the certificates were in safe keeping in the defenders' office. It is not alleged that there was any special contract made with the defenders under which they were to have the safe keeping of these certificates; their contract was merely the ordinary contract of brokers. A person who wishes to establish responsibility for loss sustained through the negligence of another, must be able to show that he has observed the ordinary rules of business in his relations with that person. I do not think it would be fair that a party who has allowed two years to elapse without looking after his certificates, should be enabled to throw the loss upon persons in no way responsible for that negligence. With regard to lots Nos. 5 and 6 I also agree with your Lordship, and upon the same grounds. As regards lot No. 5, what actually happened was this, that while the pursuer had given instructions to purchase the shares, intending, as he now says, to take them up as an investment, Cook, who was on friendly terms with both parties, informed the defenders that the pursuer meant to sell them. The shares were sold through a broker upon that false representation, and Cook appropriated the money, and we know that by sending a certain account he obtained the price of the shares without delivering them. No doubt the pursuer might have said that as a matter of fact no transfer was sent to him, and that he was entitled to restoration of the money which he had paid in error. In my opinion he would have been within his rights if the payment had been made in the ordinary course of business. It is not necessary to determine whether and in what circumstances all possible precautions should be taken for the safe transmission of money where the course of dealing between the parties is not payment by legal tender; but this I take to be clear, that if the recipient of money directs that payment shall be made only in a certain way, and the sender does not follow that direction, the loss, in the event of the money going amissing, will fall upon the sender. We know that many houses put upon their invoices cheques to be crossed with the name of a bank indicated. If the sender does not cross the cheque for payment through the bank named, and a clerk of the payee purloins the money, I think the sender would stand a very poor chance of succeeding in an action for repayment. But here no specific instructions were given as to the mode in which payment through the medium of bankers was to be made, and therefore we must consider whether reasonable precautions were taken to secure safe transmission. Perhaps the safest way of payment is by means of a bank order. But a cheque made payable to the creditor who is to receive it, by name, or to order and crossed, is accepted by all commercial men as a good payment, for if the letter is stolen or lost the bank will not pay the cheque unless to the party to whom it is made payable. But to send a cheque which is not only not crossed, but is made payable to bearer, is, I think, according to modern ideas, not a payment in the ordinary course of business. The result is that it was by the pursuer's negligence that Cook was enabled to perpetrate the fraud by paying these bearer cheques into his own bank account, and, as the loss is due to the pursuer's negligence, then, in accordance with the rule that it is the person whose negligence enables another to commit a fraud who should suffer, the pursuer ought to bear the consequences of that fraud.

I also agree with your Lordship with regard to the Nobel's shares. They are in the same position, subject to this additional observation, that as the order for the purchase of the shares was never executed, there was no contract, and therefore the pursuer could not in any case recover any profit that might be made on the transaction; and it is not said that any profit was made. I think they must be dealt with as being exactly in the same position as the other shares. For these reasons I agree with your Lordship in your fuller statement of the case, and I think the Lord Ordinary is right.

LORD KINNEAR—I agree with your Lordships.

The Court adhered.

Counsel for Pursuer and Reclaimer—Solicitor-General (Clyde, K.C.) — R. S. Horne. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Ure, K.C. — Hunter. Agents — Miller, Robson, & M'Lean, W.S.

Wednesday, December 6.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

TIGUE *v.* COLVILLE & SONS, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (3), *and First Schedule,* 12—*Compensation — Agreement — Arbitration — Competency of Arbitration where Subsisting Unrecorded Agreement—Agreement to Pay Compensation during Incapacity—Termination of Incapacity—Refusal of Farther Payments—Arbitration at Instance of Workman.*

A workman, who had been injured in his employment in August 1903, entered into an agreement with his employers under which they bound themselves to pay him 12s. 5d. weekly during the period of his incapacity as compensation under the Workmen's Compensation Act 1897. The agreement was not recorded. The employers continued the weekly payments down to 14th December 1903, when his incapacity ceased; but from that date they refused further payments.

In March 1905 the workman brought an arbitration before the Sheriff of Lanarkshire, in which he asked decree against his employers for the sum of 12s. 5d. weekly from 21st December 1903 until the further orders of the Court. The Sheriff granted decree for the sum sued for from 14th December 1903 till the date of his award.

