were loosened. The probabilities of the case are all against the conclusion reached by the Lord Ordinary. If the pursuer had made up his mind not to have intercourse why did he not say so in his letters to the defender in the autumn of 1920? If this was his attitude why was he so anxious to get the defender to Perth? Why at Perth was the letter of 17th February discussed and ultimately burnt? Why did the defender case to sleep alone and go into the pursuer's bed? Why did the pursuer hold her in his arms and loosen his pyjamas if he did not desire her? Again, when she had received the pursuer's ultimatum of 1st February 1921 why did she fail to state in any of her subsequent letters that she had been willing to consummate the marriage at Perth, but that the pursuer had not desired to do so? The Lord Ordinary considers that the tone of the pursuer's letter of 20th November is inconsistent with his oral evidence. I venture to disagree. The tone of a letter depends on the mood of the writer. The Lord Ordinary thinks that the pursuer ought to have been in a resentful mood when he wrote that letter. I do not think so. If the pursuer thought, as I am of opinion he did, that the defender although willing had been unable to yield herself to him, why should he have been resentful? He hoped that she would return shortly to Perth and that she might yet overcome her incapacity. In this mood the tone of his letter is just what would have been expected.

If those views are sound, the situation at Perth was this—the pursuer was anxious, as he had always been, to effect consummation; the defender was willing to have intercourse; efforts were made on four nights to accomplish the act, but in the end it remained unaccomplished. Following on what had happened in India, the events at Perth would seem to afford further and conclusive proof of what had already been demonstrated, to wit, that the defender was devoid of sex instinct and incapable of performing the sexual act. The only ground on which a contrary conclusion can be affirmed is this, that the Perth test was inadequate. It is suggested that this test was insufficient (*a*) because there were "disturbing elements" and (*b*) because the period was too short. It is difficult to see what disturbing elements affected the parties on the night of the 15th. There had been a complete reconciliation and the parties went to bed on the best of terms and apparently in a suitable mood for the accomplishment of what both then desired. The defender and her mother-in-law had a sort of quarrel on the Tuesday, but nothing was attempted by the pursuer on that night, and the effect of that quarrel had surely passed away on the 17th, 18th, and 19th. I am unable to hold that there were any disturbing elements which adversely affected the test to which the defender was subjected at Perth. Was the period of test at Perth of sufficient duration? If this period had been the only test it would manifestly have been insufficient. But if I am right in holding that her incapacity had been proved by what occurred in India, I think that the test to which she was subjected at Perth was quite adequate to show that her incapacity still endured.

My opinion, accordingly, is that the pursuer has proved that the defender has all along been unable to perform the sexual act.

If the marriage is not to be annulled I am of opinion that it cannot be desolved on the plea of the defender's desertion. My reasons for holding this view are fully stated in my opinion in the case of *C* v. *D*, 1921, 2 S.L.T. 182. The pursuer's future as the result of the judgment which is proposed is a singularly hopeless one. If the true view be that non-consummation of the marriage is due to the defender's stubbornness (and this seems to be the ground of judgment proposed, although it is against the defender's own evidence as to what occurred at Perth) she may persist in this attitude indefinitely, and it would seem as if the law of Scotland afforded the pursuer no remedy. I am unable to accept the view that our law is powerless to put an end to a state of affairs so hopeless and so impossible. The law will not hesitate to regard what is styled stubbornness when persisted in over a long period of time and when it has been subjected to an adequate attack as inability in fact and impotence in law.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. H. Brown, K.C.—Scott. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defender and Respondent—Moncrieff, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Wednesday, December 6.

FIRST DIVISION.

[Sheriff Court at Ayr.

WILSON *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap*, 58), *First Schedule* (16)—*Review of Weekly Payment—Payment in Abeyance During Ten Years' Employment—No Recorded Agreement—Competency of Application to Review.*

A boy fifteen years of age was injured on November 29th, 1911, and having claimed compensation under the Workmen's Compensation Act 1906 received a weekly payment from his employers until April 24th, 1912, when his employers, having taken him into their employment again though he was still partially incapacitated, stopped the weekly payment without his consent. He remained in their employment until 20th January 1922, when he was dismissed. Being still partially incapacitated he brought proceedings under the Act for review of the weekly payment formerly made. There was no recorded agreement. *Held* that the arbitrator

was entitled to review the weekly payment formerly made.

The Workmen's Compensation Act 1906, Schedule I (16), provides—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall in default of agreement be settled by arbitration under this Act: Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1."

