

natural result of pulling off the nose-bag, and I prefer to judge of what the horse might be expected to do from the evidence of those accustomed to deal with it. The evidence of Mathieson, who knew the horse well, is entirely to the opposite effect, for he says it was not in the habit of backing when the nose-bag was being removed. Sutherland says he first lifted and then pulled the nose-bag off. This is not contradicted. I think the evidence comes to this, that while Sutherland was removing the nose-bag in a proper manner the horse unexpectedly stepped back, and that accordingly there was no failure of duty on his part. I think that this was just an unfortunate accident due to unforeseen circumstances for which the defenders cannot be made responsible.

LORD JOHNSTON was sitting in the Valuation Appeal Court.

The Court pronounced this interlocutor—

“Recal the interlocutor of the Sheriff, dated 13th May 1911: Affirm the interlocutor of the Sheriff-Substitute, dated 21st March 1911; repeat the findings in fact and in law contained therein: Of new assolizies the defenders from the conclusions of the action, and decern.”

Counsel for Pursuer (Respondent)—Constable, K.C.—Mercer. Agent—R. S. Carmichael, S.S.C.

Counsel for Defenders (Appellants)—Munro, K.C.—T. G. Robertson. Agent—James Ayton, S.S.C.

Saturday, December 16.

## FIRST DIVISION.

[Sheriff Court at Glasgow.]

M'LEAN v. THE ALLAN LINE STEAMSHIP COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), Second Schedule (9)—Memorandum of Agreement—Application by Workman to Record Agreement Differing from that in fact Made—Power of Sheriff to Refuse to Record.*

The employers of an injured workman agreed to pay him compensation during total incapacity, the agreement providing, *inter alia*, “the amount of any payment due during partial disablement to be settled hereafter.” The workman sent for recording a memorandum providing that the compensation was to continue “during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act.” The employers having objected on the ground that the form proposed to be recorded contained terms to which they had not agreed,

the Sheriff-Substitute refused to record.

*Held* that the Sheriff-Substitute had rightly refused to record the memorandum tendered in respect that it did not in fact correctly set out the agreement made between the parties.

This was an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), at the instance of Angus M'Lean, seaman, 110 Houston Street, Glasgow, in which he sought to have recorded a document purporting to be a memorandum of an agreement come to between him and his employers, the Allan Line Steamship Company, Limited. The Sheriff-Substitute (FYFE) having refused the application, a Case for appeal was stated.

The facts were—“(1) The appellant, whilst in the respondents' employment as a seaman on board their s.s. ‘Hibernian,’ on 7th March 1911, sustained injury by accident arising out of and in the course of his employment, and he was thereby totally incapacitated from following his occupation.

“(2) The amount of compensation payable to appellant under the Workmen's Compensation Act was agreed upon at 13s. 9d. per week, and that is still being paid.

“(3) On 17th August the appellant signed a stamped document in the following terms:—“*First Payment.*

“Received this 17th day of August 1911 from The Shipping Federation, Limited, on behalf of the owners of the s.s. ‘Hibernian,’ the sum of Two pounds one shilling and threepence, being weekly compensation at the rate of 13s. 9d. per week from 25/7/11 to 15/8/11 inclusive, under the Workmen's Compensation Act 1906, under which Act I elect to claim for personal injury by accident sustained by me on or about the 7th day of March 1911. This weekly payment is to be continued during my total disablement resulting from the accident, in accordance with the provisions of the above-mentioned Act—the amount of any payment due during partial disablement to be settled hereafter. (Signed) Angus M'Lean, seaman, 110 Houston Street, Glasgow. (Witness) J. A. Ditchburn. Stamp sixpence.”

“(4) On 21st August 1911 the appellant lodged with the Sheriff-Clerk a memorandum to be recorded in terms of the Workmen's Compensation Act, in the following terms:—“The claimant claimed compensation from the respondents in respect of personal injuries sustained by him on 7th March 1911 while in the employment of the respondents, and on board s.s. ‘Hibernian,’ at Greenock, the claimant having sustained dislocation of the right shoulder and having been totally incapacitated from following his occupation from said date in consequence.

“The question in dispute, which was as to the amount of compensation payable to the claimant, was determined by agreement.

