

the case, it is, strictly speaking, unnecessary to consider the other, on which the Lord Ordinary is in favour of the complainer; but as it has been so fully argued, and is of general importance, it is desirable that we should express our views upon it. Now it was decided in the English case of *Blythe*, 1910, 1 Ch. 228, that the procedure under section 7 of the 1896 Act is a mere matter of machinery, by which it is competent for a friendly society to convert itself into a limited company, but only on condition that the objects remain identical and unchanged. In other words, it is not competent for a friendly society under the guise of a conversion to enlarge or alter its objects, although after conversion has taken place it has the same powers as any other limited company possesses of doing so with the sanction of the Court. In one sense it is true that the proposed conversion in this case involves no substantial change of its objects, strictly so called, because the company would still continue to insure its members in the same way as the Friendly Society does at present, except that it would no longer ensure them against sickness, and that the maximum insurance upon any one life is raised from £200 to £300. I am not sure whether even this change would not have entitled the complainer to obtain the interdict which he seeks. But the objection goes far deeper. In the first place, whereas under the existing rules the surplus of assets over liabilities may be allotted by way of bonus amongst members whose membership exceeds five years' standing and who are over sixteen years of age, the bonus must be given in the form of additions to the benefits; and no bonus is to be allotted except to whole-life assurances or endowment assurances. Under the memorandum of association of the proposed company the surplus may be divided as dividends amongst the whole shareholders, although all the B shares may be allotted to individual members who have only paid 5s. to the Society, and that in blocks of not more than 6000 shares of 1s. each. The result will necessarily be that in the case of a member of five years' standing or upwards who does not choose to apply for B shares, the greater part of the benefit to which he would be entitled by way of bonus will be distributed amongst persons who under the existing rules have no right to participate at all. The substantial rights which such a member has under the present rules would thus be taken away from him except to an illusory extent, corresponding to the porportion of the surplus to which the holding of one or two A shares as the case might be would entitle him.

The Lord Ordinary has dealt at some length with another proposal, contained in clause 7 of the memorandum, which is even more objectionable, for it provides for the immediate division amongst the officials and employees of the Friendly Society (including the delegates) of substantially one-third of the whole subscribed capital of the proposed new company. Of this sum about two-thirds is to be distri-

buted amongst the agents and collectors for their labour and trouble "in connection with the conversion and obtaining the necessary capital, and for obtaining the consent of the members of the Society to the conversion if necessary," although there is a special provision in the memorandum that they are to be retained in their employment with the same emoluments and on better terms than before.

Something is to be said for the provision that delegates and members of the board of management of the Society who would lose their fees on the conversion being carried through, should be entitled to compensation for such loss; but why the employees who remain on terms that are at least as good as, if not better than, those upon which they hold office at present, should likewise receive a large sum at the expense of the existing members of the Society I have been quite unable to fathom. I agree with the Lord Ordinary that the proposal involves the application of a large part of the Society's assets to entirely alien purposes, for although the money will be raised by fresh capital, the security for this capital and for the benefits by way of dividends or bonus which would accrue to it, consists entirely in the existing surplus assets of the Society. I think it would be difficult to justify such a proposal upon any ground, but it is enough to say that it violates the principle laid down in the case of *Blyth*, to which I have already referred. On this part of the case I entirely agree with the reasoning of the Lord Ordinary.

On the whole matter I am of opinion that the interlocutor under review must be adhered to, with additional expenses to the complainer.

LORD JUSTICE-CLERK — That is the opinion of the Court. [The Court consisted of LORD JUSTICE-CLERK, LORD ARDWALL, LORD DUNDAS, and LORD SALVESEN.]

The Court adhered, and of new granted interdict as craved.

Counsel for Complainer (Respondent)—
—Graham Stewart, K.C.—W. J. Robertson.
Agents—Watt & Williamson, S.S.C.

