terest altogether comes in, namely, the interest of the public; and that gives the case a different aspect. It is because the office in question is a *munus publicum* that it is held on the strongest tenure known to the law. But the public interest requires not merely security of tenure but also proper performance of the duties of the office; and having regard to the strong averments made here as to persistent dereliction of duty, and to the absence of any counter averments of malice or personal motive, I agree that an interim appointment should be made. I have no doubt as to the general competency of the application; and while it is not every averment of *culpa* that will suffice, yet the averments here touch so nearly the interests of the burgh and of the public within the burgh that I think that this application should be granted.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor:—

"Nominate and appoint Robert Duncan Whyte, writer, Rothesay, to be interim town clerk of the burgh of Rothesay and to act *ad interim* in the execution of the duties of said office and of the various offices and appointments connected with the duties which the Town Council of said burgh perform under the Acts mentioned in the petition, and that until the action of declarator and interdict between the petitioners and the respondent referred to in the petition is concluded or otherwise disposed of: Find no expenses due to or by either party, and decern."

Counsel for the Petitioners—Ure, K.C. —J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Jameson, K.C.—A. S. D. Thomson. Agents—Scott & Glover, W.S.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff-Substitute at Dundee.

GOURLAY BROTHERS & COMPANY *v.* FERRIER.

Reparation — Workmen's Compensation Act 1897 (60 and 61 *Vict. cap.* 37), *First Schedule, secs.* 11 *and* 12, *Second Schedule, sec.* 13—*Review of Weekly Payments—Remit by Sheriff to Official Medical Practitioner—Certificate of Medical Practitioner Conclusive Evidence of Workman's Condition—Reduction of Weekly Payment to Nominal Amount so as to Preserve Right to Apply for Review.*

By section 13 of the Second Schedule of the Workmen's Compensation Act it is provided that an arbitrator may remit to a medical practitioner appointed for the purposes of the Act to report on any matter which seems material to any question arising in the arbitration.

Section 11 of the First Schedule provides that a workman receiving weekly payments under the Act may be required by his employer to submit himself for medical examination, and may submit himself to a medical practitioner appointed for the purposes of the Act, whose certificate as to the condition of the workman is declared to be "conclusive evidence of that condition."

In an application by an employer for review of weekly payments made to a workman who had received injuries to his eyesight, the Sheriff-Substitute, in terms of section 13 of the Second Schedule, remitted to a medical practitioner appointed for the purposes of the Act to examine the workman's condition. The report bore that the power of vision of the right eye was reduced by one-half, which condition would be permanent; that the workman would never be able for any work for which unimpaired vision was essential, but was quite able to undertake his ordinary work as a labourer.

The Court (*diss.* Lord Young) *found* that the certificate was conclusive evidence that the workman's incapacity arising from his injuries had ceased, to the effect of disentitling him to further compensation in the meantime; but that it was proper in view of the terms of the report to preserve the right of the parties to apply for review, and with that object, instead of ending the weekly payments, to reduce them to a nominal amount; and *remitted* to the Sheriff-Substitute to reduce the weekly payments to 1d. per week.

John Ferrier, labourer, having been injured in the employment of Gourlay Brothers & Company, shipbuilders, Dundee, was awarded by the Sheriff-Substitute at Dundee (CAMPBELL SMITH) compensation under the Workmen's Compensation Act 1897, at the rate of 6s. 3d. per week, beginning on 3rd January 1901, until the further orders of the Court.

On 10th September 1901 Gourlay Brothers & Company lodged a minute, in which they craved the Court to review the weekly payments and bring the same to an end as at 11th April 1901.

They averred that on that date Ferrier had completely recovered from the effects of the injuries in respect of which compensation had been awarded, and had since been earning wages at other employments; that in consequence the minuters had stopped the weekly payments on said date, and that Ferrier was threatening to charge them on the decree.

On 16th October 1901 the Sheriff-Substitute pronounced the following interlocutor:—"Having seen the medical referee's report, and heard parties, reduces the compensation payable to the pursuer to 5s. a-week as from this date until the further

orders of the Court; grants warrant to the Clerk of Court to deliver up to the pursuer the consigned sum of £6, 18s. 5d." (being the amount of the weekly payments for the period after 11th April).