In a stated case on appeal at the instance of the employers, in which the question of law was whether the appellants were liable to pay compensation from the date at which the incapacity ceased to the date of the Sheriff's award, the Court answered the question in the negative, *holding* (1) that the arbiter could pronounce no decree for payments, either by way of arrears or otherwise, based upon the agreement, as the Act conferred no jurisdiction upon the statutory tribunal to deal with agreements except with regard to their statutory registration and the review of their terms in an application under Schedule I, 12; (2) that this being an arbitration under section 1 (3), he could only under the statute award compensation during incapacity.

Steel v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumpherston Oil Company, Limited*, v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704; *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 785, 41 S.L.R. 609, *commented on.*

Master and Servant — Workmen's Compensation Act 1897 — Payment of Compensation under Unrecorded Agreement —Cessation of Incapacity—No Necessity to have Recovery Judicially Ascertained before Stopping Payment — Recorded Agreement Distinguished.

Opinion, per Lord Low, that the rule that an employer paying compensation under a recorded agreement cannot cease payment until the fact of the workman's recovery has been formally ascertained, as by the certificate of a medical referee, or the decree of an arbiter, does not apply in the case of an unrecorded agreement, there being nothing in the Act compelling him in that case to continue payment for a single day after the incapacity has ceased.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) provides as follows (sec. 1, sub-sec. 3):—"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 this Act."

First Schedule, 12—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

The following case was stated by one of the Sheriff-Substitutes of Lanarkshire (M. G. Davidson) in a stated case on appeal in an arbitration under the Workmen's Compensation Act 1897, brought at the instance of Martin Tigue, respondent, against David Colville & Sons, Limited, Dalzell Steel and Iron Works, Motherwell, appellants:—"This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, at the instance of the respondent, the first deliverance in which is dated 15th March 1905, in which the Sheriff was asked to grant a decree against the appellants ordaining them to pay to the respondent the sum of 12s. 5d. weekly, beginning the first weekly payment as on the 21st December 1903, and continuing the same until the further orders of Court, in terms of the Workmen's Compensation Act 1897, with expenses.

"Parties were heard before me on this date (March 22, 1905), on a plea stated on behalf of the appellants that the application was incompetent in respect that proceedings had not been taken within six months from the date of the accident as provided by the said Act.

"I repelled that plea, and allowed parties a proof. The case was heard before me, proof being led on this date (June 27, 1905), when the following facts were established—

"1. That on or about 24th August 1903 the respondent, while in the employment of the appellants, was injured, and lost one joint of his left thumb.

"2. That the appellants admitted liability to pay him compensation in terms of the Workmen's Compensation Act 1897, and agreed with him to pay him compensation at the rate of 12s. 5d. per week during the period of his incapacity.

"3. That the said agreement was not recorded as permitted by the said Act.

"4. That the appellants continued to pay 12s. 5d. per week in terms of the said agreement until 14th December 1903, when they ceased to pay any further sums.

"5. That the appellants, when settling with the respondent for compensation at 14th December 1903, offered the respondent work at full wages.

"6. That at that time he had so recovered from his injury as to be capable of earning full wages.

"7. That he declined the offer of work.

"8. That he has been, since that date, capable of earning full wages, and has in point of fact been working for some period at lobster fishing.

"9. That a correspondence took place between the appellants and the respondent's agents concerning their liability to make further payment, the first communication being on 16th February and the last being at the end of July 1904, but that the

appellants declined to admit liability. The correspondence resulted in no agreement between the parties.

"In these circumstances I found that the appellants were liable to pay compensation to the respondent at the rate of 12s. 5d. per week from 14th December 1903 till the date of my award (July 12, 1905).

"I also found that the appellants were under no liability to pay the respondent any further sum as compensation, and assoilzied them from any claim for future compensation.

"I found the respondent entitled to expenses.

"The agent for the respondent objected to a case being stated, in respect that the questions in law proposed in the minute lodged by the appellants requiring a stated case were not determined by me, and that the questions in law hereinafter stated were not set forth in said minute. I repelled said objections.

"The questions in law for the opinion of the Court are—(1) Are the appellants liable in the circumstances above set forth to pay compensation to the respondent from the date at which the incapacity ceased to the date of my award? (2) Was the respondent precluded from taking proceedings under the Workmen's Compensation Act 1897, in respect of his failure to take the same within six months from the accident in terms of said Act?"

