saved by the way the question is here put, and I have no hesitation in agreeing with your Lordship that we should affirm the decision of the Sheriff-Substitute.

LORD DUNDAS—I think the very terms in which the question is stated invite and indeed necessitate a negative answer to the first part, and in effect an affirmative answer to the second.

LORD SALVESEN—I concur. I should prefer that the first branch of the question should be answered in the negative, and that the second branch should not be answered at all.

LORD JUSTICE-CLERK—We shall answer the first part of the question in the negative, and with regard to the second part we shall find that the appellant's refusal to submit to examination unless his own doctor is allowed to be present amounted, in the special circumstances of this case, to a refusal in terms of section 4.

The Court pronounced this interlocutor—

"Answer the first branch of the question of law . . . in the negative, and the second branch thereof by finding that the workman's refusal to submit himself for examination unless his doctor was allowed to be present amounted in the circumstances of the stated case to refusal in terms of section 4 of the First Schedule of the Workmen's Compensation Act 1906: Therefore refuse the appeal, and decern," &c.

Counsel for the Appellant — Moncreiff. Agents—Simpson & Marwick, W.S.

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

Saturday, January 14, 1911.

SECOND DIVISION.

[Sheriff Court at Paisley.

BABCOCK & WILCOX, LIMITED, *v.* YOUNG.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, sec.* 2 (*c*)—*Compensation —Average Weekly Earnings—Computation—Grade of Employment.*

A workman who was by trade a boilermaker, and who had been employed for some time as a boilermaker and for some time as a labourer under the same employer, met with an accident while employed as a labourer. In an application by his employers to review and end compensation paid to him under a verbal agreement, the arbiter, in calculating his "average weekly earnings," took into account the amount which the workman had earned as a boilermaker, and awarded him compensation on the average wage thus ascertained. *Held* that the compensation must be based on the wages the workman was earning in the grade of employment in which he met with the accident, and that the arbiter could not competently include his wages as boilermaker.

Perry v. *Wright*, 1908, 1 K.B. 441, *approved* and *followed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, enacts —"(1) The amount of compensation under this Act shall be—(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer. . . . (2) For the purpose of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman the following rules shall be observed—(*c*) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause."

This was a stated case on appeal in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Babcock & Wilcox, Limited (*appellants*), and William Young (*respondent*) against a decision of the Sheriff-Substitute (LYELL) at Paisley acting as arbitrator.

The Case stated—"This is an application to review and end weekly payments made by the appellants to the respondent by virtue of an agreement under the Workmen's Compensation Act 1906. Proof was led before me and the medical referee—sitting as assessor in terms of paragraph (5) of the Second Schedule of the statute—on 7th November 1910, and the following facts were proved:—

"The respondent is by trade a boilermaker, and was for nineteen weeks prior to 1st February 1910 in the employment of the appellants. He did not, however, work as boilermaker for the whole of that period. For fifteen out of the nineteen weeks he worked as a labourer at a wage of 20s. 3d. per week. For the other four weeks, during which he worked as a boilermaker —which is a trade, and distinct from the work of a labourer—he was paid by piecework, and it was agreed that his average weekly earnings during the whole of the period of his employment were thus increased to 25s. On 1st February he was working as a labourer when he was accidentally injured by being struck on the middle finger of the left hand with a crowbar. He was off work for one week, when he returned and worked as a boilermaker from 8th to 14th February, when blood-poisoning set in, with the result that the finger is permanenty stiffened in such a position as to incapacitate him wholly from following his trade as a boilermaker, but not from doing the work of a labourer at 20s. a-week.

"By virtue of a verbal agreement made between the parties, the appellants paid to the respondent compensation at the rate of 12s. 6d. weekly from 14th February 1910 to 4th June 1910.

"I held (1) that by reason of the said injury by accident the respondent has been since 4th June 1910 and remains partially incapacitated; (2) that his average weekly earnings during the whole period of his employment were 25s. I found him entitled to 12s. 6d. for the week from 1st to 7th February 1910, and in fixing 5s. a-week as the amount of compensation to be paid by the appellants to the respondent as from 4th June 1910 I awarded a sum not exceeding the difference between the average weekly earnings of the workman before the accident and the average weekly amount which he is now able to earn. In the special circumstances of this case I awarded the whole difference between these two sums.

