provisions of the Bankruptcy Statutes. The petitioner seems to be of opinion (and it was to maintained at the bar) that a bankrupt is entitled to his discharge whenever two years has elapsed from the date of the sequestration and a dividend of 10s., or at least 5s. in the £ has been paid to the creditors. That is not so. After two years a bankrupt is entitled to his discharge if he complies with certain conditions and his application is not opposed by his creditors. But here the petitioner's creditors are opposing, and I think with good reason. The petitioner has already paid a dividend of 10s. in the £ out of a pension which he is entitled to receive during his life, and out of that fund he is just as able to pay 10s. in the £ more—that is, to pay his debts in full. No bankrupt is entitled to claim his discharge on payment of a dividend if he has funds which will enable him to pay his creditors in full. I therefore think that we should refuse the petition.

LORD MONCREIFF was absent.

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

Counsel for the Petitioner—T. Trotter. Agents—Stirling & Duncan, Solicitors.

Counsel for the Respondents — Craigie. Agent—Marcus J. Brown, S.S.C.

Tuesday, March 6.

FIRST DIVISION.

CHRISTIE *v.* CRAIK.

Reparation — Defamation — Diligence to Recover Documents—Remoteness—Injury to Business—Receipts for Income-Tax.

In an action of damages for defamation in respect of a speech alleged to have been made by the defender in October 1898, in which he accused the pursuer of having, while a member of the Police Commissioners of Forfar, sold hay to that body above the market price, the pursuer, who was in business as a produce merchant, averred that in consequence of the accusation "his business had greatly suffered." The defender moved for a diligence to recover the receipts for income-tax paid by the pursuer for the last four years, and cited *Johnston* v. *Caledonian Railway Company*, December 22, 1892, 20 R. 222. The Court, without giving opinions, *refused* the motion.

Wednesday, March 7.

FIRST DIVISION.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* LAIDLAW.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *and Schedule* 2, *sec.* 14—*Appeal—Question of Law or Fact — Serious and Wilful Misconduct.*

Two workmen were employed as night watchmen on a railway at a point where a landslip had occurred. It was the duty of one of them to remain at the site of the landslip, and of the other to stand 500 yards down the line, so as to give warning to approaching trains should the landslip increase. A fire was lighted on the six-foot-way opposite the landslip. It was left to the workmen themselves to arrange which post each should occupy. About 5 a.m. A was stationed at the outpost and B at the fire. A left his station between 5 and 6 a.m., and both sat down at the fire, and B fell asleep. On his awakening he discovered that A had been struck by a train and killed. In a claim by A's representatives, the Sheriff awarded compensation under the Workmen's Compensation Act, and found that it was not proved "that he was asleep, or that there was serious or wilful misconduct on his part, or that, if so, the said injuries were attributable to such misconduct." The defenders asked a case to be stated for appeal, with the question of law, whether the injury was attributable to serious and wilful misconduct on the part of the deceased within the meaning of section 1, sub-section 2 (*c*) of the Act. They maintained that his desertion of his post constituted such serious and wilful misconduct. The Sheriff refused to state a case, on the ground that, assuming the conduct of the deceased amounted to serious and wilful misconduct, the accident was not attributable to it. Note to have the Sheriff required to state a case *refused.*

In a claim under the Workmen's Compensation Act 1897 at the instance of Mrs Agnes Young or Laidlaw, widow of the late Samuel Laidlaw, railway surfaceman, against the Glasgow and South-Western Railway Company, the Sheriff-Substitute (HALL), acting as arbitrator, found that the following facts were proved:—"Finds that the deceased Samuel Laidlaw was a surfaceman in the employment of the defenders, and that for the three years preceding his death his average wages were 18s. 1½d. per week: Finds that in January 1899, in consequence of a landslip which had begun to show itself on the up-line side of Blackfaulds cutting on the defenders' railway, the said Samuel Laidlaw and another surfaceman named Walter M'Quat were appointed night watchmen to give warning to approaching trains in the

