to the pursuer. This as it appears to me goes far to negative the idea of any wilful carelessness. But this consideration is not conclusive. There may be an honest belief in the destruction or the irretrievable loss of a document without any reasonable grounds for such a belief. But on the pursuer's averments in the present case I think that he may succeed in showing that he had reasonable grounds to believe in the destruction of the document. The question, it must be observed, is not whether the pursuer was guilty of carelessness in losing the document, but whether he was guilty of carelessness in not finding it timeously. It has happened occasionally, I believe, in the experience of some people who are not methodical that they have lost a document, and satisfied themselves quite reasonably after careful search not only that it was destroyed but how it must have been destroyed, and yet the document has turned up after all. A dividend warrant, about which a formal declaration has been made that it was inadvertently destroyed and an indemnity upon a sixpenny stamp has been granted, has been known to have been found in the third volume of Brown's Supplement. No search would ever have discovered that dividend warrant except a search for a case reported by Fountainhall.

Without, however, relying exclusively upon the considerations above adverted to in relation to fraud, or upon the special averments of the non-timeous production in the present case, I am content to take it that when, as in the present case, the document raises a direct issue of fraud, and no prejudice or loss of other evidence is alleged as having been occasioned by the delay, a less exacting standard of diligence will satisfy the requirements of the law than might otherwise be insisted on.

In my opinion the pursuer's averments set forth a *prima facie* case of miscarriage of justice induced by falsehood of the defenders; this case is *prima facie* instructed by production of the document founded upon; and for the reasons I have stated I do not find grounds of law which forbid the Court to allow the inquiry demanded.

I am accordingly of opinion that the interlocutor of the Lord Ordinary should be recalled and the case be remitted to him to allow parties a proof before answer of their averments.

The Court recalled the interlocutor of the Lord Ordinary, allowed parties a proof of their respective averments on record, and remitted to the Lord Ordinary to take the proof, and to proceed.

Counsel for the Pursuer—Morton, K.C. —Scott—W. A. Murray. Agents—Bowie & Pinkerton, S.S.C.

Counsel for the Defender James M'Kinstery—Macphail, K.C.—Garson. Agents —Balfour & Manson, S.S.C.

Counsel for the Defender Dugald Blackwood—M'Laren, K.C.—Ingram—MacLean. Agents—W. C. Leechman & Company, Solicitors.

Tuesday, February 19.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

HUTCHISON *v.* CADZOW COAL COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (3) *and* (16)—*Partial Incapacity—Award of Compensation—Workman Subsequently Earning Wages at a Rate Exceeding Average Weekly Earnings Prior to the Accident—Suspension of Compensation—Unemployment during Period of Miners' Strike—Application for Review.*

Workmen's Compensation Act 1906—*Procedure—Application for Review—Preliminary Defences—Relevancy.*

A miner sustained injuries owing to an accident in the course of his employment, and was awarded compensation in respect of partial incapacity. He subsequently obtained work with the same employers at an increased wage, and the payment of compensation was suspended. During the miners' strike his employers' colliery was not working, and consequently he was unemployed, while at the same time he remained partially incapacitated. In an application at his instance for review of the award suspending compensation in which he averred that he had been deprived of his employment, a plea to relevancy was sustained by the arbitrator on the ground that the application was lacking in precision, and disclosed no change of circumstances entitling him to review. *Held*, on appeal, that the claimant had sufficiently averred a change of circumstances entitling him to inquiry.

Observations per Curiam as to the circumstances in which discussions on relevancy should be allowed in applications under the Act.

James Hutchison, coal miner, 170 Low Waters, Hamilton, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Hamilton (HAY SHENNAN) in an arbitration under the Workmen's Compensation Act 1906 between him and the Cadzow Coal Company, Limited, coalmasters, Cadzow Colliery, Hamilton, *respondents*, appealed by way of Stated Case.

The Case stated—"This is an arbitration in an application presented on 26th September 1923 by the appellant for review of an award of compensation. On 28th May 1908 the appellant received injuries necessitating the amputation of his left leg by accident arising out of and in the course of his employment with the respondents. The respondents admitted liability and paid him compensation in respect of said injuries. On 30th December 1910, in proceedings initiated by the respondents, the rate of 16s. per week was fixed in respect of the appellant's partial incapacity. On 28th September 1917 the respondents again raised

