'The sequestration has been remitted to the Sheriff of the Lothians and Peebles at Edinburgh.

'All future advertisements relating to this sequestration will be published in the *Edinburgh Gazette* alone.

'ALFRED A. MURRAY, *W.S.*, *Agent*,
'23 St James Square, Edinburgh.'

And to substitute said notice for that published in the *Edinburgh Gazette* on 5th June 1906, and to hold the same as equivalent thereto, and to authorise the Sheriff of the Lothians and Peebles, upon proof of such notice having been duly inserted, to confirm the election of the trustee and commissioner, and proceed in the sequestration as if the date of the first deliverance had been correctly notified in said *Edinburgh Gazette;* or to do further or otherwise in the premises as to your Lordships shall seem fit."

Counsel for the petitioner in the Single Bills stated that the error was purely clerical; that the advertisement had been correctly inserted in the *London Gazette;* that the date of the first deliverance was not an essential fact (being inserted merely to give creditors notice of the proceedings), and had no effect in fixing the date of notour bankruptcy or in determining preferences. He referred to *Lipman & Co.'s Trustee*, June 14, 1893, 20 R. 818, 30 S.L.R. 729.

The LORD PRESIDENT having intimated that the Court was disposed to aid the petitioner, but that the prayer of the petition could not be granted as it stood, the petitioner was allowed to amend the prayer, which then read as follows:—"May it therefore please your Lordships to authorise the petitioner to insert in the *Edinburgh Gazette*, within four days from the date of your Lordships' deliverance, a notice in the following terms:—

"'*Charles Oscar Northwood's Sequestration.*

"'Whereas on 5th June 1906 the following intimation was inserted in the *Edinburgh Gazette*:— . . . [*here followed the notice originally inserted.*] . . . Notice is hereby given by authority of the First Division of the Court of Session in Scotland that the date of the first deliverance was by a clerical error stated in said intimation to be 5th June 1906 instead of 9th May 1906, and this intimation is now inserted to give notice to all concerned that the correct date of the first deliverance was 9th May 1906.'

And to authorise the Sheriff of the Lothians and Peebles, upon proof of such notice having been duly inserted, to confirm the election of the trustee and commissioner, and proceed in the sequestration as if the date of the first deliverance had been correctly notified in said *Edinburgh Gazette*, or to do further or otherwise in the premises as to your Lordships shall seem fit."

The Court (the LORD PRESIDENT, LORD KINNEAR and LORD PEARSON) pronounced the following interlocutor:—

"The Lords having considered the petition as amended at the bar, and heard counsel for the petitioner, Authorise the petitioner to insert in the *Edinburgh Gazette*, within four days from this date, a notice in the terms set forth in the prayer of the petition, and authorise the Sheriff of the Lothians and Peebles at Edinburgh, upon proof of such notice having been duly inserted, to confirm the election of the trustee and commissioner on the sequestrated estate of Charles Oscar Northwood mentioned in the petition, and proceed in the sequestration as if the date of the first deliverance had been correctly notified in the *Edinburgh Gazette*, and decern."

Counsel for Petitioner—Burt. Agents—J. & A. Murray, W.S.

Tuesday, June 26.

FIRST DIVISION.

[Sheriff Court at Dundee.

KENNEDY *v.* CALEDON SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

(*Ante*, March 13, 1906, *supra*, p. 430.)

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3) — *Arbitration — Application for Arbitration before Master has had Time to Consider Claim, and before Date of First Weekly Payment has Arrived—Competency.*

A workman met with an accident entitling him to compensation under the Workmen's Compensation Act. On 31st October he wrote intimating a claim against his master under the Employers' Liability Act or alternatively under the Workmen's Compensation Act. The first weekly payment under the latter statute fell due on 4th November. On 2nd November the workman lodged a petition for arbitration. The master pleaded that the application was incompetent and premature inasmuch as there was no question between the parties when it was presented and no time had been given him to consider the claim as made. The Sheriff-Substitute found the defences irrelevant, and awarded compensation.

Held on appeal that as there was no dispute between the parties when the petition was lodged as to the liability to pay compensation or its amount or duration, the compensation payable not being at the time of the application in arrear, no question had arisen within the meaning of section 1, subsec. (3), of the Act, and consequently that the condition-precedent to an arbitration was wanting, and the Sheriff-Substitute ought to have dismissed the petition.

