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Thursday, July 7.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

CUNNINGHAM v. M'NAUGHTON & SINCLAIR.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. II, 9—Recording of Verbal Agreement—Bar—Finding by Medical Referee mutually agreed upon that Workman has Recovered—Stoppage of Payment thereafter.

An injured workman received compensation under the Workmen's Compensation Act 1906 in virtue of an unrecorded agreement. The employers discontinued the weekly payments on the ground that the workman had recovered. A medical referee to whom the parties referred the question reported on 31st March 1909 that he was quite fit for his former duties or any ordinary work. On 12th August 1909 the workman lodged a memorandum of the agreement with the sheriff-clerk to be recorded, and the employers objected to the recording in respect of the medical report.

Held that the application for recording of the agreement was barred by the reference to the medical man and his award thereon, and that the memorandum ought not to be recorded.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—Review—Proof of Recovery—Question of Fact or Law—Appeal.

An injured workman received compensation under the Workmen's Compensation Act 1906 in virtue of an unrecorded agreement down to 25th March 1909, when his employers stopped payment on the ground that he had recovered. On 31st March 1909 a medical man to whom the parties had referred the question of the workman's recovery reported that he was quite fit for his former duties or any ordinary work. In an application by the employers for review, the arbitrator found in fact that the workman was fit to resume his former work, or to undertake any other form of labour conducted on the level of the ground; that in the meantime it would not be safe for him to climb ladders or steps (as his duties occasionally involved his doing), since from want of use, combined with the effect of the accident, his left leg was weaker than the right; that the best treatment for the left leg was the

immediate resumption of such work as the workman was capable of. On these findings the arbiter ended the compensation.

Held (following *Anderson v. Darnagail Coal Company Limited*, 1910 S.C. 456, 47 S.L.R. 342) that the question whether the workman had or had not recovered was a question of fact, and that the arbiter's finding could therefore not be interfered with.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), as applied to Scotland by section 13 and Schedule II., 17, enacts, Schedule II, 9—"Where the amount of compensation under this Act has been ascertained . . . by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] . . . by any party interested to the [sheriff-clerk], who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [recorded decree-arbitral]."

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Glasgow, between R. C. Cunningham and M'Naughton & Sinclair, printers, 29 Cadogan Street, Glasgow, the Sheriff-Substitute (BOYD) granted warrant to record a memorandum of agreement between the parties, lodged by Cunningham, and at the request of M'Naughton & Sinclair stated a case for appeal.

In another arbitration between the same parties, and heard on the same date, the Sheriff-Substitute ended the compensation payable under the agreement, and at the request of Cunningham stated a case for appeal.

The first Case set forth—"On 12th August 1909 the respondent Cunningham lodged with the Sheriff-Clerk of Lanarkshire at Glasgow a memorandum of agreement purporting to set forth an agreement between the respondent and the appellants, said memorandum being in the following terms:—"The claimant claimed compensation from the respondents in respect of personal injuries to his left leg, some of the muscles of which were lacerated and destroyed, caused by accident in the employment of the respondents at their business premises at 27 Cadogan Street, Glasgow, on the 26th day of May 1908.

"The question in dispute, which was the amount of the compensation to be paid by the respondents to the claimant, was determined by agreement.

"The agreement was made on or about the 2nd June 1908, and was as follows:—The claimant agreed to accept the sum of 14s. per week as compensation due to him by the respondents under the Workmen's Compensation Act 1906 during the period of his disablement by said accident, and the respondents agreed to pay the said sum of 14s. per week to the claimant during said period. The respondents have paid said sum of 14s. per week to the claimant down to the 26th day of March 1909.

“It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of Lanarkshire at Glasgow.”

“The appellants object to the recording of said memorandum on the ground that the respondent had been certified by a medical referee under the Act, mutually agreed upon, as being fit for work. In terms of paragraph 12 of the Act of Sederunt of 26th June 1907 the question between the parties falls to be settled by arbitration.

“The case was heard before me on the relevancy of the objections, and I assigned 2nd March 1910 as a diet for the trial of the cause. On 8th January 1910 the appellants presented an application craving the Court to grant an order finding that the respondent's right to compensation under said Act ceased on 31st March 1909, or on such subsequent date as to the Court might seem just; or alternatively, in the event of the appellants being unsuccessful in their crave, to grant such award of partial compensation as to the Court might seem just, and to find the respondent liable in expenses. Said application for review was called before me, and I assigned the same diet for the trial of that petition as had been assigned in the proceedings for the recording of said memorandum of agreement.”