proceedings for review of compensation, and on 2nd November 1917 I issued my award diminishing the rate of compensation to 12s. per week from 5th June 1917 to 2nd November 1917, and 'in respect of the employers' offer to provide him with work at a wage exceeding his average weekly earnings prior to the accident,' I suspend payment of compensation until further order. In a note to my award I stated—'As long as the employers are prepared to employ Hutchison at the increased wage, and he is fit for the work, payment of compensation falls to be suspended.' The appellant raised the present proceedings by lodging a minute on 26th September 1923. In that minute he craved the Court to award him 'compensation during the period from 31st March 1921 to 30th June 1921 at the rate of 12s. per week, or at such other rate as to the Court may seem just, in respect that during said period defenders' colliery was not working and pursuer was unemployed while still being partially incapacitated for work.' The respondents contended that the appellant's minute did not set forth a relevant case for review. I heard parties' agents on 16th October 1923, and on 27th October 1923 I issued an interlocutor allowing the appellant, if so advised, to amend his minute. In a note I stated that in my opinion the minute as it stood did not raise a case for review. The workman claims that he is entitled to payment for compensation during the period of the miners' strike (or lock-out) of 1921. I expressed the opinion that in order to make a relevant case for review the appellant must be able to state that during the period in question the respondents were not prepared to employ him at a wage greater than his average weekly earnings prior to the accident. On 5th November 1923 the appellant lodged a fresh minute, in which he substituted the following ground of review, viz. —'In respect that during said period pursuer, while still being partially incapacitated for work, was deprived of the employment which he had previously obtained from the defenders and was unemployed during the said period.' I heard parties' agents on this minute on 9th November 1923, and on 13th November 1923 I dismissed the appellant's crave for review under both minutes as irrelevant. I held that in order to warrant review the appellant must associate the respondents with the cause which deprived him of employment. I was of opinion that it is not enough for a workman (or an employer) simply to crave review in general terms, that he must give sufficient notice to the other party of the case which he must be prepared to meet, if proof is allowed. In the present case if the specific grounds of review had been set forth, it is possible that the matter might be disposed of without incurring the expense of a proof. I further pointed out that the dismissal of this application does not bar the appellant from still setting forth a relevant case."

The *question of law* for the opinion of the Court, as amended, was—"In the circumstances above set forth, was I right to dismiss the appellant's application for review?"

The arbitrator appended the following *note* to his award of 13th November 1923:—"I refer to my interlocutor and note of 27th October 1923. I expressed the opinion that the averments in the minute lacked specification and relevancy, and I indicated my reasons for so holding. In order to avoid expense I gave the workmen the opportunity of amending or lodging a new minute. He has lodged a new minute, which is more lacking in specification than its predecessor.

"As now stated, the ground of review is that 'the pursuer while still being partially incapacitated for work was deprived of the employment which he had previously obtained from the defenders, and was unemployed during the said period.' But it seems to me that before the workman can demand compensation from the employers he must in some way connect them with the cause which deprived him of his employment. On the above averment it still might be true that the colliery was working and the employers wished to employ the man. The cause of him being deprived of his work might be something totally unconnected with the employers.

"I am not a stickler in those matters. I accept constantly very meagre minutes of review if only they disclose a clear ground, *e.g.*, that the workman has partially recovered his capacity. But the objection here is one of substance. In *Quilter* v. *Kepplehill Coal Company, Limited* (1921 S.C. 905) the Lord Justice-Clerk says—'It is clearly settled in our procedure under this Act that the arbitrator is not only entitled to determine a question of relevancy, but if the point is quite sharply raised ought to answer a question of relevancy so as to save needless expense which might result if proof were allowed.'

"The workman's claim in the present case does not fall far short of the contention that I must grant a proof if he merely lodges a minute craving review in general terms. As I pointed out in my previous note, the employers here do not know what case they must be prepared to meet. If I sent this minute of review to proof, I do not see how I could resist a motion by the respondents for adjournment after the workman's proof was led if to any extent they were taken by surprise, and a defender is not bound to prepare against every possible ground of claim. He cannot be asked to prepare his case in the dark.

"I cannot understand why the workman should not make a frank disclosure of the precise ground of his claim. If he did so it is possible that the matter might be decided without the expense of a proof at all.

"As the workman has not taken advantage of the opportunity given to him to amend properly, the only course open to me now is to dismiss both minutes as irrelevant. But this course is no bar to him still lodging a relevant minute of review, and therefore I have the less hesitation in adopting it."

