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

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."

Thomas Sweeney, rivetholder, 64 Lilybank Road, Dundee, made application on 30th January 1906 in the Sheriff Court there, in an arbitration under the Workmen's Compensation Act 1897, for a decree ordaining Gourlay Brothers & Company (Dundee), Limited, to pay him nine shillings and ninepence sterling weekly as compensation under the Act as and from the 22nd January 1906. On 23rd February the Sheriff-Substitute (CAMPBELL SMITH) awarded the compensation claimed until the further orders of the Court with modified expenses. Gourlay Brothers & Company holding the application to have been incompetent appealed.

The stated case narrated—". . . The Sheriff-Substitute heard parties' procurators on 9th February 1906, when the appellants put in a written note of defences with the following pleas:—'(1) The petition is incompetent. (2) The petition should be dismissed with expenses to the defenders, in respect that—(*a*) There was no question between the parties within the meaning of the Workmen's Compensation Act when the petition was presented. (*b*) The respondent had entered into an agreement with the appellants under the Workmen's Compensation Act 1897, accepted compensation in terms thereof at the rate specified in the petition, and has received, and is still in receipt of, said compensation.'

"The Sheriff-Substitute allowed a proof, which was taken on 23rd February 1906.

"The following are the facts which the Sheriff-Substitute held as proved:—That the respondent on 5th September 1905, while working as a rivetholder in the employment of the appellants in Camperdown Shipyard, in the county of Forfar, was severely burned on his left hand and left leg through a lighted naphtha lamp falling upon him. That the appellants, in accordance with their liability under the Workmen's Compensation Act, from a fortnight after the accident till 23rd January 1906, paid the respondent 9s. 9d. per week as half his average weekly earnings. That the appellants had paid the respondent nothing since said 23rd January 1906. That when making the payment to the respondent of his weekly compensation the appellants intimated to him that in the opinion of the appellants and some unnamed medical adviser he had recovered and ought to be seeking for work, and that the payment of 9s. 9d. would in a very short time be stopped. That after having heard this warning several times repeated the respondent consulted an agent, who on 25th January 1906 gave the notice of the accident required by the statute, and on 30th January 1906 presented the petition to the Court. That no memorandum of agreement had been recorded with the Sheriff-Clerk by either party. That at the time when the petition was presented there was a dispute between the parties as to the respondent's ability to work—the respondent affirming his incapacity, while the appellants denied it, and threatened at any moment to stop payment of the compensation, and that no agreement had been made as to that dispute.

"The Sheriff-Substitute therefore held (1) that there had arisen a 'question' as to the duration of compensation within the meaning of section 1, sub-section 3, of the Act, and that the application was competently brought; and (2) that the respondent was entitled to compensation under the Act, and that complete recovery of his wage-earning powers had not been proved, as also that the appellants had not proved any probable cause for alleging it. . . ."

The following questions of law were submitted:—"(1) Whether a 'question' as to the duration of compensation within the meaning of section 1, sub-section 3, of the Workmen's Compensation Act 1897, had arisen between the parties and had not been settled by agreement. (2) Whether it being proved that the respondent has no agreement for compensation with the appellants capable of registration under the Workmen's Compensation Act, he is entitled to have his right to compensation constituted and controlled by a court of law as a guarantee against injustice being done to him or by him."

Counsel for the appellant stated that his argument in the preceding case (*Kennedy* v. *The Caledon Shipbuilding and Engineering Company, Limited*) covered the question raised in the present case.

There was no appearance for the respondent.

At advising—

LORD PEARSON—This is an appeal on a case stated by the Sheriff-Substitute of Forfarshire at Dundee under the Workmen's Compensation Act.

The appellants are shipbuilders in Dundee, and on 5th September 1905 the respondent received injuries in the course of his employment in their shipyard, which entitled him to compensation under the statute. The maximum amount due to him, on the footing of total incapacity for work, was 9s. 9d. a-week, being one-half of his average weekly earnings. This sum was duly paid to him by the appellants from a fortnight after the accident until 23rd January inclusive, that is to say, for four months and a-half. By the time the next weekly sum was payable, which was on 30th January, the respondent, through a solicitor, had given notice of the accident, and had presented a petition to the Sheriff for arbitration.

