payment as satisfies and amply satisfies the phrase is not in doubt, and I find nothing in the statute which suggests that the payment in question must continue to be payable each week.

On this matter I am entirely content with the admirable note of the learned arbitrator, which I am prepared to adopt in its entirety, and upon the terms of which I cannot hope to improve.

I think that the result which the appellants suggest is not a result to which we are driven either by statute or by decision; but that, on the other hand, the statutory language is entirely in conformity with the argument advanced on behalf of the respondent. For the reasons I have stated, as well as those which have been so well expressed by the arbitrator, I suggest to your Lordships that we should affirm his decision upon this point, and should answer the question which is put to us in the second place in the affirmative. It follows from what I have said that the third question falls to be answered in the affirmative, inasmuch as the appellants have failed in their contention that the minute which was lodged by the respondent was an incompetent minute.

LORD ORMIDALE—I concur with your Lordship on all points and have very little to add. I understood the appellants to maintain that the question that has been raised by the minute lodged by the respondent is foreclosed and excluded by the memorandum of agreement which was duly recorded, and that it is under that memorandum alone that the respondent is entitled to find a remedy—if he has any at all—for the stoppage on the part of the employers in paying him the war addition of 15s. a-week.

Before the Act of 1923 there was no difference between the parties. The weekly payment awarded under the Act of 1906 had, no doubt, been redeemed, but thereafter the war addition continued to be paid down to the date when the Act of 1923 came into force. Then, and then only, a certain view of section 1 and the proviso of that section led the appellants to take up the position that the war addition was no longer exigible from them, and accordingly they ceased to make payment to the workman of the 15s. a-week which he had been getting since the passing of the Acts of 1917 and 1919.

It seems to me that a perfectly new question which was not susceptible of being determined or predetermined by the memorandum of agreement was raised, introduced solely by the passing of the Act of 1923. That being the source and nature of the difference, it seems to me that the workman was entitled to submit it to arbitration under the provisions of the Workmen's Compensation Acts, and therefore I agree with the conclusion at which your Lordship has arrived.

I also agree with what your Lordship has said on the other point, and with the reasoning by which your Lordship reached the result you have. There can be no doubt at all, I think, on the construction of section 1 and the proviso of the Act of 1923 what the intention of the statute is, and I am satisfied that the meaning your Lordship gives to the proviso is not precluded by and does not violate the language to be found in the proviso.

LORD HUNTER—I agree. I think the learned arbitrator was wrong in holding that the minute presented by the respondent was incompetent. After the passing of the Workmen's Compensation Act of 1923 the appellants and the respondent were not at one as to whether the respondent was entitled to continue to receive certain war additions which he had got under the Acts of 1917 and 1919. Those Acts were repealed by the Act of 1923; but in certain circumstances—that is, in the case of complete and total incapacity—the workman's right to continue to receive the additions was recognised. The point in dispute between the parties was a point under that Act and that Act alone. Section 31 (2) of the Act of 1923 provides that that Act is to be construed as one with the principal Act, *i.e.*, the Act of 1906; and references in the former Act to the principal Act are to be construed as references to the Act of 1906 as amended by the Act of 1923. Now, when one turns to the provisions of the Act of 1906, one finds that under section 1 (3), "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule of this Act, be settled by arbitration, in accordance with the Second Schedule of this Act." What is there in this case to prevent the question which has now arisen under the Act—because the expression "Act" in the Act of 1906 must include the Act of 1923—being determined by arbitration? It is suggested by the appellants that it is excluded by the circumstance that there was a memorandum of agreement. The memorandum of agreement did not affect the question about which the parties are in dispute now, and I cannot see therefore that it affords the smallest obstacle to our giving effect to the respondent's contention that he is entitled to have the question in dispute between him and his employers determined by arbitration.

I am in entire agreement with your Lordship that it would be extremely unfortunate if the appellants were to be found right upon the extraordinarily technical argument they submitted to us upon this point. They suggested as the proper method to determine the question which has now arisen that the respondent should have attempted first to register the memorandum and proceed to do diligence thereon, and they would then have had an opportunity to suspend. All would necessitate, I think, much more complicated and expensive procedure than is adopted in the present case, and might have resulted, not in determining this question at all, but in the employer succeeding upon some technical defence, and in giving the workman no remedy at all, but necessitating his falling back upon arbitration proceedings. But, as I think, it is quite unnecessary to consider that case. I am clearly of opinion that the right of the workman to have arbitration is not excluded by anything that occurred prior to the Act that he now wants to have interpreted.