Argued for the appellant—The arbitrator was in error in refusing inquiry here. The appellant was entitled to review on the

ground that his incapacity still subsisted and that he had ceased to be employed—*Cory Brothers* v. *Hughes*, [1911] 2 K.B. 738, 4 B.W.C.C. 291; *Murray* v. *Portland Colliery Company, Limited*, 1923 S.C. 60, *per* Lord Justice-Clerk (Alness) at p. 641, and *per* Lord Constable at p. 67, 60 S.L.R. 56, and 1923 S.C. (H.L.) 62, 60 S.L.R. 615; *Harwood* v. *Wyken Colliery Company*, [1913] 2 K.B. 158, and 6 B.W.C.C. 225. These cases established the principle that where a workman became entitled to compensation under the Act in virtue of an accident arising out of and in the course of his employment, he did not lose that right merely for the reason that another cause of loss of earning capacity arose which was not due to the accident. Reference was also made to *Gaffney* v. *Chorley Colliery Company, Limited*, 15 B.W.C.C. 158, *per* Sterndale, M.R, at p. 163, and to *Rankine* v. *Alloa Coal Company*, 5 F. 1164, 40 S.L.R. 828, where the Court did not favour a decision on relevancy alone. Inquiry should therefore be allowed.

Argued for the respondents—This case fell to be distinguished from *Murray's* case, since in the latter the period of unemployment, which originated at the time of the miners' strike, continued to subsist after its termination on account of the condition of the labour market. Here the claim for compensation was limited to the period of the miners' strike. *Bromley* v. *Staveley Coal and Iron Company, Limited*, 1923, 16 B.W.C.C. 77, decided that no compensation was payable for loss of earning power due to the fact that a strike had been declared—*cp. per* Scrutton, L.J., at p. 86. That was precisely the position in the present case, and the rule laid down in *Bromley* should be followed. Counsel also referred to *M'Nally* v. *Furness, Withy, & Company, Limited*, [1913] 3 K.B. 605, and to *Murray* v. *Portland Colliery Company*, 1923 S.C. (H.L.) 62, 60 S.L.R. 615, where Lord Dunedin said at p. 65 that "to allow of application to review under paragraph (16) of the First Schedule a change of circumstances must be averred, and that a change of circumstances is not sufficiently averred by merely averring a change in the labour market."

At advising—

Lord Justice-Clerk (Alness)—This is an appeal by an injured workman who had obtained an award of compensation, which was subsequently suspended by the arbitrator because work was offered to the appellant by the respondents at a wage exceeding his pre-accident earnings. On 26th September 1923 a minute craving review of the award suspending compensation was presented by the appellant, in which he stated that the colliery was not working during the period for which he sought compensation. The learned arbitrator, thinking that the minute was lacking in precision, gave the appellant an opportunity of amending it, and on the 5th November 1923 a new minute was tendered by the appellant in which he stated that he was deprived of the employment which he had previously obtained from the respondents. The learned arbitrator, on a consideration of both minutes, dismissed them as irrelevant. The question put to us, properly stated, is whether the arbitrator was right in taking that course.

I think, in the first place, that procedure under the statute is intended to be summary and informal. Indeed, it may be said that the Legislature contemplated that somewhat rough-and-ready methods might be used in working out the remedies which it provides. At any rate I am convinced that the same standard of relevancy cannot properly be exacted from a workman in a minute of review as is properly exacted from a litigant in the ordinary courts who adjusts his record at leisure. The rigidity which is applied in the latter circumstances would, I think, be out of place in the former circumstances. The Legislature contemplated that there should not be undue delay in the administration of the statute, and decisions of the kind now before us may unquestionably tend to that result. We have therefore to ask ourselves whether when regarded from that angle the minute or minutes in question sufficiently disclose a change of circumstances entitling the appellant to a review of the award. Now, compensation was suspended because employment was offered to the appellant at higher wages than he had earned before the accident. It is therefore clear that the only relevant change of circumstances which the appellant need aver as entitling him to a review of the award is that the offer in respect of which his compensation was suspended is no longer available to him. The practical question we have to consider is whether that averment can be spelled with sufficient clearness out of the two minutes. In the first minute the appellant avers that the colliery was not working, and therefore he claimed review. In the second minute he goes a little further and avers he had been deprived of the employment which he had previously obtained from the respondents during the period in question. While this is not a wholly admirable statement, it seems to me to be a sufficient statement to entitle the appellant to the inquiry which he seeks.

Reference was made to the case of *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905. That was a decision on relevancy in quite different circumstances from those which we have here, and I cannot hold that one decision upon relevancy rules another case where the facts are different. For my own part I do not desire to cast the slightest doubt upon the soundness of the decision reached in the case of *Quilter*. The circumstances seem to be entirely different from those with which we are here concerned, and the decision does not seem to me to bind us in disposing of the present application.