On the crave of the minuters the Sheriff stated a case for appeal, which set forth—"On 2nd October 1901 the Sheriff-Substitute, in terms of section 13, Schedule 2 of the Act, remitted to the medical referee for the Dundee district of Forfarshire, Dr MacEwan, to examine respondent's condition, and his report is as follows:—'*Dundee, October 8th*, 1901. I, David MacEwan, a registered medical practitioner appointed by the Secretary of State for the purposes of the Workmen's Compensation Act 1897, have this day examined John Ferrier, residing at 53 Fisher Street, Broughty Ferry, who stated that he was suffering from the effect of injuries, viz.—Fracture of skull, and damage to right eye, received on the 13th day of December 1900 at Dundee, while in the employment of Gourlay Brothers & Company, engineers and shipbuilders, Dundee, and I hereby certify that his condition is as stated below:—There is a scar one inch in length immediately above the inner part of the right eyebrow, and the bone beneath is slightly depressed as a result of the fracture. The parts are soundly healed, there is no mental impairment, and his bodily health is good. The power of vision of the right eye is reduced by one-half in consequence of a wound of the optic nerve by the fractured bone. The wound of the nerve has healed, but the diminished power of vision will be permanent. The left eye is quite sound. In my opinion he will never be able for any work for which unimpaired vision is essential, but he is quite able to undertake his ordinary work as a labourer. DAVID MACEWAN, M.D., C.M.'"

The question of law for the opinion of the Court was—"Whether the foregoing certificate of the medical practitioner, dated 8th October 1901, is in law sufficient evidence of the respondent's complete recovery from his injuries, and from all disability arising therefrom, to the effect of disentitling him to all further claim under the Workmen's Compensation Act 1897, against the appellants for the accident that happened to him in their employment on or about 10th December?"

The Workmen's Compensation Act 1897, First Schedule (11), provides—"Any workman receiving weekly payments under this Act shall, if so required by his employer, . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer . . . but if the workman objects to an examination by that medical practitioner or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act as mentioned in the second schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition" . . . (12) "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."

Second Schedule (13)—"The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament."

Argued for the appellants—A workman was entitled to compensation only so long as he suffered from incapacity resulting from the injury. The certificate of the medical practitioner appointed under the Act was declared to be conclusive evidence of the workman's condition, and no further inquiry was necessary or competent—*M'Avan* v. *Boase Spinning Company, Limited*, July 11, 1901, 3 F. 1048, 38 S.L.R. 772; *Pomphrey* v. *The Southwark Press* (1901), 1 K.B. 86. The question remitted to the medical referee was as to the workman's condition, and it was immaterial whether the remit was made under sec. 11 of Schedule I. or under sec. 13 of Schedule II. The certificate of the medical referee showed that the incapacity resulting from the injury had ceased, and the appellants were therefore entitled to have the weekly payments ended. If there were any risk that the injuries might hereafter result in incapacity, the Court might reduce the weekly payments to a nominal sum, and thus keep the matter open for review if circumstances should change—*Irons* v. *Davis & Timmins, Limited* (1899), 2 Q.B. 330.

Argued for the respondent—The certificate of the medical referee was granted, not in consequence of a request by the employer in terms of sec. 11 of Schedule I., but on a remit by the arbitrator under sec. 13 of Schedule II.; and the last-named section did not provide that the medical referee's report was to be accepted as "conclusive." The arbitrator was therefore entitled to decide the question either on evidence (which the respondent had offered) or on his own knowledge and observation. The issue was as to the wage earning capacity of the respondent, and that was clearly a matter of fact, and not a question which could be determined by the professional opinion of a medical man.