Counsel for Respondents (Reclaimers)—
C. N. Johnston, K.C.—Sandeman, K.C.—
M. J. King. Agents—Simpson & Marwick,
W.S.

Thursday, January 19.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

MACANDREW v. GILHOOLEY.

Reparation—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58)—Discharge by Workman—Gratuitous Discharge—Personal Bar.

A workman having received injuries on 3rd December 1909, his employer admitted liability therefor, and paid him compensation under the Work-

men's Compensation Act 1906 from the date of his accident down to 9th March 1910. On 28th February 1910 the workman applied to the employer's cashier for payment of his compensation for the current week, and also for payment of another week's compensation in advance. He thereupon received two weeks' compensation from the cashier, who took from him two separate receipts as for compensation for the two weeks ending 2nd and 9th March 1910 respectively. At the same time the cashier took from him a cumulative receipt headed "Final Discharge." All the receipts for weekly payments granted by the workman and the "final discharge" were on one document, which was in the following terms:— "*First Payment.*

"Received this Twenty-third day of December 1909, from Mr C. Macandrew, Builder, 13 Lauriston Gardens, Edinburgh, the sum of One pound two shillings and sixpence, being two weeks' compensation to 17th November, 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 third day of November 1909.

"*Signature*—PATRICK GILHOOLEY,
X his mark.

"*Occupation*—Labourer.

"*Address*—c/o GILHANNEY, 12 Murdoch Terrace.

"MICHAEL GILHOOLEY, 1st witness.

"F. A. MATSON, 2nd witness.

"*Subsequent Payments.*

Date of Payment of Compensation.	Date up to which Compensation is paid.	Amount.	Signature of Injured Man.
Brought forward		£ s. d. 1 2 6	
Dec. 23	Nov. 24	0 11 3	Received Patrick Gilhooley X his mark
" 23	Dec. 1	0 11 3	Received Patrick Gilhooley X his mark
" 23	" 8	0 11 3	Received Patrick Gilhooley X his mark
" 23	" 15	0 11 3	Received Patrick Gilhooley X his mark
" 23	" 22	0 11 3	Received Patrick Gilhooley X his mark
" 29	" 29	0 11 3	Received Patrick Gilhooley X his mark
1910.	1910.		
Jan. 5	Jan. 5	0 11 3	Received Patrick Gilhooley X his mark
" 12	" 12	0 11 3	Received Patrick Gilhooley X his mark
" 19	" 19	0 11 3	Received Patrick Gilhooley X his mark
" 26	" 26	0 11 3	Received Patrick Gilhooley X his mark
Feb. 2	Feb. 2	0 11 3	Received Patrick Gilhooley X his mark
" 9	" 9	0 11 3	Received Patrick Gilhooley X his mark
" 16	" 16	0 11 3	Received Patrick Gilhooley X his mark
" 23	" 23	0 11 3	Received Patrick Gilhooley X his mark
" 28	Mar. 2	0 11 3	Received Patrick Gilhooley X his mark
" 28	" 9	0 11 3	Received Patrick Gilhooley X his mark
		20 2 6	

"*Final Discharge.*

"Received the sum of £10, two shillings and sixpence, being the amounts mentioned on this form, in full satisfaction and discharge of all claims whatsoever I may have against Mr C. Macandrew for the Personal Injury by accident sustained by me on or about the 3rd November 1909.

"*Signature*—PATRICK GILHOOLEY

X
his mark

(over a penny stamp).

"F. A. MATSON, 1st witness.

"J. BROWN, 2nd witness."

The employer maintained that the workman had granted him a full dis-

charge of all claims whatsoever arising out of the accident, and that he could not now claim compensation. The workman contended that he had merely given receipts for the weekly payments which he had received.

