proceedings no formal defences are lodged the defending party simply appears and denies liability and the case is ordered for proof. In *Oliver* we find that the Court had at the first diet adjourned the proof, although the defender had appeared and was prepared to lead evidence. At the adjourned diet the defender did not appear, and on this the Sheriff proceeded to pronounce judgment. The question came to be, Was that a decree which the defender was entitled to have sisted? And the Court held that it was not a decree by default, but a decree in absence, and could be opened up. This case presents practically the same features, and I am, accordingly, for holding that the appeal should be dismissed.

LORD LOW—I am of the same opinion. In the cases which have been cited all the Judges agreed that, unless there is something of the nature of litiscontestation, there may be a sist under section 16 of a decree pronounced when one of the parties was absent in the sense of not being present in Court. In the present case I cannot find anything which amounts to litiscontestation, especially in view of the decision in *Oliver* v. *Simpson*, which was a very similar case. On looking at the record one finds that the case was called for the first time on 1st October 1907. Both parties were represented by law agents, and an interlocutor was pronounced continuing the cause until 8th October 1907. On the 8th both parties were again represented by their agents, and the case was continued until the 15th. On the 15th October the pursuer was present by his agent, but the defender was absent, and decree was pronounced in favour of the pursuer. That was the decree of which the defender obtained a sist. All that we know is that at the two first diets, when both parties were present, nothing was done except to continue the cause, and that at the third diet, when the defender was absent, decree was pronounced. On these facts it seems to me to be impossible to hold that there was anything of the nature of litiscontestation which would prevent the defender from obtaining a sist. Upon that short ground I am of opinion that the appeal should be dismissed.

LORD ARDWALL—I agree. I think that this case is ruled by the case of *Oliver*. But I must add that I am disposed to concur in the views expressed by Lord Trayner in the case of *Montgomery*. I have grave doubts whether the term "litiscontestation" should be imported into proceedings under the Small Debt Acts. Litiscontestation does not form part of what I may call the principles of the law. It is matter of procedure, and has all along depended on fixed rules, both under the civil law and under the law of Scotland.

Under the civil law in early times litiscontestation took place when the *formula* was delivered by the praetor to the judex. Under the later law that was altered, and litiscontestation came to denote the judicial contract constituted by the statement by the parties of their grounds of action and defence before the praetor.

In the law of Scotland litiscontestation is held to denote the point of time when the parties definitely join issue. It was originally held to be constituted by the granting of a warrant for proof of such facts as the Judge had held to be relevant. That practice was more or less departed from, and frequent disputes arose, which were set at rest by the Act 1672, cap. 16, sec. 19. That Act provides that in the Court of Session litiscontestation should be held to take place when defences are lodged. So far, then, as the Court of Session is concerned the date of litiscontestation was settled by statutory enactment. If the phrase litiscontestation is to be imported into small debt cases, it can only be by analogy, and I think it is always more or less dangerous to qualify purely statutory procedure by analogies drawn from common law. Looking to the statute, my opinion is that the only question on which the present case turns is whether the decree was pronounced in the presence or absence of the parties, and if it was pronounced in the absence of either party it is a decree in absence, and a sist may be granted under section 16 of the Small Debt Act. I am therefore of opinion that this appeal ought to be refused.

The Court dismissed the appeal.

Counsel for Appellant—Carment. Agents—Balfour & Manson, S.S.C.

Counsel for Respondent—Riach. Agent—David Dougal, W.S.

COURT OF SESSION.

Thursday, May 14.

FIRST DIVISION.

[Sheriff Court of Ayrshire at Kilmarnock.

THE SOUTHHOOK FIRE CLAY COMPANY, LIMITED *v.* LAUGHLAND.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Sched.* 1, *sec.* 16—*Review of Weekly Payment—No Recorded Agreement—Date from which Payment may be Ended, Diminished, or Increased.*

From the date of an accident until 1st November employers paid a workman compensation under the Workmen's Compensation Act 1906, in respect of a verbal agreement of which no memorandum was recorded. On 1st November they stopped the payments on the ground that the workman had recovered, and on 21st November (the workman maintaining that he still was *incapax*) they applied to the Sheriff-Substitute as arbiter to review the weekly payments by terminating them

as from 1st November. On 29th January following the Sheriff-Substitute issued an interlocutor in which, while finding that the workman had completely recovered on 1st November, he terminated the payments as from the date of his interlocutor.

