HOUSE OF LORDS.

Tuesday, December 4.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

JOHN BROWN & COMPANY, LIMITED *v.* BAIRD.

(In the Court of Session, January 13, 1923 S.C. 300, 60 S.L.R. 208.)

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Compromise of Claims—Discharge of All Claims, including War Additions, in Return for Lump-Sum Payment—Validity.*

An injured workmen was paid compensation by his employers at the full statutory rate of £1 per week plus the corresponding war addition of 15s. per week from 15th April 1920, the date of the accident, until 21st August 1920, when they ceased payment, maintaining that he had fully recovered. The workman contended that he was still incapacitated, but eventually signed a discharge of all his claims under the Workmen's Compensation Act and the War Additions Acts for £35. The recording of the memorandum of the agreement having been objected to by an approved society, of which the workman was a member, on the ground that the sum was inadequate, the matter was referred to the Sheriff-Substitute as arbitrator. Before anything more had been done the workman raised arbitration proceedings, to which his employers replied by founding on the discharge. The arbiter having found that the agreement was void in respect that it amounted to contracting out of the Act, the employers appealed by way of Stated Case. Eventually the present appeal was taken.

Held (*rev.* judgment of the First Division, Lord Skerrington *diss.*) that the workman was not barred by the discharge from applying for an award of compensation; that the discharge amounted to an agreement to contract out of the Act in breach of section 3, sub-section 1; and that accordingly it fell to be set aside.

The case is reported *ante ut supra.*

The workman appealed.

On 4th December 1923 a joint application was made to the House of Lords by the appellant and respondents in which they craved their Lordships to pronounce an order reversing the judgment of the First Division finding that the appellant was bound by the discharge above referred to from proceeding with the arbitration.

The petition stated—"That since the date of said interlocutor and prior to the appellant presenting the said petition of appeal your Lordships had on 20th March 1923 decided in *Russell* v. *Rudd* ([1923] A.C. p. 300) (*infra*) that an agreement between an injured workman and his employer for the settlement of all claims to compensation under the Workmen's Compensation Act 1906 by the payment of a lump sum apart from the provisions of the Act relating to agreements for the redemption of a weekly payment is void as being a contracting out of the Act contrary to section 3, sub-section 1. That the respondents have intimated to the appellant's agent that in view of the decision in the said case of *Russell* v. *Rudd* their clients have decided not to maintain the said interlocutor of the First Division of the Court of Session, and the parties to the said cause have now agreed that the said interlocutor be reversed, and that the cause be remitted back to the Court of Session in Scotland with a direction to answer the questions of law, Nos. 1, 2, 3, and 6 in the case in the affirmative, and to do therein as shall be just and consistent with this judgment, and that the determination of the Sheriff-Substitute as arbiter be restored and upheld, and further that the respondents do pay or cause to be paid to the appellant the costs of the action in the Court of Session, and also the costs incurred by him in respect of said appeal to your Lordships."

Counsel for the appellant stated that the House was invited to do by agreement what it would probably, after the recent decision of their Lordships in the case of *Russell* v. *Rudd* ([1923] A.C. 309) (reported *infra*), have to do in any event, as the main question in the present case, as in *Russell's* case, related to the adequacy of a lump-sum payment.

Counsel for the respondents stated that he concurred in the application.

Their Lordships ordered that the interlocutor complained of be reversed; that the cause be remitted back to the Court of Session in Scotland with a direction to answer questions 1, 2, 3, and 6 in the affirmative; and that the respondents do pay to the appellant the costs of the action in the Court of Session, and also the costs incurred by him in respect of the appeal.

Counsel for the Appellant—Wark, K.C.—Macgregor Mitchell—Wallington. Agents—W. T. Forrester, Solicitor, Edinburgh—C. M. Scott, Solicitor, Glasgow—D. Graham Pole, S.S.C., London.

Counsel for Respondents—W. T. Watson, K.C. — Garrett — Shakespeare. Agents — Kerr & Barrie, Glasgow—Hair & Company, London.

Tuesday, March 20.

(Before the Lord Chancellor, Lord Dunedin, Lord Shaw, Lord Buckmaster, and Lord Carson.)

RUSSELL *v.* RUDD.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

(Referred to *supra* in *Brown & Company, Limited* v. *Baird.*)

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 1, 3, *Schedules I* (17) *and II* (9) *and* (10)—*Agreement to Pay a Lump Sum in Settlement of All Claims—*

Validity — Objection by the Registrar to Recording on Ground of Inadequacy.

Weekly payments of 35s. each were made for six months to a workman injured by an accident arising out of and in the course of his employment. Thereafter the workman and his employers entered into an agreement for the payment of a lump sum of £75 in discharge of all claims in respect of the accident. The Registrar, on the ground of the inadequacy of the sum agreed on, refused to record the memorandum which had been forwarded to him. The employers having thereafter stopped the weekly payment, the workman, who had not accepted the £75, commenced arbitration proceedings, in the course of which the decision of the County Court Judge refusing to record the memorandum as inadequate was reversed by the Court of Appeal. The workman appealed to the House of Lords. *Held* (*diss.* Lord Carson) that to enter into an agreement to discharge all claims under the Act for a lump sum except that to a weekly payment or the liability therefor is to contract out of the Act; that the agreement in question could be sustained as an agreement for the redemption of a weekly payment by a lump sum within the meaning of Schedule I (17) and Schedule II (9) and (10), it being reasonably capable of that construction, and that it might therefore be objected to by the Registrar.