"On the 8th June 1910 the appellants offered the respondent work as a labourer at 20s. a-week, which work he refused."

The *question of law* for the opinion of the Court was—"Was the Sheriff-Substitute right in computing the average weekly earnings of the respondent during the whole period of his employment with the appellants at 25s.? Or should he have refused to include the respondent's earnings as a boilermaker during four weeks of that period?"

Argued for the appellants—The Sheriff-Substitute had erred in considering the respondent's earnings as a boilermaker when he had been injured when acting as a labourer. These were different grades, and in changing from the one to the other he began a new employment. "Grade" had been defined as the workman's rank in the industrial hierarchy—*Perry* v. *Wright*, [1908] 1 K.B. 441. Whatever difficulty there might be in certain cases in defining grade there could be none here, because a labourer was clearly in a different grade from a boilermaker.

Argued for the respondent—The Sheriff-Substitute was right. In ascertaining the "average weekly earnings" of the workman for the purpose of fixing compensation, no part of his earnings under the employer could be excluded unless it was shown that they were due to a definite and permanent change of grade. Mere change was not enough. There must be some expectation of permanency—*Price* v. *Marsden & Sons* [1899], 1 K.B. 493. In the present case the Sheriff had found that the respondent was a boilermaker by trade, and his employment as a labourer was to be regarded as merely casual employment. There was nothing to show that he had definitely ceased to be employed as a boilermaker. In any event the question as to whether there had been a change of grade was one of fact—*Perry* v. *Wright*, *cit. sup.*

LORD JUSTICE-CLERK—In my opinion the Sheriff-Substitute has erred in the decision to which he has come. The respondent was employed by the appellants for some time as a boilermaker and for some time as a labourer. While employed as a labourer he met with an accident which entitled him to compensation under the Workmen's Compensation Act 1906. The contention of the respondent is that in calculating the average weekly wage that the Court should take the amount which the workman earned in one grade as a labourer and the amount which he earned in the other grade as a boilermaker, and put the two together in order to arrive at an average in fixing the compensation. The Sheriff-Substitute has done that, and has given compensation at the full average rate of the two grades. In my opinion that is not right. I think that this man was undoubtedly in the position stated by the Master of the Rolls in the case of *Perry* v. *Wright*, 1908, 1 K.B. 441, at p. 453—"Any step up or step down from one grade to another is to be regarded as commencing a fresh employment." And accordingly the compensation must be based on the wages he was earning in the 'grade of employment' in which he met with the accident, and if he was a labourer at the time of the accident you are not entitled to go back beyond that. I think this is well expressed by L. J. Fletcher Moulton in the same case, p. 468—"In my opinion sec. 2(*c*) is intended solely to affect cases where there has been a change in the terms of the employment, and in such cases it limits the relevant period to the time that has elapsed since the last change in those cases in which the change is of a nature to alter the grade of the workman." Every word of these two sentences seems absolutely to apply to the present case.

LORD ARDWALL—I concur. I think it is clear from the terms of section 1 (*b*), read along with section 2 (*c*) of the First Schedule of the Act of 1906, that the "employment" referred to in the former of these sections means employment in the grade in which the workman was employed at the time of the accident.

LORD SALVESEN—I also agree, and I would only point out that while our decision in this case is against the workman, I think that in the majority of cases it will operate in favour of workmen, because it more often happens that a man rises step by step in his employment than that his grade is changed from a higher to a lower grade. I think that the intention of the statute was to benefit workmen who have risen in grade. But if the workman is to take benefit so far as his claim for compensation is concerned from a rise in grade, and the higher pay which it involves, it seems to follow that he must suffer correspondingly in the case where he has descended to a lower grade, and is working at a lower wage when the accident occurs.

The Court answered the first alternative of the question of law in the negative, and the second alternative of said question in the affirmative; therefore recalled the award of the arbiter, remitted to him to

proceed with the arbitration in terms of the foregoing decision, and decerned.

