

an amendment of record at this stage upon such terms as may be thought just. It would therefore be right to give the defenders an opportunity of considering their position, and of tendering (if so advised) a minute of amendment within a specified period, reserving of course meantime as to the pursuers' right to object to the same if tendered, or to lodge answers to it, and also reserving the question of the terms upon which it might be allowed. But if the defenders do not desire to amend, the case must be disposed of upon the footing that there is no evidence competently before the Court upon those matters in regard to which the defenders have not given any notice upon the record.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court allowed the defenders to lodge an amendment, if so advised, within fourteen days.

Counsel for the Pursuers (Reclaimers)—Clyde, K.C.—Sandeman. Agents—Webster, Will, & Co., S.S.C.

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

Thursday, January 28.

FIRST DIVISION.

BOWHILL COAL COMPANY (FIFE), LIMITED v. MALCOLM.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (3) and Sched. 1 (16)—Arbitration—Procedure—Demand for Sum Due—Weekly Payment—Award of Slump Sum—Admission by Master of Sum Claimed, with Demand for Finding as to Workman's Recovery and Termination of Compensation.

In an arbitration under the Workmen's Compensation Act 1906, a miner, injured on March 23, 1908, claimed a certain sum as compensation for 2½ weeks. His employers lodged a note of defence, in which they, while admitting liability for the sum claimed, averred that the miner had recovered his earning capacity by 13th April 1908, and that on that date he returned to work and had been earning more than before the accident. The employers accordingly asked for an order declaring that their liability had terminated on that date.

Held that the proper course for the arbiter was first to find that the claimant was entitled to compensation amounting to the sum claimed, and thereafter, if the workman admitted recovery, to find that his right to compensation ended on 13th April, and if he denied recovery, to allow a proof.

The Workmen's Compensation Act 1906

(6 Edw. VII, cap. 58), sec. 1 (3), enacts—“If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . 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.”

Sched. 1 (16)—“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. . . .”

Francis Malcolm, miner, Bowhill, Cardenden, Fifeshire, claimed compensation under the Workmen's Compensation Act 1906, from his employers the Bowhill Coal Company (Fife), Limited. The latter being dissatisfied with a decision of the Sheriff-Substitute of Fife and Kinross (HAY SHENNAN), acting as arbiter, took an appeal by way of stated case.

The case stated—“This is an arbitration under which the Sheriff of Fife and Kinross at Kirkcaldy is asked to award the sum of £1, 15s. 11d. sterling, being compensation for 2½ weeks under said Act in respect of injuries sustained by the respondent through an accident arising out of and in the course of his employment with the appellants on 23rd March 1908. The initial writ, the presentation of which to the Sheriff Clerk for a warrant for service was the first step in the process, was presented at Kirkcaldy on 11th July 1908. The appellants (being the defenders therein) were cited to appear in the Kirkcaldy Court on the 22nd of said month, when a note of defence was lodged on behalf of the appellants, in which liability for the sum sued for was admitted, and an averment was made that the respondent had recovered his earning capacity by the 13th day of April 1908; that he resumed work on that date; that since then he had been earning more than he did before the date of the accident, but that he had refused to discharge his claim against the appellants in return for payment of said sum of £1, 15s. 11d. The case was continued for hearing till the 27th day of July 1908, and on this date parties were heard and I made avizandum. On 29th July 1908 the appellants lodged in process a minute craving the Court to grant an order, declaring that by the said 13th day of April 1908 the respondent had regained his earning capacity, and asking the Court to terminate his right to compensation in respect of the said accident as at that date (13th April 1908). At the hearing the appellants asked for a diet of proof to be fixed. On 30th July 1908 I issued an interlocutor finding (1) that the respondent claimed compensation for 2½ weeks in respect of said accident, amounting in all to £1, 15s. 11d., and that the appellants admitted liability for this sum, but had not paid it; (2) that the respondent made no claim for compensation for any period subsequent to 13th April 1908; and (3) that so far as the respondent's earning capacity subsequent to 13th April 1908 was concerned, there was no

dispute between the parties to be submitted to arbitration. In these circumstances, without allowing proof, I decerned against the appellants in the respondent's favour for £1, 15s. 11d., with expenses."