The English decisions *reviewed* and *overruled.*

Burns v. *William Baird & Company, Limited* (1913 S.C. 358, 50 S.L.R. 280) and *William Baird & Company, Limited* v. *Ancient Order of Foresters* (1914 S.C. 965, 51 S.L.R. 819), *approved.*

Per Lord Shaw—"There may be an agreement between an employer and workman for redemption of a weekly payment, not only in the case where there had first been an agreed-on weekly payment prior to the redemption, but also in the case where there was simply the liability under the statute to make a weekly payment."

The *facts* appear from their Lordships' considered judgment:—

LORD CAVE (L.C.)—This is an appeal from an order of the Court of Appeal in England reversing an order and award of the judge of the Edmonton County Court, and raises important questions under the Workmen's Compensation Act 1906.

The appellant Henry Russell was a carman in the employment of the respondent, and on the 26th October 1920 met with an accident arising out of and in the course of his employment and received injuries. The respondent did not dispute his liability to pay compensation under the Workmen's Compensation Act, and without entering into any agreement with the appellant paid him 35s. per week (the maximum sum to which he could be entitled as compensation) from the time of the accident until the 13th August 1921. In the month of June 1921 an agent of the insurance company in which the respondent was insured called upon the appellant and informed him that in view of a medical report he would no longer receive full compensation, and proceeded to negotiate with him for a settlement of all claims for a lump sum; and ultimately an agreement was entered into in the following terms:—"The said Henry Russell agrees to accept, and the said George Rudd agrees to pay, the sum of £75 in full settlement and discharge of all claims in respect of the afore-mentioned accident."

The respondent shortly afterwards forwarded to the registrar of the County Court a memorandum of the above agreement with the necessary forms, and applied to have it recorded under par. 9 of the Second Schedule to the Act. The registrar refused to record the memorandum on the ground of inadequacy, and referred the matter to the County Court judge in accordance with clause (*d*) of the above-mentioned paragraph. Meanwhile the appellant, whose compensation had been stopped on the 13th August, filed a request for arbitration in accordance with the Workmen's Compensation Rules, and this application came on for hearing before the judge together with the reference of the above-mentioned application to record the memorandum. The learned County Court judge, after hearing evidence and arguments on the matter, found as a fact that the above-mentioned agreement was an agreement as to the redemption of a weekly payment within par. 9 of Schedule II to the Act, and that the sum of £75 was inadequate, and he refused to record the memorandum, and in the arbitration proceedings made an award in favour of the appellant of 13s. 6d. a-week from the 14th August 1921. The respondent appealed against the order and award of the County Court judge, and the Court of Appeal on the 7th February 1922 allowed the appeal and ordered the award to be set aside and the memorandum of agreement to be recorded and an award for the respondent to be entered with costs. Thereupon the present appeal was brought.

Before dealing with the questions which arise for decision on this appeal it appears desirable to describe shortly the scheme of the Act so far as now material. Section 1 (1) provides that if in any employment personal injury by an accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as after mentioned, be liable to pay compensation in accordance with the first schedule to the Act. The compensation provided by the first schedule takes the form, where the death of the workman results from the injury, of a lump sum payable to his dependants, and where total or partial incapacity for work results, then of a weekly payment during the incapacity. Section 1 (3) provides that if any question arises in any proceedings under the Act as to the liability to pay compeusation under the Act (including any question as to whether the person injured is a workman to whom the Act applies), or

as to the amount or duration of compensation under the Act, "the question if not settled by agreement shall, subject to the provision of the first schedule to this Act, be settled by arbitration in accordance with the second schedule to this Act." The second schedule contains a number of provisions as to arbitration and also provisions for recording in the County Court a memorandum of any agreement. There are also certain provisions, to which I will refer later, for the redemption of a weekly payment by a lump sum. By section 3 (1) provision is made for registering a scheme conferring upon the workmen in any employment alternative benefits not less favourable than those provided by the Act, and it is provided that "save as aforesaid this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act."

The first question which arises on this appeal is whether apart from the provisions contained in the schedules to the Act relating to the redemption of a weekly payment by a lump sum, the agreement made between the appellant and the respondent in this case is a valid agreement. In my opinion it is not. The provision in section 3 (1) that the Act shall apply notwithstanding any contract to the contrary affects not only agreements made before an accident occurs, but also agreements entered into after an accident has happened. This was so held by Lord Wrenbury in *Clawley* v. *Carlton Main Colliery Company, Limited*, 1918 A.C. 744, 758. Of course the prohibition does not apply to agreements authorised by the Act itself, and it is argued on behalf of the respondent that the agreement in question was authorised by section 1 (3), and particularly by the words "if not settled by agreement." In my opinion these words do not cover an agreement for the payment to a workman suffering from incapacity of a lump sum in settlement of all claims under the Act. The effect of section 1 (1) of the Act is to entitle such a workman to compensation in the form of a weekly payment, and the effect of section 1 (3) so far as material is that any question as to the "amount or duration of compensation under the Act"—that is to say, in a case of incapacity of the amount or duration of the weekly payment—may be settled either by agreement between the employer and the workman or by arbitration. It is plain that an arbitrator could not under this sub-section award compensation in the form of a lump sum, and in my opinion the power to settle by agreement is limited in like manner. The intention of the Act is that a workman who is suffering from total or partial incapacity caused by an accident shall receive a weekly sum, which shall be subject to review from time to time (Schedule I, par. 16), and shall be incapable of being assigned or charged (Schedule I, par. 19), but which may be redeemed by agreement with the employer (Schedule I, par. 17) subject to the approval of such agreement by the County Court (Schedule II, par. 9). To substitute for compensation of that character the payment of a lump sum fixed only by agreement between employer and workman and free from any examination by the Court is to contract out of the Act, and accordingly is a contravention of section 3 (1) of the Act and void.