At advising—

LORD JUSTICE-CLERK—The appellants, against whom compensation had been

awarded in respect of an injury to the respondent suffered while in their employment, applied to the Sheriff to have the award reviewed under the statute, and the Sheriff remitted to the official appointed by the Secretary of State for the Dundee district to report on the condition of the respondent. The report was that the respondent was "quite able to undertake his ordinary work as a labourer." The question to be decided is, whether this report is conclusive, so as to preclude any further right to compensation, at least in the meantime. When the appellants demanded a re-opening of the inquiry they were entitled to call upon the respondent to submit himself to medical examination, and to such examination he must submit himself as a condition of his having any right to insist for payment of further compensation. The examination is to be by the public official appointed by the State, and paid by the State, and the statute declares (11 section, Schedule I.) that his report shall be conclusive as to "condition," which I consider means that it shall be conclusive as to his fitness, whether partial or full, to resume work, the purpose being to refer that question to a competent official selected by the State and acting in a public capacity. I do not attach importance to the fact that the examination by the official referee was made on a remit by the Sheriff. It was the right of the appellants to have the condition of the respondent ascertained in that manner, and I hold that it was in accordance with that right that the report was asked for and obtained, and that it is the appellants' right to have it given effect to. The case of *M'Avan* v. *The Boase Spinning Company* seems to me to be in point, and I am of opinion that the principle there declared should have been given effect to in this case. In ordinary circumstances this view would lead to a final decision. But in the present case where there has been an injury to the sight, there may be ground for holding that although the respondent is at present in no way incapacitated for his ordinary work, there may be supervening development of injury to eyesight, and this seems to me to be a reasonable contention. I would propose therefore that the course should be followed which was taken in some other cases under the Act, of keeping the case in life by awarding a nominal weekly sum, the result of which would be that on any change of circumstances, whether in the way of incapacity supervening or final recovery, either party interested might apply again to have the case reviewed and temporarily or finally dealt with as should be just.

I am of opinion that we should recal the judgment of the Sheriff and remit to him to reduce the compensation from and after 16th October 1901 to 1d. per week until further orders of Court.

LORD YOUNG—This is an appeal on case stated in an arbitration process before the Sheriff of Forfarshire under the Workmen's Compensation Act 1897. By interlocutor dated 25th January 1901 the Sheriff ordered compensation to the workman at the rate of 6s. 3d. a week from 2nd January, "continuing until the further orders of Court." This payment was made "down to 11th April 1901," when the employers (the appellants), without any order of Court or other authority, "stopped" it. They might, while the workman was receiving the weekly payments, have reqnired him to submit himself for examination by a medical practitioner under the provisions of section 11 of the First Schedule of the Workmen's Compensation Act, but this they never did. They were nevertheless entitled under section 12 of the same schedule to request that the weekly payment should be reviewed, and this they did, I assume, quite regularly by minute in the original process lodged on 10th September 1901 (see Act of Sederunt June 3rd 1898, sec. 5). In article 2 of this minute they state:—"The defenders duly paid the said weekly compensation down to 11th April 1901, but they were informed and believe that, previous to that date, the said John Ferrier had recovered from the effects of the accident, and that he has since that date been, and is in no way incapacitated from work. In fact it has come to their knowledge that Ferrier has been working and earning wages at other employments, such as road-making and fishing." This statement, denied by the workman (the respondent), presents the question of fact in dispute to be dealt with and disposed of by the Sheriff as required by section 52 of the Sheriff Courts Act 1876, "after proof led when necessary and hearing parties." It would not have occurred to me that it could be decided without proof, unless indeed against the party on whom the onus lay. I think it is important to keep in view the terms of section 2 of the First Schedule of the Workmen's Compensation Act — "In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity."

The appellants' averment, which *prima facie* it was for them to prove, was that previous to 11th April, and from that time till 10th September, the date of the minute, the respondent was "in no way incapacitated from work," and was "in fact working and earning wages" of an amount equal to his earnings before the accident. If this was proved, the appellants were entitled to have the weekly payments stopped by order in the process, and otherwise not. It would certainly not have occurred to me that it was a question for a medical expert, or that the Sheriff's judgment upon it could come before this Court on a case stated. The result (bringing the case here) has been reached in this way—The Sheriff,

acting on the permission (for it is mere permission) given by section 13 of Schedule II. of the Workmen's Compensation Act, by interlocutor dated 2nd October, remitted to David MacEwan, M.D., and he reported in the terms quoted in the case.

