up again when the whole contention between the parties had really ceased.

Now all this may not be strictly logical, and in certain cases there may be two courses open to a party in regard to reclaiming. I have no doubt that, as was quite properly decided in the *Kintore* case, the defenders in that case were entitled to reclaim although the matter of the modification of expenses had not been determined, but I have also no doubt that if they had not reclaimed then, but had allowed the case to go on, they could, under *Crellin's* case, have reclaimed against the interlocutor dealing with the modification of expenses, and this would have brought up for review the whole previous interlocutors.

The application of these rules is easy, and the result here is that there is a reclaimable interlocutor, and accordingly I think the case should be sent to the roll.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD ARDWALL, who was present at the advising, gave no opinion, not having heard the case.

LORD SALVESEN was sitting in the Second Division.

The Court repelled the objection.

Counsel for Pursuer (Reclaimer)—MacRobert. Agent—Allan M'Neil, Solicitor.

Counsel for Defenders (Respondents)—Hon. W. Watson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, October 21.

FIRST DIVISION.

[Sheriff Court at Dundee.

THE DUNDEE STEAM TRAWLING COMPANY, LIMITED *v.* ROBB.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Process—Appeal—Accident Arising out of and in Course of Employment—Failure by Arbitrator to State Facts on which his Finding was Based.*

Circumstances in which the Court, on the failure of an arbitrator to state the salient points of the evidence on which his finding was based, used, of consent of parties, a transcript of the notes of evidence taken *ex parte* in the Court below, and *reversed* his decision.

Per the Lord President—"I must add that the entry 'contusion of chest' in the register of deaths proves, in the absence of the doctor, nothing as to its own correctness."

Mrs Elizabeth Dempster or Robb, Ferry Road, Dundee, widow of John Robb, engineer there, claimed compensation under the Workmen's Compensation Act 1906 from the Dundee Steam Trawling Company, Limited, in respect of the death of her husband.

The Sheriff-Substitute (CAMPBELL SMITH) having awarded compensation, a case for appeal was stated.

The Case stated—"The following are the facts which the Sheriff-Substitute held as proved, viz., that the respondent's late husband John Robb, while working as an engineer in the employment of the defenders, and engaged in such employment on 2nd May 1909 cleaning with water and otherwise the boiler of the trawler 'Marion' belonging to the appellants, then lying in the Fish Dock, Dundee, sustained injuries to his chest through falling, and that in consequence of the injuries then sustained, and arising out of and in the course of his employment with the appellants, he died on 25th June 1909; that the average weekly earnings of the deceased during the three years next preceding the injury were £2, 4s.; that weekly payments amounting to £9, 18s. were made to or on behalf of the said John Robb; and that the respondent and her children, William and Christina, the children of her marriage with the said John Robb, were wholly dependent upon his earnings.

"The Sheriff-Substitute found that the injury from which the death of the said John Robb resulted arose out of and in the course of his employment with the appellants, and found the appellants liable in £290, 2s. of compensation, and awarded that sum accordingly, and found the appellants liable to the respondent in expenses."

The *question of law* was—"Whether, on the facts admitted and proved, I was entitled to hold that the deceased met his death through an accident arising out of and in the course of his employment?"

On 22nd February 1910 the appellants presented a note to the First Division in which they stated that the Sheriff-Substitute had refused to state a material question of law which was argued before him and which they had requested him to put before the Court. They set forth certain facts which they alleged had been admitted and which raised the question of law which he had refused to state and which they desired to submit on appeal, viz., "Whether there was evidence upon which it could competently be found that the said John Robb on 2nd May 1909 sustained injuries in consequence of which he died on 25th June 1909 by an accident arising out of and in the course of his employment."

The appellants in their note prayed for an order on the respondent to show cause why a case submitting the above question to the Court of Session should not be stated by the Sheriff for the following reason, namely—That the question whether there was any legal evidence upon which it could competently be found that the said John Robb sustained injuries by an accident arising out of and in the course of his employment was clearly and definitely raised before the Sheriff, and was a question of law which the appellants were entitled to bring before the Court.

Counsel were heard on 13th May 1910

on the stated case and note and answers thereto.