event of the said landslip extending so as to become a source of danger: Finds that the two men were under the orders of James Gordon, the squad foreman: Finds that they were directed by him to stand one at the said landslip and the other at a point 500 yards down the line in the direction in which trains would approach from Glasgow, but that he left them to arrange between themselves as to the station to be taken by each: Finds that with the knowledge of the said James Gordon a fire was lighted on the six-foot-way opposite to the said landslip: Finds that on 26th January 1899 the said Samuel Laidlaw and Walter M'Quat went on duty at 6 p.m., and that they were entitled to be relieved at 6 a.m. on the following day, though it was occasionally somewhat later before the relief arrived: Finds that from 6 p.m. to 10 p.m. the said Walter M'Quat was stationed at the outpost, and that from 10 p.m. onwards his place was taken by the said Samuel Laidlaw: Finds that while the said Samuel Laidlaw was stationed at the outpost he occasionally came up to the said fire, and that between 5 and 6 a.m. on 27th January 1899 he and the said Walter M'Quat sat down one on each side of it, when the said Walter M'Quat fell asleep: Finds that on awakening he discovered that the said Samuel Laidlaw had been struck by a train passing along the down-line: Finds that this was a goods train from Carlisle to Glasgow, which reached the said cutting about six o'clock: Finds that the said Samuel Laidlaw died of the injuries which he sustained, in consequence of being struck as aforesaid, in less than an hour afterwards: Finds that at the time when he sustained the said injuries the said Samuel Laidlaw was employed on, in, or about a railway within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act 1897: Finds it not proved that he was asleep, or that there was serious and wilful misconduct on his part, or that, if so, the said injuries were attributable to such misconduct."

He accordingly awarded compensation.

The following note was appended to the judgment—"While there is no doubt as to the cause of Laidlaw's death, as M'Quat, the only person present at the time, was asleep, the circumstances attending it are involved in some obscurity. It appears that the goods train mentioned in the interlocutor had been preceded about a quarter of an hour before by an express train, also from Carlisle to Glasgow, of which M'Quat seems to know nothing, but by which Mitchell, the driver of the goods train, maintains that Laidlaw must have been struck and killed. On the other hand, both Mitchell and Watson, the fireman, depone that as they approached the fire in Blackfaulds cutting they saw a lamp apparently carried in a man's hand, and seeming to be moving about. There is unfortunately no evidence as to the position in which Laidlaw's lamp was found after the accident, but since M'Quat was asleep the man carrying the lamp must have been Laidlaw, who was therefore alive and awake when the goods train came up. As it was a very frosty night he may have slipped and fallen so as to be struck by the goods train, and indeed the accident can in no other way bea ccounted for assuming the accuracy of Mitchell's and Watson's observations. If this be so, the fact that Laidlaw, contrary to his instructions, was at the time in the company of his fellow-watchman, did not occasion the accident, since he might equally well have slipped and fallen in front of the goods train had he been in his proper station at the outpost. In any event, I am not disposed to hold that though Laidlaw failed in some respects to carry out the orders which he and M'Quat had received from the foreman he was guilty of serious and wilful misconduct. There was undoubtedly a certain amount of looseness in those orders in not fixing which of the men was to take the post at each of the two stations, and when Laidlaw came up to the fire for the last time after he had cleared a train from Glasgow which reached the cutting about five o'clock, M'Quat seems to be in some doubt whether it was not then his turn to have gone to the outpost. It was in the knowledge of Gordon that there was only one fire, and that it was lighted in the six-foot-way opposite to the landslip, and the evidence, including that of Gordon himself, seems to show that it was almost a matter of necessity that the man on duty at the outpost should occasionally resort to it. Even if Laidlaw did so to an extent which could be held to constitute misconduct, only his last visit to the fire can have had any connection with the accident which caused his death. On this last occasion it is undoubtedly the fact that Laidlaw and M'Quat sat down and smoked beside the fire, and it is assumed by the defenders that both fell asleep. As I have already said, this is at all events doubtful in the case of Laidlaw, but if it were true it would hardly, I think, in the circumstances, amount to serious and wilful misconduct, whatever view may as a general rule be taken of the blame attachable to a watchman who goes to sleep at his post. In the present case it was natural for Laidlaw to consider that the time at which he might reasonably expect to be relieved after a twelve hours' vigil in an exceptionally cold night was close at hand, and that he had passed the last train which was likely to approach the cutting from the Glasgow side before relief arrived. On the whole matter, therefore, I have come to the conclusion that the claim of the pursuer and her daughters to compensation under the Act is not excluded by anything known and proved to have been done by Laidlaw at the time of the accident."