The *questions of law* for the opinion of the Court were—"1. Did the pleadings of the parties disclose any dispute capable of being submitted to arbitration under the Act? 2. The respondent having limited his claim to the period and the amount in respect of which the appellants admitted liability, were the appellants entitled to make it a condition of payment that he should grant them a final discharge of all claims, past and future, competent to him in respect of said accident?"

Argued for the appellants—The arbiter was wrong in holding there was no question to go to arbitration, for arbitration was only excluded where there was agreement as to (1) liability, (2) amount, (3) duration—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1, sub-section 3, and Schedule 1, section 16. Here there was no agreement as to duration. In the original arbitration there was disagreement as to duration. In any case the minute raised the question of duration. The Sheriff had been misled by having decerned for a fixed sum into thinking there remained no question between the parties. He ought to have found a certain weekly sum due, and had this been done, it would have been obvious that the appellants were entitled to have the question of duration determined—Schedule 1, section 16. The arbiter had here no power to give decree for a slump sum—*Colville & Sons, Limited v. Tigue*, December 6, 1905, 8 F. 179, per Lord Kyllachy at p. 183, 43 S.L.R. 129. A slump sum could only be awarded in case of death, or in redemption of weekly payments.

Argued for the respondent—The arbiter was right. That there should be a continuing payment was a condition-precendent to the question whether there should be review—Schedule 1, section 16. Here there was no continuing payment. The stated case showed no question in dispute. What was claimed in the arbitration had been admitted to be due. The arbitration raised no question of duration. They conceded that the statute contemplated a weekly payment; that only meant that the same decision might have been more accurately expressed in terms of weekly payments.

At advising—

LORD PRESIDENT—[*After stating the facts*]—Now I regret to say that I think this is just one of those cases where inattention to form has led to a mistake in substance. I need scarcely remind your Lordships that by the Workmen's Compensation Act the employer is liable to pay compensation in the event of an injury. That is the leading provision in section 1. Then sub-section 3 of the same section provides that, if any question arises as to the amount or duration of the compensation under the Act, the question, if not settled

by agreement, shall, subject to the provisions of the first schedule of the Act, be settled by arbitration in accordance with the second schedule. Then the second schedule has a set of provisions describing how the arbitration is to be set on foot and conducted. But the end of it all is an award of compensation. Then there are provisions, also familiar to your Lordships, allowing the person who has got an award to register that award in the Sheriff Court books, upon which registration execution may follow.

I have gone through all this, which is the A B C of the statute, to point out that there is no provision for what the Sheriff has apparently done here, namely, pronounced a decerniture for a certain sum. Although in the ordinary case it probably would not very much matter for practical purposes if the award of compensation had been put in the form of a decerniture, I think it is just that inattention to form which has led the Sheriff wrong in his after conduct of this case. Of course, in an ordinary action, if a person only asks for a certain amount, and the other party admits that that amount is due, and there is a decerniture for that amount, it is quite obvious that there is nothing else within what are called—to use the legal phrase—the conclusions of the action; and it is that class of reasoning which has led the Sheriff to say that the respondent having made no claim for compensation subsequent to 13th April 1908, there was no dispute between the parties to be submitted to arbitration. But if the learned Sheriff-Substitute, instead of being beguiled into forms of process with which he is so familiar, had steadily remembered that he was acting as an arbiter and an arbiter alone, the difficulty would not have arisen. Because what he was doing was this. He was first of all being asked to declare that the respondent was entitled to compensation and to fix the amount of compensation at so much; but then he was also being met with a minute asking him to declare that the respondent had regained his earning capacity by a certain date, and that the right to compensation must be then terminated. That is perfectly in accordance with the 16th section of the first schedule, which provides for the payment being reviewed at the request of either party, and either diminished, increased, or ended. Accordingly, it was a perfectly relevant demand for the employer to say—"Although I am admitting the amount of liability for compensation up to the 13th day of April, I want a declaration saying that the compensation was ended at 13th April." That demand could not be relevantly made without the statement that the workman had completely recovered, and upon that statement being made by the employer the workman on his part would have been bound to say "yea" or "nay" to the proposition. If he admitted it, the Sheriff could pronounce a finding that the compensation was ended; or, if he said "Nay, I have not completely recovered," then that would have been matter for proof,

and the arbitration would have been proceeded with.