At the hearing before the Sheriff-Substitute on 9th February the appellants objected to the petition as incompetent, on the ground (1) that when it was presented there was no question between the parties within the meaning of section 1, sub-section 3, of the Act, and (2) that there was a subsisting agreement between the parties for

compensation at the full statutory rate which had been regularly paid and accepted.

The Sheriff-Substitute allowed a proof, and found compensation due at the rate already mentioned, from the date of the last payment until the further orders of Court; and he awarded modified expenses to the respondent.

The Sheriff-Substitute thus virtually repelled the employers' objections to the petition; and so far as the stated case shows, the ground on which he did so was, that in making payment of the weekly compensation to the respondent the appellants had intimated to him, apparently on more than one occasion, that in their opinion and in that of their medical adviser "he had recovered and ought to be seeking for work, and that the payment of 9s. 9d. would in a very short time be stopped." In the view of the Sheriff-Substitute there had thus arisen a question as to the duration of compensation within the meaning of section 1, sub-section 3. In my opinion, no such question had arisen at the date when the petition was lodged, which is the material date. By the terms of the Act itself every payment of compensation is subject to review *de futuro;* and I regard the words used by the appellants when they made the payments as being no more than an expression of what the statute implies, namely, that the payments might have to be reviewed in the future, and even in the near future. In that sense the duration of compensation is always uncertain; but that does not mean that there is always a question as to its duration within the meaning of section 1, sub-section 3. There might be a case of payments being stopped on an allegation of complete recovery. But that is not this case. Here full payment had been regularly made down to date in accordance with the appellants' liability under the statute. It lay with the employer to make the next move, namely, to require the workman to submit himself for examination under section 11 of Schedule 1; and I see no reason at all for the assumption that in this case the employers would have taken the matter into their own hands. Indeed, I draw the contrary inference from the facts set forth by the Sheriff-Substitute as proved.

It follows that the petition should have been dismissed, unless it can be supported on the ground indicated in the second question of law stated by the Sheriff-Substitute. That question is, whether, where a workman has no agreement capable of registration under the Act, "he is entitled to have his right to compensation constituted and controlled by a court of law as a guarantee against injustice being done to him or by him?" The only possible answer is, that neither party has any right under the statute except what the statute confers; and that the question ignores the statutory conditions upon which alone an arbitration is admissible under section 1, sub-section 3. It is not until the parties are at arm's length that the statute contemplates a resort to arbitration, and then only when some definite question has arisen between them, which they have had at least an opportunity of settling by agreement and which they have failed so to settle. The mere fact that there exists no agreement capable of registration does not show that the parties are at arm's length. On the contrary, that is the normal state of matters, where, as here, the parties are *de facto* in agreement from the very first, and where compensation has been paid over a period of many weeks on the maximum scale.

In these circumstances I am of opinion that the Sheriff-Substitute ought to have dismissed the petition; and that his award of expenses was incompetent and must be recalled.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was not present.

The Court pronounced this interlocutor—

"Find that the petition by the applicant is incompetent: Therefore find it unnecessary to answer the two questions of law stated: Recal the award of the arbitrator: Remit to him to dismiss the claim, and decern: Find no expenses due to or by either party in connection with the stated case."

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

Thursday, June 7.

FIRST DIVISION.

[Lord Johnston, Ordinary in Exchequer Causes.

PATERSON *v.* INLAND REVENUE.

Revenue—Public-House—Licence Duty—Billiard Saloon in Flat above—Whether Part of Licensed Premises—"Offices"—Inland Revenue Act 1880 (43 *and* 44 *Vict. c.* 20), *sec.* 43.

The tenant of a public-house was tenant under a separate lease of a billiard saloon situated in the flat immediately above the public-house. There was no internal communication between the saloon and the public-house, access to the saloon being obtained by an outside staircase.

Held that the billiard saloon was neither part of the dwelling-house in which the retailer resided or retailed spirits, nor within the description "offices, courts, yards, and gardens therewith occupied," and consequently that licence duty was not exigible in respect thereof.

The Inland Revenue Act 1880 (43 and 44 Vict. c. 20), section 43, enacts—"(1) On and after the first day of July 1880, in lieu of the duties of excise now payable on licences