that a trustee is bound to seek for securities which creditors may possess, but when the existence of such securities comes to his knowledge, it then, in terms of the Bankruptcy Act 1856, section 51, 'appears to . . . the trustee that the oath . . . is not framed in the manner required' by that Act, and 'the trustee *shall* call upon' the creditor 'to rectify his oath.' I think that such was the duty of the trustee in this case, and that he cannot by the deliverance appealed against rank an illegal claim. In the case of *Cleland Trustees* v. *Dalrymple*, December 18, 1903, 41 S.L.R. 159, the Lord President states that the trustee should consider claims in an impartial and judicial spirit. But that course is not adopted when the result of what is done is to sustain an illegal claim.

"(2) The next ground upon which the objection to the competency is rested is, that the motion to amend is too late, in respect it has been adjudicated upon. This is met by the answer that any deliverance of the trustee is appealable under the Bankruptcy Act, section 169. But in addition to this consideration the very peculiar kind of adjudication pronounced here cannot, for the reasons already stated, be founded upon in bar to an appeal or amendment. The case of *Latta* v. *Dall*, November 28, 1865, 4 Macph. 100, establishes that an amendment such as is proposed here is within the scope of the 51st section of the Bankruptcy Act.

"I repel the objections to the competency of the appeal and allow the proposed amendment to be made."

M'Call's trustee appealed to the Court of Session.

The argument presented for the appellant is disclosed in the Sheriff-Substitute's note, *supra*. The case of *Young* v. *Strathie*, August 5, 1896, 12 Sheriff Court Review, was cited.

The repondents were not called upon.

LORD TRAYNER—I do not wish to use any language implying censure of the conduct of the appellant, but I cannot approve of the course he has followed. When the defendants' claim was lodged in the sequestration, the appellant knew (as he admits) that the defendants held the security of a life policy belonging to the bankrupt, which they had not valued in terms of the statute. I think he should have called on the defendants to amend their claim by valuing their security, in order, *inter alia*, that he and the creditors might consider whether they would take over the security at the value put upon it. Or he should have rejected the claim as made because an existing security held by the claimants had not been valued. He took neither course, but admitted the claim as made, with the effect (if not with the view) of depriving the respondents of the value of their security. Of that, as I have said, I cannot approve. The appellant says that the respondents were all along aware of the value of this security. They say they were not, and the Sheriff-Substitute has adopted their statement. I think it unlikely that they did, in point of fact, although they might perhaps by a little more diligence have ascertained it. But to allow the amended claim now to be lodged is only justice to the respondents, and does no injustice to the other creditors. Accordingly I think this appeal should be dismissed.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal.

Counsel for the Appellant, M'Call's Trustee—Cooper—D. P. Fleming. Agents—Clark & Macdonald S.S.C.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agent—A. C. D. Vert, S.S.C.

Thursday, June 30.

FIRST DIVISION.

[Sheriff Court of Dumfries and Galloway at Dumfries.

JOHNSTONE *v.* COCHRAN & COMPANY, ANNAN, LIMITED.

Master and Servant—Review of Weekly Payment—Refusal of Arbitrator to Allow Proof—Medical Examination of Workman—Power of Arbitrator—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. I* (12), *Sched. II* (13)—*Statutory Rule and Orders*, 1898, *No.* 407, *sec.* 2.

In an application by employers under Schedule I (12) of the Workmen's Compensation Act, to review a weekly payment to a workman under an agreement recorded in terms of the Act, the employers produced in the arbitration a certificate from a medical practitioner provided by them, to the effect that the workman had recovered from the injuries sustained by him. When the application came before the Sheriff-Substitute, the workman moved for a proof at large. The Sheriff-Substitute refused this motion, remitted the case to one of the medical practitioners appointed for the purposes of the Act, and subsequently, after consideration of the report of this medical practitioner, pronounced judgment ending the weekly payment.

The workman appealed.

The Court, holding that the Sheriff-Substitute was wrong in refusing to allow the proof asked by the workman, *sustained* the appeal and remitted to the Sheriff-Substitute to allow a proof.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule, enacts, sec. 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 . . . and the amount of payment

shall in default of agreement be settled by arbitration under this Act." Second Schedule, sec. 13—"The Secretary of State may appoint legally qualified 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." . . .

No. 407 of the Statutory Rules and Orders, 1898, sec. 2, is in the following terms:—"Before making any reference the committee, arbitrator, or sheriff shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient in some matter which seems material to a question arising in the arbitration, and that it is is desirable to obtain a report from a medical referee on such matter."

