the verdict cannot be allowed to stand. If the Court had been of opinion that there was evidence of fraud and circumvention in the case, I think the question would have been more difficult, though I do not know that even then we could have come to any other conclusion than that the verdict ought to be set aside as inconsistent with itself.

It is right perhaps that I should explain the course that matters took at the trial. The trial was a long one, extending over six days in all, and on the last day the jury retired at 7·46 p.m. and returned a verdict by a majority at 10·47 p.m., having been unable to come to a unanimous verdict.

Both pursuer and defender were represented by experienced senior counsel, and Mr Watt, for the pursuer, in addressing the jury, while he claimed a verdict on each issue, and did not abandon the second issue so far as my recollection goes, yet laid stress on the first issue, and as far as I recollect told the jury that if they found for the pursuer on the first issue he did not desire a verdict in his favour on the second.

In charging the jury I explicitly told them that the first question was to my mind the important one, because there was a great deal of conflicting evidence upon it, while with regard to the second I told them that although they were entitled to draw what inferences they pleased from the Milnes coming about the old man's house, I could not say, as far as I could see, that there was any evidence of fraud or circumvention. Neither counsel objected to my charge, nor was I asked to give any directions regarding the bearing of the two issues on each other. If I had contemplated that the jury could have returned a verdict upon both issues, it is possible though not certain that I would have pointed out to them the inconsistency of that course. As it was, the jury after an absence of three hours announced that they found by a majority for the pursuer on both issues. No objection was taken by the counsel for either party to this verdict being accepted and recorded, and it was recorded accordingly. On the whole matter I am of opinion that the rule should be made absolute and a new trial granted.

LORD JUSTICE-CLERK—I concur entirely in what has fallen from your Lordships. If under any circumstances a verdict on both the issues in such a case as this could be held not to call for a new trial, I am clearly of opinion that in this case there are no grounds on which it can be even plausibly maintained that the verdict in this case can stand. It does not resemble in any way the cases quoted to us at the debate. It seems to me that in a case such as this where the Court hold, as we do, that there is no evidence to support the verdict on the second issue, it would be most unjust to hold that the verdict should stand, because there may have been evidence on which the jury might find a verdict on the first issue. And this on many grounds, in particular two grounds—(1) the jury having found a verdict on the second issue, it is plain that they either did not understand the matter or did not give it proper consideration, for they have held that there was fraud or circumvention, of which there is no evidence, and (2) they have returned a verdict which casts a serious slur on the defenders, which they had no justification for doing, and from this the defenders are entitled to be freed, there being no ground for it.

I would desire to second what has been said by my brother Lord Dundas in expressing the hope that the parties might make a new trial unnecessary. The granting of a new trial completely exonerates the defender. It might therefore be very wise for the parties to endeavour to put aside personal feeling and come to some arrangement which would save the enormous expense involved in a continuation of this litigation.

The LORD JUSTICE-CLERK intimated that Lord Low, who was absent when the case was advised, concurred in the opinion of Lord Dundas.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuers—Watt, K.C.—A. R. Brown. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders—Cooper, K.C.—Hon. W. Watson. Agent—F. J. Martin. W.S.

Saturday, May 21.

FIRST DIVISION.

[Sheriff Court at Paisley.

O'DONNELL *v.* WILSON.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 39, *and First Schedule, Rule* 79—*Claim for Compensation — Instance of Claim — Amendment — Claim Made against Individual Partner instead of against the Firm, the True Employers.*

In an arbitration under the Workmen's Compensation Act 1906 a workman claimed compensation from an individual as his employer. No written defences were lodged. It appeared in the course of proof, and the objection was then taken, that in law the employer was not the individual but a firm of which he was a partner. A motion was thereupon made on behalf of the workman to be allowed to amend the instance of the application by substituting in place of the individual the name of the firm. The Sheriff acting as arbitrator refused leave to amend on the ground that the application fell under the Workmen's Compensation Act 1906, Sched. II, section 17 (*b*), to be dealt with in the manner provided for

in the Sheriff Courts (Scotland) Act 1907, and that such a course did not fall within the scope of the Sheriff Courts (Scotland) Act 1907, First Schedule, rule 79, under which a Sheriff may allow a record to be amended, including the amendment of the instance and the adding of parties.