The second question was dropped at the hearing.

The appellants argued—The appellants were not liable to pay compensation after the cessation of the workman's incapacity. To hold the contrary would be obviously unjust and unreasonable, and therefore *a priori* an improbable construction of the statute, which was, where possible, to be reasonably construed—*Lysons* v. *Knowles & Sons*, (1901) A.C. 79. The parties had come to an agreement which definitely fixed the amount and period of compensation, and arbitration was accordingly excluded—*Dunlop* v. *Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146; *Field* v. *Longden & Sons*, [1902] 1 K.B. 47. Under the agreement he could get no compensation after 14th December, as by that time his incapacity ceased—a fact proved by his being at that time capable of earning full wages—*Husband* v. *Campbell*, July 15, 1903, 5 F. 1146, 40 S.L.R. 822. But assuming that arbitration was competent he could get nothing under it, the arbitration being one at the instance of the workman under sec. 1, sub-sec. 3, and the statute only providing for compensation during incapacity. This was not a process for review of an agreement under Schedule I, 12. The Sheriff had probably been misled by such cases as *Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704; *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 784, 41 S.L.R. 609; *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; but in these cases the period during which compensation was payable was indefinite, and *Steel* and *Jamieson* were cases of review under Schedule I, 12. *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R 113, illustrated the way in which the Court would deal with a question of this nature. If the incapacity had in fact ceased, there was no rule which compelled an arbiter, even if he could consider the agreement, to treat it as enforceable up to the time of his decision if the incapacity had ceased—*Morton & Company, Limited* v. *Woodward*, [1902] 2 K.B. 276.

Argued for the respondent—The appellants were liable to pay compensation down to the date of the Sheriff's award. The agreement fixed no period of payment, the words "during incapacity" being simply an echo of the provisions of the statute, and upon this point arbitration was necessary. The agreement continued in force until it had been judicially reviewed (Schedule I, 12) or until a new agreement had taken its place, and in this respect there was no distinction between a recorded and an unrecorded agreement—*Steel* v. *Oakbank Oil Company*, *Pumpherston Oil Company, Limited* v. *Cavaney*, *Jamieson* v. *Fife Coal Company, Limited*, *cit. sup.* These cases also were authorities for the proposition that although the incapacity had in fact ceased prior to the arbiter's award he was bound to award compensation down to its date.

LORD KYLLACHY—This is an appeal from an award by the Sheriff-Substitute of Lanarkshire at Hamilton under an application presented to him by a workman under sec. 1, sub-sec. 3, of the Workmen's Compensation Act of 1897. The Sheriff finds that there was an agreement between the workman and his employers, made at the time of the accident, whereby the workman was to receive a certain weekly payment "during the period of his incapacity." He also finds that at the date when this weekly payment ceased, in December 1903, the applicant had completely recovered, and that he still continues in that condition. But he has nevertheless held the employers liable in a continuation of the weekly payment, from the date when it ceased, down to the date of his (the Sheriff's) award.

In dealing with the question thus raised it is necessary to have in view certain points which are, as it seems to me, fairly clear upon the terms of the statute.

I. The first point is this, that while extrajudicial agreement is recognised by the Act as a mode of determining questions of compensation arising under it, the provisions of the Act do not touch or affect such agreements, except in (I think at most) three particulars.

The particulars I refer to are these:—

(1) The Act provides certain summary means of enforcing agreements, that is to say, agreements made with reference to notices given and claims intimated under the Act. (*a*) Such agreements may, if in writing and probative, be recorded "in the Books of Council and Session or Sheriff

Court Books," and execution may follow in the same manner as if they had been recorded decreets-arbitral. (*b*) Such agreements may also, whether in writing or not (it has been so decided), be set forth in statutory memoranda, which (if the Sheriff-Clerk is satisfied as to their genuineness) may be recorded in the Sheriff Court Books, and have thus all the effect of Sheriff Court decrees, not necessarily decrees *in foro*, but at all events decrees in absence.

(2) The Act further seems to attach to such agreements this incident—that while subsisting, the payments under them may be reviewed, and either increased, diminished, or terminated by an application to the statutory tribunal under the 12th section of the First Schedule.