Apparently the position taken up by the employers, or probably by their insurers, was that this medical man's opinion was conclusive, and supported their averment that the workman had completely recovered from his injuries, and was as capable of working as before the accident, and that evidence in support of that averment was not only superfluous but inadmissible, and that evidence to contradict that averment was also excluded. That argument leads to this, that if the medical opinion had been the other way, that the workman was altogether unfit for work, it would have been incompetent for the employer to prove that he was fit and was working and receiving wages. Now, I cannot assent to that. I think it is an extravagant proposition. There is not a word in section 13 of Schedule II. to say that the report of the medical practitioner obtained under that section is to be conclusive, and that the Sheriff, however much dissatisfied he may be with it, must act upon it. I think if we were to pronounce a judgment to that effect no Sheriff would ever remit to a medical practitioner under that section—he would order proof. I am of opinion that the Sheriff acted rightly in holding that the report of Dr MacEwan did not prove the statement in the minute on which the motion was made, and that he acted rightly in refusing to reduce the weekly payment more than he did.

LORD TRAYNER (who was absent at advising, and whose opinion was read by the Lord Justice-Clerk)—In this case the respondent was awarded in January last compensation in respect of injuries sustained by him in the appellants' employment. The right to that compensation existed, according to the provision of the statute, "during the incapacity" resulting from his injuries, but no longer. In September the appellants, in exercise of their statutory right, moved the Sheriff-Substitute to review the award he had made, on the ground, I assume, that the respondent's incapacity had ceased, and following out the procedure provided by the statute the Sheriff-Substitute remitted to the medical referee appointed by the Secretary of State for the Dundee district of Forfarshire to examine the "respondent's condition." The medical referee has reported that the respondent "is quite able to undertake his ordinary work as a labourer." I cannot read that as meaning anything else than this, that the incapacity which had prevented the respondent for some time undertaking his ordinary work has now ceased. If that is the meaning of the medical referee's report, then the incapacity has ceased, and with it the right to the statutory compensation.

It was maintained, however, that the report of the medical referee is not conclusive of the respondent's condition at the time of his examination, but I am unable to see any good ground for such a contention in face of the express terms of the 11th section of Schedule I. It is said that that clause only has application where the injured workman submits voluntarily to examination. But the examination of an injured workman is not voluntary in any proper sense, because if he refuses to submit to examination he forfeits his right to compensation. He must therefore submit or lose his right. But, again, it is said that the clause I have referred to cannot be appealed to here, seeing that the remit to the medical referee was made by the Sheriff under section 13 of Schedule II. I think it quite immaterial to consider under what part of the 1st or 2nd schedule the remit was made. The statute provides one way, and only one way, by which the condition of an injured workman is to be ascertained where that condition is matter of dispute. It is by reference to a medical man appointed by the Secretary of State, who by such appointment becomes a public officer and performs a public duty, "paid out of moneys to be provided by Parliament," and it is obvious why such a provision was made. It saves expense and saves time where both are important, and it gives both workman and employer the unbiassed judgment of a competent man.

In pronouncing the judgment appealed against I think the Sheriff has not given effect as he should have done to the decision pronounced by us in the case of *The Boase Spinning Company*.

It being then conclusively established that the respondent's incapacity has ceased, at least for the present, his right to the compensation formerly awarded has come to an end. I should accordingly have been of opinion, had nothing more appeared from the medical referee's report than what I have alluded to, that the Sheriff-Substitute should have found that the respondent's right to compensation had "ended." But the medical referee has reported that the injuries received by the respondent have resulted in the reduction "by one-half" of the power of vision of the right eye. The left eye, he says, is quite sound. It is not said, however, that further lesion to the eyesight may not supervene, and in case that should happen I think it only fair to the respondent that his application for compensation should not be dismissed, but be kept in dependence meantime by the award of a nominal sum, as was done in the case of *Irons* to which we were referred. If any change of circumstances arises which would entitle the respondent to have that nominal sum increased, he may bring the matter before the Sheriff-Substitute under section 12 of the 1st schedule to the Act, just as the appellants may do to have even the nominal sum "ended" if after a reasonable time it appears that no incapacity emerges or is to be feared as the result of the injuries sustained.