It was proved before the arbiter that the workman had been at 28th February 1910, and was still, incapacitated for work; that he was of low mental type and unable to read or write or sign his name; that no one explained to him what was meant by the language "all claims whatsoever" contained in the discharge; that the cashier who presented it to him for his signature did not himself know what was implied in these words. Moreover, the discharge was given for no consideration, in respect that the sum named therein was merely the summation of the payments made from time to time as weekly payments from the commencement of their becoming due up to 9th March 1910. There was no agreement between the parties other than was represented by the discharge.

Held that the "final discharge" founded on did not bar the workman's claim to receive compensation till his incapacity ceased.

This was a stated case on appeal from a decision of the Sheriff-Substitute (GUY) at Edinburgh under the Workmen's Compensation Act 1906, between Colin Macandrew, builder, 13 Lauriston Gardens, Edinburgh, *appellant*, and Patrick Gilhooley, labourer, residing at 168 Lauriston Place, Edinburgh, *respondent*.

The Case stated, *inter alia*—"This is an arbitration under the Workmen's Compensation Act 1906, arising out of applications by the appellant and respondent respectively to have memoranda of agreement alleged to have been entered into between them recorded in the special register kept for the purpose under the Act by the Sheriff-Clerk of Midlothian.

"The memorandum of agreement alleged and founded on by the appellant was lodged with the Sheriff-Clerk of Midlothian on 3rd March 1910, and that by the respondent on 12th April 1910. Both were duly intimated in terms of the statute, and objections to the genuineness of each were thereafter lodged by the parties respectively.

"The appellant's memorandum set forth that the respondent 'claimed compensation from the' appellant 'in respect of personal injury, viz., injury to skull and shoulder caused by accident in the employment of the' appellant 'at New Geographical Institute, Duncan Street, Edinburgh, on 3rd November 1909. The question in dispute, which was as to the amount and duration of compensation, was determined by agreement. The agreement was made on 28th February 1910, and was as follows, viz.— 'That the' respondent 'having been paid the sum of Ten pounds, two shillings and sixpence sterling, in name of compensation, accepted same in full satisfaction and final discharge of compensation payable, or to become payable, and of all claims com-

petent, or which might become competent, to him in respect of said personal injury and accident, and a discharge was granted by him accordingly.' . . .

"The respondent's memorandum, after narrating the accident referred to, stated that an agreement was come to by the parties on 23rd December 1909 as follows—'That the' appellant 'should pay to the' respondent 'the sum of 11s. 3d. weekly during incapacity.' . . .

"I allowed a proof in each of the applications. . . .

"The following are the facts admitted or proved— . . . The respondent while in the employment of the appellant at New Geographical Institute, Duncan Street, Edinburgh, on 3rd November 1909, received personal injury by accident arising out of and in the course of his said employment, viz., injury to skull and shoulder. By said injury the respondent was totally incapacitated for work, the injury necessitating the operation of trephining the skull, the result of the operation being that the bone removed has not been replaced, and the respondent has now a part of his brain that is not protected by bone. The appellant admitted his liability for a weekly payment to the respondent under the Workmen's Compensation Act 1906, and agreed to pay him the sum of 11s. 3d. per week, being 50 per cent. of his average weekly earnings before the accident, and that weekly sum was paid by the appellant to the respondent for the period from the date of the accident down till 9th March 1910. The first date on which the appellant actually made payment of compensation to the respondent was on 23rd December 1909, when he took from him a receipt for arrears of compensation due up till 22nd December. On more than one occasion thereafter the appellant paid to the respondent more than one week's compensation at a time. On 28th February 1910 the respondent waited on the appellant's cashier, and asked for payment of his compensation for the week then nearly expired, and also for payment of another week's compensation in advance. The respondent then received from the appellant's cashier two weeks' compensation, amounting to £1, 2s. 6d., and the appellant's cashier took from him two separate receipts therefor and that as for compensation, as will appear from the document after quoted, viz.—for the two weeks ending on 2nd March and 9th March respectively. At the same time the appellant's cashier took from the respondent the cumulative receipt, headed 'Final Discharge,' which also appears in the document after quoted. Said document is as follows:—'[quoted *supra* in rubric].' No agreement between the parties other than is represented by the before-mentioned receipt was either averred or proved.