(3) The Act further seems to require as a condition of the validity of agreements, or at least of their recognition under the Act, that the compensation stipulated shall not exceed the maximum allowed under the Act. That is expressly provided in one case (Schedule I, sec. 1, sub-sec. 2), and may perhaps be implied in others. But for present purposes this requirement is not important.

Except in the above particulars, agreements following on notices and claims for compensation under the Act retain all their common law incidents. They are apparently just in the same position as, say, agreements made between masters and workmen before the Act passed, with respect to compensation for accidents occurring before the Act passed.

II. This being so, the next point—and it seems to follow—is this, that where an agreement exists and remains in force, there is no room for arbitration under the Act. In other words, there is no jurisdiction conferred upon the statutory tribunal to deal with subsisting agreements, or with the rights and remedies of parties under them, except (as before indicated) with respect to such matters as—(1) admission to the statutory register; (2) rectification of that register; (3) review of the terms of such agreements under section 12 of the First Schedule. Of course the statutory tribunal, like all other statutory tribunals, has to determine in each case, and at least in the first instance, what is the extent of its jurisdiction. It may, for example, have to decide incidentally whether some agreement submitted to it as excluding its jurisdiction, is a real agreement and a subsisting agreement. But when that is once admitted or found, the agreement must be accepted, and left, so far as the tribunal is concerned, to take care of itself. I may have overlooked some provision on the subject, but I have failed to discover any clause of the Act expressing any authority to any committee, or arbiter, or county court judge or sheriff acting as arbiter, to exercise, except to the extent mentioned, any jurisdiction with respect to agreements.

III. Lastly, the third point (which is really a corollary of the preceding) is this, that the statutory tribunal has in particular no power to pronounce decree for sums claimed to be due under agreements. The tribunal may find an agreement to be expired, and so finding may proceed to arbitrate, under section I, sub-section 3. It may also, on application for review under the 12th section, revise an agreement, or refuse to revise, or while revising refuse to revise except as from a particular date. But beyond that it cannot I apprehend go. It can no more, for instance, decern for arrears due under an agreement than it could decern for arrears due under one of its own decrees-arbitral. Agreements, like decrees-arbitral, must (with respect both to the past and to the future) be enforced in the appropriate manner, that is to say, either by proceedings at law or by the special methods of execution which the Act provides.

Now, all this being so, what in the present case was the Sheriff's duty, taking the facts as he himself finds them?

He had an application presented to him by a workman—an application founded on an alleged agreement assumed (I suppose) to be still current—whereby he was asked, as statutory arbiter, to decide—(1) that the alleged agreement subsisted, that is to say, on its just construction remained in force, until the applicant's recovery was ascertained by the reviewing tribunal under section 12 of Schedule I; (2) that nevertheless the employers had failed to pay the stipulated weekly payment as from 14th December 1903 downwards; and (3) that arrears being thus due, the workman was entitled to have a decreet-arbitral to that effect under which the arrears might be recovered. The Sheriff also, I think, conceived that he was asked (4) to decide (and to decide as if applied to by the employers under the 12th section of Schedule I) that the alleged agreement had now at all events come to an end by reason of the entire recovery of the workman, and that therefore no compensation was due for the future. I think that was in substance what the Sheriff was asked to do, or conceived that he was asked to do—I mean if we accept the narrative in the stated case as interpreted by the respondent's counsel at the discussion.

In these circumstances what the Sheriff did was, if I rightly understand his judgment, this—

(1) Assuming apparently that he had jurisdiction to decide all questions between the parties, he sustained the application as an application for arbitration under section 1, sub-section 3, of the Act.

(2) So assuming, he proceeded to find that there was in fact a subsisting agreement between the parties; his view apparently being, that although on its terms terminated by the complete recovery of the applicant, the agreement was yet still in force, because not brought to an end by a judgment under section 12 of Schedule I of the Act.

(3) So finding, he proceeded to decern for the arrears claimed up to the date of his decree.

(4) Lastly, holding it proved that there had now been complete recovery (and indeed complete recovery so far back as Dec-

ember 1903), he assoilzied the employers from all claims with respect to the future.