The Glasgow and South-Western Railway Company requested a case for appeal, and stated the following as the question of law—"Whether the injury to the deceased was attributable to serious and wilful misconduct on his part within the meaning of section 1, sub-section (2) (*c*), of the Workmen's Compensation Act 1897?"

The Sheriff refused to state a case, and

gave a certificate of refusal in the following terms—"I hereby certify that on this date I refused to state and sign a case in the arbitration *Laidlaw* v. *The Glasgow and South-Western Railway Company*, on the application of the defenders, because I am of opinion that the question of law stated in the draft case submitted to me was not raised by the admissions made or the facts proved before me, in respect that, assuming the deceased Samuel Laidlaw's temporary desertion of his post to have been serious and wilful misconduct, the accident which caused his death was not attributable to that misconduct."

The Railway Company presented a note to the Court of Session praying for an order on the applicant to show cause why a case should not be stated by the Sheriff.

Mrs Laidlaw lodged answers.

By section 14 of Schedule 2 of the Workmen's Compensation Act 1897 it is provided that "in the application of this Act to Scotland . . . (*c*) Any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily . . . 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." By section 1 it is provided that compensation shall be awarded subject to the proviso "(*c*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

Argued for the appellant—A case should be stated. It was a question of law whether in the circumstances of the case a railway workman was guilty of serious and wilful misconduct in leaving his post—*M'Nicol* v. *Speirs, Gibb, & Company*, February 24, 1899, 1 F. 604; *Todd* v. *Caledonian Railway Company*, June 29, 1899, 36 S.L.R. 784. The facts found by the Sheriff disprove his conclusion that the accident was not attributable to the workman's fault, if fault there were, because if he had stayed at his post he would not have met with that particular accident, though he might have been knocked down by another train. If the Sheriff decides a fact when there is no evidence on which he can properly find it, that is a matter of law—*Chandler* v. *Smith*, 1899, 2 Q.B. 506, *per* A. L. Smith, L.-J., at page 510. If the facts show a question of law, it is the duty of the Sheriff to state it—*Durham* v. *Brown Brothers*, December 13, 1898, 1 F. 279.

Counsel for the respondent were not called upon.

LORD PRESIDENT—I think we cannot grant the application in this case, as the Sheriff has quite rightly apprehended and performed his duty. The question arises under sub-section 2 (*c*) of section 1 of the Workmen's Compensation Act 1897, which provides that "If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed." It is clear from the initial words of the sub-section that it was contemplated that the question whether a workman had been guilty of serious and wilful misconduct would generally, at all events, be a question of fact. Accordingly, the Sheriff, quite properly treating the question as one of fact, has found that it is not proved that Laidlaw was asleep, or that there was serious and wilful misconduct on his part, or that if there was, the said injuries were attributable to such misconduct. In this finding he states alternatively two propositions of fact, either of which would be quite sufficient to negative the contention of the Railway Company. Unless the Sheriff is wrong in holding that question to be one of fact, we have no power to interfere with his judgment; and while I do not say that under no circumstances a point of law can enter into the question whether there has been serious and wilful misconduct, I am clear that there is no such point of law in this case.

But the Sheriff has also issued a note, in which he states the facts of the case. [*His Lordship here stated the facts as narrated in the Sheriff's note.*] The Sheriff there says that there was no evidence that Laidlaw fell asleep or even sat down. No doubt he was away from the outpost, but I do not think that that was necessarily serious and wilful misconduct. He may have seen that his companion, who had fallen asleep, was in a dangerous position, and may have gone to warn him, or he may have gone to remind him that the time had come for his taking his turn of watching at the outpost. At all events, no Court could hold that for a man to go along the line for about 300 yards under such circumstances was serious and wilful misconduct in the sense of the Act. It seems to me, on the whole, that the Sheriff here has very carefully fulfilled the requirements of the Act in his findings. We cannot ask him to alter his findings of facts, or, as was suggested, to omit any findings on the material facts, leaving us to draw conclusions from the remaining findings as matter of legal inference. I am therefore of opinion that we should not send the case back to the Sheriff with a request for a statement of a question of law when no question of law arises in the case.

LORD ADAM concurred.