Held, on appeal, that the compensation should have been terminated as from 1st November.

Steel v. *Oakbank Oil Company*, Dec. 16, 1902, 5 F. 244, 40 S.L.R. 205, and *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724 (cases of payments in respect of a recorded memorandum of agreement, which by sec. 8 of Schedule II of the Act of 1897 is equivalent to a judgment of Court), *distinguished*.

Opinion (*per* the Lord President) as to whether these cases had been rightly decided, *reserved*.

On 21st December 1907 the Southhook Fire Clay Company, Limited, Crosshouse, presented a petition in the Sheriff Court at Kilmarnock for the review and termination, as from 1st November 1907, of the compensation payable under the Workmen's Compensation Act 1906 to William Laughland, miner, Crosshouse.

On 29th January 1908 the Sheriff-Substitute (MACKENZIE) pronounced an interlocutor ending the compensation as from 29th January 1908 (the date of his interlocutor), and at the request of the petitioners stated a case.

The facts found proved were—"That the defender on 2nd July 1907 sustained personal injury by accident while in the employment of the pursuers; that liability in compensation for said injury was admitted by the pursuers, and that compensation calculated on a basis of an average weekly wage of £1, 7s. 8d., was paid by the pursuers to the defender down to 1st November 1907; that no memorandum of said agreement was recorded; that on 1st November 1907, the defender having recovered from the effects of his injury, resumed work, and has since been engaged in the pursuers' employment, and has been earning full wages; that the defender refuses to discharge the pursuers from his claim for compensation; that the wages at present received by the defender are greater in average weekly amount than those received by him before the accident, being £1, 9s. 4d. as contrasted with £1, 7s. 8d.

The questions of law were—"(1) Was the arbitrator right in holding that he could terminate the compensation only as from the date of his interlocutor? (2) Ought he to have terminated the compensation as at the date of the presentation of the application for review? Or (3) Ought he to have terminated the compensation as at 1st November 1907."

Argued for appellants—The compensation ought to have been ended as from 1st November 1907, the date at which the workman's incapacity had ceased. The only possible reason for fixing upon any other date was the fact that in the cases of *Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205, and the *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, it had been decided that the arbiter could only terminate the compensation as from the date of his decision. These cases were, however, distinguishable from the present. In each of them the weekly payment was being made in respect of a recorded memorandum of agreement, which was under Schedule II, 8, of the Act of 1897, equivalent to a decree of Court, and the *ratio* of the decisions was that payment must proceed under this decree until the decree had actually been superseded by a formal interlocutor of the arbiter. In the present case there was no memorandum and therefore no decree. Further, in both these cases there were strong dissents, and both conflicted with the judgment of the Court of Appeal in England in the case of *Morton & Company, Limited* v. *Woodward*, [1902], 2 K.B. 276. In these circumstances if it was thought that the present case was indistinguishable from them, the present case should be remitted to a Court of Seven Judges for reconsideration of the whole question. The provision in the Act of 1906 as to the review of compensation was practically the same as in that of 1897—section 16 of the First Schedule of the Act of 1906 corresponding to section 12 of the First Schedule of the Act of 1897.

There was no appearance for the respondent.

LORD PRESIDENT — This stated case touches the fringe of a question on which there seems to be a considerable amount of difference of judicial opinion. But I do not think it imposes upon us the necessity of taking either of the two courses, which otherwise would have been alone open to us. That is to say, either to have sent the case to a Court of Seven Judges or the Whole Court for consideration of the differing judicial opinions which have been expressed in the case of *Steel* v. *The Oakbank Oil Company*, 5 F. 244, in the other Division, in the case of *Cavaney* v. *The Pumpherston Oil Company*, 5 F. 963, in this Division, and in the case of *Morton*, L.R. [1902] 2 K.B. 276, in the English Court of Appeal; or of treating the matter as decided as it has been by a majority in both Divisions, leaving to the unsuccessful party the remedy of going to the House of Lords. I do not think we are driven to choose between these two alternatives, because I think this case presents in one particular so important a difference that it takes it out of the class of cases which I have just mentioned. The point is, where a person has been paid compensation under the Workmen's Compensation Act for a certain period, and then there has been an application to the arbitrator—in this case the Sheriff-Substitute—under the sixteenth section of the first Schedule of the Act for review of the payment, whether the arbitrator in making the review should make the date of the new condition of circumstances—that is to say, the affirmance that