"The respondent is a man of 'very low mental type' as deponed to by the medical witness adduced by the appellant. He can neither read nor write nor sign his name. The whole of said receipts for weekly payments and the said cumulative receipt headed 'Final Discharge' are only signed

by the respondent by his mark. The said cumulative receipt was read over to the respondent before he adhibited his mark to it. The appellant's cashier did not himself understand or explain to the respondent what was meant by 'all claims whatsoever which the respondent might have against the appellant, but he did explain to him that 'if he signed that receipt he was signing off and was not entitled to any more compensation.' There is no evidence in the case indicating that the appellant at any time made any misrepresentations to the respondent to induce him to sign the said receipt. At the time when the said cumulative receipt was signed the respondent expressed to the appellant's cashier the anticipation that he would be fit for work in another week, and the cashier deponed that he thought he was foolish in anticipating this, as he took it that if he was not in a week's time able to resume his occupation he could not come back for any more compensation, but the respondent said that he would take the risk of that upon himself. The respondent was on said 28th February 1910, and still is, totally incapacitated for work as the result of said accident, or, at all events, he has not recovered his capacity for work to such an extent as would entitle the appellant to have his compensation diminished. The said cumulative receipt is not and does not bear to be a discharge of the respondent's rights under the Act on the footing that his incapacity for work had ceased, and is not and does not bear to be an agreement under the Act for the redemption of a weekly payment by a lump sum the memorandum of which might have been laid before the arbitrator by the Sheriff-Clerk under paragraph 9 (d) of the Second Schedule annexed to the Act, the whole money payment made to the respondent having been so made in payment of weekly compensation only. All that was paid to the respondent on 28th February that was not then due as compensation was one week's compensation, 11s. 3d., for which the appellant took a receipt as for compensation paid in advance. No adequate sum, in fact no sum at all, was paid to the respondent as the consideration for redemption of the weekly payment. The said cumulative receipt does not bear to be a discharge of any right to compensation beyond 9th March 1910 or of any other future claim of the respondent. It is not stamped as a discharge but only as a receipt.

"I accordingly held that the memorandum of agreement sought to be recorded by the respondent was genuine, but that the memorandum of agreement sought to be recorded by the appellant was not genuine, in respect (1) that said memorandum bears to be a memorandum of an agreement to redeem a weekly payment for a lump sum of £10, 2s. 6d., no such agreement having been made and no such payment, in fact no payment at all, having been made, in redemption of the weekly payment; (2) that said memorandum bears that the respondent had accepted said sum in full

satisfaction and final discharge, not only of compensation payable, but of compensation to become payable to him, and of all claims, not only then competent, but which might become competent to the respondent, no such discharge of future compensation or claims having been expressly or impliedly granted by the respondent; (3) that the said cumulative receipt was not a valid discharge of the respondent's right to compensation subsequent to 9th March 1910. I therefore granted warrant to record the memorandum lodged by the respondent, and refused warrant to record that lodged by the appellant. . . ."

The following question was stated, *inter alia*, for the opinion of the Court—"5. Standing the said cumulative receipt, was I entitled to grant warrant to record the memorandum of agreement presented by the respondent?"

