quent express adjustment or otherwise. Now if this view is correct I consider that the post-Union actings of the parties concerned in this particular matter are of the utmost importance. It may be that if the language of article 20 of the Treaty of Union were held to be clear and unambiguous so far as relating to the office in question, no evidence of usage following upon it could be admitted to contradict its plain terms. But if, as I hold, the terms of article 20 of the Treaty are open to construction, evidence of such usage,—by which I mean actings during a long subsequent period by the parties concerned in this matter,—seems to me to be of the highest relevancy in the interpretation of the article. I think this view is in accordance with the principles of construction and interpretation of any ancient document laid down alike by our text writers and our decisions. Now it is amply explained by the evidence in the case why the fees of this office were not exacted for a considerable period after the Union; and it was quite properly conceded in argument that the right, if such existed, to demand them was not lost to the Usher by lack of such demand. But the fact that the fees were, after this gap of about sixty years, exacted by and paid to him continuously and without interruption for much more than a hundred years, down to the time when the present dispute began to arise, is to my mind quite sufficient to explain (so far as explanation or interpretation is necessary) the true meaning of the Treaty of Union as relating to the matters in question and the terms upon which the right to the fees of this hereditary office ought now to be determined. I am for adhering to the Lord Ordinary's interlocutor.

LORD JUSTICE-CLERK — The opinion of Lord Low, which I have read, so accurately and fully expresses the opinion I have formed in this case, that having also heard the opinions of your Lordships, in which I also concur, I feel that I cannot add usefully any words of my own which could but be of the nature of repetition. The Lord Ordinary has also expressed his opinion in the same sense so fully and clearly that I content myself with saying that I agree with all your Lordships that his judgment should be affirmed.

The Court adhered.

Counsel for the Pursuers (Respondents) — Clyde, K.C. — Macphail, K.C. — C. H. Brown. Agent—George J. Wood, W.S.

Counsel fer the Defenders (Reclaimers) Lord Advocate Ure, K.C. — Solicitor-General Hunter, K.C.—Pitman. Agent—Thomas Carmichael, S.S.C.

Wednesday, May 25.

FIRST DIVISION.

[Sheriff Court at Airdrie.

UNITED COLLIERIES, LIMITED *v.* M'GHIE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58)—*Appeal —Transmission of Process from Sheriff Court—A.S., 26th June* 1907, *sec.* 17 (*f*).

Circumstances in which the Court in a Stated Case under the Workmen's Compensation Act 1906 *granted* upon conditions an order to transmit the process from the Sheriff Court.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *First Schedule, sec.* 15—*A.S., 26th June* 1907, *secs.* 9 *and* 15 (2)—*Minute Constituting Process—Review of Compensation—Application, Form of.*

A workman asked to continue to receive compensation from his employers under the Workmen's Compensation Act 1906. The parties agreed to refer the question of the pursuer's fitness for work to a medical referee in terms of section 15 of the First Schedule to the Act. A joint minute to that effect was accordingly lodged with the sheriff-clerk, who remitted the matter to one of the medical referees. The referee having reported that the pursuer had recovered, the employers lodged a minute craving the Court to interpone authority to the medical referee's certificate and to end the compensation. There was no memorandum of agreement. The Sheriff-Substitute holding that there was no process before him, and that accordingly he could not act until a separate application to end the compensation was made by the employers, dismissed the minute.

Held on appeal that the application "to end the compensation" was properly before the Sheriff-Substitute as arbitrator, and that accordingly he ought to have entertained it and disposed of the case on its merits.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, sec. (15), as applied to Scotland, enacts, *inter alia*, that the sheriff-clerk, "on application being made to the Court by both parties, may . . . refer the matter" (*i.e.*, the workman's condition) "to a medical referee."

The A.S., 26th June 1907, enacts—sec. ix —"Applications under paragraphs . . . 15 . . . of the first schedule to the Act . . . shall be made by a minute, which shall be lodged in the original process, if any, and if there be no process, a copy of the recorded memorandum certified by the sheriff-clerk shall be lodged along with the minute, and shall be held to be the process. Such minute shall be intimated to the other party or parties interested, and thereafter be disposed of summarily, as if it were

an application for settlement by arbitration under the Act. . . ." Section xv (2)—"The sheriff-clerk shall, if he finds the application" (*i.e.*, an application to the Court under paragraph (15) of Schedule I) "to be in order, refer the matter to one of the medical referees appointed for the county or district of a county. . . ."