Accordingly, I think that for want of attention to form the whole thing went wrong, and it has got so off the lines that the questions as put are really not questions that can arise at all. There is no question of the employer being entitled to make it a condition of payment and to demand a final discharge. There is nothing about that in the statute. On the other hand, there is in the statute a perfect right in the employer to ask the Sheriff to say that the compensation is ended. The result is that I do not think the questions put can be answered, because they are not questions which can properly arise, and that the whole case must go back to the Sheriff, with the declaration that he must repeat his finding of the workman being entitled to the £1, 15s. 11d., but that he must then take up the question proposed to him by the employers, as to whether the compensation should be declared to be ended upon the 13th April 1908. The workman must either say "yea" or "nay" to that. If he says "yea," there must be a finding as to that. If he says "nay," there must be proof.

LORD KINNEAR—I agree with your Lordship.

LORD PEARSON—I also concur.

LORD M'LAREN was absent at the hearing, and delivered no opinion.

The Court pronounced the following interlocutor:—

"Find that the questions of law do not raise the point at issue between the parties: Further, that in granting a decerniture for the sum of £1, 15s. 11d. the Sheriff-Substitute exceeded his jurisdiction as arbiter: Therefore recal the determination of the Sheriff-Substitute as arbiter: Remit the cause to him as arbiter to repeat his finding that the respondent is entitled to compensation amounting to £1, 15s. 11d., and further, to deal with the question raised by the minute for appellants lodged on 29th July 1908, and to proceed as accords: Find no expenses due to or by either party in connection with the stated case."

Counsel for the Appellants—Horne—Strain. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—G. Watt, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Saturday, January 30.

FIRST DIVISION.

(SINGLE BILLS.)

ROBERTSON, PETITIONER.

Bankruptcy—Sequestration—Omission to Make Timeous Insertion of Notice in the Gazette—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 48.

The petition in a sequestration presented to the Keeper of the Register of Inhibitions an abbreviate in statutory form which was recorded, but he omitted *per incuriam* after sequestration had been awarded, to have the statutory notices timeously inserted in the *Edinburgh* and *London Gazettes*. Thereafter he applied to the Court for authority to insert in the *Gazettes* a notice of the sequestration, and calling a meeting on a certain day to elect a trustee and commissioners.

The Court *de plano* granted the prayer of the petition.

Morrison, January 21, 1874, 1 R. 392, distinguished.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 48, enacts—" . . . the party applying for sequestration shall . . . if it is awarded by the Sheriff, within four days after a copy of said delivrance could be received in course of post in Edinburgh, insert a notice in the form of Schedule (B) hereunto annexed in the *Gazette*, and also one notice in the same terms within six days from the said date in the *London Gazette*."

John Robertson, 63 York Place, Edinburgh, presented to the Court a petition which set forth—"That on 18th December 1908 the first delivrance was pronounced in common form in a petition by the petitioner to the Sheriff of the Lothians and Peebles at Edinburgh for sequestration of the estates of George Flett, 4 Bright Terrace, Edinburgh.

"That as required by section 48 of the Bankruptcy (Scotland) Act 1856, the petitioner duly presented to the Keeper of the Register of Inhibitions at Edinburgh an abbreviate in the form prescribed, which was recorded on 19th December 1908.

"After further procedure in terms of said Bankruptcy Act, the Sheriff of the Lothians and Peebles at Edinburgh, on 11th January 1909, awarded sequestration of the estates of the said George Flett.

"There should have been thereafter inserted, within four days from the date of said last-mentioned delivrance in the *Edinburgh Gazette*, and within six days from the said date in the *London Gazette*, a notice in the form of Schedule B annexed to the Bankruptcy (Scotland) Act 1856. Owing to a mistake on the part of a clerk, who failed to despatch said notices, these notices were not inserted. The date fixed by said delivrance for the meeting of creditors—viz., 22nd January 1909—has now passed, and it will be necessary to fix another date.