In an application by Cochran & Company, Annan, Limited, engineers and boilermakers, lately carrying on business at Newbie, near Annan, Dumfriesshire, and Walter Ward Platt, chartered accountant, Liverpool, the liquidator thereof, in terms of Schedule I (12) of the Workmen's Compensation Act 1897, for the review of a weekly payment payable by them under a recorded memorandum of agreement with John Johnstone, engineer's labourer, Whinnyrig, Annan, the Sheriff-Substitute (CAMPION) stated the following case for appeal:—"This is an arbitration arising under a minute lodged by the said Cochran & Company, the employers, under section 12 of the first schedule of the Workmen's Compensation Act 1897, craving the Court to review and to end or diminish the weekly payment of eleven shillings and threepence sterling, payable by them to the said John Johnstone, under a memorandum of agreement between the parties dated 10th December 1903, and recorded by warrant of the Court in the Special Register under said Act, kept by the Sheriff-Clerk at Dumfries, on 12th January 1904, in respect of injuries received by the said John Johnstone through accident at the works of the said Cochran & Company at Newbie aforesaid on 2nd June 1903, and along with said minute the said Cochran & Company produced a certificate, granted by William Murdoch, M.D., Annan, their medical practitioner, dated 22nd January 1904, to the effect that the workman had at that date wholly recovered from the effects of the bodily injuries sustained by him.

"After having heard the agents of the parties upon said minute and medical certicate, the Sheriff-Substitute ordained the workman John Johnstone to submit himself for examination to Dr Thomas Ferguson, Dumfries, the medical referee appointed by the Secretary of State under said Act, and appointed the said medical referee to report, and the said medical referee having lodged a report of his examination in the following terms, viz.—'*Dumfries, 11th Feb.* 1904.—This is to certify that, by order of the Sheriff of Dumfries and Galloway, I have this day, at 16 Castle Street, Dumfries, seen and examined John Johnstone, residing at Whinnyrigg, near Annan. As a result of the accident which happened to him at the works of Messrs Cochran & Company, Annan, Limited, on the 2nd June 1903, he has lost the fourth and fifth toes of his right foot. The amputation wound has healed well, leaving a thick useful pad on the under surface, where pressure occurs in walking. There is a puckered well-healed cicatrix on the upper and anterior surface of the foot, not tender upon moderate pressure, and out of the way of pressure in walking. From the loss of the two outer toes there is permanently diminished spring of the foot, causing a slight handicap in walking, especially long distances, but with a carefully fitting boot he has now a good useful foot, serviceable for most of the ordinary purposes of work. Further improvement can only occur by exercise increasing the strength of the foot, and giving confidence in its use. Excepting that he is somewhat handicapped in walking long distances to and from his work, I am of opinion that he is now of fair wage-earning capacity, and has made a fair recovery from the effects of his accident. This I certify on soul and conscience.—THOMAS FERGUSON, M.B. & Surgeon, 16 Castle Street, Dumfries'—the agents of parties were heard thereon, and the Sheriff-Substitute, on 27th February 1904, pronounced the judgment complained of, finding (1) that on 2nd June 1903 John Johnstone, the pursuer and appellant, while employed in the works of Messrs Cochran & Company, engineers and boilermakers, Annan, the defenders and respondents, met with an accident that necessitated the amputation of the fourth and fifth toes of his right foot; and (2) that the amputation wound had healed well, and that the pursuer had recovered so that his wage-earning capacity was (at the date of said judgment) equal to what it was before sustaining said injury, and ending the foresaid weekly payment under said memorandum of agreement, and against which judgment the workman has applied for a stated case under section 9 of the Act of Sederunt, dated 3rd June 1898, to regulate the procedure under the said Act in certain points."

The questions of law for the opinion of the Court were:—"(1) Whether the certificate by the medical referee, dated 11th February 1904, is in law sufficient evidence of the appellant's complete recovery from his injuries, and from incapacity resulting therefrom, to the effect of disentitling him to all further claim under the Workmen's Compensation Act 1897, against the respondents in respect of the accident which happened to him while in their employment on 2nd June 1903? and (2) Was the Sheriff-Substitute at this stage entitled to make the remit to the medical referee appointed under the Act?"