Argued for the appellant—The questions raised by the Sheriff as to the statutory termination of compensation in respect either of recovered capacity or redemption of weekly payments were not here in point. The respondent had granted the appellant a total discharge. The Sheriff had forgotten that this was a discharge at common law, and barred any claim on the respondent's part. It was unimpeachable in respect that on the facts neither misrepresentation by the appellant inducing the discharge was proved nor essential error—*Dornan v. Allan & Son*, November 22, 1900, 3 F. 112, 38 S.L.R. 70; *Hanley v. Niddrie and Benhar Coal Company, Limited*, 1910 S.C. 875 (Lord Kinnear at 880, and Lord Salvesen at 885), 47 S.L.R. 726; *Ellis v. Lochgelly Iron and Coal Company, Limited*, 1909 S.C. 1278 (Lord President at 1282), 46 S.L.R. 960; *Wood v. North British Railway Company*, July 2, 1891, 18 R. (H.L.) 27, 28 S.L.R. 921. There was clearly no essential error here. What happened was that the respondent had made a wrong estimate as to the time it would take him to recover. Nor was the discharge entirely gratuitous. On 28th February 1910 he got compensation up to 9th March, which was not then due. Lord Ardwall referred to the case of *Dickson v. Halbert*, February 17, 1854, 16 D. 586.

The respondent was not called upon.

LORD SALVESEN—I do not think all the questions in law which the Sheriff-Substitute has stated for the opinion of the Court need be answered, nor indeed that all of them are appropriate to the facts which he has held to be proved. He has given us a long statement of the circumstances in which this so-called final discharge came to be executed by the respondent so far as they appeared to be material to the question whether this discharge is binding upon the respondent. Amongst these are the circumstances that the respondent is a man of a very low mental type, unable to read or write or sign his name; that no one explained to him what was meant by the language "all claims whatsoever" contained in the so-called discharge; that the cashier who presented it to him for his

signature did not himself know what was implied in these words; and that the document was signed without any consideration being received by the respondent at all. The conclusion which the Sheriff-Substitute reaches upon the whole facts is that this is not a discharge which can be pleaded against the right of the respondent to continue to receive compensation until his incapacity ceases. In that conclusion I entirely agree. It is true that he narrates a conversation which took place between the workman and the cashier when the so-called discharge was signed, and it is open to argument that the statement made by the cashier and the answer that the respondent made indicate that the respondent understood that what he was signing was a discharge of all future claims under the Act. But I apprehend that the reason why the Sheriff has stated all the other circumstances to which I have alluded is because on a review of the whole evidence he did not believe that the respondent truly understood what he was doing, or that he intended to make a present to his employer of all future claims to compensation which he might have. Now the arbiter, having reached that conclusion, which appears to me to be really a conclusion in fact, was, I think, warranted in holding that the document did not bar the respondent's claims for compensation, and that he was accordingly entitled to grant warrant to record the memorandum of agreement which the respondent had presented. I propose, therefore, to your Lordships that we should find it unnecessary to answer the first four questions, and that we should answer the fifth question in the affirmative. That is sufficient for the decision of the case.

LORD SKERRINGTON concurred.

LORD ARDWALL—I concur with both your Lordships in holding that the appellant's memorandum falls to be rejected, and that the Sheriff has done rightly in refusing to record it, and that the respondent's memorandum ought to be recorded. This is the effect of the views held by both your Lordships and myself. I think that the so-called "final discharge" cannot be regarded as such, and I must say I go very much on the terms of the whole document of which it forms the concluding portion. We are told it is a printed form, and it looks very much as if it is, but that really does not matter. It is divided into three portions, headed respectively, "First Payment," "Subsequent Payments," and "Final Discharge." Now the first payment is for two weeks' compensation; and then we come to subsequent payments, which are all set down with the periods for which they were paid up to 9th March, and opposite every one of these the respondent adhibits his receipt and his mark. Now that seems to me to close the chapter of these payments altogether. They are received, as they bear to be, week by week, as weekly compensation for the accident up to the last day specified, and nothing

more; they are for weekly compensation only, and for nothing else. Now it seems to have been maintained before the arbitrator, to judge from the questions stated by him in the case, that what follows changes these payments for weekly compensation, as far as the statute is concerned, into either a discharge in respect that incapacity had ceased, which, it is stated in the case is not so, or as redemption money for all future weekly payments. Now I think it clear that such contentions are untenable, and that in no view could the document founded on by the appellant be regarded as a valid statutory discharge; but Mr Dykes, in a very careful and able argument, says it is beside the question to consider this discharge as being either a discharge on account of the incapacity having ceased or otherwise under the statute. He maintains that it must be considered simply as a common law discharge of all future claims. Taking it then as a common law discharge, what do we find? We find it sets forth as follows—"Received the sum of Ten pounds, two shillings and sixpence, being the amounts mentioned on this form, in full satisfaction and discharge of all claims whatsoever I may have against Mr C. Macandrew for the personal injury by accident sustained by me on or about the 3rd November 1909."

