Counsel for the Appellants (Defenders)—Morison, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent (Pursuer)—Constable, K.C.—Gilchrist. Agent—D. C. Oliver, Solicitor.

Friday, June 6.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BABCOCK & WILCOX, LIMITED *v.* PEARSON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (9)—*Memorandum of Agreement—Recording of Agreement in Terms not Coinciding with what Arbitrator Found to be the Agreement.*

Held (1) that a workman's own evidence and the terms of a series of receipts were sufficient to entitle an arbitrator to find it proved that his employers agreed to pay him 15s. 1d. per week in terms of the Workmen's Compensation Act 1906, being 50 per cent. of his average weekly earnings, the payments to begin as from a certain date, and (2) that such a finding entitled the workman to record a memorandum that his employers agreed to pay compensation under the Act at the rate of 15s. 1d. per week, being 50 per cent. of his average weekly earnings, beginning the payment as from said date, and "continuing the payment thereof until the same is ended, diminished, redeemed, or suspended in terms of the above-mentioned Act."

James Pearson, engine-driver, Glasgow, *respondent*, applied in the Sheriff Court at Glasgow for warrant to record a memorandum of agreement, under paragraph (9) of the Second Schedule to the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), with his employers, Messrs Babcock & Wilcox, Limited, engineers, Glasgow, *appellants*.

The Sheriff-Substitute (GLEGG) granted warrant to record the memorandum, and at the request of the employers stated a Case for appeal.

The Case stated—"The Sheriff was asked to grant warrant to the sheriff-clerk to record in the Special Register kept at Glasgow in terms of said Act a memorandum purporting to set forth an agreement between the respondent and the appellants, said memorandum being in the following terms, viz.—'The claimant claimed compensation from the respondents in respect of personal injuries to his right hand and wrist, caused by accident in the employment of the respondents at their works at Renfrew on the 28th day of February 1912. The question in dispute, which was the amount of compensation, was determined by agreement. The agreement was made on the 17th day of June 1912, and was as follows:—The respondents agreed to pay to the claimant compensation under the Workmen's Compensation Act 1906 at the rate of 15s. 1d. sterling per week, being 50 per cent. of his average weekly earnings, beginning the first payment as at the 6th day of March 1912, and continuing the payment thereof until the same is ended, diminished, redeemed, or suspended in terms of the above-mentioned Act. It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of Lanarkshire at Glasgow.'

"On said memorandum being intimated to the appellants they lodged a minute of objections in the following terms, viz.—'The said Babcock & Wilcox, Limited, object to the recording of the said memorandum of alleged agreement on the ground that the memorandum is not genuine, the respondents not having made the agreement set forth in the memorandum. The claimant met with the accident as averred, and has been paid compensation since the date of the accident under the Workmen's Compensation Act 1906 at the rate of 15s. 1d. per week. No agreement, however, was made for payment of compensation except an agreement to make the weekly payments which the claimant actually received, and in particular no agreement was made to continue payments of compensation until the same should be ended, diminished, redeemed, or suspended in terms of the Workmen's Compensation Act 1906.'

"Proof was led before me on this date, the only evidence in the case being that of respondent himself, and the receipts hereafter referred to which were recovered under diligence, when the following *facts* were established:—(1) The respondent, aged forty-three, sustained severe injury to his right hand and wrist on 28th February 1912. (2) On 17th June 1912 respondent called for compensation, which was agreed upon at the rate of 15s. 1d. per week, and on 18th June 1912 he signed a receipt for payments down to that date in the following terms, viz.—'Received this 18th day of June 1912, from Babcock & Wilcox, Limited, the sum of £11, 13s. 10d., being weekly compensation to date 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 28th day of February 1912.

'*Signature.*—JAMES His X Mark PEARSON.

'*Occupation*—Engine Driver.

1d. STAMP

'*Address.*—6 Cavendish Street, Glasgow.

'(Signed) H. MACKINTOSH, *1st Witness.*

,, J. H. ROGER, *2nd Witness.*

'*Weekly.*'

"And on the following subsequent dates, viz.—29th July, 19th August, 2nd, 9th, 16th, and 23rd September, 8th, 14th, 21st, and 28th October, 4th, 11th, 18th, and 25th November, and 2nd, 10th, 16th, and 23rd December, all 1912, and 6th, 13th, and 20th January 1913—he signed receipts, the terms of said receipts being similar to those in

the receipt granted on 18th June 1912. (3) On the occasion of the signing of the first receipt he was told to return the following Monday for the next payment of compensation, and on each subsequent occasion down to 20th January aforesaid he was invited impliedly, if not explicitly, to return the following Monday. Nothing more was said. (4) On 20th January 1913 it was intimated to him that compensation was to be stopped, but no reason was assigned.

