The case was again mentioned to the Lord Ordinary on 27th April, when his Lordship allowed the petition to be amended by the substitution of the words "such early day" for the words Thursday, 5th May, or such other date," and on an undertaking being given that the question of competency would be brought under the notice of the Court at its meeting, granted, *quantum valeat*, an order for intimation and service in the following terms:—"Appoints intimation of the petition as amended to be made on the walls and in the minute-book in common form, and to be served on the county clerk of the county of Stirling, and appoints all parties having interest to lodge answers, if so advised, within six days after such intimation and service; further, appoints notice of the petition to be advertised once in each of the *Stirling Journal* and *Falkirk Herald* newspapers."

On the petition appearing in the Single Bills of the First Division on 12th May counsel stated what had taken place in the Bill Chamber, and moved the Court to grant the prayer of the petition without further procedure.

The opinion of the Court (LORD KINNEAR, LORD JOHNSTON, and LORD SKERRINGTON) was delivered by

LORD KINNEAR—The facts on which this petition is presented are very simple. The statutory meeting of the Licensing Court could not be constituted because of the failure of a quorum to attend on the appointed date, and the statute provides no machinery for setting up the Court or enabling it to meet at another date. In such circumstances the Lord Ordinary on the Bills was probably right in thinking it to be at least extremely doubtful whether he might competently deal with the matter. But it does not follow that the intimation and advertisement which have been made must go for nothing. The practical point for us is whether we are satisfied that sufficient notice has been given to all having interest.

On the statement of counsel that intimation, advertisement, and service had been made as ordered by the Lord Ordinary on the Bills, the Court pronounced this interlocutor:—

"Authorise and appoint the County Licensing Court of the County of Stirling to meet within the Court-house at Stirling on Thursday 19th May current, at eleven o'clock forenoon, for the purpose of transacting the business mentioned in the prayer of the petition, with power to the said Court when so met to adjourn its meetings from time to time, but subject always to the conditions and limitations prescribed by the Licensing (Scotland) Act 1903; further, authorise and appoint the petitioner Andrew Chrystal Buchanan, as clerk of the peace for the county of Stirling, to notify the meeting of the Court so appointed as craved in the prayer of the petition; further, appoint said meeting to be advertised once in each of the *Stirling Journal* and *Falkland Herald* newspapers; and decern."

Counsel for Petitioners—J. R. Christie. Agents—Macpherson & Mackay, S.S.C.

Saturday, May 14.

SECOND DIVISION.

[Sheriff Court at Hamilton.

MATTHEWS *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. II,* 9 (*b*)—*Application by Dismissed Workman for Warrant to Record Memorandum of Agreement—Proof that Workman, before Dismissal, had in fact Returned to Work and was Earning the Same Wages—Warrant Granted on Conditions—Competency.*

A workman who met with an accident resulting in incapacity received compensation from his employers under an unrecorded agreement under the Workmen's Compensation Act 1906 for some months, and afterwards returned to his former work and earned higher wages than before the accident. Some weeks later he was dismissed on a reduction of the staff. Thereafter, while he was still unemployed though not incapacitated, he presented an application for warrant to record the memorandum of agreement. The Sheriff-Substitute granted warrant on certain conditions.

Held that the Sheriff-Substitute was not bound to grant warrant to record *de plano*, but was entitled, in virtue of section 9 (*b*) of the second schedule of the Act, to adject conditions to the granting of the warrant.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—"Second Schedule (9) (as applied to Scotland)—Where the amount of compensation under this Act has been ascertained . . . by agreement, a memorandum thereof shall be sent . . . to the [Sheriff-Clerk], who shall . . . on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [recorded decree-arbitral]. Provided that—. . . . (*b*) Where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act, and the employer . . . proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the [Sheriff], under the circumstances, may think just."

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court

at Hamilton, between William Matthews and William Baird & Company, Limited, in which Matthews presented an application for warrant to the Sheriff-Clerk to record a memorandum of an alleged agreement between the parties, the Sheriff-Substitute (THOMSON) granted warrant on certain conditions, and, at the request of the applicant, stated a case for appeal.

The Case stated—"The said application set forth that the appellant had been earning at the time of the accident 30s. 8d. per week, and that he had been since the date of the accident, and still was, incapacitated for work as a consequence of the accident.