I will only add that it goes without saying that the defences of the respondents remain entire and unaffected by the decision which I suggest to your Lordships. They may in the course of the inquiry, which I propose we should allow, be able to prove that this was a strike and not a

lock-out. They may prove that the offer of employment was not withdrawn but remained open, and was rejected by the appellant. If they prove any or all of these things they may win their case. But it does not seem to me to be possible to exclude all defences in the appellant's averments, nor indeed is it, in my opinion, necessary to do so. Should the respondents be prejudiced by any lack of specification in the averments made, the arbitrator can grant an adjournment which will safeguard their rights if justice requires it.

Having regard to the fact that the statute contemplates summary and informal procedure, that it is therefore reasonable to view more leniently the averments in a minute of review than those in a Court of Session record, I suggest to your Lordships that the averments made by the appellant are sufficient to entitle him to the inquiry he seeks, and that the respondents will not be prejudiced thereby. If I am right so far, the question put by the learned arbitrator, altered as I think Mr Fenton properly suggested, namely, In the circumstances set forth, was I right in dismissing the appellant's application for review? should be answered in the negative.

LORD ORMIDALE—I confess that my earlier impression during the debate was that the arbitrator was right in dismissing both the minutes of review as irrelevant. I thought myself that it was for the workman when he presented his minute of review to show that there had been some change in the circumstances since compensation was suspended owing to the readiness of the employers to pay him wages higher than the wages he was earning prior to the accident, and that the only change of circumstances which could be relevantly averred was the disability of his employers or their unwillingness or refusal to continue to pay the higher wages. I confess I still have some difficulty in reading out of the scanty statements and obscure averments of the workman any statement instructing any such change of circumstances. Your Lordship, however, sees your way to spell out of them such an averment, and as I feel the force of the reasons stated by your Lordship in favour of a lenient scrutiny of the averments, I am not prepared to dissent from the course proposed.

I agree with your Lordship in regard to the case of *Quilter* (1921 S.C. 905), to the decision in which I was a party. I see no reason whatever, as at present advised, to think that that case was wrongly decided. In that case the question of relevancy in the circumstances disclosed in the pleadings was very sharply raised, and I do not think any member of the Court had any doubt as to the relevancy of what was said by the appellant. We are coming to a different conclusion here on a different question of relevancy, and in doing so I do not see that we are either helped or impeded by what was said in *Quilter's* case.

Accordingly on the whole matter I am prepared to agree with your Lordship in thinking that the question should be answered as your Lordship suggested.

LORD HUNTER—I agree. Discussions upon relevancy in applications under the Workmen's Compensation Act ought not in my opinion to be encouraged. In rare and exceptional cases it may be that a discussion is justified and an expense saved to one or other or both of the parties by such a course being followed. On the other hand I think it is more likely that discussions on relevancy, particularly if they are repeated discussions, may greatly increase the expense that is caused to both parties.

The case of *Quilter* (1921 S.C. 905) has been referred to, and undoubtedly it is an authority for the proposition that you may have an application thrown out as irrelevant. For my own part, without expressing any concluded opinion, I am not prepared to say that I agree with the result in *Quilter's* case. Moreover, I am not certain that it does not afford an unfortunate example of a too precipitate course being followed. At anyrate it is a decision that has to be taken along with the very strong expressions of opinion in the earlier case of *Rankine* v. *Alloa Coal Company*, 5 F. 1164. There Lord Adam, Lord M'Laren, and Lord Kinnear all declared very strongly that in arbitrations under the Workmen's Compensation Act the averments made by a workman should not be strictly scrutinised in order to see whether the case might not fail because of some inaccuracy or imperfection of expression.

Where a workman applies for a review of an award it is enough perhaps that he should indicate that there is some alteration in the situation then as compared with the situation when the award was made. When I turn to the first application made here I confess that I see a distinct trace of an alteration. I do not say for a moment that it was an alteration entitling the workman to get the reward he was asking. That would depend on the facts as they were brought out, but it entitled him at all events to have the case determined by the arbitrator upon the facts. If the employers were dissatisfied with the result reached by the arbitrator after such inquiry they might come before us, and upon the full facts of the case have the matter, which may be of considerable importance, determined. The loss of which complaint is made and which justifies an award must be a loss traceable to the injury and not a loss that arises solely and entirely from an economic cause, or it may be solely from the conduct of the workman. But upon the case before us I am quite at a loss to understand what the exact circumstances were. At the time when the application was made previously the arbitrator found that owing to incapacity for work the workman was entitled to an award of 12s. But he added—"He is not to get that meantime because his employers are offering him a weekly wage that is in excess of his pre-accident wage." The man was an incapacitated man because he had lost a leg, but owing, I suppose, to the rate of wages the employers were able to offer him although incapacitated such a wage as, in accordance with the rules in the schedule for determining the rate of compensation, disentitled