Now, it humbly appears to me that, in so dealing with the matter, the Sheriff went outside the Act and beyond his authority. He had at the outset to make up his mind whether there was or was not a subsisting agreement. But having done that he had only two courses open to him. If he thought—as I infer he did—that there was a subsisting agreement, his duty, I apprehend, was to throw out the application and leave the agreement to take its course. If, on the other hand, he thought (as perhaps he might) that there was no subsisting agreement—that on its just construction the alleged agreement came to an end when the incapacity in fact ceased—his duty was to proceed to arbitrate (under section 1, sub-section 3); but doing so, to reject the applicant's claim as wholly unfounded. There was no third course open to him. In particular, it was not, I apprehend, open to him to decern for arrears as due under a subsisting agreement, any more than it was open to him, apart from agreement, to award compensation for a period which he found to have been in fact a period of complete capacity.

I am therefore of opinion that we should sustain the appeal, and find in answer to the first question that the Sheriff was not entitled to find the respondents liable in the payments mentioned. As to the second question, we had no argument, and it does not seem to require an answer.

I may add that, taking the above view of the case, I do not, as will be observed, express any opinion as to whether or not the agreement here was a subsisting agreement such as, on the one hand, sufficed to exclude arbitration under section 1, sub-section 3, and, on the other hand, to open the door to application for review under section 12 of Schedule 1. It was argued to us that an agreement to pay to a workman compensation "during the period of his incapacity" was necessarily indefinite, and must therefore, recorded or unrecorded, be held to remain in force until terminated by a finding of the tribunal under section 12 of Schedule I. It was, on the other hand, maintained to us *contra*, that such an agreement necessarily came to an end when incapacity in fact ceased, and that there was no room for prolonging its subsistence beyond that date, at all events when, as here, it was unrecorded and had not obtained the force of a decree. I find it, as I have said, unnecessary to express an opinion upon any of those questions.

Lord Stormonth Darling—To my mind the solution of the only question of law which we have to answer, lies in the fact that this was an arbitration instituted by the workman. As such it had nothing to do with agreement, for under the statute arbitration and agreement are mutually exclusive. It is only where any question as to the liability to pay compensation, or as to the amount or duration of it, is not settled by agreement that the provisions for arbitration take effect.

I do not read the stated case as implying that the workman founded on the agreement which the employers and he had made immediately after the accident, as a subsisting agreement. It was of course part, and an important part, of the history of the case, and according to his crave the weekly payments for which he asked decree were to run from the date when the last weekly payment under the agreement had been made. If the payments had been purely voluntary on the part of the employer, and not under agreement, the workman must equally have given credit for these in any proceedings under the Act. It appears that evidence was led before the Sheriff that the parties had tried to make a new agreement and had failed, because one of the facts which the Sheriff holds to be established is that between February and July 1904 there had been a correspondence which "resulted in no agreement between the parties." Except therefore in a historical sense, I do not understand the workman as having founded on the original agreement at all. If he or his advisers had intended to do so, their course would have been obvious. They would have applied to have the agreement recorded, whatever the effect of that might have been. Instead of doing that, they applied for arbitration.

Now, proceedings for arbitration (where, as here, no question either as to dependants or as to payment of a lump sum is involved) can only be instituted under section 1 (3) of the Act or under section 12 of the first schedule. The latter is a proceeding for review of a weekly payment, and is open to either the employer or the workman, but when it is brought by the workman it must plainly be brought for the purpose of having the weekly payment "increased," for he has no interest to have it either "ended" or "diminished." Here he did not ask to have it increased, he only asked to have it paid at the rate of 12s. 5d. weekly, being the full rate which the employer had paid him under the original and unrecorded agreement. It seems to me therefore beyond all doubt that the arbitration was, and could only be, instituted under section 1 (3).

It is quite true that the employers might have taken proceedings to have the weekly payments "ended" under the 12th section of the first schedule. But I do not see that they were in any way bound to do so, or that they ought to be made to suffer for not doing so. They had, in point of fact, stopped the weekly payments as at 14th December 1903, and had offered the workman work at full wages, alleging that his incapacity had ceased. This offer was declined, and, if they were right as to the fact of his complete recovery, they had fully implemented their agreement, which was to pay him 12s. 5d. per week "during the period of his incapacity." They no doubt took the risk of its turning out that he had not fully recovered, and if their position had been merely that he had partially recovered, and that the weekly payment ought therefore to be "diminished," it might have been proper for them to take the initiative in order that an arbiter should

assess the amount of the diminution. In such a case it may be reasonable that the original rate of payment should hold good until the diminished rate takes its place—at all events when the original rate stands upon a recorded agreement having the force of a decree. That was the point decided by the cases of *Steel* (5 F. 244) and *Cavaney* (5 F. 963), the only difference of opinion among the Judges being as to the precise date when the diminished rate was to take effect—whether at the date of the award or at the date of the application for review. With that minor question we are not here concerned, because, as I have endeavoured to explain, this is not an application by the employer under section 12 of the First Schedule, but an application by the workman under section 1 (3) of the Act.