LORD MONCREIFF—It is important to note at the outset how this case comes

before us. I was at first at a loss to understand on what grounds the Sheriff-Substitute proceeded, because according to the statement in the case he had before him no evidence except the report of the medical man. But I suppose he must have proceeded, as he did in the case of the *Boase Spinning Company*, upon his own personal observation and opinion against that of the medical practitioner. He did not order further inquiry as to the workman's condition, or as to whether in point of fact the workman was fit for work and earning as high wages as before the accident, but (on what grounds does not appear) he actually reduced the allowance, although only to a small extent. The question therefore is in substance just what was put to us in the former case, viz., Whether the Sheriff was entitled to follow his own judgment against that of the reporter? We there decided that he was not.

The medical report is to the effect that the respondent, notwithstanding the injury to his right eye, is at present quite able to undertake his ordinary work as a labourer; and the only question which we can answer just now is, whether that report is conclusive as to his present condition. I am of opinion that it is. This is an application made under Schedule I., sub-section 12, of the Act, under which the question whether compensation previously awarded should be diminished or ended falls to be settled by the Sheriff as arbitrator. Now, with a view to presenting such an application, and for the purposes of the arbitration under that sub-section, the employer is entitled under section 11 of the First Schedule, before coming to the Sheriff, to get the workman examined by a medical practitioner, who may be one of the medical practitioners appointed under Schedule 2 (13), and it is provided that the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be conclusive evidence of that condition. We so held in the case of the *Boase Spinning Company*.

But if the employer makes an application under Schedule I., section 12, without having previously obtained such a certificate, the Sheriff may under the 13th sub-section of Schedule II. appoint the official medical practitioner to report upon any matter material to the question arising in the arbitration. It must be observed that the power conferred on an arbitrator under Schedule II. (13) of remitting to the official medical practitioner to report applies to all arbitrations under the Act, and therefore the scope of the particular arbitration must be kept in view in considering the scope and effect of the report. Now, in an arbitration under Schedule I., sub-section 12, the material question is the condition of the workman, and I cannot suppose that it was intended that a report made by the official medical practitioner under remit to him by the arbitrator or judge under Schedule II. (13) should carry less weight than the certificate of the same person obtained at the instance of the employer as to the condition of the workman under Schedule I. (11). The result therefore, I apprehend, is the same, viz., that such a report is equally conclusive on that matter.

Although the workman is at present able to earn as high wages as before, the injuries which he has sustained may hereafter disable him from doing so. But in that case he can apply for review under Schedule I., sub-section 12, if the compensation is not finally ended. To ensure his power to do so I agree that instead of ending the compensation we should simply reduce it to 1d. a-week.

The Court pronounced this interlocutor—

"Answer the question put in the stated case by finding that the certificate there referred to is conclusive evidence that the incapacity of the respondent arising from the injuries received by him while in the appellants' employment has ceased, to the effect of disentitling him to a continuance at present of the compensation awarded to him on 25th January 1901: Recal the interlocutor of the Sheriff-Substitute dated 10th October 1901, except in so far as it is thereby ordered that the consigned sum of £6, 18s. 5d. shall be delivered up to the respondent, and remit to him to reduce the said compensation to the sum of one penny per week from and after 16th October 1901 until further orders of Court: Find the appellants entitled to expenses, modify the same to £6, 6s., and decern."

Counsel for the Appellants—Campbell, K.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Sandeman. Agents—Galloway & Davidson, S.S.C.

Thursday, March 20.

FIRST DIVISION.

PARISH COUNCIL OF LEITH *v.* M'DONALD.

Poor—Child in Industrial School—Decree against Parish Council for Future Payments—Industrial Schools Act 1866 (29 *and* 30 *Vict. cap.* 118), *secs.* 38 *and* 40, *Sched. H.*

Held that it is not competent on a complaint against a parish council brought under section 38 of the Industrial Schools Act 1866, to grant a continuing order for expenses not already incurred.

Poor—Children Left Destitute by Father—Mother Deserted and Destitute—Chargeability of Children—Industrial Schools Act 1866 (29 *and* 30 *Vict. cap.* 118), *sec.* 38.

Two children were deserted and left destitute by their father, who had disappeared. They were sent to an industrial school on June 11, 1901. Their mother had also been left unprovided for, and had no means to support her