him to any payment during the period when he was receiving that wage. When the workman came forward in 1923 he averred that during the period in respect of which he made his claim the employers had no works going. He did not say more. That may be a very succinct statement of the situation. At all events it is *prima facie* an indication that the cause suspensive of his receipt of compensation had disappeared. The employers could not offer employment when they had no work. They could then have offered wages only out of charity. The right upon the part of the workman was to an effective offer—that is to say, an opportunity to earn that amount of money in the employment offered him. The moment the man averred the works were not going he was *prima facie* entitled to something, because he was then still incapacitated. It may be, however, that because of the particular facts of this case he is not entitled to anything.

I think therefore that the case should go back to the learned arbitrator in order that if it is to come before us at all it may come before us in proper form.

LORD ANDERSON—I agree with what has fallen from your Lordships and I desire to make only one or two observations as to the procedure which I think ought to be followed in arbitrations under this Act of Parliament. There is high authority for the view that in every case of an arbitration under this Act there should be inquiry. In the case of *Rankine* (5 F. 1164) Lord M'Laren says (at p. 1168)—"I think there is no such procedure contemplated in the Act as a dispute upon relevancy before the facts have been ascertained." Lord Kinnear expressly agrees with Lord M'Laren's views and Lord Adam's opinion is to the same effect. I think that view is supported by considerations as to the object of the statute and as to the procedure which is prescribed in order to effect that object. The object of the Act is to enable compensation to be obtained by an injured workman or by the dependants of a workman who has been killed, and to enable compensation to be obtained as speedily as possible. Accordingly we find that the procedure prescribed by the Act is simple, summary, and informal. I think it has been contemplated that the pleadings in these arbitrations may be, as your Lordship has suggested, of a rough-and-ready character and are not to be judged by standards which apply in this Court or even in the Sheriff Court. But while that view has been expressed by Judges of the other Division, there is, on the other hand, the express decision of *Quilter* (1921 S.C. 905) in this Division. In the course of that case the Lord Justice-Clerk said (at p. 907)—"It is clearly settled in our procedure under this Act that the arbitrator is not only entitled to determine a question of relevancy, but if the point is quite sharply raised ought to answer a question of relevancy so as to save needless expense which might result if proof were allowed." It seems to me that the only approach to reconciliation of these conflicting views which can be made is that judgments on relevancy ought to be pronounced only in highly exceptional circumstances. *Quilter's* is such an exceptional case, because as I read it not only did it appear to the Court that the averments were irrelevant, but I think it appears from the basis of the claim, viz., that there had been a general fall of wages, that it was questionable whether the case could not have been made relevant. This is a different case, as has been pointed out, and accordingly I agree that it can be distinguished from *Quilter* and that it ought to be disposed of as your Lordship has suggested.

The Court answered the question of law, as amended, in the negative.

Counsel for the Appellant—The Solicitor-General (Fenton, K.C.)—Thomson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Graham Robertson, K.C.—Marshall. Agents—W. & J. Burness, W.S.

Thursday, February 21.

SECOND DIVISION.

[Lord Morison, Ordinary.

SPEIRS LIMITED *v.* PETERSEN.

Contract—Executory Contract—Breach—Remedy—Building Contract—Defective Construction—Building Accepted on Construction.

A firm of structural engineers contracted to build a mansionhouse at the price of £16,400, payable in five instalments. When the house was built dry rot made its appearance as the result of defective construction. The owner did not reject the house, but claimed to withhold payment of the last instalment on the ground that the defects were so substantial that the pursuers were disentitled from recovering anything. *Held* that the contractors were entitled to sue the owner for the contract price of the house, and to recover the price, less the sum required to bring the work into conformity with the conditions of the contract.

The law applicable to building contracts *discussed.*

Speirs Limited, structural engineers, Glasgow, *pursuers*, brought an action against Sir William Petersen, K.B.E., of the Island of Eigg and of 80 Portland Place, London, *defender*, for payment of (1) £5677, 14s., (2) £378, 17s. 1d., and (3) £820, with interest.

The following narrative is taken from the opinion of Lord Morison *infra*:—"The pursuers are a limited company who design themselves as constructional engineers. They erect and supply a type of building called a Speirsesque plasmentic house. . . . The pursuers have erected a number of them during the last thirty years. They are largely constructed of timber and plaster strengthened by heavy gauge per-