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Ayr, in which Charles Wilson, *respondent*, applied for review of a weekly payment formerly made to him by William Baird & Company, Limited, *appellants*, the Sheriff-Substitute (BROUN) reviewed the weekly payment and at the request of the company stated a Case for appeal.

The Case stated—"The following *facts* were admitted or proved—1. On 29th November 1911 the respondent, who was born on 23rd April 1896, received personal injury by accident arising out of and in the course of his employment as a coal picker by the appellants in their No. 12 Common Pit. While working at the picking tables the respondent's left hand was caught in the moving plates and was badly crushed and bruised. The middle and ring finger had to be amputated at the knuckle joint, and one of the knuckle joints had also to be taken away. 2. At the date of the said accident the respondent's average weekly earnings were 9s. 3d. 3. The respondent claimed compensation under the Workmen's Compensation Act 1906, and although no memorandum of agreement was recorded the appellants admitted liability and paid to the respondent compensation at the rate of 9s. 3d. a-week from 29th November 1911 to 24th April 1912, when they stopped all payment of compensation without any consent on the part of the respondent. 4. On 22nd April 1912, although the respondent was still partially incapacitated as the result of the said injury, he obtained employment from the appellants and continued to work with them at various jobs at their pits in the district down to 20th January 1922, with the exception of the period from 1st April till the beginning of July 1921, when the pits were closed on account of the national coal stoppage. These various jobs were—hutch runner on pithead at Barglachan Pit from 22nd April 1912 to 9th January 1913; pony driver on surface at No. 15 Common Pit from 10th January to 25th March 1913; hutch runner at No. 16 Common Pit from 1st April 1913 to 14th July 1914; screeman at pithead at same pit from 15th July 1914 to 15th January 1916; boiler fireman at pithead at number 15 Common Pit from 2nd February to 23rd December 1916; screeman at No. 16 Common Pit from 13th December 1916 to 16th August 1917; boiler fireman on pithead at No. 15 Common Pit from 17th August 1917 to 10th December 1918; labourer stacking pit props on surface at Barglachan Pit from 11th December 1918 to 12th December 1919; bottomer underground at No. 16 Common Pit from 19th December 1919 to 7th February 1920; boiler fireman at pithead at No. 15 Common Pit from 9th February to 1st August 1920; and haulage engineman on surface at Highhouse Pit from 5th August 1920 to 20th January 1922. 5. On 20th January 1922 the respondent was dismissed by the appellants for alleged carelessness. At the date of his dismissal he was earning about 6s. per shift or £1, 13s. per week. At the same date the earnings of a worker at the most highly paid job which the respondent had undertaken while in the appellants' service, viz., that of boiler fireman, were about £2, 4s. per week. 6. On 7th June 1922 the respondent obtained work at No. 1 and 2 Bothwell Castle Colliery from the Lanarkshire branch of the appellants' firm without the knowledge of the Ayrshire officials by whom he had been dismissed. This work consisted of braking railway waggons which were loaded at the screes and run into the lyes. At this work the respondent is still employed, and earns 5s. 11d. per shift or about £1, 12s. per week. 7. As the result of the said injury the respondent's left hand is permanently damaged. Not only has he lost his middle and ring finger, but there is a tender spot on the palmar aspect of the hand below the ring finger. The gripping power of his hand is consequently weak, and this will prevent him performing efficiently the work of a miner at the face for which he intended to qualify himself when he entered the employment of the appellants prior to the said accident. 8. On 8th February 1922 the respondent through his agents intimated a claim for compensation, but the appellants refuse to pay any compensation to the respondent. 9. On 8th February 1922 the respondent was, and still is, partially incapacitated for work as the result of the said injury. 10. On 8th February 1922 and down to the present date the respondent if he had remained uninjured would probably have been earning as a miner a weekly wage of £2, 9s.

"On these facts I found in law that the Court was entitled, in terms of section 16 of Schedule I of the said Act, to review the weekly payment formerly made by the appellants to the respondent as compensation for the said injury. I therefore reviewed as from 8th February 1922 the weekly payment of 9s. 3d. formerly made by the appellants to the respondent as compensation for the said injury, and assessed the compensation payable by the appellants to the respondent from the said date till the further orders of the Court at five shillings per week as compensation for partial incapacity resulting from the said injury, and found no expenses due to or by either party."