LORD M'LAREN—There is no doubt that the Court has jurisdiction to direct the Sheriff or arbitrator to state a case. The power is given by the Act of Sederunt made under the authority of the Workmen's Compensation Act. It is desirable to consider on what principle the power is to be exercised. The point to be considered is this, whether, according to the hypothesis of the petition, the arbitrator has erred by

omitting to take notice of a point of law, or has he decided a point of law and refused to state a case raising that point. Our power to require a case extends to the second case, but not, as I think, to the first. The Workmen's Compensation Act in the second schedule 14 (*c*) provides that "it shall be competent to either party . . . to require the Sheriff to state a case on any question of law determined by him." The duty of the Sheriff, then, in acting as arbitrator is to grant a case on the question of law which he has determined, and which presumably he thinks is necessary for the decision of the case. Without wishing to lay down any absolute rule, one would not be inclined to direct an arbitrator to state a case unless it could be shown that he had determined some question of law and had refused to grant a case, thus precluding the consideration of the question of law by the court of review. While I do not say that there might not be special circumstances for directing a case, as where the arbitrator had taken a one-sided view or omitted to notice some legal point which he ought to have noticed, yet the rule in ordinary cases being as I have stated, the present application must fail because the Sheriff has not decided any such question of law as the Railway Company now desires to raise. On the contrary, the Sheriff says that according to his view of the facts no such question of law is raised by the facts. It may possibly be that another arbitrator might have so stated the facts as to present a question of law for the decision of the Superior Court, but according to the facts as found there is no question on the construction of the statute raised, and I think that it would be a very strong thing to require a judge or arbitrator to state a case which, on the view which he has taken of the evidence, would be a purely hypothetical case, not arising on the facts which he considers essential to the decision.

LORD KINNEAR concurred.

The Court refused the note.

Counsel for the Appellants — Guthrie, Q.C.—Spens. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondent—Baxter—W. Thomson. Agents — Sturrock & Sturrock, S.S.C.

Thursday, March 8.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

ABERNETHY & COMPANY *v*, LOW.

Reparation — Workmen's Compensation Act 1897, *sec.* 7—*Factory—Dock—Ship in Repairing Dock—Undertaker.*

A workman in the employment of a firm of ship-engineers met with an accident while engaged in repairing the boiler of a ship which was lying in the repairing dock of Aberdeen Harbour, and claimed from his employers compensation under the Workmen's Compensation Act. In a case stated for appeal, *held* (1) that a workman employed on a ship in a dock is not employed "on or in or about" a dock within the meaning of section 7, sub-section 1, of the Act; (2) that the repairing dock was not a factory within the meaning of section 7, sub-section 2; and (3) that the ship-engineers were not the occupiers of the dock in the sense of the Factory and Workshop Acts 1878 and 1895, and consequently were not the undertakers under section 7, sub-section 1, of the Workmen's Compensation Act. *Held*, accordingly, that the workman was not entitled to compensation.

By section 7 of the Workmen's Compensation Act 1897 it is provided, *inter alia*, "(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work. (2) 'Factory' has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895. 'Undertakers' in the case of a factory, quarry, or laundry means the occupiers thereof within the meaning of the Factory and Workshop Acts 1878 to 1895." The provisions of the Factory and Workshop Acts referred to in these sections are quoted in the opinion of the Lord President, *infra*.

This was a case stated for appeal by the Sheriff-Substitute of Aberdeen (BURNET) on a claim under the Workmen's Compensation Act at the instance of William Low, apprentice boilermaker, against James Abernethy & Company, Ferryhill Foundry, Aberdeen. The facts of the case as stated by the Sheriff were as follows:—"That on the morning of Wednesday 19th July 1899 the respondent William Low, who is an apprentice boilermaker in the employment of the appellants, who carry on business as ironfounders, engineers, &c., in Aberdeen, was employed by them on what is termed the 'night shift,' in repairing the boiler of the s.s. 'St Ola,' belonging to the Orkney and Shetland Steam Navigation Company, Limited, which was then lying in the repairing dock of Aberdeen Harbour. That said repairing dock is the property of the Aberdeen Harbour Commissioners, and the rates for the occupation by the s.s. 'St Ola' were paid by the Orkney and Shetland Steam Navigation Company. That the said dock is about a mile distant from the appellants' works. That on the date mentioned, while engaged cutting out old rivets inside the fire-box of the boiler of said vessel a piece of rivet struck said respondent's right eye. That in consequence of said accident he has meantime suffered total disablement, having temporarily lost the use of his right eye, and since the date of said accident having been unable to earn any wages."