"The respondents lodged in reply a minute objecting to the recording of said memorandum on the ground that the appellant had returned to work and was earning the same wages as he did before the accident, and they explained and averred that in terms of paragraph 12 of the Act of Sederunt of 26th June 1907 the question fell to be settled by arbitration.

"I allowed a proof, which was taken, and I found in fact (1) that the appellant on 16th March 1909 met with an accident in the respondents' employment; (2) that his average weekly earnings were then 30s. 8d., and that he was by agreement to be paid compensation at the rate of 15s. 4d. per week during total incapacity for work in respect of said accident; (3) that he was accordingly paid such compensation from the date of the accident till 29th June, when payment was stopped, the ground alleged for stoppage being that he was then fit for his former employment; (4) that no steps were thereupon taken by either party, but that the appellant returned to his former work with the respondents on 20th July, earning higher wages than before the accident, viz., 31s. 2d. per week; (5) that he attempted but failed to prove that although he had resumed his former work he was unfit for it, and I found that he had been remonstrated with on more than one occasion for laziness, and that finally, on 6th August, on a reduction of the staff of men, was dismissed although quite fit for his work; (6) that since said last-mentioned date he had not been working or earning any wages, and that particularly he was not working or earning wages at the date of presentation of said memorandum, nor at the date of the presentation of the minute to record same, nor at the date of the proof taken before me; (7) that it was not proved that total incapacity for work had supervened since his dismissal."

The Sheriff-Substitute granted warrant to the Sheriff-Clerk to record the memorandum of agreement subject to these terms and conditions:—"(1) That the said recorded memorandum of agreement should only be a ground of charge for compensation between 29th June and 20th July 1909; (2) that no charge should be given thereupon till the expiry of three weeks from 14th January 1910; (3) that if the respondents presented an application to the Court within said three weeks to have the compensation reduced or ended as from said 29th June, or any other date prior to said 20th July, no charge should be given until final judgment in said application."

The *questions of law* were—"(1) Whether on the facts admitted or proved the arbiter should have granted warrant to record said memorandum of agreement *de plano?* (2) Whether in view of the fact that at the date when the appellant sought to record said memorandum of agreement he was neither working nor earning any wages, the arbiter was bound to grant warrant to record said memorandum of agreement without adjecting thereto the conditions which he has done."

The appellant argued—The Sheriff was bound to grant warrant unconditionally unless the circumstances were within section 9 (*b*) of Schedule II of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). That section authorised the granting of the warrant conditionally only if the workman had returned to work and was earning the same wages as before the accident, *i.e.*, at the time of the application for warrant to record. The sixth finding in fact established that that was not so in this case. The words of the section were plain and unambiguous and not susceptible of construction. Nor was it a good answer to the application that the workman had recovered—*Coakley* v. *Addie & Sons, Limited*, 1909 S.C. 545, 46 S.L.R. 408. This view involved no hardship on the employers, for they could have proceeded by way of arbitration even though there was an unrecorded agreement—*Nelson* v. *Summerlee Iron Company, Limited*, 1910 S.C. 360, 47 S.L.R. 344. Counsel also referred to *Dunlop* v. *Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146.

Argued for the respondents—Section 9 (*b*) of the second schedule applied, for it was sufficient if the workman had returned to work at the same wages as before the accident, even though he should be subsequently out of employment for reasons totally unconnected with incapacity. In that view the section was simply declaratory of the law laid down in *Nimmo & Company, Limited* v. *Fisher*, 1907 S.C. 890, 44 S.L.R. 641, and *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113. The object of the section was to simplify the procedure by way of suspension of a charge resorted to in these cases. Further, if the appellant's view were right, it also followed that if he had returned to work and were earning higher wages than before the accident the Sheriff would nevertheless be bound to grant an application for warrant to record. That was out of the question, and the Act must be construed in a reasonable way so as to avoid unnecessary litigation. The Sheriff was entitled to exercise a discretion not directly conferred on him by the Act—*M'Ewan* v. *William Baird & Company, Limited*, February 10, 1910, 47 S.L.R. 430; *M'Vey* v. *William Dixon, Limited*, March 18, 1910, 47 S.L.R. 463. It was doubtful if the respondents could have safeguarded themselves by an application for review—*per* Lord President in *Lochgelly Iron and Coal Company*,

Limited v. *Sinclair*, 1909 S.C. 922, at p. 934, 46 S.L.R. 665, at p. 671. *Nelson* v. *Summerlee Iron Company, Limited, cit.*, dealt with the competency of arbitration and not with an application for review. In any case, if the respondents were wrong the case should be returned to the Sheriff to be dealt with by him. Counsel also referred to *Malcolm* v. *Bowhill Coal Company, Limited*, 1909 S.C. 426, 46 S.L.R. 354.