The Court, without determining whether such an amendment was or was not competent under rule 79, *found* that apart from said rule it was competent for the arbitrator to allow the firm to be added as respondents in the application, and remitted to him to allow the motion to amend, made in such altered form.

Opinion per Lord Johnston that rule 79 did not apply to arbitration proceedings under the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts, Second Schedule, section 17 (*b*)—"Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section 52 of the Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70). . . ."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), enacts, section 39—". . . The procedure in all civil causes shall be conform to the rules of procedure set forth in the First Schedule hereto annexed. . . ."

Section 50—"In summary applications (where a hearing is necessary) the sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the sheriff shall order a record) shall summarily dispose of the matter and give his judgment in writing: Provided that wherever in any Act of Parliament an application is directed to be heard, tried, and determined summarily or in the manner provided by section 52 of the Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70), such direction shall be read and construed as if it referred to this section of this Act. . . ."

First Schedule, rule 79—"Upon the motion of either party the sheriff may, at any stage of the cause, . . . allow a record to be altered or amended to the effect of determining the real question in controversy (including amendment of the instance and the initial writ, and the adding of parties). . . ."

Charles O'Donnell, labourer, Bishopton, Renfrewshire, being dissatisfied with a determination of the Sheriff-Substitute at Paisley (Welsh) acting as arbitrator between him and Henry Wilson, builder, Bishopton, Renfrewshire, in an arbitration under the Workmen's Compensation Act 1906, appealed by way of stated case.

The case stated, *inter alia*—"This is an arbitration under the Workmen's Compensation Act 1906, in which on January 20, 1910, the appellant initiated proceedings by an application, in which he claimed compensation from the respondent at the rate of 11s. weekly in respect of personal injuries sustained by him on or about 10th December 1909. . . .

"On February 1, 1910, the case was called in Court, when no written defences were lodged.

"On February 22, 1910, proof was led, when, during the progress of the respondent's proof, the appellant's agent made a motion that he should be allowed to amend the instance of the appellant's application, by substituting in place of the respondent the firm name of Henry Wilson & Sons.

"On said date the proof was adjourned until February 24, 1910, in order that parties' agents might fully consider this motion, and for further proof.

"On said last-mentioned date, after hearing the parties' agents, when the appellant's agent relied upon rule 79 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, ch. 51), in support of his motion, I refused to grant leave to amend, on the ground that in my view such a course did not fall within the scope of rule 79 of the First Schedule of the Sheriff Courts Act 1907.

"Thereupon the respondent's proof was proceeded with, and on February 28, 1910, I found (1) that in the month of December 1909 the appellant was in the employment of a firm of Henry Wilson & Sons, joiners and builders, Bishopton, of which firm the respondent is not the sole partner." [Here followed certain findings in fact with regard to the nature of the accident, and the appellant's resulting incapacity.]

"I further found that the appellant had not proved that the said accident arose out of and in the course of his employment with the respondent, but that it was proved that the accident arose out of and in the course of his employment with a firm of Henry Wilson & Sons, and held that he was not entitled to an award of compensation against the respondent."

The *question of law* for the opinion of the Court was:—"Whether it was competent, in virtue of rule 79 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, ch. 51), to amend the instance of the appellant's application in the arbitration proceedings by substituting in place of the respondent the firm name of Henry Wilson & Sons, of which firm the respondent was not the sole partner, and whether a motion so to amend, made towards the end of the proof in the arbitration proceedings, was properly refused."

Argued for appellant—Rule 79 of Schedule I of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) applied and conferred the necessary power upon the Sheriff. By section 39 of that Act the procedure in "all civil causes" was conform to the rules of the First Schedule. An application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) was a civil cause. Schedule II, section 17 (*b*), of the latter Act provided that applications should be tried summarily in the manner provided by the Sheriff Courts (Scotland) Act 1876, section 52, which section was now replaced by section 50 of the Sheriff Courts (Scotland) Act 1907. Such "summary application" was

clearly a "civil cause" within the meaning of the last named Act. Apart from these express statutory powers, the tribunal appointed to carry out the informal procedure of the Workmen's Compensation Act had inherent power to allow amendment of the instance in such a way as to enable substantial justice to be done—*M'Ewan* v. *William Baird & Co., Ltd.*, 1910 S.C. 436, 47 S.L.R. 430; *M'Vey* v. *William Dixon Ltd.*, 1910 S.C. 544, 47 S.L.R. 463.

