it is undesirable to make the constitution of notour bankruptcy any easier than it has hitherto been according to the universal understanding of the profession, and indeed according to the understanding of the present pursuer, who was not content with his expired charge but followed it up by poinding before he presented his petition for cessio. I am therefore of opinion that the Sheriff-Substitute's judgment should be recalled, and that the case should be remitted back to him to allow a proof of the averments with regard to the effects attached by the poinding.

LORD MACKENZIE — I agree with the reasoning of the Lord President in the cases of *Harvie* v. *Smith*, 1908 S.C. 474, and *Paull* v. *Smith*, 1910 S.C. 1025, and with the opinion which Lord Kinnear has just delivered.

LORD JUSTICE-CLERK — I concur in the opinion of Lord Salvesen, which I have had an opportunity of perusing.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Pursuer and Respondent—Wilton—Valentine. Agent—Robert Wood, S.S.C.

Counsel for Defender and Appellant—Blackburn, K.C.—A. M. Stuart. Agent—Alexander Sutherland, S.S.C.

Wednesday, March 8.

FIRST DIVISION.

[Sheriff Court at Jedburgh.

WALKER *v.* MURRAYS.

Master and Servant—Compensation—Refusal to State a Case—Note for Order to State Case—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*Act of Sederunt June* 26, 1907, *sec.* 17 (*h*).

The Act of Sederunt of 26th June 1907 provides—section 17 (*h*)—"When a Sheriff has refused to state and sign a case, the applicant for the case may within seven days from the date of such refusal apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note . . . shall be accompanied by the abovementioned certificate of refusal, and shall state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise. . . ."

Where a Sheriff has refused to state a case for appeal under the Workmen's Compensation Act 1906, the claimant, in order to succeed in an application for an order to state a case, must state the findings to which he says he is entitled, and these must be such as to disclose an accident arising out of and in the course of the employment.

Ellen Storey Walker, housekeeper, Mervinslaw, Jedburgh, for her own interest, and also as custodian of her illegitimate pupil child, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Thomas Murray and William Murray, farmers, Mervinslaw, Jedburgh.

The Sheriff-Substitute (BAILLIE) of Roxburghshire, acting as arbitrator under the Act, having refused to state and sign a case for appeal, the claimant presented a note to the First Division of the Court of Session. The Note stated—"In this arbitration, which was decided by Sheriff-Substitute Baillie on 28th December 1910, the said Sheriff-Substitute has refused, conform to certificate herewith produced, to state and sign a case, for which the appellant duly applied in writing.

"The question raised in the application to state and sign said case was whether on the facts proved the pursuer's father sustained personal injury by accident arising out of and in the course of his employment with the defenders (which injury resulted in his death) and thereby entitling the pursuer to compensation from the defenders under the Workmen's Compensation Act 1906.

"The deceased, who had previously suffered from rupture, became actually ruptured on 27th April 1910 while in the employment of the defenders. The rupture became strangulated and the deceased underwent an operation therefor, but died on the morning of Saturday, 30th April 1910. The pursuer raised an action in the Sheriff Court of Roxburghshire at Jedburgh, in which she claimed compensation under the Workmen's Compensation Act 1906 in respect that the said accident arose out of and in the course of deceased's employment

"The Sheriff-Substitute having considered the proof and whole process in said action, and heard parties' procurators in debate, found in fact and in law as follows, *videlicet*, that the deceased James Walker had for many years been suffering from ruptures which in January 1909 necessitated an operation, and that in January 1910 one of the ruptures reappeared; that on several occasions thereafter this rupture came down after slight natural exertion and without any exceptional causes or violent exertion; that on 27th April 1910 James Walker went to Ashtrees to fetch home a sow; that the whole distance there and back was about five miles, of which the last mile and a half was the smoothest part of the road with a bridle track or cart road along it; that during said mile and a half the rupture came down, that strangulation thereafter set in, and that James Walker died from shock following on an operation therefor on 30th April 1910, and that Walker made no statement of having met with any accident on his way home, and further that it was not proved that James Walker met with an accident

on said way home, and that claimant was not entitled to compensation as claimed.

"The pursuer maintains that the evidence in said arbitration shows that the determining factors of hernia and strangulation are exertion and strain, and that there was ample evidence of exertion and strain in the work which the deceased man was doing at the time when the rupture came down to account for it so coming down. She further maintains that there is no proof of the rupture having come down after Dr Jeffrey, deceased's medical attendant, saw the deceased incidentally in February 1910, and after the truss which the deceased wore was improved by a pad.