In the second Case the following facts were found proved:—“(1) That the appellant (Cunningham) was a hoistman and electrician in the employment of the respondents. (2) That as hoistman his duties were to work the passenger hoist and keep the gear oiled, for which purpose he had to climb on the top of the hoist cage, a height of about eight feet. (3) That he had also to work the goods hoist when he had time. (4) That as electrician he had to look after eighteen motors and keep them clean and oiled, and he had only occasionally to execute repairs on pendent lights, which necessitated him ascending a pair of steps. The height of the lights was not proved. (5) That on 26th May 1908 appellant's left leg was caught by the ascending hoist, and he was drawn up for some little distance, and received a fall, in consequence of which his left leg was lacerated, and he was treated in the Infirmary. (6) That the appellant was paid compensation in respect of said accident at the rate of 14s. per week from the date of the accident till 26th March 1909. (7) That on 6th March 1909 the agents for parties by joint letter referred to Dr James H. Nicol the question whether the appellant had then recovered, and on 31st March 1909 Dr Nicol reported that the appellant was quite fit for his former duties or any ordinary work. (8) That on 12th August 1909 the appellant lodged a memorandum of agreement to be recorded, and on 8th January 1910 the respondents presented this petition for review. (9) That the appellant was at the date of said trial fit to resume his former work as hoistman, including the oiling of the gear from the top of the hoist, and that he was then fit to undertake any other form of labour which is conducted on the level of

the ground (10) That in the meantime it would not be entirely safe for him to climb ladders such as the steps referred to in repairing the pendent lights, as from want of use, combined with the effect of the accident, the appellant's left leg is weaker than the right. (11) That the best treatment for the appellant's left leg is the immediate resumption of work such as he is capable of.”

In the first Case the Sheriff-Substitute found that the memorandum was a genuine agreement between the parties, and granted warrant to record the same, and in the second he ended the compensation as at the date of his judgment (15th March 1910).

The questions for the opinion of the Court were, *inter alia*, in the first Case—“(2) Was the arbitrator right in granting warrant to the Sheriff-Clerk to record the memorandum of agreement lodged by the respondent on 12th August 1909, in respect that the respondent acquiesced in the stoppage of compensation on Dr Nicol reporting him fit for work on 31st March 1909?” and in the second Case—“(1) Was the arbitrator entitled to end compensation to the appellant?”

The cases were heard together.

Argued for M'Naughton & Sinclair—(1) The Sheriff was right in ending the compensation. The sole question there was whether the workman had recovered, and that was a pure question of fact, on which the Sheriff-Substitute was final—*Anderson v. Darrigavil Coal Company, Limited*, 1910 S.C. 456, 47 S.L.R. 342. (2) The memorandum ought not to have been recorded, because at the time it was lodged there was no agreement between the parties under which compensation was payable. The original agreement had come to an end when the parties agreed to refer the question of recovery to Dr Nicol and he reported that the workman had in point of fact recovered. That extinguished the original agreement just as effectively as a discharge by the workman; and it had been held that a discharge was a good answer to an application for recording—*Niddrie and Benhar Coal Co., Limited, v. Hanley*, July 6, 1910, 47 S.L.R. 726. Any claim therefore in respect of incapacity, other than supervening incapacity, was discharged by the agreement to refer to Dr Nicol and his report—*Field v. Longden & Sons*, [1902] 1 K.B. 47, *per* Collins, M.R., at p. 54. If there was supervening incapacity then the proper course was for the workman to proceed by arbitration—*King v. United Collieries, Limited*, 1910 S.C. 42, 47 S.L.R. 41; *Dempster v. Baird & Company, Limited*, 1908, S.C. 722, 45 S.L.R. 432. The reference to Dr Nicol, even if it could be regarded as a statutory reference to a medical referee instead of a private agreement between the parties, would not bar arbitration—*Strannigan v. Baird & Company, Limited*, June 7, 1904, 6 F. 784, 41 S.L.R. 609. Arbitration was of course competent only if the amount of compensation had not been fixed by agreement—*Workmen's Compensation Act 1906* (6 Edw. VII, cap. 58), section 1 (3); *Dunlop v.*

Rankin & Blackmore, November 27, 1901, 4 F. 203, 39 S.L.R. 146; *Colville & Sons, Limited, v. Tigue*, December 6, 1905, 8 F. 179, 43 S.L.R. 129. There was no such agreement here, because it had been extinguished by the agreement to refer to Dr Nicol.