Argued for respondent—The provisions of the Workmen's Compensation Act 1906, together with the relative Acts of Sederunt, made up a complete and exhaustive code. The procedure rules of the Sheriff Courts Act did not apply; an application under the Workmen's Compensation Act was not a "cause" at all. Even if the rule in question were held to apply, it did not cover the motion made, for although an additional defender might be added it was incompetent to substitute one for another—*Andersen* v. *Harboe*, December 12, 1871, 10 Macph. 217, 9 S.L.R. 155. In any event it was too late to make such a motion in the course of a proof.

LORD JOHNSTON—It is unfortunate, I think, that this case has had to be brought here and expense to be incurred which might have been avoided had less attention been given to technicalities and more to substance.

I conclude that the reason why the Sheriff refused the proposed amendment was solely because of the form in which the motion was couched, and in respect that it craved that the name of the firm should be substituted for, and not merely added to, that of the individual partner called. And he asks whether, in refusing that motion to substitute, he was right in so doing.

We have had a long argument on the Sheriff Courts (Scotland) Act 1907 and the Workmen's Compensation Act 1906, but so far as I am concerned I do not think that the parts of the Sheriff Courts Act founded on are applicable to the present question. Under the Workmen's Compensation Act 1906 it is contemplated that a question of this kind shall, in the first instance, be settled by agreement between the parties, and, failing agreement, then by arbitration as provided by the Act, the Sheriff, in Scotland, being arbitrator, failing the parties agreeing on a mutual appointment. The Act provides that any application to the Sheriff as arbitrator "shall be heard, tried, and determined summarily" in the manner provided by section 52 of the Sheriff Courts (Scotland) Act 1876. The latter section is now superseded by section 50 of the Sheriff Courts (Scotland) Act 1907, which provides for a new category of proceedings which are termed "summary applications." There is no question that this is properly a summary application, and though it is not easy to distinguish between what are described in the Act as "causes," "summary causes," and "summary applications," it is clear that what is intended is that any application which is summary shall be heard without unnecessary multiplication of forms of procedure. For myself I am not prepared to hold that the procedure rules of the schedule to the Act of 1907 are to be applied to summary applications in particular, and I do not see how those of the seventy-ninth procedure rule, which is framed expressly to apply to a class of case in which there are to be formal pleadings, can be held to apply to cases where there are intended to be no such formal pleadings. But whilst that is my opinion as to the applicability of section 79, I think that there is inherent power in the Sheriff, to whom it is remitted to consider such matters in the summary way provided by section 50 of the Act, to see that such proceedings are carried on with reasonable effect. It is quite within the power of the Sheriff to say, "A mistake has been made here; the proper party has not been called as defender. I will sist the case until that proper party has been brought into court." But I think that the Sheriff was technically right in holding that that could not be done by a mere substitution; the name of the new party to the proceedings must be added to the name already on the paper. It appears to me that this is so for several reasons, not the least cogent of which is that there may be something to be said by the party sought to be brought in as to why the party originally cited should not be kept in the case. I think that the course which the Sheriff should have taken—as the person to whom it was remitted to do justice in the case as quickly and as cheaply as possible—was to have said, "I cannot grant this motion as it stands, but if you ask me to add the name of the firm as defenders to that of the partner, I am disposed to do so, but under the condition that, as this motion is made so late in the day, you will give the party who is sought to be brought in the opportunity of adopting, if so advised, the evidence that has been led on behalf of the present defender, and if he thinks proper of supplementing it."

I therefore propose that we do not answer the question submitted directly, but that whilst finding that the motion to the Sheriff was wrongly framed, we should remit the case to the Sheriff so that he may yet put the process into proper form and proceed with it as accords.