payment should stop altogether—(*a*) the time at which he holds in fact that the real change in circumstances occurred; or (*b*) the time at which the person asking review presented the petition; or (*c*) the date of the judgment or interlocutor giving effect to the Sheriff-Substitute's views. Where the payments that had been made were made under something which is equivalent to a judgment—that is to say, in respect of a recorded memorandum—is one state of affairs. But where there was no compulsory warrant for the payment is another state of affairs. I do not propose to go into the arguments that were used in these cases; and in particular I reserve my own personal opinion as to whether I agree with the Judges of the majority here, or with the Judges of the minority here who agreed with the Judges of the English Court. But I say this, that it is perfectly evident that the whole of the reasoning of the majority here, who decided that the date must be the third of the dates I have specified, depended upon the fact that there was an operative judgment ordaining a certain sum to be paid weekly to the workman, and that until that judgment was got rid of it must continue to have effect. When we come to the facts of this case it is otherwise. Here no memorandum of agreement was ever recorded. All that happened was that there was a *de facto* payment from 2nd July 1907 down to 1st November 1907; that on 1st November 1907 the employers ceased payment, and then, as the workman would not admit that he had no claim for compensation, the employers presented a petition to the Sheriff to bring the payments to an end. On that petition the Sheriff-Substitute has found as matter of fact that on 1st November 1907 the workman was completely recovered, and that he had recovered was evidenced by the fact that at that moment he was in full employment with a wage actually higher than he had earned before. In other words, the Sheriff-Substitute has found that *de facto* the ceasing of payment was perfectly right. Then, in addition, we are face to face with the fact that there is no decree in existence, nor any decree which can ever be called into existence, which would affirm that the employers were under obligation to pay anything after 1st November 1907. Accordingly it seems to me here that the arbitrator was not right. I think that he, perhaps not unnaturally, thought that he was bound by these cases, but I think he ought in the circumstances to have terminated the compensation as at 1st November 1907, and that we should so determine. I am quite clearly of opinion that it is not necessary for the decision of this case to decide the difference of judicial opinion in the cases I have cited.

LORD M'LAREN—If I had to consider the result at which I would personally arrive in regard to this question in its various forms, I should say that my opinion, as expressed in the case of *Cavaney*, 5 F. 963, is unaltered. But then I was in a minority in that case, and I must accept the decision of the Court unless and until that decision is overruled by a competent authority. Therefore I am very glad to be able to concur in the judgment proposed, regarding it, if I may say so, as a bridge by which I may more quickly arrive at my destination than I should in the former case. I agree with your Lordship that it is impossible to read the opinions of the judges constituting the majority without seeing that in their opinions it was a very important element—certainly in the case of *Cavaney*, 5 F. 963,—that there was a recorded agreement, or an award in an arbitration, which set up an obligation indefinite as regards duration in time. Such obligation would naturally continue until it was brought to an end by some means as effectual as the agreement or award, and their Lordships came to the conclusion that the agreement would subsist until the decision of the case. I should have thought myself that, following the analogy of ordinary legal proceedings, reductions or any other mode of terminating an agreement, the effect of the decision would draw back at least to the date of the initial writ of the case. But then in this case we have no award, we have no recorded agreement, and the most that can be said is that there is an inferential agreement to continue to pay, because as a matter of fact the employer has paid compensation substantially on the basis of the statute during the period of incapacity. But then it seems to me to follow that, as there is nothing to set aside, you can only infer an agreement to pay during incapacity and no longer. Therefore when the Sheriff-Substitute has found the date when incapacity should cease, that seems to me to be the date when payment would necessarily terminate. I therefore agree that the question should be so answered.

LORD KINNEAR—I think that this case is clearly distinguishable, on the ground your Lordship has stated, from the cases of *Steel* v. *The Oakbank Oil Company*, 5 F. 244, and of *Cavaney* v. *The Pumpherston Oil Company*, 5 F. 963. Upon its own merits I concur with what your Lordship has said, and that we must answer the question as proposed.

LORD PEARSON was absent.

The Court answered the first and second questions in the case in the negative and the third question in the affirmative, recalled the interlocutor of the Sheriff-Substitute as arbiter, and remitted to him to proceed accordingly.

Counsel for the Appellants—R. S. Horne. Agents—Simpson & Marwick, W.S.