“The agreement was made on the six-

teenth day of August 1911, and was as follows, viz.—That the respondents should pay compensation to the claimant from the date of the accident at the rate of thirteen shillings and ninepence sterling per week, to continue during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed, in accordance with the provisions of the said Act.

"(5) The Sheriff-Clerk, in terms of section 11 (1) of the Act of Sederunt of 26th June 1907, on said 21st August 1911 sent a copy of said memorandum of agreement in a registered letter to the respondents, containing a request that he might be informed on or before 28th August 1911 whether the memorandum and agreement set forth therein were genuine or were objected to. On 23rd August 1911 The Shipping Federation, Limited, on behalf of the respondents, sent to the said Sheriff-Clerk a letter objecting to said memorandum being recorded, on the ground that it did not accurately set forth the agreement made with the appellant. The Sheriff-Clerk thereupon intimated to the appellant that the recording of the memorandum had been objected to, and that the same would not be recorded without a special warrant from the Sheriff. In terms of section 12 of said Act of Sederunt, the memorandum thereupon fell to be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the objection to the recording of the memorandum."

The Sheriff-Substitute further stated—"On 11th October 1911, after having heard parties' procurators, I found that on the 17th August 1911, the document above referred to had been signed by the appellant Angus M'Lean, and that that document constituted a formal agreement between the appellant and the respondents, expressed in terms different to those set forth in the memorandum sought to be recorded.

"I therefore found that said application to record a memorandum of agreement was unnecessary and incompetent, and I dismissed the application and found no expenses due to or by either party."

The question of law was—"Did the fact that on 17th August 1911 the appellant had signed the said document render his application to record an alleged agreement of 16th August in different terms incompetent?"

Argued for appellant—The memorandum should have been recorded as tendered. The obligation in the two documents (apart from the error as to the date, which the appellant was prepared to rectify) was identical. It would be no advantage to the respondents to have the agreement recorded in the form as signed, for in neither case would he be able to suspend, the only competent process of review being an application to vary—*Lochgelly Iron and Coal Company, Limited v. Sinclair*, 1909 S.C. 922, 46 S.L.R. 665; *Finnie & Son v. Fullon*, 1909 S.C. 938, 46 S.L.R. 665, at p. 672.

Argued for respondents—The Sheriff-Substitute was right, for he had no power to record any agreement other than that come to between the parties—*Shore v. Owners of s.s. "Hyrcania,"* (1911) 4 Butterworth's Compensation Cases, 207; *Lunt v. Sutton Heath and Lea Green Collieries, Limited*, (1911) 4 Butterworth's Compensation Cases, 219. There was a material difference (apart from the error as to the date) between the words in the agreement and those proposed to be recorded, for in the former case the respondents would on the cessation of total incapacity be entitled to suspend, whereas in the latter case they would not, but would have to go on paying till an application had been made for review—*Wilson and Clyde Coal Company, Limited v. Cairnduff*, 1911 S.C. 647, 48 S.L.R. 500. *Ergo* that the judgment in an application to vary was retrospective, that would not benefit the respondents, for they would not be able to recover what they had paid. That being so, they desired to be in a position to suspend the moment total incapacity had ceased, and that they submitted they could do were the agreement recorded in the form in which it was signed.

LORD PRESIDENT—This stated case conceals in an extraordinary manner the real point which was argued before your Lordships, but as the matter is now clearly before the Court I do not think that it is necessary to send the case back.

The matter arises in this way. The appellant, who is a seaman, met with an accident on board the ship "Hibernian," belonging to the respondents. He does not seem to have been paid compensation at first because, I suppose, he was on board the ship and got his wages, and nothing more was necessary. But on 17th August 1911—that is to say, about five months after the accident—he signed an agreement in these terms—" . . . [quotes v. sup.] . . ."

Thereafter, on 21st August 1911, he lodged a memorandum to be recorded in terms of the Act, which began by simply setting forth that he had claimed compensation in respect of personal injuries sustained by him; and then it went on to say that the amount of compensation was determined by agreement, and proceeded—"The agreement was made on the 16th day of August 1911 and was as follows, viz.—That the respondents should pay compensation to the claimant from the date of the accident at the rate of thirteen shillings and ninepence sterling per week, to continue during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed, in accordance with the provisions of the said Act." Now that agreement the Sheriff refused to record, and the present appeal is as to whether he was bound to record it. In the discussion before your Lordships the appellant admitted that the words "from the date of the accident" were a slip, and he is quite willing to alter them by putting in "from 25th July 1911," and if that were the only matter the respondents would not, as I understand, object.

