

second part of the 42nd section of the Act of 1900. The application therefore which the defender made to the Sheriff to fix the rate per thousand gallons at which the pursuers were bound to supply his premises with water was quite competent, and the determination of the Sheriff upon that matter is final.

I am accordingly of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK—I have had considerable difficulty in this case, as I do not feel able to say that I concur in holding that the word “dwelling-house” is necessarily exclusive of places of business unless someone sleeps upon the premises. I am prepared, however, to concur in the decision on the grounds stated by Lord Stormonth Darling.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Solicitor-General (Ure, K.C.)—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Defender and Respondent—Hunter, K.C.—Grainger Stewart. Agent—James Purves, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Sheriff Court of Forfarshire
at Dundee.]

CALEDON SHIPBUILDING AND ENGINEERING COMPANY, LIMITED v. KENNEDY.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. (3)—Arbitration—Condition-Precedent to Jurisdiction of Arbitrator—Application for Arbitration before Master who Admits Liability has had Time to Consider Claim—Plea that Application for Arbitration Premature—Refusal of Sheriff to State a Case thereon.

On 1st November 1905 an employer received from a workman a claim for compensation alternatively under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1897. On 2nd November a petition under the latter Act was served on him at the instance of the workman. The employer admitted liability, but objected to the competency of the proceedings since there was no question at issue between the parties as required by section 1 (3) of the Act, and there had been no reasonable opportunity to admit liability. The Sheriff having found the defences irrelevant and awarded compensation with expenses, refused to state a case. *Held* that the Sheriff was bound to state a case, since questions of law were involved with regard to jurisdiction and competency.

The Workmen's Compensation Act 1897, sec. 1, sub-sec. (3), enacts, *inter alia*—“If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), 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 to this Act, be settled by arbitration in accordance with the Second Schedule to this Act.”

Second Schedule, sec. 14, enacts—“In the application of this schedule to Scotland . . . (c) any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced.”

This was a note presented by the Caledon Shipbuilding and Engineering Company, Limited, Lilybank, Engineering Works, Dundee, appellants, to have the Sheriff-Substitute at Dundee (CAMPBELL SMITH) required to state a case in an arbitration between them and Robert Kennedy, apprentice shipwright, 59 Dock Street, Dundee, respondent, under the Workmen's Compensation Act 1897.

In the note the appellants stated that in the arbitration they had at once admitted liability, but had pleaded (1) that the application was incompetent; and (2) that it should be dismissed with expenses, in respect that (a) no question had arisen between the parties within the meaning of the Act when it was presented, and (b) reasonable opportunity was not given to the appellants to admit their liability. The Sheriff, however, had found the defences to be irrelevant and given the applicant compensation, with two guineas of expenses, and had refused to state a case. Further details of the circumstances of the case are given in Lord Pearson's opinion (*infra*).

Argued for the appellants—What was at stake here was the question of expenses. An award had been given when there was no question in dispute between the parties, which was incompetent, and the applicant had been given the expenses of obtaining such award. Since liability was admitted the petition was at most a claim. It could be nothing more until some question arose between the parties—Workmen's Compensation Act 1897, section 1, sub-section (3). The defenders were entitled to have an opportunity of settling, and that had not

been given in the present case. There was no room for the Sheriff to act as arbitrator, nor was it necessary to have recourse to him in that capacity, the condition precedent, *i.e.*, dispute between the parties, being absent—*Field v. Longden & Sons* [1902], 1 K.B. 47. The application was therefore clearly premature. At least whether it was so or not was a question of law the Sheriff had to decide and on which his decision might be reviewed. He therefore should have stated a case and should now be required to do so.

Argued for respondent—The note should be refused. The case of *Fraser v. Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 653, decided that an application for arbitration to the Sheriff was competent where no claim had been made and consequently no question could have arisen. An application was as competent in the circumstances of the present case. The action, further, was not brought prematurely and the defenders were dilatory in intimating their admission of liability. The Sheriff had an absolute discretion in the matter of expenses, and no appeal was competent against his decision therein. *Binning v. Easton & Sons*, February 24, 1906, 43 S.L.R. 312, was referred to.