The second question which arises is whether agreements such as the agreement in question fall within Schedule I, par. 17, and Schedule II, pars. 9 and 10, so as to be valid if registered under the latter schedule. If your Lordships should agree with me as to the effect of section 3 (1) of the Act, this question will not closely concern the present appellant, as his agreement if falling within Schedule II has been disallowed under par. 9, but the question has been fully argued, and it is desirable to answer it.

Schedule I, par. 17, enables an employer to redeem a weekly payment which has been continued for not less than six months, a proviso being added that "Nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum." The effect of par. 9 of Schedule II so far as now material is that where the amount of compensation under the Act has been ascertained, or any other matter decided under the Act by agreement, a memorandum of the agreement is to be sent to the Registrar of the County Court, who on being satisfied as to its genuineness is to record it in a special register, and thereupon the memorandum is to be for all purposes enforceable as a County Court judgment, but by clause *(d)* it is provided that where it appears to the registrar that an agreement as to the redemption of a weekly payment by a lump sum ought not to be registered by reason of the inadequacy of the sum, or for other reasons which are specified, he may refuse to record the memorandum of the agreement and may refer the matter to the judge, who is to make such order as in the circumstances he may think just. Clause (*e*) of the same paragraph empowers the judge within six months after a memorandum has been recorded to order that the record be removed from the register on proof that it was obtained by fraud or undue influence or other improper means, and by par. 10 it is provided that an agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with the Act is not to exempt the employer from liability to continue to make a weekly payment.

Is the agreement in question an "agreement as to the redemption of a weekly payment by a lump sum" within the meaning of these provisions? It was held by the Court of Appeal, following previous decisions, that this expression applied only to an agreement for redemption of a weekly payment which had been previously fixed by arbitration or agreement, and accordingly that no such weekly payment having been fixed in this case the provisions did not apply. With great respect to the learned Judges who have taken that view, I think that it puts too narrow an interpretation upon the words to be construed. When a workman is suffering from inca-

pacity caused by an accident falling within the Act, he becomes *ipso facto* entitled to a weekly payment which though not ascertained as to amount is capable of being immediately ascertained by the process laid down in the statute, and I see no reason why the liability to make this ascertainable weekly payment should not be redeemed though the amount has not in fact been fixed. Admittedly the parties might agree on a weekly sum under section 1 (3) of the Act and might then at once agree for its commutation by a lump sum; and it does not appear to me that it is essential that they should go through the form of agreeing on the amount of the weekly payment before settling the lump sum to be paid. It may be that an agreement to pay a lump sum in full settlement of all claims is not very appropriately described as an agreement as to the redemption of a weekly payment by a lump sum, but in fact the only existing claim in this case was a claim to a weekly payment, and it is that claim which was commuted under the agreement. Further, an agreement such as the agreement in question is (as I have held) void altogether unless it can be sustained as an agreement for the redemption of a weekly payment within the meaning of Schedule I, par. 17, and Schedule II, pars. 9 and 10; and it appears to me to be right, *ut res magis valeat quam pereat*, to put upon a document a construction which gives it validity if it is reasonably capable of that construction. I think, therefore, that an agreement of this kind falls within the schedule.

I am, of course, conscious that in advising your Lordships to come to these conclusions I am recommending the House to overrule a series of decisions of the Court of Appeal in England. It was held by that Court in *Ryan* v. *Hartley* ((1912) 2 K.B. 150) that there was nothing in the Act of 1906 to prevent an adult workman from coming to an arrangement with his employer to accept a lump sum in satisfaction of all claims under the Act, and that such an agreement if entered into would be valid though not registered under the Act; and this decision was followed in *Hudson* v. *Camberwell Corporation* (116 L.T.R. 523), *Rawlings Ltd.* v. *Hodgson* (119 L.T.R. 137), *Williams* v. *Minister of Munitions* (121 L.T.R. 321), and *Haydock* v. *Goodier* (125 L.T.R. 71, 1921, 2 K.B. 384), as well as in the present case. Further, it was held by the same Court in *Rawlings Ltd.* v. *Hodgson* that there could not be an agreement for the redemption of a weekly payment until the weekly payment had been fixed, and this decision also was followed in *Haydock* v. *Goodier* and in the present case. This is a formidable list of authorities, and I should hesitate long before advising your Lordships to overrule them were it not that the eminent Judges who were responsible for the later decisions purported only to follow the earlier decisions, and in some cases with expressions of doubt or dissent. Instances of such dissent are to be found in the judgment of Atkin, L.J., in *Williams* v. *Minister of Munitions*, and in those of Scrutton, L.J., in *Haydock* v. *Goodier*, and in the present case. Further, in a series of cases which came before the Court of Session in Scotland, of which *William Baird & Company, Limited* v. *Ancient Order of Foresters* (1914 S.C. 965) is an instance, the law was decided or assumed to be the other way. Having regard to this conflict of opinion and decision, it is plainly desirable that the provisions of the statute should be construed by your Lordships' House without undue regard to previous decisions of the Courts, and it appears to me that if your Lordships should agree in the conclusions which I have expressed effect should be given to them.

It has been suggested that it might be injurious to a workman if he were held incapable of accepting a lump sum in satisfaction of his claims under the Act, as the receipt of a lump sum which might be invested in a business for his benefit might be more advantageous to him than a weekly payment. But in fact there is nothing in the statute as I have construed it to prevent such a transaction. It will still be open to a workman to agree with his employer for the payment to him of a lump sum in commutation of his right to a weekly payment under the Act, and the only difference will be that the agreement will be subject (at little or no cost to him) to the criticism and approval of the County Court. In any case this appears to me to have been the intention of Parliament as expressed in the statute.

For the above reasons I am of opinion that this appeal should succeed, that the judgment of the Court of Appeal should be set aside and the decision of the County Court Judge restored, and that the respondent should pay the costs of the appellant in the Court of Appeal and in this House.