Now, the arbitration having been thus set agoing, what does the Sheriff find as to the facts? He finds that on 14th December 1903, when the last weekly payment was made, the workman had so recovered from his injury as to be capable of earning full wages, and that he has been since that date capable of earning full wages. In short, he finds that the employers' attitude on 14th December 1903 was well founded, and that they are under no liability to pay compensation for any period after the date of his award.

But, strangely enough, the Sheriff also finds that the employers are liable to pay compensation at the rate of 12s. 5d. per week from 14th December 1903 till the date of his award on 12th July 1905, or, in other words, that, under a statute which allows compensation to an injured workman "during the incapacity," a workman may be entitled to receive compensation for more than eighteen months after the incapacity has entirely ceased. A construction of the statute which involves a result so inconsistent with its main purpose is to be avoided if at all possible.

I cannot help thinking that the Sheriff (whose experience of the working of the statute is large) has been misled by some decisions which are applicable to a different set of circumstances, and particularly by those which I have mentioned. While holding himself free, and rightly free, to determine upon the facts placed before him whether the workman had suffered from any incapacity since the date of the last weekly payment, and answering that question in the negative, he yet seems to have felt bound to award full compensation for the past. He can only have reached that result by holding that his hands were tied by the original agreement. If that was his view he ought to have dismissed the application for arbitration as incompetent. On the other hand, if he entertained the arbitration as competently brought (and, in my opinion, it certainly was) he was bound to proceed on his own view of the facts, and he was not entitled to award any compensation for the period after incapacity had entirely ceased. It is impossible under the statute to combine, as the Sheriff has done, the province of arbitration with the province of agreement.

Perhaps I ought to notice the case of *Jamieson* (5 F. 958) as having possibly conduced to the Sheriff's misapprehension. The facts of that case were very special, and as unlike the present as can be imagined. The workman (a miner) had become totally incapacitated for work by an injury to his only remaining good eye, and the sole question of law which the Court found it necessary to answer was whether the Sheriff, in slightly diminishing the weekly compensation, was entitled to take into account that there had been a general reduction of miners' wages in the district, and that the applicant was 64 years of age. In holding that it was not competent to take these facts into account, Lord Adam and Lord M'Laren expressed the opinion, that although the payments by the employer had been voluntary, the application was to be regarded as an application for review under section 12 of the First Schedule. The Lord President and Lord Kinnear said nothing about this, and Lord Kinnear's opinion in the subsequent case of *Strannigan* (6 F. at p. 793) shows, I think, that he would not have agreed in the view, if it had been necessary to deal with it, that the application was to be regarded as brought under section 12. It follows, from what I have already said, that I cannot regard the application here as having anything to do with section 12. At all events the opinions on that point, though entitled to all respect as applied to the circumstances of that particular case, were *obiter*, and cannot affect a case which on its proved facts is so completely distinguishable.

With regard to the 2nd question of law, the argument against the workman was not pressed. I am therefore for answering both questions in the negative.

Lord Low—On 24th August 1903 the respondent was injured while in the employment of the appellants. An agreement was then come to between the parties, the purport of which the Sheriff-Substitute states as follows:—"The appellants admitted liability to pay him" (the respondent) "compensation in terms of the Workmen's Compensation Act 1897, and agreed with him to pay him compensation at the rate of 12s. 5d. per week during the period of his incapacity."

That was a complete agreement, because it dealt with all the matters which are necessary for the settlement of a claim for compensation under the Act, namely, (1) the liability of the employers to pay compensation, (2) the amount of compensation, and (3) its duration.

It is also to be observed that the duration in the agreement is for the full period allowed by the Act, which provides that where total or partial incapacity for work results from the injury, the compensation shall be a weekly payment "during the incapacity."

A memorandum of the agreement was not registered in terms of section 8 of the second schedule of the Act, which gives to a registered agreement the force of a Sheriff Court judgment.

