The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—section 31—"In any action raised in the Sheriff Court by an employee against his employer, concluding for damages under the Employers' Liability Act 1880, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may, so soon as proof has been allowed or within six days thereafter, require that the cause shall be tried before a jury. . . . The verdict of the jury shall be applied in an interlocutor by the Sheriff, which shall be the final judgment in the cause. . . ."

Section 32—"Where jury trial has been ordered, the Sheriff shall, after hearing parties, if he shall think that necessary or desirable, issue an interlocutor setting forth the question or questions of fact to be at the trial proponed to the jury, and fixing a time and place for the trial, being not sooner than fourteen days from the date of the interlocutor."

First schedule, section 146—"Any party in the cause may . . . move the Sheriff to apply the verdict . . . As soon as practicable the Sheriff shall issue an interlocutor applying the verdict, and grant decree accordingly. . . ."

Hugh M'Vicar, grainweigher, Suffolk Street, Glasgow, brought an action of damages for personal injuries in the Sheriff Court at Glasgow, against his employers John Robertson & Son, grainweighers and stevedores, Princes Dock, Glasgow.

On pursuer's motion the Sheriff-Substitute (FYFE) appointed the cause to be tried by jury.

On 14th July 1909 the Sheriff-Substitute appointed seventeen questions to be proponed to the jury. At the trial the jury returned a verdict in which they answered the questions proponed to them.

On 25th November 1909 the Sheriff-Substitute pronounced this interlocutor—"Having heard parties' procurators upon defenders' motion to apply the verdict of the jury, finds that the facts as admitted by the parties or found by the jury are . . . [*Here followed a number of findings in fact*] . . . Upon these facts finds in law that in respect the answers returned by the jury to the questions proponed to them do not support the case laid on record under the Employers' Liability Act 1880, the verdict is for the defenders: Applies the verdict accordingly, reserving to the pursuer any rights competent to him under section 1 (4) of the Workmen's Compensation Act 1906: Therefore dismisses the action: Finds the defenders entitled to expenses," &c.

On 2nd December 1909 the pursuer appealed to the Second Division of the Court of Session on the ground that the verdict was contrary to evidence.

At the discussion counsel for the defenders drew the attention of the Court to the fact that the Sheriff-Substitute's interlocutor applying the verdict contained findings in fact, and argued that this was incompetent, on the ground that under the Act the facts of the case as found by the jury exhausted the cause, and the Sheriff had no power to apply the verdict on facts found by himself.

On 10th February 1910 the Court in refusing the appeal pronounced the following interlocutor:—

"Recal the findings in fact in the . . . interlocutor from the words 'finds that the facts as admitted by the parties' down to and including the words 'upon these facts,' in respect that such findings are incompetent: *Quoad ultra* refuse the appeal, and adhere to the said interlocutor: Find and determine in terms of section 1, sub-section 4, of the Workmen's Compensation Act 1906, that the injury to the pursuer is one for which the defenders would have been liable to pay compensation under the provisions of the said Act, and remit to the Sheriff to determine the amount due to the pursuer under and in terms of the said Act, and decern: Find the defenders entitled to additional expenses," &c.

Counsel for Pursuer and Appellant—Anderson, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders and Respondents—Watt, K.C.—Lippe. Agents—Balfour & Manson, S.S.C.

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.

ANDERSON *v.* DARNGAVIL COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (15) *and* (16) — *Review — Proof of Recovery — Question of Fact or Law.*

A brusher in a mine, who had sustained an injury to his knee, was paid compensation down to 9th April 1909, when his employers stopped payment on the ground that he had recovered. On 13th May 1909 the workman was examined by a medical referee, who reported that, with the exception of a certain thinning of the muscular tissue of the knee joint (due to the prolonged use of an elastic bandage), the effect of the injury had passed off; that with the above exception the condition of the knee was now normal; and that in his opinion the workman should keep the knee unbandaged, continue doing light work for a month, and then resume his original work. The workman accordingly removed the bandage and resumed his light work. On 4th June 1909 the cartilage of the knee again became loose, requiring the knee to be bandaged, in consequence of which the workman was off work for a day.

In a claim at the instance of the workman against his employers, the arbiter (after finding that this condition of the knee would likely recur if the workman did not wear an elastic bandage or a knee-cap) found that if he wore a knee-cap he would be able to resume his original work as a brusher, and ended the compensation as from 13th August 1909, down to which date he found him entitled to it.