Field v. *Longden & Sons*, [1902] 1 K.B. 47, *approved.*

Expenses — Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule II, sec.* 6—*Incompetent Application for Arbitration—Discretion of Arbiter.*

The Workmen's Compensation Act 1897, Schedule II, section 6, provides:—"The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. . . ."

Held that this enactment did not cover the expenses of an application for arbitration found to be incompetent and premature.

[This case is reported *ante ut supra* and was now heard along with the immediately following case of *Sweeney* v. *Gourlay Brothers & Company (Dundee), Limited.*]

The Workmen's Compensation Act 1897, sec. 1, sub-sec. (3), enacts—"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 the Act."

Section 6 of the Second Schedule provides that the expenses of the arbitration shall be in the discretion of the arbiter (*v. supra in second rubric*).

On 13th March 1906 the First Division of the Court ordained the Sheriff-Substitute at Dundee (CAMPBELL SMITH) to state a case in an arbitration under the Workmen's Compensation Act 1897 between Robert Kennedy, apprentice shipwright, 59 Dock Street, Dundee, now respondent, and the Caledon Shipbuilding and Engineering Company, Limited, Lilybank Works, Dundee, now appellants (*v. supra, page* 430). The Sheriff-Substitute had pronounced this interlocutor, dated 10th November 1905:—"Finds the defences as stated to be irrelevant: Finds the pursuer entitled to compensation from the defenders under the Workmen's Compensation Act 1897 at the rate of four shillings and sixpence weekly, as and from 28th October 1905, until the further orders of the Court: Further finds the pursuer entitled to expenses from the defenders, modified to two guineas, and decerns."

The stated case set forth—"On 2nd November 1905 the respondent presented an application in the Sheriff Court at Dundee, praying the Court to find him entitled to compensation from the appellants under the said Act in respect of personal injuries caused to the respondent on 14th October 1905 by accident arising out of and in the course of the respondent's employment with the appellants; to ascertain and fix such weekly payments as might be found to be due and payable to the respondent by the appellants under and in terms of the said Act; and to grant an award in favour of the respondent against the appellants therefor, with expenses. Notice of the accident had been duly given in terms of the statute. On the presentation of the application the usual warrant was granted for citation of the appellants, and appointing parties to be heard on 10th November 1905. On that day (10th November 1905) the Sheriff-Substitute heard parties' procurators. At the hearing, or after it, on the same day, the appellants' procurator lodged in process a written note of defences containing the pleas—(1) That the application was incompetent. (2) That the application should be dismissed with expenses to the appellants in respect that—(*a*) No question had arisen between the parties within the meaning of the Workmen's Compensation Act when the application for arbitration was presented. (*b*) Reasonable opportunity was not given to the appellants to admit their liability to pay the compensation claimed before the application was presented. The only part of these pleas argued at the bar, as understood by the Sheriff-Substitute, was that the action had been prematurely brought, and that therefore no expenses should be allowed to the respondent. The following facts were admitted at the bar—That on 14th October 1905 the respondent, while in the employment of the appellants, met with an accident entitling him to compensation under the Workmen's Compensation Act. That on 28th October 1905 the compensation to which he was entitled began to run. That on 31st October 1905 written notice of the accident was duly given to the appellants in terms of the Act. That on 2nd November 1905 the application was presented to the Court. That citation was effected on 3rd November 1905. That down to 10th November 1905, when the application was called before the Sheriff-Substitute as aforesaid, no payment of compensation had been made or tendered to the respondent, although the compensation had begun to run on 28th October 1905, and thirteen days' compensation was thus due. That down to 10th November 1905, when the application was called as aforesaid, no memorandum of agreement under the said Act had been sent to the sheriff-clerk either by the appellants or the respondent, although twenty-seven days had then elapsed since the accident. . . . The appellants did not aver that in fact any agreement had been made, but asserted merely that they were willing to pay. . . . The Sheriff-Substitute . . . was of opinion that, prior to the hearing on 10th November 1905, no 'agreement' within the meaning of section 1, sub-section 3, of the Act had been arrived at. He was, however, fully satisfied that an agreement, entitled to the sanction of the Court, had been arrived at by the agents, and, relying on their statements at the bar, he gave effect to it, and further that, without decree, the respondent could not enforce payment of any sum whatever. The Sheriff-Substitute was further of opinion—(*a*) that no agreement having been arrived at prior to the hearing on 10th November 1905, and

the respondent having presented an application for arbitration, a 'question' had arisen within the meaning of section 1, sub-section 3, of the Act; and (*b*) that, in any event, in respect that prior to the hearing on 10th November 1905 the parties were admittedly at one only as to the liability to pay compensation, and not as to the amount or duration of compensation, and in respect that notwithstanding the general admission of liability to pay compensation no payment of compensation had been made, and the compensation was thus in arrear, a 'question' had arisen within the meaning of said section. . . . ."