At advising—

LORD PEARSON—The purpose of this note is to have the Sheriff-Substitute at Dundee required to state a case on certain questions of law said to have been determined by him in an arbitration under the Workmen's Compensation Act.

The applicants are a shipbuilding company in Dundee; and it is not disputed that on 14th October last the respondent while in their employment met with an accident which entitled him to compensation under the Act.

The material averments of the employers are as follows, and it will be understood that for the present purpose I take them only as their averments, and not as facts proved or admitted.

On 1st November they received from the respondent's agents a notice of the accident, and a claim in an alternative form, bearing to be in terms of the Employers' Liability Act 1880, or alternatively under the Workmen's Compensation Act. The employers at once forwarded the document to the Insurance Company in Glasgow with which they were insured against such accidents. On the next day, 2nd November, without any further notice or communication, the respondent presented a petition in the Sheriff Court at Dundee under the Workmen's Compensation Act, on which he obtained an order for service; and the petition was served on the employers on that date. The petition did not aver that any question had arisen between the parties as to the liability to pay compensation, or as to the amount or duration thereof, or that the employers had declined to admit liability for compensation, or to settle the same by agreement; and the employers say that no such question had

in fact arisen, and that they were ready to admit liability under the Act and to settle the amount of compensation. On 4th November, they wrote to the petitioner's agents admitting liability and intimating that objection would be taken to the competency of the arbitration proceedings. At the first calling of the petition on 10th November, they admitted liability to pay compensation at the rate claimed by the respondent. They further pleaded that the petition was incompetent in respect that when it was presented no question had arisen between the parties within the meaning of section 1, sub-section 3, of the statute, and that no reasonable opportunity had been given to the employers to admit their liability.

On 10th November the Sheriff, after hearing parties, found the defences irrelevant; found the pursuer entitled to compensation at the rate of 4s. 6d. weekly as from the date of the accident until the further orders of Court; and found the defenders liable in £2, 2s. of modified expenses.

The employers thereafter duly lodged a minute craving the Sheriff to state a case for the opinion of the Court, but he refused to do so. By section 9 (c) of the Act of Sederunt of 1898 it is provided that if the Sheriff, on a draft case being submitted to him, is of opinion that "any question of law stated in it was not raised by the admissions made or the facts proved before him, or that the application for a case is frivolous, he may refuse to state or sign the case," specifying in a certificate the cause of the refusal. The Sheriff-Substitute's certificate is produced, and it sets forth as the cause of the refusal that the defender's sole contention as he understood it was that the action had been prematurely brought, and that therefore no expenses should be allowed to the pursuer; and that the Sheriff-Substitute was clearly of opinion that the action was not premature, and that the defenders' admission of liability was too late if they desired to settle without litigation, and so deprive the pursuer of his right to raise an action under the Workmen's Compensation Act.

Now it is clear upon that certificate of the Sheriff, and upon his findings of 10th November, that in order to reach those findings he had to determine certain questions of law, namely—(1) Whether, having regard to the terms of the statute, and particularly of section 1, sub-section 3, he had jurisdiction to entertain the petition; and (2) whether the petition was competent in the circumstances. These questions were both raised in the application to the Sheriff to state a case, though the form in which they were expressed was unfortunate. They were both treated as falling under the objection to the competency of the proceedings; and further, the questions as proposed to the Sheriff failed to distinguish accurately between law and fact. But it was not beyond the province of the Sheriff in settling the case to put it in proper shape in these particulars. I think he should have set forth, relatively to the

question of jurisdiction, whether any and what question had arisen at the date of the petition as to the liability to pay compensation under the Act, or as to the amount or duration of compensation, and under what circumstances such question had arisen; and also, as regards the question of competency, whether the employers had any and what opportunity before the petition was presented of settling by agreement.