Argued for Cunningham—(1) The *onus* of proof of the workman's recovery lay on the employer—*M'Callum v. Quinn*, 1909 S.C. 227, 46 S.L.R. 141. The certificate was not conclusive evidence—*King v. United Collieries, Limited, cit.*—and the proof had not established recovery. The Sheriff's findings were not consistent with complete recovery. He was therefore wrong in ending the compensation. (2) The agreement still subsisted, and there was therefore no answer to the application for warrant to record. The reference to Dr Nicol did not end the agreement, and even if there had been recovery, that was not a good answer to the application for recording—*Cammick v. Glasgow Iron and Steel Company, Limited*, November 26, 1901, 4 F. 198, 39 S.L.R. 138.

LORD DUNDAS—We have heard argument upon two Stated Cases arising under the Workmen's Compensation Act 1906, which were heard together, because the parties in both are the same and the questions raised relate to the same accident. It appears that a workman, Cunningham, was in the service of the employers, M'Naughton & Sinclair (who are described as printers and stationers in Glasgow), as hoistman and electrician, with certain duties which we have described in one of the Cases. The principal dates in the matter are these. On 26th May 1908 the workman met with an accident in the course of his employment. Then, after that, compensation was by agreement paid to him at the rate of 14s. per week—being, as I understand, on the footing of total incapacity—down to 25th March 1909, when it ceased. On 31st March 1909 a report was returned by Dr Nicol, to whom, on 6th March previously, the agents for parties had addressed a joint letter referring the question whether the workman had then recovered. Then on 12th August 1909 the workman presented an application to have a memorandum of agreement recorded; and on 8th January 1910 the employers lodged an application to have the compensation ended or diminished.

In the application for review, the Sheriff-Substitute, as arbitrator, heard proof, and has ended the compensation, and the question raised in the case in which the workman is the appellant is whether the Sheriff-Substitute was entitled to end the compensation. We have the facts found for us in the case, and they begin by describing the duties of this hoistman when he was at work. I need not read them in detail. They included apparently the occasional duty of going up steps or ladders. Then the accident is described, which seems to have been a painful one to the appellant's leg. Then the payment of compensation, as above narrated, is set forth; and then it is

stated that a joint reference was made by the parties to Dr Nicol, and that his report was that at its date, 31st March 1909, the appellant was quite fit for his former duties or any ordinary work. Passing on, we come to three findings, 9, 10, and 11, which I shall read. The 9th finding is—“That the appellant was at the date of said trial fit to resume his former work as hoistman, including the oiling of the gear from the top of the hoist, and that he was then fit to undertake any other form of labour which is conducted on the level of the ground;” the 10th is—“That in the meantime it would not be entirely safe for him to climb ladders such as the steps referred to in repairing the pendent lights, as from want of use, combined with the effect of the accident, the appellant's left leg is weaker than the right;” and the 11th finding is—“That the best treatment for the appellant's left leg is the immediate resumption of work such as he is capable of.” Mr Ingram contended vigorously that from these findings it was obvious that the man had not completely recovered; and accordingly he said that the Sheriff-Substitute had no business to end the compensation as he did. Whether or not the Sheriff-Substitute decided rightly upon the evidence before him, I do not think it is for us to affirm; for it seems to me that this is just one of those cases, which occur from time to time under this Act, where what is put to us as a question of law is truly a question of fact. I think the case has a strong general similarity to, although it is not identical with, a recent decision of the First Division—*Anderson v. Darnagavil Coal Company, Limited* (1910 S.C. 456). That case had relation to the injured knee of a workman. A report by a medical referee had been obtained, and the Sheriff-Substitute gave his views, construing the report and coming to certain conclusions which he found as facts. The question put in the stated case was—“In the circumstances above stated, was the Sheriff entitled to end the compensation payable to the appellant?” The Lord President in his opinion said—I concurred in it then, and I apply it now—that “The question as stated here is, whether in the circumstances the Sheriff was entitled to end the compensation payable to the appellant upon the ground that he had recovered. This is absolutely a question of fact and nothing else, and it is impossible, I think, to do as was attempted to be done in the argument, to put before us the report of the medical referee which the Sheriff had got, and then to argue upon that report and say that it led to another conclusion. The report was there, and other matters were there before him, and the whole thing was to determine whether the man had recovered or not. I think the question is one of pure fact, and although it is really improperly stated, for practical purposes I think it may be answered in the affirmative.” Therefore in the case in which the employee is the appellant I think we should not interfere with the result of the arbitrator's decision. The questions are

not well stated, but probably it would be sufficient to answer the first question in the affirmative, as was done in the *Darn-gavil* case.