"I found it proved that on 17th June 1912 it was agreed between respondent and appellants that respondent should be paid 15s. 1d. per week in terms of the Workmen's Compensation Act 1906, the 15s. 1d. being 50 per cent. of the respondent's average weekly earnings, and the payments to begin on 6th March 1912.

"I found in law that the terms of said agreement entitle respondent to record a memorandum in the terms craved.

"I therefore granted warrant to record accordingly, and found respondent entitled to expenses."

The *questions of law* for the opinion of the Court were—"1. Whether there was evidence upon which the arbitrator was entitled to find it proved that on 17th June 1912 it was agreed between the parties that the respondent should be paid 15s. 1d. per week in terms of the Workmen's Compensation Act 1906? 2. If the foregoing question is answered in the affirmative, whether the terms of such agreement entitle the respondent to obtain warrant to record a memorandum in the terms craved?"

Argued for the appellants—The Sheriff's finding as to what the agreement was did not coincide with the agreement which he had found the claimants entitled to record. He had inserted into the agreement a clause dealing with duration. Where terms of an agreement were ascertained the agreement must be recorded as it stood, and the Sheriff was not entitled to record his interpretation of the agreement—*M'Lean* v. *Allan Line Steamship Company, Limited*, 1912 S.C. 256, 49 S.L.R. 207—and an agreement to pay during total incapacity had been held not to entitle a workman to record a memorandum providing for payments "until the same shall be ended, diminished, or increased by order of the Court or by agreement between the parties"—*Shore* v. *Owners of s.s. "Hyrcania,"* 1911, 4 But. W.C.C. 207. An agreement on any one of the three matters—liability, amount, and duration—was an agreement "in terms of" the Act. Here liability and amount were fixed, and it did not follow that the terms of the Act were to apply to duration. *Summerlee Iron Company, Limited* v. *Freeland*, [1913], A.C. 221, 49 S.L.R. 518, did not decide that an agreement which did not deal with duration could not be registered, but only that the workman was entitled to go to arbitration on the question of duration. There was no evidence to support an agreement in the terms allowed by the Sheriff. The mere fact of payment of compensation did not necessarily imply an agreement to pay in the future, and still less when full incapacity had ceased—*Phillips* v. *Vickers, Sons, & Maxim*, [1912], 1 K.B. 16; *Hartshorne* v. *Coppice Colliery Company*, 5 But. W.C.C. 358, Cozens, M.R., at p. 361.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—[*After narrating the facts*]—The first question that arises upon this appeal is whether upon the evidence before him the arbiter was entitled to come to that finding. I think he clearly was. I think that, quite apart from the evidence of the respondent, who no doubt swore to the fact of that being the agreement, the very terms of the receipt, which were of course chosen by the employer and not by the workman, show perfectly clearly that the agreement was to pay weekly compensation under the Workmen's Compensation Act at a certain rate—"weekly compensation under the Workmen's Compensation Act and in terms thereof."

The next step the Sheriff took was that having come to that finding he allowed the memorandum as produced to be recorded. The employers say that that is wrong because the memorandum as recorded is not an absolute echo of the agreement as found proved by the Sheriff, and they especially rely upon the case of *M'Lean* v. *Allan Line Steamship Company, Limited*, which was decided in this Division. In *M'Lean's* case we decided that where parties had come to an agreement in writing, and then a memorandum of agreement was tendered, it was not part of the duty of the Sheriff to interpret the writing in any way at that stage, that his action then was a purely ministerial one, and that the only way in which he could discharge that ministerial duty was to put the writing upon the register as he found it, that is to say, if neither party objected to the writing being put on. But in the judgment which I pronounced there I carefully saved the case where there was no written agreement between the parties, because I say this—"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 on a proof what the true verbal agreement was."

To prevent misunderstanding, let me say one word about my use of the word "must"—"the Sheriff *must* record that agreement as it stands and nothing else." There was no objection by either party in *M'Lean* to the agreement being recorded in some shape or other, and the word "must," as used by me, must be understood *secundum subjectam materiem*. I did not decide in that case anything contrary to the House of Lords case of the *Summerlee Iron Company*. If I did, of course I should have been deciding wrongly.