The written notice of claim dated 31st October was alternatively under the Employers' Liability Act 1880 or the Workmen's Compensation Act 1897.

Various questions of law were stated, but the Court found it unnecessary to answer them.

Argued for the appellants—The Sheriff-Substitute was in error in thinking that a "question" in the sense of section 1, sub-section 3, of the Act had arisen here. There was no such question, and that being so the application should have been dismissed. A workman was not entitled to institute a claim in all cases at the expense of the employer, and irrespective of the fact whether his claim was admitted or not. Nor was he entitled to rush into Court with an arbitration before his employer had had time to accede to his claim or to pay the compensation admitted. The crucial date here was the date of the application, viz., 2nd November. Compensation was not payable till 4th November; the application was therefore incompetent. It should have been dismissed and expenses should then have been awarded to the appellants instead of to the respondent. Reference was made to *Field* v. *Longden & Sons*, [1902] 1 K.B. 47, and to the previous report of *Caledon Shipbuilding and Engineering Company, Limited* v. *Kennedy*, March 13, 1906, *supra*, p. 430.

Argued for the respondent—The claim here was not really made till 10th November. The application of 2nd November was merely the notice of the claim (*vide* section 2 of the Act). By 10th November the compensation was in arrear and no agreement had been registered. The question of expenses was a matter solely in the discretion of the arbiter (*vide* Schedule II, section 6).

At advising—

LORD PEARSON—This appeal comes before us on a case stated by the Sheriff-Substitute at Dundee in obedience to your Lordships' order, under the Workmen's Compensation Act.

The appellants are a shipbuilding and engineering company in Dundee. On 14th October 1905 the respondent met with an accident in the course of his employment at their works which entitled him to compensation under the Act. The first weekly sum of compensation became payable on 4th November, but before that date arrived the respondent had on 2nd November presented a petition for arbitration in the Dundee Sheriff Court, which was served on the appellants on 3rd November. I note in passing that the notice of claim given to the appellants on 31st October bore to be in terms of the Employers' Liability Act 1880, and it further stated that alternatively he claimed compensation under the Workmen's Compensation Act. The election to claim under the latter Act was made, as I understand it, by the lodging of the petition for arbitration on 2nd November.

At the hearing before the Sheriff-Substitute on 10th November the appellant objected to the petition on the ground that it was premature and unnecessary, as the appellants had never been unwilling to pay the half wages to the full statutory amount. I take this as being the Sheriff's recollection of what passed. A short written note of defences was also handed in by the appellants and lodged in process, which says the same thing in legal language, namely, that the application was incompetent and should be dismissed in respect (1) that no question had arisen between the parties within the meaning of the Act when the petition was presented, and (2) that no reasonable opportunity was given to the appellants to admit their liability. But the Sheriff's own account of it is quite sufficient to show that the point was definitely raised and argued.

Now, what the Sheriff did was this. He found the defences as stated to be irrelevant and he found the pursuer entitled to compensation at the rate of 4s. 6d. weekly as from 28th October. He further found the pursuer entitled to £2, 2s. of modified expenses, which he says he did in virtue of the discretionary power conferred on him by section 6 of Schedule II.

In my opinion the Sheriff has proceeded on an erroneous view of the statutory requirements, and the result at which he has arrived is inconsistent with the scope and intention of the Act. The Act does not regard arbitration with any degree of favour. It is to be the last resort of persons who find themselves unable to agree. It is assumed that there is to be a *bona fide* attempt to settle the matter without it. But the first requirement of all is, that there shall be a question arising in any proceedings under the Act as to the liability to pay compensation or as to the amount or duration of it. The expression "any question" obviously means any dispute. Then the statute prescribes that the question, if not settled by agreement, shall be settled by arbitration; which plainly imports that each party is entitled to an opportunity of settling by agreement, before arbitration can be forced upon him by the other. If either party attempts to rush an arbitration before any such question has arisen, or (if a question has arisen) before the other party has an opportunity of settling it by agreement, then the conditions precedent to the statutory arbitration are wanting and the petition for arbitration is incompetent *ab initio*.