"The *question of law* proposed to be submitted for the opinion of the Court is whether the arbiter was entitled to draw the inference which he had drawn that there was no accident, and that the claimant was not entitled to compensation under the said Act."

The prayer of the note was "for an order on the respondents, the said Thomas Murray and William Murray, to show cause why a case should not be stated by the Sheriff-Substitute for the following reason, viz., that the facts as stated did not reasonably entitle the arbitrator to find that there was no accident sustained by the deceased James Walker."

On 18th January 1911 the Court appointed the cause to be put to the Summar Roll, and allowed the defenders and respondents to lodge answers within seven days.

The following answers were lodged for the defenders and respondents—"Admitted that the Sheriff-Substitute has refused to state and sign a case conform to the said certificate, which is dated 7th January 1911, that the deceased had suffered from rupture before 27th April 1910, and that he died on 30th April 1910 from the result of an operation. The said certificate and the whole proceedings in the said action, and in particular the findings of the Sheriff-Substitute, are referred to. *Quoad ultra* denied. Explained and averred that the interlocutor of the Sheriff-Substitute, which is dated 28th December 1910, copy whereof is produced herewith, is not correctly quoted in the note for the appellant, and that the said interlocutor makes separate findings in fact and in law. The appellant adduced no evidence of accident before the Sheriff-Substitute, and the said interlocutor proceeds solely on the absence of any such evidence. Upon the other hand it was established by evidence that the appellant was in a physical condition which allowed rupture to occur without exertion upon his part or strain. The question determined by the Sheriff-Substitute was a question of fact. No question of law is at issue between the parties or is stated by the appellant for the consideration of the Court."

The arguments of the claimant and of the respondents sufficiently appears from the opinion of the Lord President. Reference was made to the Second Schedule of the Workmen's Compensation Act, section 17 (*b*), and to the Act of Sederunt of 26th June 1907, section 17 (*h*).

At advising—

LORD PRESIDENT — This note raises a question, perhaps of some nicety and of some importance in general practice. The matter arises out of an application for compensation at the instance of Ellen Walker against Thomas Murray and William Murray, from whom compensation was demanded in respect of the death of the applicant's father, who it is alleged died owing to an accident arising out of and in the course of his employment with the respondents.

The application was refused by the Sheriff-Substitute as arbiter, who held that the death had not really resulted from an accident (I am leaving out the following words, that being the real point of the judgment), and refused to grant a case when asked, and this note asks us to ordain him to grant a case.

Now there is no doubt that the course of decisions sanctioned, and indeed I may say encouraged, by the Supreme Courts and the House of Lords, has quite finally fixed that although an appeal on a case stated is only competent upon a matter of law, yet it will be considered a matter of law whether a finding in fact can be reasonably supported upon the evidence adduced. Therefore the initial demand, if I may so call it, of the claimant here is obviously a relevant demand where she says that she should have an opportunity of contending that the Sheriff-Substitute's finding in fact cannot be supported on the evidence brought before him. But then we have had a very cogent argument from Mr Moncrieff to this effect, that here the applicant has tabled a set of findings which, if they were before us as findings in a Stated Case, would not justify a finding on our part that there was no evidence upon which the Sheriff's finding in fact could be supported. And he further said with great force, "What is the use of ordering a Stated Case in order to have re-stated something which on the face of it will not be sufficient for the applicant's purpose?" To that it is replied that the applicant was bound in stating his application, in terms of the Act of Sederunt, to give a general résumé of the facts, but that he was not necessarily confined to the particular findings which he there specified.

My view is that although, as I have said, the applicant's demand is *prima facie* a relevant demand, yet in order to induce us to tell the Sheriff-Substitute to grant a case the applicant must upon the face of his application state specific findings which he considers he is entitled to, and which if he got them would be sufficient to found, at least at this stage, a *prima facie* argument that the Sheriff's finding in fact could not be supported. Now in the present state of the note I do not think he has done that, but I do not think it would be just to turn him out of Court upon that ground; and therefore what I propose to do is to allow Mr Gillon an opportunity of amending the prayer of his Note in order that he may put in findings

which he says he is entitled to get from the Sheriff, and which would, as I call it, found a *prima facie* argument.