The *question of law* for the opinion of the Court was :—"On the facts above set forth was I entitled, in terms of section 16 of Schedule I of the Workmen's Compensation Act 1906, to review the weekly payments formerly made by the appellants to the respondent as compensation for the personal injury received by him in the accident on 29th November 1911?"

Argued for the appellants—The application for review was incompetent. The First Schedule (16) only applied to an existing weekly payment—*Nicholson* v. *Piper*, [1907] A.C. 215, *per* Lord Robertson, and in the Court of Appeal, 96 L.T. 75, *per* Cozens-Hardy, L.J. Here there was no existing payment. All that was known of it was that it had been made and had ceased ten years ago, without any agreement being recorded or anything done to keep the question open. There was nothing therefore to review. Further, the workman could have raised proceedings for review after twelve months, and by his delay must be taken to have acquiesced in the termination, by his employment, of the agreement—*Dempster v. Baird & Company, Limited*, 1908 S.C. 722, 45 S.L.R. 432, *per* Lords Low and Ardwall.

Argued for the respondent—The agreement to pay was admitted, and it had not been brought to an end in any competent manner. It was still, therefore, an existing agreement, and review of the payment was competent—*Southhook Fire-Clay Company, Limited* v. *Laughland*, 1908 S.C. 831, 45 S.L.R. 664; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665; *Nelson* v. *Summerlee Iron Company, Limited*, 1910 S.C. 360, 47 S.L.R. 344. The fact that the payments had ceased while wages were paid was no bar to review—*Dempster* v. *Baird & Company, Limited* (*cit*). The decision in *Nicholson* v. *Piper* (*cit.*) depended on the fact that the payments had been ended by the arbitrator, and was really in the respondent's favour.

LORD SKERRINGTON—The question of law which the arbitrator puts to us is whether he was entitled in terms of paragraph (16) of Schedule 1 of the Workmen's Compensation Act 1906 to review the weekly payment formerly made by the appellants to the respondent as compensation for the personal injury received by him in the accident on 29th November 1911.

I should have thought from the facts stated that the present was a typical example of a case in which it was both competent and necessary for the arbitrator to review the weekly payment. Its amount was fixed by agreement more than ten years ago, at a time when the workman was a boy of fifteen, and when, as we may infer, he was totally incapacitated for work. Moreover, the maximum compensation which the parties were compelled to have in view at the time when they made their agreement was just one-half of that which is declared to be applicable where the parties or an arbitrator are called upon to review, in terms of paragraph (16) of Schedule 1, the weekly payment to a workman who was under twenty-one years of age at the date of the accident and where the review takes place more than twelve months after the accident. It is unnecessary to decide the point, but as at present advised I am disposed to think that it is not a condition-precedent to the workman's right to demand a review in terms of the paragraph in question that he should be able to point to what has been called a subsisting or living agreement or award which fixes his weekly payment at a particular figure, but that it would be enough for him to show that he has a subsisting statutory right to a weekly payment in respect of his injury, and that the amount as formerly fixed by award or agreement is either no longer binding upon the parties or is no longer a correct measure of the workman's statutory right. Obviously it would be fatal to an application for review if it appeared that the workman's statutory right to demand a weekly payment in respect of his injuries had been extinguished in some manner which it was the duty of the Court to recognise. That was what happened to the workman who was the appellant in the case of *Nicholson* v. *Piper*, [1907] A.C. 215. It was, I think, a misunderstanding of the judgment of the House of Lords in that case which inspired the present appeal. In the case with which we are concerned it is certain that nothing has happened which deprives the workman of his statutory right to a weekly payment. Even, however, if it were held to be necessary that a workman who applies for review under paragraph (16) of Schedule I should be able to point to a subsisting or living agreement or award which fixes the amount of his weekly payment at a certain figure, the respondent is in my opinion able to fulfil this requirement. The appellants' counsel admitted that at one time there was an agreement which fixed the respondent's weekly payment at 9s. 3d. It was open to them to ask the arbitrator to find that this agreement had been abandoned by the parties and discharged—an inference which the arbitrator was entitled to draw if he considered that it was justified by the facts as proved. No such finding was made by the arbitrator, and we were not asked to remit the case to him in order that he might, if he thought proper, pronounce such a finding. So far as appears, he took what seems to me to be the natural and proper view of the matter, viz., that the workman accepted the employment which was offered to him by the appellants as in satisfaction for the time being of their obligation to pay him compensation at the rate of 9s. 3d. a-week, but that he never discharged them of their whole future liability under the agreement.