Counsel for the Appellants—Horne, K.C—Dykes. Agent—Robert Miller, S.S.C.

Counsel for the Respondent—J. G. Robertson. Agents—Paterson & Salmon, Solicitors.

Wednesday, January 18.

SECOND DIVISION.

[Sheriff Court at Dumfries.

DUKE OF BUCCLEUCH AND ANOTHER *v.* SMITH AND OTHERS.

Fishings—Salmon Fishing—Public Right of White Fishing—White Fishing with Fixed Nets in Solway—Paidle Nets—Act of Queen Anne 1705, *September* 21—29 *Geo. II, cap.* 23, *sec.* 1.

Circumstances in which *held* that paidle nets situated in the Solway Firth within the limits of the district of the river Nith, as defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, had been erected and used for the purpose of capturing salmon, and were injurious to the rights of the proprietors of salmon fishings in the river Nith and its tributaries; and interdict *granted* at the instance of such proprietors against the defenders erecting and using within the district stake nets, paidle nets, and other fixed engines fitted to capture salmon.

Interdict—Proof—Injury to Salmon Fishings—Complaint Directed against the Use of a Certain Kind of Net.

Proprietors of salmon fishings sought to interdict white fishermen from using within the fishery district paidle nets fitted to capture salmon. *Held*, distinguishing such a complaint from one directed against persons catching salmon or poaching, that it was unnecessary for the pursuers to prove actual killing of salmon in order to get interdict.

Opinion by the Lord Justice-Clerk that in order to get interdict against any particular defender it was unnecessary to prove against him individually actual killing or even enclosure in his nets.

The Duke of Buccleuch and another, proprietors of certain salmon fishings in the river Nith and its tributaries, brought an action in the Sheriff Court at Dumfries in which they craved the Court "to interdict defenders from erecting and using stake and paidle nets or other fixed engines on the river Nith and estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, or at least to interdict defenders from erecting and using stake nets, paidle nets, or other fixed engines for the purpose of catching salmon or fish of the salmon kind, or of such size and construction, or in such situations, or used in such manner and at such times as to prejudice, interfere with, or injure the pursuers' rights of salmon fishings on the river Nith or estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith, fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862, and to find defenders liable in expenses and decern therefor."

The pursuers pleaded, *inter alia*—"(1) The stake nets of the defenders being illegal, interdict should be granted against defenders from erecting and using stake and paidle nets or other fixed engines on the river Nith and estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith fixed and defined as aforesaid. (2) In any event, the nets in question being illegal as being injurious to the proprietors' salmon fishings, the defenders should be interdicted from erecting and using them or any of them, or from erecting and using stake nets or other fixed engines within the district stated of such a construction and in such situations or manner as to prejudice or injure the pursuers' rights of salmon fishing."

The defenders pleaded, *inter alia*—"(1) The defenders, in erecting and using the nets in question, having acted in pursuance of their just and legal rights, are entitled to be assoilzied from the conclusions of the action. (2) The defenders are entitled to be assoilzied from the conclusions of the action in respect that (*First*) they have not erected or used the nets in question for the purpose of catching salmon or fish of the salmon kind; (*Second*) and the said nets are not of such size or construction, or so situated or used, as to injure the pursuers' rights of salmon fishing to any substantial or material extent."

The facts are given in the note of the Sheriff-Substitute (CAMPION) (see also opinion of Lord Ardwall), who on 14th December 1909 pronounced this interlocutor—"Finds that the nets in question in this action belonging to the defenders respectively are fixed stake nets or paidle nets, and (excepting those belonging to the defender James Swan) are fixed and erected on the river Nith or estuary thereof, and upon the sands and shores between high and low water-mark within the limits of the district of the river Nith as fixed and defined by the Commissioners acting under the Salmon Fisheries (Scotland) Act 1862: Finds therefore that the said nets are illegal: Finds further that the said nets have been erected and used by the defenders for the purpose of capturing salmon and fish of the salmon kind, and that the capture of salmon and fish of the salmon kind by the said nets is injurious to the rights of the pursuers as proprietors of salmon fishings in the river Nith and its tributaries: Therefore inter-