But the real point of discussion between them lies in the words that are put in the agreement as to payment to be continued during total disablement. I ought to say, first of all, that although the so-called agreement is a document unilateral in its terms, it is not disputed by the respondents that it constitutes an agreement—that is to say, that it was accepted by them as such. Now the real dispute is upon the words that occur after the provision as to payment during total disablement, namely, the words “the amount of any payment due during partial disablement to be settled hereafter.” In the document as signed the words are as I have read them, whereas in the memorandum as proposed to be recorded those words are replaced by the words “or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act.” Now the appellant maintains that those words in the memorandum are really simply a more accurate and proper way of expressing what the words in the written agreement bore. The respondents, on the other hand, say No, and in particular maintain that it will make an important practical difference to them, because they say that the result of recording the memorandum as proposed will be that if the seaman partially recovers they will be bound to pay if charged until they can get the payment reviewed in a process of review, and that, albeit that eventually decree in that process of review will draw back to the term of presenting the petition, yet nevertheless they may find themselves in this unpleasant position, that during the time the case has taken to decide they have had to pay the full sum, and that sum they will never get back; whereas if the agreement was recorded in the precise terms in which it was written they could not be charged to pay during the period after they had alleged that total incapacity had ceased, or rather, to put it more accurately, that if a charge were presented against them they would be able to suspend it, and therefore would not be in the position of having to pay the money that they eventually would not be able to get back.

Now I do not think, although we have had a discussion on the question, that we need decide at present whether the one set of words is exactly the same as the other or is not. The only thing we can decide to-day is, what is the Sheriff's duty when a memorandum is produced to him for the purpose of being recorded and the genuineness of it is disputed? Now with regard to this matter the Sheriff is not really acting as arbiter at all; he is acting in a semi-ministerial capacity. I say a semi-ministerial capacity, because he has to decide upon the matter of genuineness if that is controverted, and he has to exercise a judicial function in deciding that. But I think it would never do if we said that in the case of written agreements being tendered it was open to the Sheriff, who is really only acting here for the sheriff-clerk, to consider as a question of construction whether the thing to be recorded was or

was not the same as the thing which had originally been signed. In other words, I think it comes to this, that where an agreement which has been come to between the parties is admittedly in writing, the Sheriff must record that agreement as it stands and nothing else. It is otherwise if the agreement has been come to verbally and is then disputed. The Sheriff has in that case to decide what the true verbal agreement was on a proof; but where the agreement is professedly in writing, I think his duty begins and ends in recording that agreement and that agreement only, and accordingly in this case I think the Sheriff rightly refused to record the memorandum as proffered. Therefore I think that in order to avoid further procedure, as it is stated at the bar that the appellant is now content to have the agreement recorded in the exact words in which it was signed, we should find that the Sheriff-Substitute was right in refusing to record the memorandum proffered, and remit the case to him to proceed with the recording of the memorandum in the words of the document signed upon the 17th August 1911.

LORD KINNEAR—I quite agree with your Lordship. I think that the sheriff-clerk under the direction of the Sheriff has an administrative duty imposed upon him to record a memorandum of an agreement actually made between the workman and the employers, and if there be a question as to the genuineness of that agreement his functions are confined to the determination of that particular point subject to certain other questions for which the statute provides. But the question of the true legal construction and effect of an agreement proposed to him is not one of the questions he is authorised to decide. He has no jurisdiction to decide that, but only to say whether he is satisfied that it is, in point of fact, an agreement between the parties.