In the course of the argument it was stated by counsel for the appellant that, before the Sheriff-Substitute made the

order on the appellant to submit himself for examination by an official medical referee, the agent of the appellant moved the Sheriff-Substitute to allow a proof, and that this motion was refused by the Sheriff-Substitute. This statement was not admitted by counsel for the respondents.

The Court thereupon remitted to the Sheriff-Substitute to amend the case by stating whether and when the agent for the appellant had moved for an allowance of proof.

From the case as amended it appeared that when the case first came before the Sheriff-Substitute for hearing, the appellant's agent asked for a proof at large and for an adjournment to allow him to lead such a proof. The Sheriff-Substitute nevertheless, on 9th February 1984, remitted the case to the official medical referee.

The following cases were referred to on the question whether the appellant was *in titulo* to have a proof at large in the arbitration — *Niddrie and Benhar Coal Company, Limited* v. *M'Kay*, July 14, 1903, 5 F. 1121, 40 S.L.R. 798; *Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239; *Ferrier* v *Gourlay Brothers*, March 18, 1902, 4 F. 711, 39 S.L.R. 453. Reference was also made to the Workmen's Compensation Act 1897, Second Schedule, sec. 13 (quoted *supra*), and the Statutory Rules and Orders 1898, No. 407 (being regulations by the Secretary of State and the Treasury as to the appointment and payment of medical referees in Scotland), sec. 2 (quoted *supra*).

LORD ADAM—The appellant in this case, on 2nd June 1903, when in the employment of the respondents, met with an accident from which he suffered certain injuries to his right foot.

A memorandum of agreement was thereafter entered into between the parties, by which the respondents agreed to make him a weekly payment of 11s. 3d., which was duly recorded on 12th January 1904.

Subsequently the appellant had been required by the respondents to submit himself, under the 11th section of the first schedule of the Act, for examination to a medical practitioner provided by them. He did so, with the result that the medical practitioner granted a certificate, dated 22nd January 1904, to the effect that the appellant had wholly recovered from the effects of the bodily injuries sustained by him.

Having obtained this certificate the respondents originated the present proceedings by lodging a minute under the 12th section of the schedule, craving the Court to review, and to end or diminish, the weekly payment payable by them to the appellant, and they produced therewith the foresaid certificate.

It was stated in the case that the Sheriff-Substitute had, on hearing the parties on this minute and certificate, ordained the appellant to submit himself for examination to Dr Thomas Ferguson, the medical practitioner appointed by the Secretary of State, and appointed him to report; that on 11th February 1904 Dr Ferguson had given in a report, the details of which I need not repeat, to the effect that he was of opinion that the appellant was then of fair wage-earning capacity, and had made a fair recovery from the effects of his accident; that upon considering the report the Sheriff-Substitute on 27th February had pronounced the judgment which is now submitted to review, by which he ended the foresaid weekly payment under the said memorandum of agreement.

When the case was argued before us it was alleged by the appellant that at the hearing at which the Sheriff-Substitute made the remit to Dr Ferguson he had moved to be allowed a proof, but that the Sheriff-Substitute had refused the motion. As this was not admitted by the respondents, and we thought it was a material fact in the case, we remitted to the Sheriff-Substitute to amend the case by stating whether such an application for allowance of proof had been made then or at any other time. We have now before us the amended case, from which it appears that the remit to the medical referee was made on 9th February 1904, when the case first came before the Sheriff-Substitute for hearing, and that the appellant's agent then asked for a proof at large, and that the case should be adjourned to allow him to lead such proof. The Sheriff-Substitute does not state specifically that he refused to allow the proof, but it is obvious that he did so, because he at once proceeded to remit the case.

In my opinion the Sheriff-Substitute was wrong in refusing to allow the proof asked. This was an application under the 12th section of the schedule for review of a weekly payment, and it appears to me that either party is entitled to prove his case by any competent evidence, and that he is not limited to medical evidence only. It appears to me that this case is ruled by the case of the *Niddrie and Benhar Coal Company*, 5 F. 1121, in which the construction of the 11th and 12th section of the schedule as regards this matter was fully considered.

I am accordingly of opinion that there has been a miscarriage of justice in this case, and that the Sheriff's judgment should be recalled, and remit made to him to allow the appellant a proof in the arbitration, and thereafter to proceed as shall be just. It appears to me to be unnecessary in these circumstances to answer the questions of law put in the case.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court sustained the appeal and remitted to the Sheriff-Substitute to allow a proof.

Counsel for the Appellant—G. Watt, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Respondents—Wilson, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.