The United Collieries, Limited, being dissatisfied with a decision of the Sheriff-Substitute (GLEGG) at Airdrie, acting as arbiter under the Workmen's Compensation Act 1906, between them and John M'Ghie, one of their workmen, who had been injured, appealed by stated case.

The United Collieries Limited had lodged in the Sheriff Court a minute, which the arbiter dismissed, in the following terms:—"Craig for the defenders stated that the parties agreed to remit the question of the pursuer's fitness for employment to a medical referee in terms of paragraph 15 of the first schedule to the Workmen's Compensation Act 1906, and on or about 2nd February 1910 a joint minute to that effect was lodged with the Sheriff-Clerk of Lanarkshire at Airdrie, who remitted the case to Dr James Barras, one of the medical referees appointed to Act for Lanarkshire under the Workman's Compensation Act 1906; that on 14th February 1910 the said medical referee gave a certificate certifying that pursuer had recovered from the injury sustained by him on 12th October 1909, a copy of which certificate, together with a copy of the joint minute referred to, are hereto annexed, and therefore craves the Court to interpone authority to said certificate by the medical referee, and to end the pursuer's compensation."

The facts giving rise to the case were thus narrated by the Lord President—"The facts are simple enough. A workman, James M'Ghie, was injured in the course of his employment, and his employers, the United Collieries, Ltd., agreed to pay him a certain sum during his incapacity. No memorandum of that agreement was registered, but the payments were *de facto* made. After some time the employers thought that the workman had entirely recovered and told him so, but the workman did not admit this. As the parties were not disposed to come to an agreement upon this point, they together lodged in the Sheriff Court with the sheriff-clerk a joint minute. This minute, after narrating the occurrence of the accident, the payment of the compensation, the contention of the employers that the workman had recovered, and the workman's contention that he was still incapacitated, went on to state that 'the parties being at variance, and no agreement being likely to be arrived at, therefore the said James M'Ghie and the said United Collieries, Ltd., crave the Court, in terms of section (15) of the First Schedule of the Workmen's Compensation Act 1906, to refer the matter to the medical referee, including in such reference whether any incapacity from which the said James M'Ghie now suffers is due to said accident.' Proceeding upon that minute the sheriff-clerk made a remit to one of the medical referees, who examined the man and furnished a report. The report was in these terms:—'In accordance with the reference made to me by the sheriff-clerk of the Sheriff Court at Airdrie upon the application of James M'Ghie, late of Aitkenhead Rows, Uddingston v. The United Collieries, coalmasters, Nackerty Collery, Bargeddie, I have, on the 14th day of February 1910, examined the said James M'Ghie, and I hereby certify as follows: (1) The said James M'Ghie, age forty-nine, is at present in good health, and his condition is such that he is, in my opinion, quite fit for his usual employment as a drawer or miner, and that the accident of 12th October 1908 has left no evidence of injury either to his head or back that can be ascertained by examination.' That report was communicated to the parties, and thereafter the employers lodged a minute in the Sheriff Court. By an interlocutor dated 25th February 1910 the Sheriff appointed copies of that minute, of the minute of reference, of the medical referee's report, and of his deliverances, to be served on the workman, and this was done. Now the minute for the employers narrated the facts that the joint minute had been lodged and that the medical referee had given a certificate, and contained a crave that the Court should "interpone authority to the said certificate," and should "end the pursuer's compensation." Answers were put in to that minute by the workman, and these answers admitted, as of course was inevitable, the accuracy of the history of the proceedings which was given in the employers' minute. These answers, after quoting various sections of the Workmen's Compensation Act and the Act of Sederunt under which the minute was lodged, proceeded —'Pursuer pleads that the application by minute under section (15) of the First Schedule of the principal Act, and of section 9 of the aforementioned Act of Sederunt, are applications to the sheriff-clerk as registrar of the County Court, and that the sheriff or judge of the County Court have no powers conferred upon them to deal with said minute or any proceedings thereunder, and it is incompetent for the sheriff or arbitrator to deal therewith. The pursuer therefore objects to the crave of the defenders' minute being granted in respect (1) that the said joint minute and the proceedings thereunder are proceedings before the sheriff-clerk as registrar of the County Court, who is the person appointed to attend thereto under the Workmen's Compensation Act 1906, and are in no manner subject to the jurisdiction of the sheriff or arbitrator.' Parties having been heard upon the minute and answers before the Sheriff-Substitute, he pronounced the following interlocutor—'Having heard parties' procurators and considered the cause, dismisses the application; finds neither party entitled to expenses, and decerns.' And he adds a note to the effect that he agrees with a decision which is not reported—'that the sheriff-clerk has nothing to do with ending compensation, and that an application for that purpose

must be made to the sheriff, and that I cannot sustain the defences as pleaded in writing.' A stated case was taken upon that, and is now before your Lordships."