LORD SALVESEN—This is an appeal under the Workmen's Compensation Act in an arbitration at the instance of a workman against a person whom he alleged, and no doubt at the time believed, to be his employer. Had it been an ordinary action in the Sheriff Court answers would have been lodged stating that the true defender was not the person cited but the firm of which he was a partner. A technical mistake of the kind would then have been easily rectified by simply calling the firm and remaining partners, and leaving in the respondent as one of the partners. The Workmen's Compensation Act provides for no written pleadings other than the initial writ. Accordingly this mistake was not

disclosed till proof was in course of being led, and indeed, as I understand, not till the respondent himself was in the box. At this stage the pursuer moved that the firm should be substituted in place of the respondent. I agree with Lord Johnston that this was probably not the correct form of motion, but I also think the Sheriff has adopted too technical an attitude in refusing the motion. It being an obvious technical mistake of which the defender had known all along and by which he could in no way be prejudiced, the sensible course would have been to add the firm as a defender, and as new parties were being brought in to give them an opportunity of considering whether they would adopt the proof already led or not. The defence would almost inevitably have been the same as that already maintained by the partner actually called, and in the circumstances it would no doubt have been easy to persuade the defenders to adopt this course.

I do not think it necessary to say whether section 79 of the Sheriff Courts Act 1907 applies, for I think the Sheriff in an application of this kind has at least as much power as in an ordinary action, and can deal with procedure so as to meet the justice of the case. I think it is regrettable that the respondent should not have facilitated the correction of the technical error, and that the Sheriff should have felt bound to sustain his objection. I am satisfied that he could quite competently have done so, and that he ought to have given substantial effect to the motion made although not in the precise form proposed. I agree with Lord Johnston that it is not necessary to answer the question specifically, but that the case should be remitted to the Sheriff to add the name of the firm as a defender, and thereafter to proceed with the cause in common form.

LORD KINNEAR—I am of the same opinion. The objection sustained by the Sheriff-Substitute is too entirely technical to have any substantial bearing on a question under the Workmen's Compensation Act. The whole proceedings under that Act are to be summary; there is as little form as possible, and there is no record. In this case the question was whether a workman was to have his application thrown out because instead of calling the firm, who were in law his employers, he called as respondent Henry Wilson, who gave his name to the firm. We do not know whether Henry Wilson was the managing partner, or what share his copartners may have taken in the management. But we know that he was actually a partner; that he was supposed by the workman to be his employer; and that the only objection was that the firm should have been made respondents. The objection seems to have arisen for the first time on the evidence of Henry Wilson himself. Since the respondent thought fit to take that objection it might be right to sustain it unless it could be displaced by the workman's motion to call the firm at that stage of the process. But I think that this course was both competent and expedient in the interests of justice, and that the firm should be made a party.

I agree with both your Lordships that the exact method should not have been by substitution, because, until the respondent was in Court, the Court could not say that the first respondent should be let out. The proper course was to call the firm without in the meantime dismissing the case as against Wilson. But then I think there was no real question as to the amendment intended, and that all that was necessary was that the firm should be called as well as the partner who had been called already.

I agree with Lord Salvesen that it is not necessary for us to determine whether section 79 of the Sheriff Courts Act was applicable. If the Act is not applicable, I agree with both of my learned brethren that the Sheriff had power to effect the same result by his ordinary authority in these informal proceedings.

I agree that in any motion of this kind there is a question of discretion for the Sheriff to consider as to the fairness of the proposal at the stage which had been reached. But there is no room for a suggestion of prejudice in the present case. The firm should have had an opportunity for stating whether they would adopt the proof already led, and if they thought they had a reason for taking a different course the Sheriff would have considered it. The Sheriff should be instructed to amend the instance by introducing the name of the firm.

The LORD PRESIDENT was absent.

The Court found that it was competent for the Sheriff-Substitute as arbitrator to allow the firm of Henry Wilson & Sons to be added as respondents in the application, found it unnecessary to answer the question of law stated in the case, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to allow the motion to amend to be made in altered form, and to proceed as accords.

Counsel for the Appellant—Munro, K.C. —J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondent—MacRobert. Agents—Weir & Macgregor, S.S.C.