When I speak of findings I mean findings in the Stated Case. Here in the original interlocutor the Sheriff seems to have put in findings. I am not saying he was in any degree wrong in that, but findings in the interlocutor in an arbitration are quite unnecessary. All that the arbitrator need say is whether the claimant is entitled to compensation or is not.

I would further observe that I think it is absolutely necessary for Mr Gillon to put in some finding to which he says he is entitled which discloses "an accident arising out of and in the course of the employment." He does not seem to me to state a relevant case if he merely says that something has happened while the employment is going on—that is to say, during the duration of the employment—without in some way asserting that there was something of the nature of an accident. In other words, it is not enough for him to say, "Before such and such a period of my employment commenced I was in a state of complete health; at the end of this period I was not in a state of complete health; something had happened to me; *ergo* there must have been an accident." That is not a complete *sequitur*. There may have been something which for want of a better word I will call disease, although that is not a term which accurately describes every form of impaired health.

Of course it does not follow that although Mr Gillon puts in those findings which he says he is entitled to, he will necessarily get them from the Sheriff; that is a matter for his consideration.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court before answer allowed the appellant to lodge a minute of amendment of the note specifying the findings in fact which he desired should be inserted in the Stated Case.

Counsel for the Claimant and Appellant—Gillon. Agent—James D. Melrose, W.S.

Counsel for the Respondents—Moncrieff. Agents—Fraser, Stodart, & Ballingall, W.S.

Thursday, March 9.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

ROBERTSON *v.* M'CAW.

Expenses — Caution — Defender, who had Left Scotland, Ordained to Find Caution.

A wife who had obtained decree of divorce against her husband brought an action against him for payment of her legal rights. The defender having subsequently left Scotland, the Court, in view of the fact that he had no estate therein, and that he was disposing of his estate in Ireland to the pursuer's prejudice, *ordained* him to find caution for expenses.

Mrs Margaret G. Robertson, formerly M'Caw, Maxwell Terrace, Glasgow, brought an action against her divorced husband Daniel M'Caw, printer, then residing at Dunallan, Bearsden, in which she sought decree (1) that she was entitled to her legal rights in his estate as at 20th July 1907 (the date of the decree of divorce), and (2) that the defender should be ordained to produce an account of his whole moveable estate in order that the pursuer's *jus relictæ* might be ascertained; or otherwise to make payment to her of the sum of £2000 as the amount thereof.

The defender pleaded, *inter alia* — "(3) The defender having had at the date of said decree no moveable estate available for payment to the pursuer of her *jus relictæ*, is entitled to be assoilzied from the conclusions for accounting and payment."

On 8th December 1910 the Lord Ordinary (ORMIDALE), after hearing counsel in the procedure roll, made a remit before answer to Mr Samuel Smyth, chartered accountant, Belfast, to report to him as to the value of certain shares in M'Caw, Stevenson, & Orr, Limited, printers and lithographers, Belfast, belonging to the defender as at 20th July 1907.

On 24th December 1910 the Lord Ordinary, on the statement of the pursuer's counsel that the defender had left Scotland and was disposing of his estate to the pursuer's prejudice, ordained him to find caution for expenses within fourteen days. The defender having failed to do so, his Lordship decerned against him for the sum of £551 odd—the amount to which the petitory conclusion had been restricted by minute.

The defender reclaimed, and argued—A defender was not bound to find caution unless (1) he were practically pursuer, or (2) had been divested of his estate. The reclaimer was in neither of these categories, and therefore was not bound to find caution. He cited *Taylor* v. *Fairlie's Trustees* (1833), 6 W. & S. 301, at p. 316, and *Johnstone* v. *Henderson*, March 15, 1906, 8 F. 689, 43 S.L.R. 486.

Counsel for the pursuer stated the following facts—That since the action was raised the defender had left Scotland; that his only assets so far as known to the pursuer were the shares above referred to; that said company was registered in Ireland; that meantime it was not competent for the pursuer to attach these shares by arrestment on the dependence of the action or by any analogous process in Ireland; that 200 of the shares had been transferred by the defender to his present wife (in respect of adultery with whom the pursuer had obtained divorce), and that the said shares had been charged with the sum of £200 against all dividends accrued or to accrue. In support of his statement he produced letters from the defender's agent in London to the secretary of the company relative to the transfer of the shares. He argued—*Esto* that in general a defender