The Case, which in an appendix gave the respondent's answers to the minute, narrated the terms of the minute and stated—"The case was heard before me on this date (18th March 1910), when I dismissed the minute in respect that the report of the medical referee does not of itself entitle the Sheriff-Substitute to end compensation, and does not bar the said James M'Ghie from contesting an application to end compensation.

"The *question of law* for the opinion of the Court is—'In the circumstances stated was I right in dismissing the application by the United Collieries, Limited?'"

On the case appearing in the Single Bills, on 12th May 1910, counsel for the appellants moved the Court, in terms of section xvii (*f*) of the A. S., 26th June 1907, for an order on the Sheriff-Clerk to transmit the process. He stated that in an unreported case such an order had been made—the transmission of the process being in the opinion of the Court necessary for the proper understanding of the case. That was so here, inasmuch as the arbitrator's finding could only be justified, consistently with the facts as stated, if the respondent averred supervening incapacity, seeing that the medical referee's certificate was final—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, section (15). Whether the respondent did so or not was not stated in the case, but would appear from the pleadings, and that would enable the Court to dispose of the application forthwith. Otherwise it would be necessary to remit to the arbitrator, and that would involve unnecessary expense. The appellants were prepared to bear all expense connected with the transmission in the event of the Court holding the transmission unnecessary.

Counsel for the respondent did not oppose the motion.

The Court (LORD KINNEAR, LORD JOHNSTON, and LORD SKERRINGTON) pronounced the following interlocutor:—"Ordain the Sheriff-Clerk at Airdrie to transmit the process to the Clerk of the First Division under the declaration that in the event of said process not being referred to or not offering the Court any assistance at the hearing the expense connected with the transmission shall be borne by the appellants."

On 25th May 1910 the case was heard on the merits.

Argued for appellants — The Sheriff-Substitute was in error in thinking that there was no proper process before him. The minute was a good application to the Court and should therefore have been entertained. Where, as here, there was no written agreement and no memorandum the minute itself was the process. There was no necessity for an initial writ. Moreover, there was evidence before the arbiter in which he could deal with the application, for the medical referee's report was conclusive—*M'Avan* v. *Boase Spinning Company, Limited*, July 11, 1901, 3 F. 1048, 38 S.L.R. 772.

Argued for respondents—The Sheriff was right, for there was no proper process before him. "Minute" as used in section ix of the A. S., 26th June 1907, and "application" as used in section xv thereof, implied an existing process, as in the case of *King* v. *United Collieries, Ltd.*, 1910 S.C. 42, 47 S.L.R. 41. Further, the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 57), Schedule I, section 1, provided that all actions should be commenced in the forms thereto annexed, *i.e.*, by initial writ, and that was wanting here. The application therefore had been rightly dismissed.

LORD-PRESIDENT—The process here is in a rather awkward position. . . . [*His Lordship gave the facts, v. sup.*] . . .

Now obviously the Sheriff has not taken the workman's view that he had no jurisdiction to deal with anything that had been done by the medical referee and any report that had been furnished by him to the sheriff-clerk, but rather he seems to have held that there was no process before him, and that accordingly he could not act at all until a separate application to end the compensation had been presented by the employers. In the argument before your Lordships it was maintained that this view was sound, and that in such cases a separate application must needs be made in the form of what is now known as an initial writ. I think it would be very unfortunate if there were any such necessity. The great object in these matters is to have as little procedure as possible, and I see no end which would be served by insisting on an initial writ. If an initial writ were ordered here, the question would then come up in precisely the same way as it seems to me to come up now.

The only difficulty arises on the terms of the Act of Sederunt of 1907 in regard to the Workmen's Compensation Act, which in section ix deals with applications, under various paragraphs of the schedule of the Act, and, *inter alia*, paragraph (15). It provides that these applications "shall be made by a minute which shall be lodged in the original process, if any; and if there be no process, a copy of the recorded memorandum certified by the sheriff-clerk shall be lodged along with the minute and shall be held to be the process. Such minute shall be intimated to the other party or parties interested, and thereafter be disposed of summarily as if it were an application for settlement by arbitration under the Act." Strictly speaking, there is, I think, a lacuna in this section, but I do not think it is beyond our power to read into the Act of Sederunt after the words "recorded memorandum" the words "if any." Where there is an original application, of course it is a part of the process. Where there has been no original application but a recorded memorandum, it is quite right that a process should be initiated by means of that recorded memoran-