My noble and learned friend Lord Buckmaster desires me to say that he concurs in this judgment.

LORD DUNEDIN—The appellant was a workman in the service of the respondent. On the 20th October 1920 he met with an accident arising out of and in the course of his employment. The respondent thereafter until June 1921 paid the appellant the sum of 35s. per week, which was the maximum sum to which he was entitled as compensation under the Workmen's Compensation Act In June 1921 the representative of an insurance company who had insured the respondent's liability had two interviews with the appellant, and informed him that in view of a medical report which they had got the company could not continue to pay him the full compensation, and made him an offer of £75 in settlement of all claims. This the appellant, who was without independent advice, accepted, and on the 20th June 1921 the respondent forwarded to the Registrar of the County Court a memorandum of the said agreement in the following terms:—"The said Henry Russell agrees to accept, and the said George Rudd agrees to pay, the sum of £75 (seventy-five pounds) in full settlement and discharge of all claims in respect of the afore-mentioned

accident," and requested the Registrar to record the same. The Registrar, after giving notice to the appellant of this request, refused to record the memorandum on the ground of the inadequacy of the sum therein mentioned, and referred the matter to the County Court Judge, as prescribed by par. 9 (*d*) of Schedule II of the Act. The respondent continued the payment of 35s. up to the 13th August 1921 but then ceased, maintaining that the matter was concluded by the settlement above mentioned. The appellant did not accept payment of the £75, but on the 12th September filed a request for arbitration. The respondent filed an answer setting forth the settlement. The application to record and the application for arbitration came before the County Court Judge on the 1st November 1921 and evidence was laid before him. The County Court Judge found as a fact that the agreement was an agreement as to a redemption of a weekly payment, that the sum of £75 was inadequate, and refused to record the memorandum, and in the arbitration proceedings he found the appellant entitled to 13s. 6d. a-week from the 24th August 1921. An appeal was taken to the Court of Appeal. The Court of Appeal held themselves bound by former decisions in the Court of Appeal, which had settled that there could be no redemption of a weekly payment unless such weekly payment had been *de facto* fixed either by agreement or by arbitration. They further held that on the facts there had been no such fixing of a weekly payment but only a tender of a lump sum, that accordingly the agreement did not fall within the words of par. 9 (*d*) of the Second Schedule, and could not be objected to by the Registrar and the County Court Judge on the ground of inadequacy. They thereupon recalled the judgment of the County Court Judge and ordered the memorandum to be recorded.

I may say at once that so far as their view of the facts is concerned I agree with the learned Judges of the Court of Appeal and not with the County Court Judge, the law being as it stood binding on the County Court Judge and the Court of Appeal. I think it impossible to say that there was here any fixed weekly payment which had been settled by agreement or arbitration, and which as such was capable of redemption. I do not think it necessary to analyse the evidence, for the fact itself becomes immaterial in the view I take of the law of the case. The broad and important question raised is this — Given a settlement come to between employer and workman in which a lump sum is tendered and accepted as in full settlement of all claims for compensation in respect of an accident arising out of and in the course of employment, what would be the effect thereof if nothing more were done? and second, what is the effect if a memorandum of the settlement is proffered for recording?

Section 1 of the Act provides absolutely that if in any employment personal injury by accident arising out of and in the course of employment is caused to a workman the employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule. Turning to the First Schedule, we find that the compensation to be paid is in the case of a workman killed a lump sum to his dependents, in the case of a workman injured but still living a weekly payment during total or partial incapacity. Then section 3 of the Act, after providing for the allowance of a scheme of compensation approved of by the Registrar of Friendly Societies (the non-existence of such a scheme I take as a hypothesis to the settlement indicated), goes on to say that if the scheme is approved the employer shall only be liable as under the said scheme, but "save as aforesaid this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." The effect of this section seems to me plain. The right of an injured workman (I assume the fact as to his injury arising out of and in the course of employment) to a weekly payment is absolute and cannot be got rid of except in so far as the Act allows. It follows therefore that a contract which purports to take away that weekly payment is bad, so that in the case first put the workman could go on to claim the weekly payment by arbitration and could not be stopped by virtue of the contract alleged.

The Act, however, does not leave the matter standing to this effect, that a weekly payment can never be got rid of. The weekly payment itself as to amount is in terms of section 1 (3) to be settled either by agreement or by arbitration in accordance with the Second Schedule of the Act. A memorandum of the terms of such a settlement whether made by arbitration or by agreement is in terms of section 9 of the Second Schedule to be made and sent to the Registrar of the County Court to be recorded, and it then becomes enforceable as a County Court judgment. Any weekly payment may be reviewed at the request of either party, and failing agreement the new sum must be settled by arbitration (Schedule I, 16), and on such review may be ended, diminished, or increased. When the weekly payment has been continued for not less than six months the employer may apply to have it redeemed by payment of a lump sum, and in addition agreements to redeem by a lump sum are authorised (Schedule I, par. 17). Such agreements must be embodied in a memorandum and recorded. The opening words of Schedule II, par. 9, make this clear — "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, a memorandum thereof shall be sent . . .," &c. If they are not, then Schedule II, par. 10, provides that the liability to make compensation still exists even if the lump sum has been paid. Then further, by Schedule II, par. 9 (*d*), it is provided that "Where it appears to the Registrar of the County Court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . ought not to be registered by reason of the inadequacy of

the sum . . . he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge."