We have, of course, no concern at present with the merits of either of these questions of law. The Sheriff may have decided them quite rightly; but in my opinion the employers are entitled to have his determination reviewed on a case stated, just as the workman would have been entitled if the Sheriff had decided the other way.

The cases of *Fraser v. Great North of Scotland Railway Company* (1901, 3 Fr. 908) and *Field v. Longden & Sons* (1902, 1 K.B. 47), which were referred to at the discussion, may have to be considered at a future stage of this case. They certainly emphasise the view that it involves questions of law of some importance.

It was argued for the respondent that the present application is really brought in order to get rid of the Sheriff's award of £2, 2s. of expenses; and it was pointed out that by section 6 of the second schedule of the Act the costs are in the discretion of the Sheriff. But that section can only apply to a case where the proceedings were competently before him as arbitrator under the statute; and it is the prior question of jurisdiction and competency which is sought to be raised here.

I hold, therefore, that we should require the Sheriff to state a case under the statute.

LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court ordained the Sheriff to state a case as craved.

Counsel for the Defenders and Appellants—Younger, K.C.—Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Pursuer and Respondent—MacRobert. Agent—D. G. Mackenzie, W.S.

Friday, March 16.

SECOND DIVISION.

HUNT'S TRUSTEES v. HUNT AND OTHERS.

Succession—Vesting—Acceleration—Conditional Institution of Issue—Liferent of Whole Capital—Postponement of Vesting till Liferenter's Death—Liferent Reducible in Certain Contingency to One-Third—Contingency having Happened Effect on Vesting of Remaining Two-Thirds—Accumulation of Income—Intestacy.

A testatrix in her trust-disposition and settlement directed her trustees to pay to her husband during his lifetime if he survived her the net income of her

estate, providing, however, that in the event of his contracting a second marriage the provision in his favour should be restricted to one-third. She further directed that "upon the death of my said husband if he shall survive me, or at my own death if he shall predecease me," her trustees were to hold and apply, pay and convey, "the fee or capital of the residue of my said means and estate" to her children equally on majority, or in the case of daughters, marriage, "declaring that in the event of any of them predeceasing the period of payment and conveyance, and leaving lawful issue, such issue shall be entitled equally among them *per stirpes* to the share which their parent would have taken on survivance, and further, in the event of any of them predeceasing the said period without leaving lawful issue, then the share of such predeceaser shall accresce to my other children surviving, and the lawful issue of any child who may have deceased leaving such issue." No provision was made as to the disposal, (1) of the income which would be set free if the liferenter married, or (2) of such part of the capital as would in that event no longer be required for the restricted liferent.

The testatrix was survived by her husband and three children. The trustees paid the whole income to the husband until he entered into a second marriage, after which they continued to pay him one-third of the income and accumulated the remainder. The children all attained majority.

In a special case, held (1) that vesting was postponed until the death of the husband, and that his second marriage had not accelerated the date of vesting and payment of two-thirds of the estate; (2) that the accumulated income was not disposed of by the trust-disposition and settlement and accordingly fell into intestacy.

This was a special case brought to determine certain questions of difficulty arising out of a trust-disposition and settlement left by Mrs Mary Page M'Coll or Hunt, wife of Thomas Hunt, who died on 25th October 1885.

By her trust-disposition and settlement she conveyed her whole means and estate to trustees for certain purposes. The second and third purposes were as follow:—“(Secondly) I direct my trustees to hold and apply my whole means and estate in trust, and pay to my husband, the said Thomas Hunt, in the event of his surviving me, the net income or revenue arising therefrom during all the days and years of his life after my death, at such terms or times as they may consider proper, which income or revenue shall be paid to my said husband as a purely alimentary provision to him and shall not be assignable by him, nor affectable by his debts or deeds or the diligence of his creditors; but I provide and declare that in the event of my said husband entering into a second marriage, the provisions hereby conceived in his