

LORD M'LAREN was absent.

The Court answered the question of law in the affirmative and dismissed the appeal.

Counsel for Appellant—D. F. Scott Dickson, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

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

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.]

NELSON v. THE SUMMERLEE IRON COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (3) and First Schedule (16)—Application by Employers to have it Declared that Workman's right to Compensation Ceased on a Certain Date—Competency of Application at a Date when no Compensation is being Paid and no Memorandum has been Recorded.

A workman was injured on 31st July 1908, and his employers paid him compensation until 1st April 1909, on which date payment was stopped. On 17th May 1909 the employers presented an application to have it declared that the workman's right to compensation had terminated on 1st April 1909, in respect that he had then, as they averred, recovered, or alternatively to have such an award of partial compensation granted as to the Court might seem just.

Held that the application for arbitration was competent at a date when (1) no compensation was actually being paid to the workman, parties being in dispute as to the amount and duration of compensation, and (2) no memorandum of agreement had been recorded.

The Southhook Fireclay Company, Limited v. Laughland, 1908 S.C. 831, 45 S.L.R. 664, followed.

Claude Nelson, coal miner, Larkhall, appealed by way of stated case from an award of the Sheriff-Substitute (THOMSON) at Hamilton acting as arbiter in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between him and The Summerlee Iron Company, Limited, coalmasters, Dykehead Colliery, Larkhall.

The case stated—"This is an arbitration in which the respondents on 17th May 1909 presented an application for an award under the Workmen's Compensation Act 1906 to have it declared that the appellant's right to compensation under the said Act in respect of an accident on 31st July 1908 arising out of and in the course of his employment with the respondents at their Dykehead Colliery, Larkhall, ceased on or about 1st April 1909, or at such subsequent

date as the Court might think fit, or alternatively, if the respondents were not entitled to have the appellant's said right to compensation terminated as aforesaid, then to grant such award of partial compensation as to the Court may seem just.

"The respondents explained and averred that the appellant was paid compensation in respect of said accident at the rate of 20s. per week from the date of said accident to the said 1st April 1909, on which date payment was stopped. Respondents averred that on said date the appellant had recovered from the effects of the said accident and was fit for his former employment, or alternatively if he was not fit for his former employment that he was fit for light work, and that any incapacity from which he suffered was not attributable to or connected with said accident. The respondents further explained that the question which had arisen between the parties was as to whether the appellant was entitled to compensation beyond the said 1st day of April 1909, and if so to what amount was he entitled.

"The appellant lodged a note of defence in which he pleaded (1) that the application was incompetent, and (2) that the appellant not yet having recovered from the effects of his accident so as to resume his former employment the application should be refused.

"I repelled the first of these pleas and allowed a proof.

"The question of law is whether the respondent's application for arbitration was competent at a date when (1) no compensation was actually being paid to appellant, parties being in dispute as to the amount and duration of compensation, and (2) no memorandum of agreement had been recorded."

Argued for the appellant—The application was not competently made, whether it was regarded as an original application made under section 1 (3) of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), or as an application for review under section 16 of the First Schedule. The former only applied where there was no agreement; the latter, which was the correct mode of viewing this application—*Powell v. Main Colliery Company*, [1900] A.C. 366, per Lord Brampton—applied where there was an agreement which had been recorded, but had no application unless and until it had been recorded—*Lochgelly Iron and Coal Company, Limited v. Sinclair*, 1909 S.C. 922, Lord President Dunedin at 931, Lord Salvesen at p. 936, 46 S.L.R. 665; *Dunlop v. Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146; *Donaldson Brothers v. Cowan*, 1909 S.C. 1292, 46 S.L.R. 920. Further, the Act of Sederunt of 26th June 1907, section 9, only contemplated review where the memorandum had been recorded. Nor did section 16 of the First Schedule apply unless payments were being made—*Nicholson v. Piper*, [1907] A.C. 215, Lord Robertson at 220, 45 S.L.R. 620. The case of *The Bowhill Coal Company (Fife), Limited v. Malcolm*, 1909 S.C. 1426, 46 S.L.R. 354, was not to the contrary effect.