Taking all these sections together, I confess I think that the result is clear, and may be summed up in the following propositions:—1. The compensation which in the case of an accident arising out of and in the course of employment the workman is entitled to is in the case of a living workman a weekly payment. 2. Any agreement whereby the workman gives up his right to get that weekly payment is void. 3. A weekly payment may be redeemed by a lump sum. 4. It follows that when a lump sum is agreed on in settlement of all claims afterwards it must either be a redemption of a weekly payment or a void agreement. 5. If it is a redemption of a weekly payment, Schedule II, 9 (*d*), applies in terms, and submits the adequacy to the consideration of the registrar and after him to the judge before recording the memorandum setting forth the settlement. 6. Recording is the only method by which future liability can be avoided.

I am now bound to consider the cases decided in the Court of Appeal by which the Court in this case was undoubtedly bound, though I do not think it doubtful that the true opinion of Scrutton, L.J., at least was not in accordance with the cases. The first case that is usually cited is *Fox* v. *Battersea Borough Council* (1911, 4 B.W.C.C. 261), and undoubtedly it is in subsequent cases treated as the parent authority, but it does not really raise the point. A workman met with an accident in respect of which he eventually became totally incapacitated. Negotiations ensued, and eventually a formal agreement in May 1909 was entered into by which he accepted a weekly payment of half-wages. In April 1910 he commenced proceedings for arbitration. In May 1910 the employers applied for an order to record the memorandum of the agreement of 1909. This was objected to by the workman on the ground that the agreement was not genuine. The County Court Judge held that the memorandum was not genuine as that word is used in Schedule II (9) and refused to record it and awarded compensation. The Court of Appeal reversed his decision, and held that there was no evidence as to non-genuineness, and ordered the memorandum to be recorded. It will be at once observed that no question was raised, or indeed could be raised, as to Schedule II, 9 (*d*), nor any question as to whether in the face of an agreement to pay so much a-week the workman could not apply for a revision under Schedule I, 16. It really seems to have been assumed rather than argued that once the memorandum was recorded all other proceedings came to an end. Then comes the case of *Ryan* v. *Hartley*, 1912, 2 K.B. 150. This decided that an agreement to take a sum in full settlement of all claims precluded arbitration, but unfortunately not a single word is said in argument or judgment as to the effect of section 3 (1) of the Act—an omission which I humbly think makes the judgment worthless. The next is the case of *Rawlings Limited* v. *Hodgson* (119 L.T.R. 137), and here for the first time the question is directly raised as to the Registrar's power to pronounce on inadequacy when a lump-sum agreement is tendered to be recorded. It was held that unless a weekly payment has been actually fixed or agreed on, a lump-sum agreement could not be an agreement to redeem a weekly payment, and that consequently a registrar has no powers. Here again no notice is taken at all of the dilemma presented by section 3 (1). Then comes *Williams* v. *Minister of Munitions*, 121 L.T.R. 341. This was a case of payment of a lump sum in full of all claims. It is sufficient to quote a sentence from the judgment of Atkin, L.J., at p. 345): "I understand that Mr Lowenthal raised before us, and raised for the purpose of reserving it for a higher tribunal, the important point which I understood to be this: that a valid agreement cannot be made in discharge of all liabilities under the Act except under the provisions of Schedule I (17), dealing with the redemption of weekly payments subject to the protection given by Schedule II (9). I understand him to admit that this was a point which was not open in this court under decisions which have been already given in this court. I think he was right, because I do not think the point is open to us; I do not think that the decision of the House of Lords given in *Clawley* v. *Carlton Main Colliery* (1918 A.C. 744) was intended to overrule the decisions in *Ryan* v. *Hartley* and *Rawlings, Ltd.* v. *Hodgson*." As regards the remark about *Clawley's* case, it is clear the point was quite different. The employer had made a settlement under which he promised to give the man a house and, in addition, light work and a compensation payment of 8s. 10d. The point decided is accurately put in the headnote—"The employer is not entitled under par. 17 of Schedule I to redeem a weekly payment which does not represent the full compensation payable under the Act." There was therefore no occasion to consider or review the cases of *Ryan, &c.*, none of which so far as appears from the report seem to have been quoted in the argument. Lastly came the case of *Haydock* v. *Goodier*, 125 L.T.R. 71; 1921, 2 K.B. 384. There the point is made and held as settled, as indeed it was by the prior decisions. There is, however, an elaborate judgment of Scrutton, L.J., which, referring to the decisions of *Ryan, &c.*, has this pregnant sentence—"I do not propose to say what I should have thought but for the decisions of the Court of Appeal, except that it is very likely I should have gone wrong." He then points out that under the old Employers' Liability Act, which had no equivalent to section 3 (1), it had been held in *Griffiths* v. *Earl of Dudley* (9 Q.B.D. 357) that a workman could contract out of the Act and that in his view section 3 (1) of this Act was inserted to meet that decision. He points out that in none of the decisions is section 3 (1) examined, but he holds quite rightly that none the less these decisions bind him.

These decisions do not bind your Lordships, and I think they are wrong. If I may venture the expression, I think the Court of Appeal in the past tumbled into the present state of authority without adequate consideration being given to the actual words of the statute.

It may not be out of place for me to say that I have carefully examined the Scots cases with which the learned counsel at the bar have no undue familiarity, as they cited none. I find that although the point has never been argued and then decided, it has been assumed to be resolvable in the way I have expressed. In the case of *Burns* v. *William Baird & Company, Limited* (1913 S.C. 358), in the Second Division, and again in the case of *William Baird & Company, Limited* v. *Ancient Order of Foresters* (1914 S.C. 965), in the First Division, memoranda of lump sums agreed on as in satisfaction of all claims, no weekly payments having been made, were presented for recording, and the adequacy was held examinable by the Sheriff-Clerk, who takes the place of the Registrar in England. Since the point was not argued, I cannot say it was decided; but at least I can say that the instincts in Scotland were, according to my judgment, right. I am of opinion accordingly that the appeal should be allowed, and the judgment of the County Court Judge restored.