I quite understand the *Summerlee Iron Company* to have decided this — that if the memorandum which the employer proposes to have recorded does not deal with the whole of the three points with which the Act deals, namely, the fact of liability, the amount to be paid, and the duration of liability to be fixed as the Act chooses to fix it under the procedure therein provided, if the memorandum tendered by the employer falls short in dealing with all those three points the workman is entitled to say—"That memorandum is not good enough for me; I am entitled to go to arbitration."

But coming back now to the present case, it seems to me that the only question is whether the memorandum, as the Sheriff has ordered it to be recorded, is truly in any sense different from the agreement as he finds it proved. Now I think it is absolutely the same. It is not absolutely textually the same, because there are one or two words that are different. But I think myself that the words "continuing the payment thereof until the same is ended, diminished, redeemed, or suspended in terms of the above-mentioned Act" is merely an expansion of the words "in terms of the Workmen's Compensation Act."

The learned counsel for the appellants here, who I must say argued his case remarkably well, argued that inasmuch as there was the possibility of coming to an agreement upon less than the whole three points under the Act, therefore an agreement in terms of the Act might be an agreement which did not deal with the whole terms of the Act. I do not think it is necessary to decide the question whether an agreement which deals with less than the three terms of the Act forms a proper subject for a memorandum which may be recorded. I do not think that the question is one of practical importance. I have already said that the House of Lords has determined that if one of the parties objects to such a truncated memorandum he is entitled to do so. But of course that is not the same proposition as to say that if both parties are agreed to put upon the record what I am calling a truncated memorandum they may not do so. I do not think it is necessary to decide that. Let us suppose that they may; you have still got to find out what is the agreement between the parties. It seems to me that when the employers say "We agree to pay so much a week in terms of the Workmen's Compensation Act," they necessarily say "We agree to pay in terms of the whole provisions of the Workmen's Compensation Act."

I ventured to put an illustration in the course of the argument which I think was quite sound. Suppose a landlord and tenant entered into a lease. They may say "This lease is subject to the estate conditions which are authenticated in a certain way." If they say that, it will certainly import the whole estate conditions. There would be nothing wrong in their saying, if they chose, "This lease is subject to estate conditions 1, 5, and 12," and, in that case 1, 5, and 12 would be binding, and the others would not. So, for the moment, I will assume that there could be a perfectly good memorandum of agreement which imported an agreement upon less than the whole three points in the Act. But if nothing is said which cuts out certain portions, I think it is very clear indeed that "an agreement in terms of the Act" means an agreement in all the terms of the Act.

And accordingly, when the Sheriff allowed the memorandum to be recorded with the words I have read in it, though the words were in one sense mere surplusage, and did not add anything, to my mind the memorandum as recorded truly expressed the precise agreement which the Sheriff had already found proved.

Upon the whole matter, therefore, I am of opinion that the questions ought to be answered in the affirmative.

LORD KINNEAR—I entirely agree with your Lordship. I think that an affirmative answer to the first question put by the learned Sheriff for the opinion of the Court concludes the whole matter. The Sheriff had to consider whether an agreement had been made in terms of the Act which could be put upon the register at all, and therefore he had to find upon evidence what the agreement really was which had been made between the workman and his employers, if any such agreement there were.

Now he found that it was proved that the workman and the employers had agreed that the workman should be paid 15s. 1d. a week in terms of the Workmen's Compensation Act, and he asks—and this is the only question on the agreement that is before the Court—whether there was evidence upon which he was entitled to find that proved. I think there was quite clear evidence before him which justified that finding. He had, according to his statement of fact, the evidence of the workman, who was the only witness tendered to him in the case, and he had the evidence of the receipt which was tendered by the employers to the workman in return for a weekly payment.

Well, the receipt says that the workman has received a certain sum, being weekly compensation to date under the Workmen's Compensation Act 1906. Now I apprehend that can have no meaning but one. It means that the money is tendered to him, and that he agrees to accept it as compensation fixed in terms of the Act. What the Act finds him entitled to is a weekly payment during the incapacity in a case where the incapacity has resulted from the injury.