Counsel for the appellants moved that it should be remitted to the Sheriff-Substitute to re-state the case, contending that, as set forth in the note, there was no sufficient evidence that the deceased had met with an accident, and that the finding that death had resulted from accident was inconsistent with the medical evidence, which was that the cause of death was a sarcomatous tumour.

On 14th May 1910 the Court (LORDS KINNEAR, JOHNSTON, and MACKENZIE) pronounced the following interlocutor:—"Remit to the Sheriff-Substitute to state the facts which he found proved or admitted upon which he held (1) that the deceased John Robb met with the accident alleged to have taken place on 2nd May 1909; (2) that said accident arose out of and (3) in the course of his employment as engineer by the appellants; and (4) that the said deceased John Robb sustained injuries in consequence of said accident which directly caused or contributed to cause his death; and to state any question in law which appears to him to arise in the case for the determination of the Court."

The Sheriff-Substitute reported as follows:—"The Sheriff-Substitute aforesaid believed and found that it was proved beyond all reasonable doubt that the deceased John Robb met or encountered the cause of his death when, on 2nd May 1909, as engineer of the trawler 'Marion' and general superintendent, and, if need be, factotum in all work in it that he saw needed to be done, when in cleaning out the boiler, probably because of the thin coat, not quite dry, of mud in it, he slipped and fell, and that this fall and its consequent sequels liberated or roused into activity the inert or immature germs of sarcosis or sarcoma, or whatever it may be called, each germ on its course of progress to death either in itself or in the entire body, and that in the final event the life of the whole body was killed by sarcoma, working death especially in the region of the lungs; and that the Sheriff-Substitute found it impossible to disbelieve that this strong man's death and the fall in the boiler, however apparently unimportant in itself, were bound together by natural law as cause and effect, and that therefore the fall, however trivial it may appear, did most certainly contribute very materially to the death of John Robb, for many trying years a powerful, ever-willing, deft-handed servant of the defenders, whose death by accident as it really occurred was determined in its date by the fall in the boiler. Dr Fraser, of the Dundee Infirmary, in which John Robb died, certified his death to be due to 'contusion of the chest'—'mediastinal tumour.' The Sheriff-Substitute has been accustomed to accept of Dr Fraser's certificate as legal evidence in numerous 'fatal accident inquiries,' and he has as yet seen no reason why he should not. The Sheriff-Substitute feels bound to declare that he has not heard or read any evidence that could justify belief on his part that Dr Fraser's said certificate is untrue."

Thereafter counsel were again heard on 8th July before a Court consisting of LORD KINNEAR, LORD JOHNSTON, and LORD SALVESEN.

On 14th July the Court ordered the process in the arbitration proceedings to be transmitted, counsel for the parties concurring in the notes of evidence taken by a shorthand writer on behalf of the appellants being made part of the process, and admitting them to be correct notes of the evidence adduced before the Sheriff-Substitute.

On 19th October 1910 counsel were heard on the note, answers, and whole process. The import of the evidence sufficiently appears from the opinion *infra* of the Lord President.

Argued for appellants—There was no proof of the alleged fall, and even assuming that the deceased had fallen, there was no proof that the fall was the cause of death. The defender therefore should have been assoilzied.

Argued for respondent—There was evidence before the Sheriff which entitled him to hold that the deceased had sustained injuries by falling, and though the Court might not have reached the same conclusion they were not entitled to interfere with his decision. *Esto* that the medical evidence as to the cause of death was conflicting, there was sufficient evidence to justify the Sheriff's conclusion. The extract from the register of deaths stated as the cause of death "contusion of chest—mediastinal tumour." That was sufficient proof—Registration (Scotland) Act 1854 (17 and 18 Vict. c. 80, sec. 58).

[It appeared, *inter alia*, from the notes of evidence that the doctor who certified the cause of death as "contusion of chest—mediastinal tumour," was not examined as a witness.]

At advising—

LORD PRESIDENT—It has been decided again and again by this Court, by the Court of Appeal in England, and by the House of Lords, that the question whether a finding by the arbiter that personal injury by accident to a workman did or did not occur in the course of and arising out of his employment can be supported on the evidence led before him, is a question of law within the meaning of sections 4 and 17B of the Second Schedule of the Workmen's Compensation Act. It is useless to multiply instances, and it will suffice to give two of the most recent cases in the House of Lords, *Marshall* v. *The Owners of the "Wild Rose,"* and *Moore* v. *The Manchester Lime Company, Limited.* In both of the cases there were differences of opinion, and in each opposite results were reached—that is to say, in one of them it was held that the accident had happened in the course of the employment; in the other it was held that it had not. Neither of the cases is yet reported in the

reports, but they were both decided in the early days of July, and will doubtless shortly be reported.