LORD SHAW—So fully do I agree with the judgment of my noble and learned friend on the Woolsack, both in regard to the statement of facts and to the conspectus given of the provisions of the Act, that I hesitate to add anything. I only do so in case of any doubt being suggested on the proposition, which I hold to be unquestionable. That proposition is this—There may be an agreement between an employer and workman for redemption of a weekly payment, not only in the case where there had first been an agreed-on weekly payment prior to the redemption, but also in the case where there was simply the liability under the statute to make a weekly payment.

With much respect to the judges who decided the case of *Ryan*, and in full knowledge that that decision has been followed by those of *Hudson*, *Rawlings*, *Williams*, and *Haydock*, as well as in the present case, I am not myself able to apply the word "redemption" in any more limited sense. In particular, the judgment of the Court of Appeal in *Rawlings*, which specifically ruled that a registrar had no power to inquire into the adequacy of the lump sum agreed upon unless there had first been an ascertainment in fact of a weekly payment proceeded, in my humble opinion, upon an erroneous construction of the statute, and the sequence of cases in that sense must now be also pronounced erroneous.

Redemption simply means commutation. (1) The statute starts with the fact of liability to make a weekly payment as the one outstanding fact. And (2) it shows by repeated provisions much care in securing that the amounts to be paid to the workmen shall be subject to scrutiny not only as to the bargain being untainted by fraud but being adequate in amount. These protective provisions are equally outstanding. Unless this protective provision as to declinature to record a redemptive agreement for an inadequate amount be given effect to in circumstances such as those of the present case, the Act is *pro tanto* defeated; its protections fail.

I repeat redemption is simply commutation, and the commutation is commutation into one sum of the sums which would otherwise, on a calculation of the liability, have been periodically due to the workman. Redemption by its very nature points to the future, and it is liability for the future which is the essential thing which has to be compounded or commuted. The case may be easily figured of a worker to whom a capital grant would be more advantageous than a weekly payment. The chance may thereby be furnished of placing him in a way of life where his livelihood would be secured if only the sum be paid at once and even before weekly payments are made or settled. To such a case the use of the expression "an agreement for redemption of a weekly payment by a lump sum" is perfectly applicable, and that is the very case (Schedule II, 9 (*d*)) where scrutiny as to adequacy is provided for. The Act does not say "weekly payment which has already been fixed" or "paid" or "agreed upon"; and in my view "weekly payment" means comprehensively a weekly payment for which under the Act the employer is liable.

Furthermore, it is just in such a case that the beneficent protective provisions of the Act can be possibly more usefully invoked than in the fixation of a weekly payment, as the transaction may involve more or less complex actuarial elements.

Your Lordships are all agreed that this workman did commute, compound, or redeem for an inadequate sum, *i.e.*, £75, the weekly payment to which he was entitled. The registrar properly refused to record it, and the learned County Court Judge, agreeing on the point of inadequacy, also refused to record it. Following the course of decisions in England to which I have referred, the learned Judges of the Court of Appeal have held that this was wrong. In the state of the decisions they could not avoid this result, although it is not surprising that more than one of their number was conscious of, to say the least, much personal hesitation on the merits of the point.

In Scotland two cases have arisen in which there was an agreement as to the redemption of the weekly payment of compensation in circumstances such as the present—that is to say, where no agreement as to the amount of the weekly payment had been previously made. These cases were *Burns* v. *William Baird & Company, Limited* (1913 S.C. 358), decided in the Second Division, and *William Baird & Company, Limited* v. *Ancient Order of Foresters* (1914 S.C. 965), decided in the First Division. In both cases points of procedure arose, and the decisions took place upon them. But

the minutely and carefully discussed objections to procedure took no stock of any radical illegality which would have, if the English decisions referred to were sound, underlain the agreements themselves. The learned judges of these Divisions clearly assumed, as I think they were entitled to do, that the redemption of a weekly payment could be made at any time, and that having been made in the sense of a commutation of liability for a weekly payment, such an agreement fell under the protective provisions of the statute. The Lord President, in an opinion with which I entirely agree, said this—"I am of opinion, therefore, that the case must go back to the Sheriff-Clerk in order that he may receive and consider any information which is tendered to him by the Approved Society" (a society to which the insured workman belonged and which obtained a *locus standi* in such cases under the provisions of the National Insurance Act of 1911). "If he in his discretion thinks the information so tendered is sufficient, then he himself must prepare a minute setting forth the grounds of his action, and lay that minute before the arbitrator, whose duty it will then be to proceed exactly as if the memorandum of agreement were an arbitration, and consider the question raised in the Sheriff-Clerk's minute, and pronounce such order as in the circumstances he shall think just."

It appears to me to be clear that the assumption throughout is that the transaction of redemption — of the same kind there as here—fell properly to be recorded under the statute, and was not by its nature excluded from the statutory provisions on that head. In my humble opinion this assumption was entirely sound in law.

LORD CARSON—It is not suggested that the agreement of the 20th June 1921 was open to any objection on the grounds of its "genuineness" (Schedule II (9)), or on the grounds of duress, fraud, or mistake or the like. As the Master of the Rolls states in his judgment—"It is plain and simple on the face of it that it is in discharge of all claims, and the applicant in his evidence said—'I presumed the £75 was to settle everything; I understood it to settle everything.' The learned County Court Judge found on looking at the surrounding circumstances that it was not an agreement to settle all claims. How he has arrived at that conclusion upon the wording of the document and the evidence of the applicant I do not understand, but he has. I think such a finding cannot possibly stand in the face of the evidence and of the document itself." I agree with the Master of the Rolls.