It is said that that involves the consideration of three different points: In the first place, whether there is any liability at all in respect of the injury of which the workman complains; secondly, the amount of compensation if there was such liability; and, thirdly, the duration of the compensation payable. I do not myself think that that third element enters into the question of agreement at all. The Act fixes that

the compensation is to endure during the incapacity; and therefore the term of the duration of the compensation is fixed once for all by the statute itself. And the only question that can arise under the statute as to duration is whether, in point of fact, the incapacity is still enduring or not.

Now I agree that that is a question which, when it does arise, may be fixed by agreement or by arbitration, because, if the parties agree about it there is no dispute; if there is any dispute, then the statute says any dispute in the course of the proceedings shall go to arbitration.

There is an additional contingency which does not involve any alteration of the amount of the compensation, but which affects the amount payable, because there is also a provision that the compensation may be redeemed by a single payment in certain circumstances; and therefore the Act says the compensation is to continue during incapacity and until it is ended, diminished, redeemed, or suspended. All these things appear to me to be clearly implied in an agreement that the compensation is to be a weekly compensation, payable under the Act and in terms of the Act.

That an agreement to that effect does not fix duration is perfectly clear; but no agreement fixing a definite duration would be in terms of the Act at all. The employer is not bound to undertake to pay for a fixed time, nor is the workman bound to accept a payment for a fixed time; but the amount of the compensation being fixed, the Act determines that it shall last until some change in the man's condition makes it right and proper that it should be altered. An agreement to that effect, therefore, appears to me to be clearly other than the terms of the receipt tendered by the employer; and if the receipt meant anything else, I think the case of *Freeland* v. *Summerlee Iron Co.* is an authoritative decision that the workman would not have been bound to accept it. He is not bound to accept a tender which gives him a sum of money for a particular time. If the employer does not give him voluntarily the full benefit of the Act in accordance with its conditions he is entitled to an arbitration.

It appears to me, therefore, that the Sheriff's first question must be answered in the affirmative, because there was evidence before him on which he could come to that conclusion; and, if that be so, the second question appears to me to be of no importance whatever. If the memorandum of agreement which the Sheriff was asked to record had omitted the words between "beginning the first payment" and the words "the above-mentioned Act," I think it would have had exactly the same effect as it has in the terms which are actually expressed. I see no difference between saying that the respondents have agreed to pay a certain weekly compensation, beginning the first payment on the 6th March, "in terms of the above-mentioned Act," and saying that they have agreed to pay that amount, beginning at that date, and continuing the payment thereof until the same is ended, diminished, redeemed, or suspended, because the additional words simply express what is clearly implied in the words which are admittedly proper, namely, "in terms of the Act." I therefore agree with your Lordship.

LORD JOHNSTON—I cannot decide this question without paying some regard to the real question behind the technical question. There is no doubt that employers have felt it a very great hardship that they should under certain circumstances have to go on paying at the full rate after the workman has either entirely or partially recovered, and after, therefore, he should be getting only a modified amount of compensation. I sympathise entirely with that feeling, and I cannot help feeling that there is a certain defect in the Act as regards this point. But we have got to administer the Act as it stands.

Now what these employers want to ascertain is whether they can, out of their agreement made with their workman, deduce the conclusion that at their own will they can say "This agreement is now at an end in respect that there has been recovery." Because if one looks at the statement at the bottom of page 2 of the case it becomes apparent their contention is that no agreement was made for payment of compensation except an agreement to make the weekly payments which the claimant actually received, and in particular no agreement to continue payment of compensation until the same should be ended or diminished under the Act.

Now if one looks at the form of receipt granted by the workman it is hardly possible to square that statement with its terms. Because it would lead to this, that there was no agreement whatever to pay compensation, but merely the act of payment, which only involves an agreement *ad hoc* or to make that particular payment. Thus on 29th July 1912 they would maintain—"There is no obligation on us to pay anything though we did pay on 18th June. Each payment constitutes a new agreement." It is in accordance with this contention that with their last payment on 20th January they intimate that compensation is to be stopped, that is to say, there is no agreement for the future.

Now I do not think it is possible to maintain that such an agreement would be an agreement for compensation under the statute. The whole error on the part of the appellants appears to me to be in attempting to maintain that, *ab initio*, there can, and must be if the agreement is to be an agreement under the statute, a determination of all the three points of liability, of amount, and of duration. There must be an agreement or a determination *ab initio* of liability, but it is always of liability under this Act. In the same way *ab initio* there must and can be a determination of amount under this Act. These things are matters which must *ab initio* be fixed. But you cannot fix the duration of the compensation *ab*

initio. That must always be determined according to the event. The question of duration can only be determined when there is a call for review as provided for in the 16th section of the Act.