As regards the second point, I also agree with your Lordship. I think the position has been quite clearly and fairly stated by the arbitrator in his note. The proviso of the Act of 1923 appears to me clearly to contemplate that where a workman has been totally incapacitated, his right to receive these war additions should continue. And I do not see anything in the language of the statute, fairly read, to suggest that there was any intention on the part of the Legislature to prefer a workman who continues to receive the weekly payment to one who, as regards the weekly payment under the Act of 1906, has received a sum fixed in an application by the employers to have the weekly payment redeemed by the payment of a capital sum. The workman here had continued to receive a weekly sum in addition to the capital sum, and I see no

reason why he should not continue in the future as in the past to receive that sum in consequence of total incapacity.

LORD ANDERSON—On the point of competency, the main argument advanced by the appellants' counsel was that there was no subsisting dispute between the parties for the settlement of which arbitration is appropriate or indeed competent. The only question that was said to be between them is the question of the meaning of the recorded agreement. Now, if the facts had supported that contention the appellants would have been entitled to succeed in this appeal, because I think it is quite plain that an arbitrator has no jurisdiction to construe what in effect is his own decree, that is—the recorded agreement. But then, it seems to me that the facts do not fit the contention of the appellants to which I have alluded, because it appears to be plain on the facts that the dispute has arisen under and because of the passing of the Act of 1923. The question between the parties is not what is the meaning and effect of a recorded memorandum of agreement, but what is the meaning and effect of the Act of 1923 in so far as regards the weekly payment which the workman was receiving at the time when that Act was passed.

Now, this is a new question as to which there has been no agreement, and as to which there could have been no agreement. And it seems to me that arbitration is necessary and competent and appropriate for the purpose of solving this question. The procedure, which the appellants' counsel say should have been taken, and which the arbitrator suggests might have been taken, obviously will not do, because if a charge had been given as suggested upon the recorded memorandum, the answer at once would have been made that the Acts of Parliament which purport to give the 15s. charged for had been repealed and no longer applied, and that, it seems to me, would have sealed the fate of the suggested charge at the outset.

Accordingly I am of opinion that a minute such as was lodged by the workman in this case, inviting arbitration, was quite competent and, indeed, the best procedure for solving the dispute which subsists between the two parties.

As to the merits, I content myself with agreeing *in omnibus* with the admirable way in which the arbitrator has disposed of that part of the case.

The Court answered the first question in the negative, and the second and third questions in the affirmative.

Counsel for the Appellants—Wark, K.C. —Macdonald. Agents — Alex. Morison & Company, W.S.

Counsel for the Respondent — Keith. Agents—Douglas & Miller, W.S.

Friday, May 30.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

BLACK *v.* DUNCAN.

Reparation—Rape—Action of Damages by Husband—Title to Sue—Relevancy.

In an action of damages brought by a husband against the alleged ravisher of his (the pursuer's) wife, the pursuer averred that the defender had, "notwithstanding her struggles . . . succeeded in overcoming her resistance and then obtained carnal connection with her." The defender pleaded that the pursuer had no title to sue. *Held* that the pursuer had a good title to sue, and that his averments were relevant.

Process—Jury Trial—Action of Damages for Rape—Form of Issue.

In an action of damages by a husband against the alleged ravisher of his (the pursuer's) wife, the Lord Ordinary approved of an issue in the following terms:—"Whether . . . the defender obtained carnal connection with the pursuer's wife, to the loss, injury, and damage of the pursuer?" The defender reclaimed and along with his reclaiming note lodged a notice of motion to vary the issue by "deleting the words 'obtained carnal connection with' and substituting therefor the word 'ravished,' or alternatively by inserting between the word 'defender' and the word 'obtained' the words 'seized hold of the pursuer's wife and endeavoured to embrace her, and in spite of her resistance to the utmost of her strength and her struggles and efforts to get free, succeeded in overcoming her resistance and thus.'" *Held* that the issue must conform to the case made on record, and that it should therefore be varied as proposed in the second of the alternatives suggested by the defender.

William Black, plater, 19 Allison Place, Port-Glasgow, brought an action against Alan Duncan, motor engineer, Port-Glasgow, for £500 in name of damages for ravishing his (the pursuer's) wife.

The pursuer averred—"(Cond. 2) The pursuer was married on 9th November 1914 to his present wife, Mrs Mary Black or Black. There are two children of the marriage. After their marriage the pursuer and his wife resided together in family with the parents of the latter at 19 Allison Place aforesaid, and the pursuer's wife assisted her mother in a fruit, confection, and tobacco shop carried on by her at 17 Allison Place. The said shop is immediately across the street from the West Renfrew Motors garage. . . . (Cond. 3) In the evening of Saturday, 24th February 1923, the pursuer's wife, the said Mrs Mary Black, was assisting her mother in the said shop. In connection with her business the latter had occasion to require change for a £1 note, and she sent her daughter, the said Mrs Mary Black, to the said garage in order to obtain the