Now my first observation is that the consideration which is stated is a false one. It is stated that the consideration for the discharge is this sum of £10, 2s. 6d. That is false on the face of the document itself, because we see from what immediately comes before that that sum of £10, 2s. 6d. was just the summation of the payments which were paid as weekly compensation from time to time from the commencement of their becoming due up to 9th March. So this is a false consideration, and possibly that would be sufficient to entitle the Court to disregard the so-called "final discharge."

But let us pass from that and inquire what was the consideration given for this "final discharge." The answer must be that there was no consideration at all, and that the discharge was purely gratuitous. The sum of £10, 2s. 6d. is mentioned as the consideration, but then we know that this sum was never paid for the final discharge. It had already been consumed in weekly payments, and the discharge was given for no consideration whatever. It is entirely *sine causa*, for it is stated that there was no agreement between the parties other than is presented by the receipt. In that state of matters, viewing it as a common law question, it comes within the rule laid down in the case of *Dickson v. Halbert*, 16 D. 536, for there the discharge was granted entirely *sine causa* by people who did not understand their legal rights, which we may assume is the case here, for I cannot believe, looking to the statements of the Sheriff that the workman was a man of "very low mental type," that he could appreciate what his legal rights were and what he was giving up. In point of fact, he gave this discharge in full without

any consideration whatever—that is to say, he forfeited all claims for the future, and that in the circumstances that he had not then recovered from his incapacity, and it is, we are informed, the fact that he has not recovered yet. That being so, I think we must hold that the Sheriff acted perfectly rightly in disregarding this discharge altogether. It was within his competency to do so, as was decided by the case of *Ellis v. Lochgelly Iron and Coal Company, Limited*, 1909 S.C. 1278, and I think he has rightly dealt with the matter in disregarding it.

The result will be that we affirm the decision of the Sheriff, and hold that the appellant has not a right to have his memorandum recorded, and that the respondent is entitled to have his memorandum recorded.

The LORD JUSTICE-CLERK and LORD DUNDAS were absent.

The Court answered the fifth question of law in the affirmative.

Counsel for Appellant—Horne, K.C.—Dykes. Agent—Robert Miller, S.S.C.

Counsel for Respondent—Morison, K.C.—Kirkland. Agents—J. Douglas Gardiner & Mill, S.S.C.

HOUSE OF LORDS.

Friday, March 31.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, and Lord Shaw).

INTERNATIONAL SPONGE IMPORTERS LIMITED *v.* WATT & SON.

Principal and Agent—Fraud—Sale of Goods—Course of Business—Scope of Authority—Commercial Traveller Embezzling Cash Paid him for Goods, Payments usually being Made by Cheque to Principal.

Circumstances in which held that the purchaser was not bound to pay over again for goods for which he had already paid, though such prior payment had been made, out of the usual course of business, in cash to the seller's commercial traveller, who had embezzled the money.

On February 13, 1909, the International Sponge Importers, Limited, London, pursuers, brought an action against Andrew Watt & Sons, saddlers, Edinburgh, defenders, in which they sought decree ordaining the defenders to deliver to the pursuers in as good condition as they were received three consignments of sponges, or, on failure to deliver, to make payment of £314, 15s. 10d. as the value thereof. The three consignments had been obtained from Cohen, a traveller of the pursuers, sponges not being sold by sample, and the defenders had paid him in cash or by open cheque in his favour, and he had embezzled