dum, because it is necessary for the Court to know what up to the moment is the ruling document between the parties; but where there is no recorded memorandum, then I can see no reason why the minute, which is the first step, should not itself form the process. Of course, if the minute had not contained a proper crave there would then have been nothing upon which the Sheriff could act; but the minute which I have read seems to me to contain such a crave, although no doubt it begins with words which are not particularly appropriate. I refer to the crave to the Court "to interpone authority to said certificate." I think that is an echo from a familiar form of minute in ordinary actions, and obviously the writer of the minute used these words without considering their appropriateness in this connection, because, of course, there is no ground for the Court to interpone authority to the minute and certificate. The Court has no authority which it can interpone, and further, there is nothing to which authority can be interponed. But the minute goes on, "and to end the pursuer's compensation." That is a crave in the precise terms of one of the provisions of the schedule of the Act which allows of such applications, and accordingly I think that that crave enabled the Sheriff to consider the whole matter, and that he ought not to have dismissed the application.

I think, therefore, we ought to recal the Sheriff's interlocutor and remit the case to him to consider whether he is to end the compensation or not. It is quite clear that the parties are entitled to be heard on the one side and the other as to what the true result of the medical certificate is. It is also perfectly clear from the terms of the 15th paragraph of the first schedule of the statute that the medical certificate is conclusive evidence as to the matters certified, and I should have thought that it was equally clear that whether there was or was not room for further evidence would depend upon the contents of the certificate. I do not say anything more, because I do not wish to prejudice any argument on either side, but it is obvious that in some cases there can be no room for other evidence, while in other cases there would be room for further evidence. The Sheriff has to consider what this certificate states, and after considering that, and on further evidence or without such evidence, he will proceed either to end the compensation or to refuse to do so according to what he thinks just.

LORD KINNEAR—I am entirely of the same opinion.

LORD JOHNSTON—I think it may not be inappropriate to point out what seems to me to be the root of the error which has crept into this process and resulted in the Sheriff coming to a wrong determination. That error seems to be due in the first place to this, viz., that it was assumed that the original joint minute which was presented to the sheriff-clerk in terms of Schedule I, par. (15), was a matter truly presented to him and not to the Court. Now if paragraph (15) is looked at it is found that this joint application is in the very terms of the paragraph made to the Court, though to be disposed of in Scotland by the sheriff-clerk. The precise words are, the sheriff-clerk "on application being made to the Court by both parties may . . . refer the matter to a medical referee." That being so, the application for the appointment of a medical referee is truly made to the Court, although the sheriff-clerk does what is required in disposing of it. The next mistake was that the Sheriff assumed that the sheriff-clerk alone was to deal with all that followed on this application, to use his own words, "the proceedings thereunder," and consequently he seems to have assumed that the next step in the process, namely, the minute, which ends with a crave to apply the medical referee's report, and therefore to end the compensation, was a proceeding thereunder, that is, under the original joint minute, and therefore still a matter before the Sheriff-Clerk and not before the Court. I think that these two errors have led the Sheriff-Substitute to the conclusion that this was not properly an application for the ending of compensation, and therefore not one in which he could take the course which I think he seems to contemplate as possibly necessary—of giving the workman an opportunity before him of contesting the application for ending the compensation. I think, therefore, that the Sheriff was in error in the assumption that the original application was not an application to the Court, but merely to the Sheriff-Clerk as an official of that Court, and that this erroneous assumption has led him to decline to deal with the minute in question. I therefore concur with your Lordship in thinking that the case should go back to the Sheriff in order that he may dispose of the matter upon the minute as an application to end compensation.

LORD SALVESEN—I agree with all that your Lordship in the chair has said. I would just like to add that I think the appellants here followed a very sensible course. Before asking that their workman's compensation should be ended they agreed with him that there should be a remit to a medical referee to ascertain what his condition was. If that remit had been in the workman's favour there would have been no proceedings at all before the Sheriff. But as the employers interpreted it as being entirely in their favour they then took the step which I think is in substance and also in form an application to have the pursuer's compensation ended. I think the minute might have been somewhat better expressed, but the crave of the minute, which is what the Sheriff-Substitute has mainly to look to, was unexceptionable, and he ought to have taken the course which was obviously competent and to have disposed of the application on its merits.

The Court answered the question of law

in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to proceed as accords.