If authority is needed in regard to what seems to me to be a simple case, I may refer to *Nelson* v. *Summerlee Company*, 1910 S.C. 360. The question of law ought in my opinion to be answered in the affirmative.

LORD CULLEN—While no memorandum was recorded, it is common ground that, following on the accident, an agreement was made whereby the employers undertook to

pay compensation under the Act to the workman. After a period, during which the employers paid to the workman 9s. 3d. per week, being the amount of his antecedent weekly wage, the workman obtained employment from them during a number of years, and apparently accepted it as covering any claim he might have for the time being in respect of his partial incapacity. Ultimately circumstances arose in which the workman fell back on the agreement, and he presented an application for review in which the arbitrator has assessed at 5s. the weekly amount of compensation in respect of partial incapacity to be paid to him until further orders of Court. The objection stated by Mr Hunter for the appellants was that the application for review was incompetent in respect that when it was presented there was no "existing" weekly payment to review. Paragraph (16) of Schedule I of the Act, it was said, applies only to existing weekly payments. I am unable to follow this line of argument in its application to the present case. Paragraph (16) cannot be displaced merely because the employer has ceased to pay compensation for some period before the application for review is presented. And there is no special prescription for claims under the Workmen's Compensation Act. The appellants founded on *Nicholson* v. *Piper* ([1907] A.C. 215), and in particular on the opinion of Lord Robertson. But there the arbitrator had pronounced an order which was held to make a final ending of the previous weekly payment, so that it was quite true to say in a legal sense that there was no longer any existing weekly payment to review. Here there is no corresponding state of facts. The weekly payment under the agreement had been *de facto* in abeyance for a number of years owing to the workman having taken employment in substitution, but it had never been put out of existence legally. I am unable to accept the Solicitor-General's contention that we should now hold on the facts of the case that the agreement had been discharged by mutual consent—a view which was not presented to the arbitrator and on which he has accordingly made no finding. I concur with your Lordship in holding that the application was competent, and that the question in the Stated Case should accordingly be answered as your Lordship proposes.

LORD SANDS—Under paragraph (16) of the First Schedule to the Act of 1906 any weekly payment may be reviewed. I accept the Solicitor-General's representation that a weekly payment falling to be reviewed must be a weekly payment under a living agreement. Now it is obvious in this case that the real question between the parties—the only question of any real interest to them—is whether when this application was made there was a living agreement. The appellants object to the review of the agreement by the arbitrator, but if there were a living agreement it would be in the interest of the appellants that it should be in the power of the arbitrator to review it seeing that the arbitrator has fixed the amount at 5s., whereas if it is a living agreement and he cannot review it the amount is 9s. 3d. But the question which is before the Court, it seems to me, is whether we have any materials before us, or whether we are placed in a position, to judge in any way whether or not there was here, when the application was made, a living agreement. I can quite conceive of circumstances where it might be held that an agreement such as this had come to an end, or was no longer a living agreement, even although the man might still have a claim in respect of his injury. I figure the case, for example, of a man who is temporarily totally disabled and gets a sum fixed on that basis for a few weeks. He then recovers completely except that he wants a finger, and being reinstated in employment he claims nothing for a number of years. I think in these circumstances it might reasonably be held that the man, whether or not he had abandoned all claim to compensation, had abandoned the agreement for compensation at a certain rate. We have nothing of that kind presented to us here in the case as stated, and therefore I concur in the proposed answer to the question.

The LORD PRESIDENT did not hear the case.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—The Solicitor-General (D. P. Fleming, K.C.)—Hunter. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Patrick. Agents—Macpherson & Mackay, W.S.

Saturday, December 9.

SECOND DIVISION.

TRUSTEES OF CHALMERS' HOSPITAL, BANFF, PETITIONERS.

Trust—Administration—Special Powers—Nobile Officium—Petition for Authority to Sell Heritage—Sale of Heritage Expressly Forbidden by Trust Deed—Sale "Expedient for the Execution of the Trust"—Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *sec.* 5.

The Trusts (Scotland) Act 1921, section 5, enacts—"It shall be competent to the Court, on the petition of the trustees under any trust, to grant authority to the trustees to do any of the acts mentioned in the section of this Act relating to general powers of trustees, notwithstanding that such act is at variance with the terms or purposes of the trust, on being satisfied that such act is in all the circumstances expedient for the execution of the trust. . . ." The section of the Act which relates to the general powers of trustees is section 4, and by sub-section (1) thereof it is enacted that —"In all trusts the trustees shall have power to do the following acts, where