These considerations are, I think, clear on the face of the statute, and I am confirmed in the view I have expressed by the

decision of the English Court of Appeal in the case of *Field* v. *Longden & Sons* (1902, 1 K.B. 47), to which we were referred, and in which I may be allowed to express my entire concurrence.

Coming now to the grounds in law of the Sheriff-Substitute's decision, I find that the first ground which he assigns for it is this—that no agreement having been arrived at prior to the hearing on 10th November 1905, and the respondent having presented an application for arbitration, a "question" had arisen within the meaning of section 1, sub-section 3, of the Act. The underlying assumption here is, that the presentation of the petition for arbitration of itself created a question within the meaning of sub-section 3. But that is an impossible assumption, because, as was pointed out in the case of *Field*, the section in terms provides that a question must have arisen as to compensation before the provisions as to arbitration come into play. The Sheriff's second ground of decision is this—that in any event a "question" had arisen within the meaning of the Act, in respect that prior to the hearing on 10th November the parties were at one only as to the liability to pay compensation, and not as to its amount or duration, and in respect that notwithstanding the general admission of liability to pay, no payment had been made and the compensation was thus in arrear. But the compensation was not in arrear at the date when the petition was presented, which is the date at which its competency must be judged of; while as to the extent to which the parties were at one, there was certainly no question between them, when the petition was lodged, either as to the amount of the compensation or the duration of it.

The Sheriff-Substitute suggests that there was a waiver on the part of the appellants of their plea to the competency. I cannot draw this conclusion from the facts which he states; and it is inconsistent with the opening words of his interlocutor, where he finds the defences stated to be irrelevant, thus giving judgment on the plea which he says was waived.

Again, it was argued that this appeal is truly against the finding of expenses, and that as to these the Sheriff is final under section 6 of the Second Schedule. But that section applies only to the expenses of and incident to an arbitration and the proceedings connected therewith; and in my view there was here no arbitration properly so called. The sum in dispute is indeed very small, for the appeal is mainly directed against the award of expenses; but it raises a question of principle, of considerable importance to the proper administration of the statute.

In my view the Sheriff-Substitute ought to have sustained the preliminary defences and dismissed the petition, and it follows that his finding of expenses in favour of the petitioner cannot stand. But as there is no objection to the finding settling the compensation, it would seem unnecessary to recal that finding merely in order that the same result should be reached by registration of an agreement, and therefore I should propose that we should recal the first and last findings of the interlocutor and *quoad ultra* dismiss the appeal.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was not present.

The Court pronounced this interlocutor—

"Recal the first and last findings in the interlocutor of the Sheriff-Substitute as arbitrator, dated 10th November 1905: *Quoad ultra* dismiss the appeal, and find it unnecessary to answer the questions of law stated: Find no expenses due to or by either party in connection with the stated case."

Counsel for Appellants—C. D. Murray—Hossell Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

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

Tuesday, June 26.

FIRST DIVISION.

[Sheriff Court at Dundee.

SWEENEY *v.* GOURLAY BROTHERS & COMPANY (DUNDEE), LIMITED.

[This case was heard and decided along with the immediately preceding case of *Kennedy* v. *The Caledon Shipbuilding and Engineering Company (Limited)*.]

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *sub-sec.* (3)—*Arbitration—Application for Arbitration while Master is Paying Full Compensation—Competency.*

His employers, without arbitration or a specific agreement, were paying an injured workman the full weekly compensation which he could claim under the Workmen's Compensation Act 1897, but had on several occasions when making payment intimated to him that they thought he had recovered and that the payments might soon be stopped. The workman after a time presented a petition for arbitration.

Held, on appeal, that the petition was incompetent and should have been dismissed, inasmuch as (1) when it was lodged no question had arisen between the parties as required by section 1 (3) of the Act prior to arbitration, and (2) the workman had no right to have his right to compensation constituted and controlled by a court of law irrespective of the Act.

The Workmen's Compensation Act 1897, section 1, sub-section (3), enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any