Now if that be the case, in order to make any particular agreement an agreement under the statute it is only necessary that it contains the terms which the Sheriff has used. For it is perfectly indifferent whether the memorandum of agreement says that the appellants "agreed to pay compensation under the Act at the rate of," &c., or adds "during total disablement," or adds "continuing the payment thereof until the same is ended," &c. These three forms are precisely the same in result, and no agreement is an agreement under the statute which does not in one form or another provide for liability and amount and leave duration to be determined at the proper time and from time to time.

I therefore think that though the Sheriff has sanctioned the recording an agreement which includes the latter expression the words are innocuous, because if they were not there they must be implied. Accordingly I agree with your Lordship in the way in which you propose to answer the questions.

LORD MACKENZIE—I am of the same opinion. I think that the conclusive answer to the first question that is put is to be found in the terms of the receipt which is quoted in the case, because that bears that the workman received from the employers a sum of money, "being weekly compensation to date under the Workmen's Compensation Act 1906, under which Act I elect to claim for personal injury by accident." He made the claim under the Act. The payment was made to him in satisfaction of that claim, and the employer was content to accept a receipt which expressly bore that it was received "under the Workmen's Compensation Act 1906."

Now, under these circumstances the Sheriff had ample justification for finding in fact that the agreement was made in terms of the Workmen's Compensation Act 1906. I am unable to see as regards the second question which is put, how, when that conclusion is reached, it is possible to say that the true construction of the agreement is not just that it is in terms of the Workmen's Compensation Act 1906, which is scheduled as part of the agreement. If that conclusion is reached, then all that the Sheriff has done in granting warrant for the memorandum being recorded in the terms which are complained of here is merely to write at a greater length what is contained in the finding of fact that he sets forth in the latter part of the case.

The Court answered the questions of law in the affirmative.

Counsel for the Appellants—Horne, K.C. —Aitchison. Agent—Robert Millar, S.S.C.

Counsel for the Respondent—Constable, K.C.—T. G. Robertson. Agents—Gardiner & Macfie, S.S.C.

Friday, July 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.

SHIELDS *v.* SHEARER AND ANOTHER.

Reparation — Wrongous Apprehension — Privilege—Malice and Want of Probable Cause—"Reasonable Grounds of Suspicion"—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 88.

Process—Issue—Form of Issue—"Without Reasonable Grounds of Suspicion"—Illegal Apprehension by Police Constable —Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 88.

The Glasgow Police Act 1866 enacts—Section 88—"It shall be lawful for the Chief-Constable or for any superintendent, lieutenant, or constable acting under or appointed by him . . . without any other authority than this Act, to do any of the following acts within but not beyond the city, viz.—They may search for, take into custody, and convey to the police office any person who is either accused or reasonably suspected of having committed . . . a penal offence."

In an action of damages for wrongful arrest against two police constables who, acting under the Glasgow Police Act 1866, had apprehended the pursuer without a warrant, *held* that the *bona fide* belief of the constables that they had acted reasonably was not sufficient to justify their plea of privilege, and that it was unnecessary to put in issue malice and want of probable cause, and issue approved whether defenders "wrongfully and illegally and without reasonable grounds of suspicion apprehended the pursuer."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), sec. 88, is quoted *supra in rubric.*

Stephen Shields, Creeslough, County Donegal, *pursuer*, brought an action in the Sheriff Court at Glasgow against James Shearer and John Bruce, police constables, Glasgow, *defenders*, in which he claimed damages for illegal arrest.

The pursuer averred—"(Cond. 3) During the afternoon of Saturday, 12th October 1912, the pursuer went to Great Clyde Street, Glasgow, and visited a number of hawkers' barrows, which on Saturdays only are allowed by the police authorities to stand in Great Clyde Street aforesaid for trading purposes. At one of said barrows the pursuer purchased a white metal watch for the sum of 1s. 6d., which was duly paid by him. The pursuer retained said watch in his possession until the Monday following, viz., 14th October 1912, when being doubtful as to whether said watch was worth the money he had paid for it, he visited a watchmaker's shop and asked the man in charge to examine said watch and let him know the value thereof. The pursuer was informed that if he got