In order to allow this question of law to be decided by this Court it is necessary that the Sheriff, acting as arbiter, should, when called upon, state intelligibly the salient points of evidence on which his finding was based. That duty is in general rightly and cheerfully fulfilled. On this occasion, in spite of a remit made by your Lordships with explicit directions to that effect, it has been plainly neglected. This Court will certainly not be prevented from doing its own duty, and thereby justice to litigants before it, by the inability or unwillingness of a subordinate member of the judicature to perform a simple statutory duty. But the difficulty and unpleasantness of enforcing that duty has been removed by the exceedingly proper and right-minded concession on the part of the respondent's counsel in consenting that the evidence as led should be put before us as it was recorded by a shorthand writer employed *ex parte* at the time.

In dealing with that evidence I wish to make it clear that I merely accept it as a substitute for the case which the Sheriff-Substitute ought to have stated, and propose to deal with it in the same way. In other words, I do not propose to consider what my finding would have been on that evidence. What I do propose to do is to take the Sheriff-Substitute's finding as it is, namely, that the death of the respondent's husband was caused by an accident arising out of and in the course of his employment, and then to see whether that finding can possibly be supported on the evidence led.

I am of opinion that it cannot. I do not myself think that it was proved that the deceased had a fall; but there was evidence to that effect, and accordingly I think that if the only question had been, was there a fall? that is, an accident, the finding to that effect could not have been disturbed.

I assume also that the accident was in the course of and arising out of his employment. But then comes the question—was the injury, that is to say, the death, caused by the accident? Now, here, the affirmer of that proposition must prove it, and here I find no evidence to support it. The evidence for the defence, including the very cogent evidence of the *post mortem*, is absolutely destructive of the idea. But, apart from that, the doctors who speak for the respondent affirm no such proposition. All they say, at the utmost, is that a fall may be the original cause of sarcoma, and that sarcoma may grow to the size here observed within a period no longer than that which elapsed between this fall and this death. But they never say that, in their opinion, the fall caused the sarcoma which caused the death. No wonder they did not do so, for their own diagnoses ignored sarcoma altogether, and their certificates of death are absolutely inconsistent with death being the result of the accident.

I must add that the entry "contusion of chest" in the register of deaths proves, in the absence of the doctor, nothing as to its own correctness.

There is, therefore, nothing, in my view, on which the finding of the Sheriff-Substitute can be supported.

The result must be to recall the interlocutor and find that the respondent is not entitled to compensation.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD SALVESEN was sitting in the Second Division.

The Court pronounced the following interlocutor—

> "The Lords having considered the stated case on appeal along with the note to state a case between the same parties, Find in answer to the question of law in the case that the respondent is not entitled to compensation: Remit to the Sheriff-Substitute as arbitrator to dismiss the claim: Find no expenses due to or by either party, and decern."

Counsel for Appellants—Macmillan—Hon. W. Watson. Agents—Alexander Morison & Company, W.S.

Counsel for Respondent—Constable, K.C.—Garson. Agent—William Douglas, S.S.C.

Saturday, October 22.

SECOND DIVISION.

MARJORIBANKS AND OTHERS (TRUSTEES OF THE DUART BURSARY FUND), PETITIONERS.

Charitable and Educational Trusts — Bursary for "Young Man of Merit" to Secure University Education—Extension to Young Women—Trust Created after Admission of Women to University Degrees.

A truster who died in 1895, by a settlement executed in 1893, directed his trustees to apply the annual proceeds of a certain sum as a bursary "to be conferred on one young man of merit, being a native of the parishes of C or T, and to be tenable for three years," to enable the holder to attend the Arts Classes in any of the Scottish Universities with a view to taking his degree. In October 1892 women were admitted to the arts degrees of the Scottish Universities. In 1910 the trustees presented a petition to the Court craving power to extend the benefits of the trust to young women. They averred that in the fifteen years since the truster's death only three young men had been found eligible, and that in 1907, 1908, and 1909 no eligible candidate was found.