The appellants continued to pay the respondent the agreed-on sum weekly until the 14th December 1903, after which date they made no further payments.

The Sheriff-Substitute finds that at that date the respondent "had so recovered from his injury as to be capable of earning full wages."

I read that (and it was so treated in argument) as a finding that at 14th December 1903 the respondent's incapacity for work had terminated, or, in other words, that the period during which the appellants had agreed to pay compensation had come to an end.

Notwithstanding that fact, however, the Sheriff-Substitute has found that the appellants are liable to continue payment to the respondent of the agreed-on weekly amount until 12th July 1905, that is to say, for more than eighteen months after the respondent had, by recovery from the effects of the accident, ceased to have any right to compensation either under the agreement or in terms of the statute.

What happened was this. When the respondent recovered from the injury the appellants offered him work at full wages. The respondent however declined the offer, and the appellants ceased payment of compensation. Some correspondence, which led to no practical result, then took place between the agents of the parties, but the respondent took no active step to enforce the claim which he made for a continuance of the compensation until March 1905, when he instituted arbitration proceedings before the Sheriff in which he sought decree against the appellants, ordaining them to pay to him compensation at the same rate as that fixed by the agreement (which I take to have been the maximum amount allowed by the statute) from the date when they stopped payment in December 1903 until the further orders of the Court. The Sheriff-Substitute disposed finally of the proceedings on 12th July 1905, when, as I have said, he found the appellants liable to pay compensation down to the date of his interlocutor.

The Sheriff-Substitute's view appears to have been that an employer who was paying compensation to a workman, either under an agreement or under a decree, was not entitled to stop payment on the ground that the workman had recovered and was no longer incapacited for work, even although that was the case, unless and until the fact of recovery had been ascertained and declared in a formal way, as by the certificate of a medical referee or the decree of an arbiter.

I think that that view—and also the Sheriff-Substitute's finding in regard to the date to which the payments must be continued—would have been justified by certain decisions of the Court, to which I shall refer presently, if the agreement had been registered, and had thus been equivalent to a judicial decree. In my judgment, however, the agreement not having been registered, the Sheriff-Substitute had no power to order compensation to be paid after the date when the respondent in fact ceased to be incapacitated for work.

Questions of compensation under the Act may be settled either by agreement or by arbitration. Section 1 (3) of the Act makes that clear, and therefore, where there is an agreement, arbitration is excluded as regards all matters which are settled by the agreement. It is clear, however, that where, as here, the agreement is to pay compensation during incapacity, the question whether the obligation to pay has come to an end by reason of the condition of incapacity having terminated, is a question of fact outside of the agreement, which must be determined in some way apart from the agreement. The method which the respondent took to have that question settled was to institute an arbitration under section 1 (3) of the Act.

It was argued that that was not a competent method to adopt, and I do not think that it was, if the respondent's object was to enforce the agreement. If that was his object, he ought to have recorded the agreement and proceeded upon the decree implied in registration. The appellants, however, having ceased to make payments under the agreement, and the parties having failed to come to a new agreement, I am not prepared to say that the respondent was not entitled to institute proceedings under section 1 (3) on the ground that he was a workman who was entitled to compensation, and who had no subsisting agreement with his employers. But if that was the nature of the application, it seems to me that it failed upon the merits, because the fact, as found by the Sheriff-Substitute, was that the respondent was not, and never had been, during any part of the period covered by the application, entitled to compensation, because during the whole period the statutory requisite of incapacity for work had been awanting.

It was argued, however, that when liability has been admitted and weekly payments made, whether under an agreement or under a decree-arbitral, the employer is not entitled to stop or diminish the payments on the ground that the workman's incapacity has wholly or partially ceased, until the fact that the incapacity has ceased is ascertained or declared by a decree in an application for review under Schedule I, section 12, or the certificate of a medical referee under Schedule I, section 11, or a settlement of the question by agreement.

In support of that argument the respondent relied upon the cases of *Steel* v. *Oakbank Oil Company*, 5 F. 244, and *Pumpherston Oil Company* v. *Cavaney*, 5 F. 963.