Now the agreement which he was asked to record is in certain terms, and its genuineness depends upon the conformity of these terms with a written document in the shape of a receipt signed by the workman and accepted by the employer, which purports to set forth what the parties have agreed upon, and which accordingly is produced as the basis on which the application is made. Either party is quite entitled to say that, in so far as it departs from the express terms of this document, the agreement proposed is not what he has consented to. It either expresses what both parties have agreed to, or it does not; and unless the objection to its terms is merely frivolous it seems to me perfectly obvious that one party can have no right to insist against the opposition of the other on the registration of a document which undeniably varies from the actual terms agreed upon. The variation may or may not be material. But the parties are at variance as to the true meaning and effect of certain words of the document, and I do not think that the sheriff-clerk or Sheriff has power to deter-

mine that question or to do anything but the exact ministerial act which the sheriff-clerk is appointed to perform.

I agree with your Lordship, therefore, that the appellant is not entitled to have the memorandum which he proposes recorded, because it is not the exact agreement which was made between the parties.

LORD MACKENZIE — I agree with your Lordships. I do not think it was part of the duty of the Sheriff in this case first of all to construe the written document, and then, after arriving at an opinion as to the true meaning of that document according to his view, to record a memorandum of agreement giving effect to that construction. I think his duty, and his only duty, was to record the memorandum of agreement in terms in which it was agreed to by the parties.

LORD JOHNSTON was sitting in the Valuation Appeal Court.

The Court pronounced this interlocutor—

“Find that the Sheriff-Substitute was right in refusing to record the memorandum of agreement lodged in the application by the appellant: Find it unnecessary to answer the question of law as stated in the case: Further, in respect that the appellant now states at the bar that he desires to have the printed agreement signed by him on 17th August 1911 recorded as an agreement under the Workmen's Compensation Act 1906, recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit to him to proceed as accords, and decern.”

Counsel for Appellant—Crabb Watt, K. C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Respondents—Horne, K. C.—Carmont. Agents—J. & J. Ross, W.S.

Thursday, November 30.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

WRIGHT v. LINDSAY AND OTHERS.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 6—Right of Workman to Take Proceedings both against Third Party and Employer—Receipt of Compensation by Workman under Reservation of Claims against Third Parties—Competency of Action of Damages against Third Party.*

The Workmen's Compensation Act 1906 enacts, sec. 6—“Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) The workman may take proceedings both against that person to recover

damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation.”

A workman having been injured by collision with a motor car, received from his employers compensation, which he accepted under reservation of claims against third parties, and on the understanding that he would make repayment if he recovered damages. He thereafter brought an action of damages against the owners of the car.

Held that he had not “recovered” compensation in the sense of the Act, and was entitled to maintain such action of damages.

Robert B. Wright, Dalmuir, *pursuer*, brought an action of damages for personal injuries in the Sheriff Court at Glasgow against J. S. Lindsay and others, motor car hirers there, *defenders*.

The following narrative, taken from the opinion of Lord Salvesen, gives the facts of the case.—“This case raises an important question under the Workmen's Compensation Act 1906, which, as it has a general application, deserves careful consideration. The pursuer was injured by a collision with a motor car which belonged to the defenders. He was at the time employed as a night watchman with the firm of J. & H. Williamson. Both the Sheriffs have found that the injuries which the pursuer received were due to the fault of the person in charge of the motor car, for whom the defenders are responsible; and if the case had stopped there the Sheriff-Substitute would as a matter of course have assessed the damages to which he considered the pursuer entitled. The defenders, however, pleaded that the pursuer had already received compensation from his employers, and that his right to recover damages against them is barred by section 6 of the Act. The only findings in fact with regard to this matter are as follows—‘Finds that after the accident the pursuer claimed and received compensation from his employers under the Workmen's Compensation Act for the period from 6th July 1909 to 16th November 1909, amounting to £11, 7s. 5d., and granted receipts therefor: Finds that this compensation was received by the pursuer under reservation of his claims against third parties, conform to the receipt No. 15/1 of process.’ The Sheriff has, however, supplemented these findings in his opinion by saying that the payments made by the employers' agent were so made ‘on the footing that the pursuer was to recover from the party in fault,’ and that ‘it was understood that under the Act the pursuer would have to pay them back if he recovered anything from the party in fault.’ These findings were not seriously challenged.”

The terms of the receipt granted by the pursuer are set forth in the Sheriff's note, *infra*.

On 19th May 1910 the Sheriff-Substitute (BALFOUR) pronounced this interlocutor—“... Finds that after the accident the pursuer claimed and received compensation