Held that the question whether the workman had recovered or not was a question of fact, and that as there was evidence before the arbiter entitling him to find as he did, the appeal was incompetent and must be dismissed.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) James Anderson, brusher, Larkhall, claimed compensation from his employers, the Darngavil Coal Company, Limited, Birkrigg Colliery, Dalserf, at the rate of twenty shillings per week from 9th April 1909. The Sheriff-Substitute (THOMSON) at Hamilton, acting as arbitrator, ended the compensation as from 13th August 1909, and at the request of the claimant stated a case for appeal.

The Case stated—"The case was before me on 22nd July 1909, when the following facts were admitted or proved, viz.—(1) that the appellant was at the date of his injury a brusher with respondents, brushing being one of the heaviest forms of mining labour; (2) that the appellant injured his right knee by a displacement of the semi-lunar cartilage of the knee joint in an accident arising out of and in the course of his employment with respondents on 16th October 1908; (3) that his average earnings were then £2, 1s. 6d. weekly, and he was paid compensation from the date of the accident at the rate of £1 per week till it was reduced by agreement, the final rate being 5s. 9d. per week, which was paid until 9th April 1909, when it was stopped on the ground, as alleged by respondents, that he had then recovered entirely; (4) that from the date of the accident until after the medical referee's report he had kept his knee bandaged; (5) that he was on 13th May 1909 examined by a medical referee in terms of section 15 of Schedule I of the Workmen's Compensation Act 1906, who reported on 14th May 1909 in the following terms:—'As requested, I yesterday examined James Anderson, brusher, who had his knee injured while at work last October. All that is now discoverable is a certain thinning of the muscular tissue in the immediate neighbourhood of the joint that was injured. This wasting is due to the prolonged use of an elastic bandage, which should now be discarded. Whatever the original injury was its effects have passed off. In shape and freedom of movement the knee is quite normal with the exception above noted and explained. My opinion of the case is (*a*), as stated above, to keep the knee unbandaged; (*b*) to allow him for a month to continue at his present light labour; and (*c*) then to resume his original work. (Sgd.) D. Macartney, M.D., medical referee.' (6) That notwithstanding this report the appellant continued at his light work and still works thereat, earning on an average 12s. 6d. per week; (7) that following on the medical referee's report the appellant removed the bandage from his knee on or about 20th May 1909; (8) that the only change in circumstances since the examination by the medical referee is this, that while at said light work, on or about 4th June, the knee cartilage again became loose and required to be bandaged by a doctor, and that he was off work in consequence for a day and then resumed his light work at the picking tables; (9) that this is a condition of the knee that is likely to recur if he does not wear an elastic bandage or a knee cap; (10) that the appellant has continued to wear the said bandage since the 4th day of June 1909; (11) that the appellant if he wears a knee cap will be able and ought to resume his original work as a brusher. In these circumstances I ended as from 13th August 1909 the compensation payable to appellant at the rate of 5s. 9d. per week, and decerned and ordained respondents to pay appellant compensation at the rate of 5s. 9d. per week from 9th April 1909 till said 13th August 1909, together with one day's wage in addition, and found neither party entitled to expenses."

The *question of law* was—"In the circumstances above stated was the Sheriff entitled to end the compensation payable to the appellant."

Argued for appellant—The arbitrator had drawn an unreasonable inference in fact. He had no evidence before him on which he was entitled to end the appellant's compensation. Finding (11) was the statement of an opinion, and not a finding in fact.

Counsel for respondents were not called on.

At advising—

LORD PRESIDENT—The question as stated here is, whether in the circumstances the Sheriff was entitled to end the compensation payable to the appellant upon the ground that he had recovered. This is absolutely a question of fact and nothing else, and it is impossible, I think, to do as was attempted to be done in the argument, to put before us the report of the medical referee which the Sheriff had got, and then to argue upon that report and say that it led to another conclusion. The report was there, and other matters were there before him, and the whole thing was to determine whether the man had recovered or not. I think the question is one of pure fact, and although it is really improperly stated, for practical purposes I think it may be answered in the affirmative.

LORD KINNEAR—I agree. I think this is a pure question of fact.

The LORD PRESIDENT stated that LORD DUNDAS, who was absent at the advising, concurred.

LORD JOHNSTON gave no opinion, not having heard the case.

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.