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

Counsel for Respondent—Dean of Faculty (Scott Dickson, K.C.)—Moncrieff. Agents—Simpson & Marwick, W.S.

Friday, July 8.

FIRST DIVISION.

CRAWFORD'S TRUSTEES *v.* CRAWFORD AND OTHERS.

Succession—Trust-Disposition and Settlement — Construction — Supplying Omission by Implication.

By their trust-dispositions and settlements, couched in similar terms and executed on the same day, two sisters made four separate provisions, each of a sum of £1000, in favour of (1, 2) two brothers and (3) a sister and their children, and (4) the children of a deceased sister. The terms of the clauses dealing with all four provisions were, *mutatis mutandis*, the same, with the exception that whereas in three of them the destination of the fee was, that on the death of the last survivor of the brother's (or sister's) children "the said sum of one thousand pounds destined to be liferented as aforesaid shall be divided among his (her) surviving grandchildren and the lawful issue of such grandchildren as may have died leaving such issue, in equal shares *per stirpes*, and failing grandchildren or their lawful issue, then and in that case the said sum of one thousand pounds shall be divided into three parts or shares, and my trustees shall pay one-third to . . ." (then followed a gift to the three other beneficiaries and their heirs), the destination in the third was, that on the death of the last survivor of the sister's children "the said last-mentioned sum of one thousand pounds shall also be divided into three parts or shares, and my trustees shall pay one-third thereof to . . ." (then followed a gift to the three other beneficiaries and their heirs).

Held (*diss.* Lord Johnston) that there could not be read, by implication, into the destination of the fee of the third provision the words occurring in the destination of the fee of the other provisions but wanting in it.

Opinion (*per* Lord Kinnear) that to enable the Court to supply into a particular bequest words which are present in other bequests of the will, or of the class to which the particular bequest belongs, it must find in the will itself the expression of a general intention which will cover the particular bequest.

In re Redfern, 6 Ch. Div. 133, and *Mellor* v. *Daintree*, 33 Ch. Div. 198, *distinguished* and *approved*.

On November 24th 1909 a Special Case was presented to the Court by John Anderson and another, the trustees acting under (1) the trust-disposition and settlement of Miss Jean Crawford, Harplaw, Largs, and (2) the trust-disposition and settlement of her sister Miss Margaret Crawford, Harplaw, Largs, *first parties;* Alexander Crawford and others, children or those in right of children of the deceased William Crawford, Daniel Crawford, and Elizabeth Crawford or Fraser, who were brothers and a sister of the testatrices, *second parties;* Mrs Elizabeth Aitkin or Morris, only child of the deceased Mary Ann Crawford Fleck or Aitkin, who was a daughter of the deceased Janet Crawford or Fleck, another sister of the testatrices, with advice and concurrence of her husband James Morris and the said James Morris for his own interest, *third parties;* Maggie Watson Fleck, daughter of the deceased James Fleck, who was a son of the above-mentioned deceased Janet Crawford or Fleck, *fourth party;* James Fleck junior, brother of the above-mentioned Maggie Watson Fleck, *fifth party;* and Elizabeth Fleck and Mary Annie Fleck, sisters of the above-mentioned Maggie Watson Fleck and James Fleck, *sixth parties.* The point at issue between the parties was whether there ought to be supplied by implication a destination with regard to the fee of a legacy in favour of Mrs Crawford or Fleck and her children which was present in the legacies, otherwise similar in terms, *mutatis mutandis*, in favour of Daniel Crawford and William Crawford and their children, and the children of the deceased Elizabeth Crawford or Fraser. The destination in the legacies in favour of Daniel Crawford, William Crawford, and the children of the deceased Elizabeth Crawford or Fraser, which was sought to be supplied by implication is printed in *italics* in the excerpt (*infra*) from the testatrices' trust-dispositions and settlements.

Miss Jean Crawford died on 11th January 1889 and Miss Margaret Crawford died on 3rd December 1891, both leaving trust-dispositions and settlements dated 7th September 1882. By both *settlements*, which throughout were expressed in precisely similar terms, it was provided that the surviving sister should enjoy a liferent of the estate of the predeceaser. On the death of the survivor of the testatrices the settlements directed the trustees "to invest the following sums, and to pay the interest and capital thereof in manner after specified, vizt. —(*First*) the sum of one thousand pounds sterling and to pay the free annual interest and produce thereof to my brother the said Daniel Crawford during his life and after his death to pay the said free annual interest and produce to and among his children in equal shares during their respective lives or the life of the survivor of them and in the event of any of my said brother Daniel's children dying leaving lawful issue, such