Argued for the respondents—(1) So long as there was a continuing liability to pay a weekly payment, that liability could be reviewed though actual payments had ceased—*The Bowhill Coal Company v. Malcolm* (cit. sup.). (2) Review of an unrecorded argument was competent—*Archibald Finnie & Sons v. Fulton*, 1909, S.C. 938 Lord President Dunedin at 942, 46 S.L.R. 665; *Jamieson v. Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, opinions of Lord Adam and Lord M'Laren, 40 S.L.R. 704. *Dunlop v. Rankine & Blackmore* (cit. sup.) was no authority for the proposition that an unrecorded agreement could not be reviewed. Section 16 of the First Schedule, and similarly section 9 of the Second Schedule, referred to "any" weekly payment. The Act of Sederunt could not qualify the rights given under the statute. There must be read into section 9 thereof the words "if any" after the words recorded memorandum. Apart from the present question the employers had no interest to record a memorandum, and the interest of the workman to record was solely for purposes of diligence. Reference was also made to *Caledon Shipbuilding and Engineering Company, Limited v. Kennedy*, June 26, 1906, 8 F. 960, 43 S.L.R. 687; *Gourlay Brothers & Company (Dundee) Limited v. Sweeney*, June 26, 1906, 8 F. 965, 43 S.L.R. 690.

At advising—

LORD PRESIDENT—In this case the employers of a workman presented an application to have it declared that the present appellant's right to compensation under the Act in respect of an accident on 31st July 1908, arising out of and in course of his employment, ceased on or about 1st April 1909, or at such subsequent date as the Court might think fit; or alternatively, if the respondents were not entitled to have the appellant's said right to compensation terminated as aforesaid, then to grant such award of partial compensation as to the Court might seem just. They explained in their petition that the appellant was paid compensation in respect of the accident at the rate of 20s. per week from the date of said accident down to 1st April 1909, on which date payment was stopped, and they stated he had completely recovered at that date. The workman lodged a note in which he first pleaded that the application was incompetent, and second, denied that he had recovered. The Sheriff-Substitute repelled the first of these pleas, and allowed a proof of the second, and the question of law put to us is whether the respondent's application for arbitration was competent at a date when (1) no compensation was actually being paid to appellant, parties being in dispute as to the amount and duration of compensation, and (2) no memorandum of agreement had been recorded. There is a case decided in 1908 which decides the point in terms. That case was not quoted in the case of *Lochgelly*, and I am satisfied that the doubt I expressed in *Lochgelly* was not well founded. The case is *The Southhook Fireclay Company,*

Limited v. Laughland (1908 S.C. 831), and is indistinguishable from the present, and I propose that we should follow that judgment and answer the question of law in the affirmative.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court answered the question of law in the affirmative, affirmed the determination of the Sheriff-Substitute as arbitrator, remitted the cause to him to proceed as accorded, dismissed the appeal, and decreed.

Counsel for the Appellant—Constable, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

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

Saturday, February 26.

FIRST DIVISION.

(SINGLE BILLS.)

GRAY AND ANOTHER, PETITIONERS.

Company — Winding-up — Liquidator — Caution—Death of Liquidator in Voluntary Liquidation under Supervision — Requirement of Caution from his Successor—Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69), sec. 149 (5).

The liquidator in a voluntary winding-up, which had afterwards been placed under the supervision of the Court, died, and the Court on the petition of certain contributories appointed a successor. Caution had not been required of the original liquidator.

Held that the liquidator so appointed must find caution.

The Companies Consolidation Act 1908 (8 Edw. VII, c. 79), sec. 149, (5), enacts—
"In a winding-up in Scotland . . . the Court may determine whether any and what security is to be given by a liquidator on his appointment."

On 3rd February 1910 Andrew R. Gray, 9 Lonsdale Terrace, Edinburgh, and Lewis Bilton, W.S., 16 Hope Street, Edinburgh, contributories of the Scottish Amicable Heritable Securities Association, Limited (in liquidation), and acting members of the Committee of Advice thereof, with consents, presented a note to the First Division under sections 199 to 204 of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), for the appointment of a new liquidator of the Association in room of the deceased J. A. Robertson Durham, the former liquidator thereof. The petition stated that the Association having resolved on a voluntary winding-up the late Mr Robertson Durham was duly appointed liquidator; that thereafter the liquidation was placed under the supervision of the Court; that during his tenure of office the