LORD JUSTICE-CLERK—We have had an elaborate and able argument on this matter, an argument that has been necessary in consequence of the wording of the schedule to the Act of Parliament. But after considering it as well as I can I have come to the conclusion that the course which the Sheriff took here is right. There is no doubt that if you read the words "is earning the same wages as he did before the accident" as referring absolutely to the time when the workman seeks to record the memorandum, Mr Munro's argument would be sound, but I cannot see that they ought to be so read, and I read them in a different sense. There are other words in the sub-section which are also unsatisfactory, namely, "the same wages," for if these words were read strictly they would mean that if the workman was earning more wages at the time of the application than he earned before the accident he would be entitled to have his memorandum recorded without conditions. As regards wages, it is quite plain that the sub-section applies when the workman has actually received since his return to work such wages as cover the wages he had before, whether more or not; and that shows that a strict reading of the words cannot possibly be taken here. The words must be read in a reasonable sense, and I take it that they really mean, first, that the workman has returned to work, and secondly, that he earns wages the same as or more than he had before the accident. I think that is a reasonable reading, and it is certainly the most sensible reading possible, of the words. They are distinct in themselves, but they require construction in the connection in which they stand, and, construing them reasonably, I think that the proper reading is as I have suggested.

LORD LOW—I at first felt considerable difficulty in this case, because it seemed to me very doubtful whether the words of this sub-section were really capable of construction at all, but for the reasons stated by your Lordship I have come to think that they are. Certainly the words "the same wages as he did before the accident" are open to construction. If a man is earning more than the wages that he earned prior to the accident he would not literally be earning the same wages, but it cannot be doubted that the case would fall within the sub-section. In like manner I think that the words "has returned to work and is earning wages" are open to construction. I do not think that the object of the enactment is doubtful. If a workman returns to work and earns the same or higher wages than before the accident there is a strong presumption that he has completely recovered from the accident, and accordingly a discretion is given to the Sheriff either to refuse to record the memorandum or to do so subject to conditions. Now suppose that a workman returned to work at as good wages as prior to the accident, but gave up the employment, not because he was unable to work but because he chose to do so, would he then be entitled to have a memorandum recorded as a matter of right, and would the discretion given to the Sheriff by the sub-section be lost? I think not. I think that such a case would fall within the enactment just as a case in which a workman was earning higher wages than before the accident would do so, although in the latter case as well as in the former a literal reading of the language used would lead to a different result. On the other hand, of course, if the workman had ceased to work because he was again incapacitated by the injury the sub-section would not apply. But between these two extreme cases there may be many intermediate cases, and the first thing which the Sheriff has to do as arbiter is to determine whether the particular case does or does not fall within the enactment. Here the reason why the appellant was not working and earning wages when he applied to have the memorandum recorded appears to have been that the respondents were reducing their staff and selected the appellant as one of the men to be dismissed because he had been somewhat lazy in his work. In these circumstances I think that it may fairly be held that the sub-section applies, and at all events I think that it is impossible to say that the Sheriff went so clearly wrong as to entitle the Court to interfere.

LORD ARDWALL—This question turns on the terms of sub-section (*b*) of section 9 of the second schedule to the Workmen's Compensation Act 1906. I think that the facts which the Sheriff has stated as having been proved show that the employer in this case substantially complied with what is required by that sub-section, because I think it may be truly said that he has proved that since the accident the workman has returned to work and is earning the same wages as he earned before the accident, which in my opinion means nothing more than that the workman had returned to work at the same wages as he was earning before the accident. The fact that having returned to work at the same wages as he was earning before the accident, the workman ceased to work from some other cause than physical incapacity, does not in my opinion affect the position of matters.

LORD DUNDAS concurred.

The Court answered both questions in the negative.

Counsel for Appellant—Munro, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondents—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.