The broad question therefore raised in this appeal, and one of the first importance, is whether such an agreement is under the Act of Parliament a valid agreement, or in other words, whether it is competent for the workman and the employer to settle or compromise a claim by the payment of a lump sum. If the answer is in the negative, one of the results will be that it will not be possible in any case, however doubtful, or raising any of the difficult questions which so often arise as to whether, for example, the workman is entitled to compensation under the Act, for the employer and the workman to agree to a settlement of the disputed points by payment of a lump sum, and the parties, however willing they may be to agree, or however beneficial the agreement may be, will be left to litigate such disputed questions in accordance with the procedure laid down by the Workmen's Compensation Act.

When we recollect the innumerable questions which arise from day to day, such as, What is an "accident"? Has the injury arisen out of and in the course of his employment? and many others with which we are so familiar, I cannot but think that we ought not to come to such a conclusion unless we find clear words in the Act of Parliament taking away the inherent right of compromising legal claims.

It is not disputed that since the Act of 1906 was passed, in this country at all events, it was settled by a series of authorities—some in the Court of Appeal—that such an agreement was valid, and there can be no doubt that hitherto a great number of cases must have been settled or compromised on this view of the law. None of these cases has ever been impeached in your Lordships' House until now, and we are asked in the present case to overrule them, as we have undoubtedly the right and the power to do if in our opinion they were wrongly decided. Some of these cases have been already referred to in the speeches of noble and learned Lords who have preceded me, and I need only refer to them very briefly.

Ryan v. *Hartley* (1912, 2 K.B. 150) decided that an agreement to accept a lump sum in full settlement of all claims was valid and precluded any subsequent proceedings. This case was decided by the then Master of the Rolls, afterwards Lords Cozens-Hardy, Fletcher Moulton, L.J., afterwards Lord Moulton, and Buckley, L.J., now Lord Wrenbury—Judges, I need hardly say, of the highest eminence and authority. My noble and learned friend Lord Dunedin says—"But unfortunately not a single word is said in argument or judgment as to the effect of section 3 (1) of the Act—an omission which I humbly think makes the judgment worthless." With that point I shall deal later, but I would like to point out that in a subsequent case in the Court of Appeal—*Hudson* v. *Camberwell Corporation* (116 L.T.R. 523)—in which Lord Cozens-Hardy, M.R., was again the presiding Judge, the point as to section 3 (1) was decided by the County Court Judge, and specifically raised before the Court of Appeal, the other Judges being Warrington, L.J., and Lawrence, J. (now Lord Trevethin), and so far as I can see no doubt was thrown on the authority of *Ryan* v. *Hartley*. Again, in *Rawlings Limited* v. *Hodgson* (119 L.T.R. 137) the Court of Appeal, consisting of Swinfen-Eady, M.R., afterwards Lord Swinfen, Bankes, L.J., and Neville, J., came to the same conclusion, and so far from throwing any doubt upon the previous decisions I find Bankes, L.J., used the follow-

ing language at p. 140—"I am all the more glad to be able to come to this conclusion because I am satisfied that it never was intended that the Registrar should have a kind of prying jurisdiction into a case where the workman himself, who is being independently advised by a firm of competent solicitors, has come to the conclusion as his advisers have come to the conclusion, that the sum which is offered to him, and which he has accepted, is adequate and sufficient."

It is to be noted with reference to this decision that if section 3 (1) invalidates the agreement, the fact that the workman was independently advised would make no difference.

When it is said that these authorities are "worthless" because section 3 (1) was not considered, with great respect to my noble friend, I hardly think we do justice to the eminent judges who decided these cases in supposing that this point was overlooked. I have already pointed out that in one of the cases the point was specifically referred to, but I would like also to refer to the reasons suggested by the present Master of the Rolls in *Haydock* v. *Goodier* (1921, 2 K.B. 384) as to why importance may not have been attached to this section and which are well worthy of consideration. He says at p. 395—"The only thing that was said in derogation of these cases which decide that an agreement can be made was that they do not refer to section 3 of the Act of 1906 which deals with what is called 'contracting out.' I do not think the fact that that section was not referred to, even if it applies, is any ground on which we can disregard the authorities. They are there. I will only say this that, to my mind, it is by no means clear that the section has any application. I do not say that it has not, as it is not necessary to decide that point. I think, however, it may very well not have been referred to for the reason that it was taken to apply to an agreement to exclude a scheme . . . by which the employer and the workmen undertook to carry on their relations outside the provisions of this Act altogether, and without giving to the workman the additional right of compensation which is contained in this Act—that is to say, to leave him in the case of any accident, subject to the liability of having to prove, in order to get compensation, that either the employer himself at common law, or somebody under the authority of the employer under the Employer's Liability Act, had been negligent, and that it was not intended to prevent a contract by which, admitting that the provisions of the Act apply, the parties agree to compromise a possible liability under the Act. That may be the reason why the section was not referred to, but whether that be so or not there is the decision."

Turning to the Act itself I can find no sufficient reason for disagreeing with these authorities. As I understand the argument it is shortly this—the compensation for which an employer is liable must be in accordance with the first schedule, and that schedule in the case of a workman injured but still living provides a weekly payment during total or partial incapacity. It is argued therefore that to contract to accept a lump sum is contracting out of the Act, which is prohibited under section 3 (1) unless in the case of a scheme authorised under that section.

I cannot myself agree with that argument. There is, in my opinion, no contracting out of the Act so long as the workman had behind him the leverage supplied by the terms of the Act in arranging a settlement, and can, if a satisfactory settlement is not agreed to, fall back upon the procedure under the Act. Compromising a claim under the Act is not contracting out of it (*per* Younger, L.J., in *Haydock* v. *Goodier*). Here there is an agreement by which these persons did contract themselves not out of the Act but out of any further proceedings as to liability under the Act (*per* Lord Sterndale, M.R., in the same case).