The other case arises out of an application by the workman to have a memorandum of agreement recorded, and the terms of the memorandum are set forth in the Case. Now I am bound to say that this Case is very unfortunately framed, because from beginning to end it contains no single finding of fact. But the two cases are so intimately connected—they are between the same parties, arose out of the same accident, and were conducted together and decided on the same day—that I have no doubt we are entitled to look at the facts which are found in the one Case as applicable to the other Case so far as necessary. Therefore I take it that we may safely import into the case I am now dealing with the 7th finding of fact in the other case with regard to this joint reference to Dr Nicol and his report thereupon. It was argued to us by Mr Anderson in this case, on behalf of the employers (appellants), that the effect of the parties having voluntarily agreed to refer to Dr Nicol the question whether the workman had recovered from his injury, and of Dr Nicol's report, already stated, was really to supersede and put an end to the agreement which it is now sought to record. Although the Case is not well stated, I think if we take it upon the footing I have indicated there is enough to warrant us in accepting that argument. We were informed that the First Division decided a case yesterday—*The Niddrie Coal Company v. Hanley*—which appears to have a bearing on this point. I understand that it was there held that, in reply to a workman's application to have a memorandum recorded, it was relevant for the employers to allege a discharge by him of prior date of his claims in respect of the accident, and a remit was made to the arbiter to inquire into the matter. If a discharge by a workman is a good answer to his request for the recording of a memorandum, it would seem that an award adverse to the workman, by a referee to whom the parties have voluntarily referred the decision in fact as to his recovery, would equally bar his application for registration; and in the present case there is no need for further inquiry into the facts, for we have them found for us in the Stated Case. I have therefore come to the conclusion in this case that the employers are entitled to succeed. Here, again, the questions are not very well framed, but in the result we shall find that the memorandum ought not to be recorded.

The LORD JUSTICE-CLERK and LORD MACKENZIE concurred.

LORD LOW was absent.

LORD ARDWALL was taking a proof.

The Court answered the second question in the first Case in the negative, and the first question in the second Case in the affirmative.

Counsel for Cunningham — Ingram.
Agent—C. Strachan Petrie, Solicitor.

Counsel for McNaughton & Sinclair —
Anderson, K.C.—J. A. Christie. Agents—
St Clair Swanson & Manson, W.S.

Saturday, July 16.

SECOND DIVISION.

[Sheriff Court at Ayr.]

CADENHEAD v. AILSA SHIP-BUILDING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (3) and First Schedule, sec. 12—Super-vening Incapacity—Agreement to Pay Compensation Ended by Sheriff on Recovery of Capacity—Application for Compensation of New—Competency.

A workman having been injured, his employers agreed to pay him compensation under the Workmen's Compensation Act 1897. A memorandum of the agreement was duly recorded. The employers afterwards applied to the Sheriff as arbiter to have the weekly payments reviewed in respect the workman had recovered. The Sheriff after proof found that the incapacity had ceased, and ended the compensation. The workman thereafter made application to the Sheriff for compensation under the Act, on the ground that supervening incapacity had arisen, caused through the injury sustained by him.

Held that as the Sheriff had already found that incapacity had ceased and had terminated the weekly payments, the application for an award of compensation of new was incompetent.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), enacts—First Schedule, sec. (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.”

James Cadenhead, caulker, 20 West Portland Street, Troon, *appellant*, and the Ailsa Shipbuilding Company, Limited, *respondents*, brought this Stated Case under the Workmen's Compensation Act 1897 from the Sheriff Court at Ayr.

The Case, stated by the Sheriff-Substitute (SHAIRP), set forth the following facts:—“In this arbitration the appellant, who on 8th September 1906 sustained personal injury by accident while in the respondents' employment, presented an application under section 1, sub-section 3, of the said Workmen's Compensation Act 1897, for compensation, in terms of said Act, from the respondents at the rate of 18s. 4d. per week as from and after 3rd September 1908. The personal injury to the appellant before referred to was a wound on the anterior surface of his right forearm, which was struck by a piece of iron or steel rivet. The injury incapacitated the appellant from