In *Steel's* case the circumstances were these—There had been an agreement which was registered under the Act, fixing the amount of compensation. The employers stopped payment of compensation on 14th October 1901, on the ground that the incapacity of the workman had ceased, or partially ceased, and on 8th April 1902 they lodged an application under Schedule I, section 13, in which they sought to have the compensation ended or diminished

The Sheriff-Substitute found that on 14th October 1901 the workman had to a large extent, but not wholly, recovered from the injury, and that therefore the employers were entitled to have the weekly payments diminished. He also held that the diminished payments should only come into operation from the date (23rd July 1902) when he finally disposed of the application.

In these circumstances the questions of law submitted to the Court were whether the diminution in the rate of compensation should take effect from 14th October 1901, the date of partial recovery, or from 8th April 1902, the date of the application to the Sheriff, or from 23rd July 1902, the date of the Sheriff-Substitute's judgment. The Court held unanimously that the diminution did not take effect from the date of partial recovery, and, by a majority, that the Sheriff-Substitute was right in diminishing the payments only from the date of his final interlocutor.

The main ground of judgment was that the agreement having been recorded was equivalent to a decree, and that that decree must remain in force until it was recalled.

Thus, Lord Young said that "the payment which was ordered by the Court must be continued at least until the application for review of that judgment," and that "when a judgment is pronounced fixing the amount of payment, that payment must be continued so long as the judgment subsists." In like manner Lord Adam (who was sitting in the Second Division) said—"Once an order for weekly payment has been obtained by a workman under the Act, and the memorandum of agreement duly recorded, that continues in force until it is altered by some other order." The case of the *Pumpherston Oil Co.* v. *Cavaney* was substantially the same as that of *Steel*, and was decided in the same way.

In both these cases the fact that the agreement had been recorded and was an equivalent to a decree was an essential element in the judgment which was pronounced, and in that respect these cases differed entirely from the present case, in which there was no decree, express or implied, but only an unrecorded agreement.

It was further argued, however, that in those cases it was laid down that in no circumstances did the Act allow an employer to stop weekly payments which he had been making, at his own hand, but that he must obtain authority to stop them in one or other of the ways provided by the Act. There are, no doubt, dicta to that effect, both in the case of *Steel* and in that of the *Pumpherston Oil Co.* These dicta, however, must, I think, be read as being applicable to the circumstances of the cases with which the Court was dealing, and cannot be regarded as extending to entirely different circumstances which the learned Judges had no occasion to consider.

I can find nothing in the Act which, when there is only an unrecorded agreement to pay compensation during incapacity, compels the employer to continue payment after the incapacity has in fact ceased. The Act recognises agreements for payment of compensation, and it nowhere provides that such agreements shall, as regards the rights and liabilities of parties, be in a different position from any other agreement. Now, the fact in this case is that the appellants have fully implemented their agreement with the respondent, because they have paid compensation to him during the whole period of his incapacity, and, in my judgment, they cannot be compelled to do anything more.

I am therefore of opinion that the first question of law should be answered in the negative. In regard to the second question the appellants did not maintain in this Court, as they did before the Sheriff-Substitute, that the application was incompetent in respect that it was not brought within six months of the accident. I therefore think that that question also should be answered in the negative.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the negative.

Counsel for Appellants—The Dean of Faculty (Campbell, K.C.)—Spens. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Younger, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Saturday, December 23.

WHOLE COURT.

[Lord Pearson, Ordinary.

WRIGHT *v.* BELL.

Jurisdiction — Justices of the Peace for County of Midlothian — Jurisdiction within County of City of Edinburgh— Edinburgh Extension Act 1896 (59 *and* 60 *Vict. cap. cciii*).

Held (by the Whole Court unanimously) that the Justices of the Peace for the County of Midlothian have jurisdiction in small debt actions within the area of the existing City or Burgh of Edinburgh as defined prior to the passing of the Edinburgh Extension Act 1896.

Question — whether their previously existing jurisdiction has been determined by force of that statute within the districts annexed to the City by that Act.

On 2nd January 1903 an action was raised in the Justice of the Peace Small Debt Court of the Shire of Edinburgh, at the instance of Mrs Isa Bell, residing at 30 Earl Grey Street, Edinburgh, against Adam Wright, for payment of £1, 2s. 6d. as the rent of a house at 5 West Adam Street, near the Pleasance. At the date when the summons was served Wright had left West Adam Street and was residing at 17 Tron Square, a house within the ancient