I have already said we ought not to interfere with the inherent right of settling or compromising claims unless we find clear words taking away that right. I do not myself find any such words, and I entirely agree with what was said by Younger, L.J., upon this point in *Haydock* v. *Goodier*, p. 402—"I must not be taken as at present advised to give any encouragement to the view that apart from these judgments" (*i.e.*, the judgments to which I have already referred) "an agreement—not, of course, open to objection on the ground of duress, fraud, mistake, or the like—to compromise a disputed claim under this Act is prohibited by the fact of its being entered into by a workman of full age. My view is that the power to compromise their disputes being inherent in all persons of full contractual capacity, that power is not in any particular case to be regarded as taken away by any other than very plain statutory words, words which I have not myself hitherto found in this statute."

That the Act does allow of a settlement by agreement as to the payment of a weekly sum is not and cannot be disputed, and although there is provision for review of weekly payment in Schedule I (16), no such review can be entertained unless there has been a change in the circumstances of the case since the weekly payments were fixed—*Scott* v. *Long Meg Plaster Company*, 111 L.T.R. 773.

It is also contended that the agreement in this case if it is valid must be considered as an agreement for the "redemption of a weekly payment by a lump sum" within the meaning of Schedule I (17), and that therefore under Schedule II (9) (*d*) the registrar had power to inquire into the inadequacy of the sum agreed upon and to refuse to record the agreement, and report the matter to the County Court Judge. We know, as a matter of fact, that the sum mentioned in the agreement had no reference to any weekly payment, as Warrington, L.J., said (126 L.T.R. at p. 737)—"We have nothing except the bare fact that from the date of the accident to the time of the making of

this agreement the employer had paid the full amount which the workman could have recovered as compensation if he had insisted on his legal right. I agree with the Master of the Rolls that it would be most mischievous to the workman especially, but also to the employer, if we were to hold that it was incompetent for the employer voluntarily to make a payment to the workman without at the same time being held thereafter by implication to have agreed to continue that payment, because, of course, in order that there may be an agreement for redemption by payment of a lump sum, you must find weekly payments for the future in redemption of which the lump sum has been paid." I agree with the decisions upon this point to be found in the cases of *Rawlings* v. *Hodgson*, *Williams* v. *Minister of Munitions* (121 L.T.R. 341), and *Haydock* v. *Goodier*. When it is suggested that the proposed decision will not in effect interfere with a settlement between the employer and the workman for a lump sum because it could always be arranged on the basis of a commutation of a weekly payment, I would like to point out that not only does such a course necessitate litigation and a hearing, but it is apparent that such a settlement may very often involve other considerations than that of amount as the basis of the settlement agreed upon. I am therefore of opinion that this appeal fails on both points, and that (1) the agreement is a valid agreement, and (2) is not an agreement for the redemption of a weekly payment, and that the Registrar was bound under Schedule II (9) on being satisfied as to its genuineness to record it in a special register.

I am of course aware that having regard to the opinions expressed by your Lordships in the course of this debate the views which I have put forward are of no importance, but I have thought it right to give my reasons for dissenting from the motion put from the Woolsack at some length out of respect for your Lordships and for the learned Judges who have decided the cases already referred to, and which this House has decided to overrule.

Appeal allowed with costs.

Counsel for the Appellant—Morris, K.C. — Duncan. Agents — Kingsley Wood, Williams, & Company, Solicitors.

Counsel for the Respondent—Compston, K.C.—Shakespeare. Agents—Hair & Company, Solicitors.

Thursday, December 6.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

"VITRUVIA" S.S. COMPANY, LIMITED *v.* ROPNER SHIPPING COMPANY, LIMITED.

(In the Court of Session, March 9, 1923 S.C. 574, 60 S.L.R. 379.)

Process — Record—Matter not on Record—Absence of Appropriate Averments and Pleas — Amendment — Ship — Collision — Damages — Detention for Repairs — Whether Detention Due to Collision.

Ship — Collision—Damages—Detention for Repairs — Whether Detention Due to Collision —Averments —Record—Amendment.

In an action of damages for detention for repairs alleged to be due to collision the defenders, while admitting responsibility for the collision, disputed their liability for the loss incurred by the vessel during the time she was laid up. Proof was led, in the course of which it appeared that during the time the vessel was under repair there was extant a defect in her propeller which the defenders alleged made the vessel unseaworthy. This question was argued both in the Outer and Inner House, though the appropriate averments and pleas *hinc inde* were not set forth on record. The pursuers having been awarded damages the defenders appealed to the House of Lords. *Held* that the procedure followed was not in accordance with the Rules of Pleading in Scotland, and cause *remitted* to the Court of Session with a direction to allow the parties to amend the record in terms of the minutes tendered at the bar, to allow a proof thereof, and to make findings of fact and to report the same to the House.

Davidson v. *Logan* (1908 S.C. 350, 45 S.L.R. 142), so far as regards the procedure therein followed, *disapproved*.

The case is reported *ante ut supra*.

The defenders, the Ropner Shipping Company, Limited, appealed to the House of Lords.

In the course of the hearing, their Lordships having intimated that the question now raised by the defenders, viz., as to whether the "Vitruvia" while under repair was unseaworthy irrespective altogether of anything for which the defenders were responsible, would not be considered without an appropriate amendment of the record, counsel for the defenders craved leave to amend answer 4 by adding the following statement:—"The 'Vitruvia' at the time when she arrived in the port of Glasgow on 12th August 1920 was in an unseaworthy condition. In any event her owners had decided that the vessel should not be sent to sea in her then condition. At that date a fault had developed in her propeller which required to be repaired before the