Thursday, February 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

TODD *v.* REID.

Writ— Witness's Designation— "Founded on in any Court" — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *secs.* 38 *and* 39.

A discharge for a sum of money not holograph of the granter, was signed by him and by one of the witnesses of the date it bore. The other witness added his signature and designation some time afterwards. The designation of the witness who signed along with the granter was added by a third party after the second witness had signed. In a process in which the discharge was founded on it was proved that it had been subscribed by the granter of it and by the witnesses by whom it bore to be attested. *Held* that it was valid under the 39th section of the Conveyancing Act 1874.

Question — Whether, assuming that the designation of the second witness had been appended after defences had been lodged in the action in which the discharge was founded on as a defence, it would have been excluded from being probative under the 38th section by "having been founded on in any Court?"

Section 38 of the Conveyancing (Scotland) Act 1874 provides—"It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not . . . that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves."

Section 39 provides—"No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such grantor or maker and witnesses."

Archibald Todd, twister, Rutherglen, raised this action in the Sheriff Court of Lanarkshire at Glasgow against Francis Robertson Reid, coalmaster there, for damages on account of the death of his son, who, while working in the defender's pit, fell, through the alleged fault of the defender, into a hole or sump at the bottom of the pit, sustaining such injuries that he shortly thereafter died.

The defender, besides denying fault, alleged that the pursuer, in consideration of £6, 10s. paid to him by the defender, had granted a discharge in his favour waiving all alleged claims of damages. He produced in support of this allegation the following writ, which was stamped—

"*Stonelaw Cottage,*
"*Rutherglen, 18th February* 1882.

"RECEIVED from F. R. Reid, Esq., proprietor of Stonelaw Colliery, the sum of Six pounds ten shillings stg., as a gratuity, in consideration for which I agree to waive all alleged claims against him relating to the death of my son Archd. Todd.

18/2/82
"ARCHIBALD TODD,

"Witness to Archd. Todd's signature, ROBERT TODD,
"*Cotton Yarn Twister,*
"71 *Dale Street, Bridgeton, Glasgow.*

"JOHN PARK, manager, Stonelaw Collieries, Rutherglen, residing at Stonelaw Cottage, Rutherglen, witness to the signature of Archd. Todd."

In reference to this document the pursuer averred—"The alleged discharge referred to by the defender was granted by the pursuer, not as a discharge of all claims the pursuer had against him, but under essential error that the same was simply for funeral expenses of the deceased agreed to be paid by the defender, and exception is taken to the same. The pursuer offers to return the £6, 10s. if required by the defender." He also averred that "at the time that discharge was granted the only parties who signed it were Archibald Todd and Robert Todd, and that the name of John Park was written in at too late a period to render it sufficient as a signature of the deed in question, and also that the designation of the alleged witnesses Robert Todd and John Park were not added until the deed was founded on."

He pleaded—"(3) The alleged discharge is objected to, the same having been granted under essential error, and exception taken to the same. It is, besides, neither holograph or properly tested."

A proof was allowed *primo loco* of the averments of the parties as to the alleged discharge.

The material facts deponed to in evidence were—The body of the document was written by Mr Park, the colliery manager, at a meeting with Archibald Todd and Robert Todd in his house, and it was signed of the date it bore by Archibald Todd and Robert Todd, after having been read over to them by Mr Park. The words "Witness to Archd. Todd's signature," opposite the name of Robert Todd, were also written by Mr Park —according to his own evidence—on the same date, while Robert Todd swore these words were not there when he appended his signature. The words "John Park, manager, Stonelaw Collieries, Rutherglen, residing at Stonelaw Cottage, Rutherglen, witness to the signature of Archd. Todd," were written by Mr Park on the 7th of March following in the office of the defender's law-agent. The words "Cotton-Yarn Twister, 71 Dale Street, Bridgeton, Glasgow," being the

designation of Robert Todd, were added by the defender's law-agent when alone in his own room in his office some days afterwards. He was called as a witness for the pursuer, but was unable to fix the date of his doing so. He deponed —"It was probably a day or two afterwards" (*i.e.*, after 7th March), but admitted having sent a clerk to Bridgeton a considerable time after the 7th of March to ascertain the designation of Robert Todd. He thought that he added the words before the clerk went to Bridgeton, and that he sent the clerk merely to ascertain whether the designation was correct, but was unable to speak with certainty on the point. The action was raised on the 13th of March, and defences were lodged on the 21st. The defender's law-agent was not positive that the designation of Robert Todd was appended before the defences were lodged.

The pursuer deponed that he accepted the £6, 10s. in payment only of his son's funeral expenses, and that when he signed the discharge he did not consider that he was discharging any legal claim against the defender. He also stated that at the meeting with Mr Park when the discharge was signed, as well as at a previous meeting shortly before, the latter refused to entertain or discuss the question of legal liability. "When I went to see Mr Park on the first occasion I asked him what he was going to do regarding the loss I had met with, and he said he would assist me with the funeral expenses, but as for liability he would not entertain that. (Q) Did you specify the items of your loss to him?—(A) Yes; I said that the loss of my son was a great loss to me, and he said that if I was going into the matter of liability I would get nothing, but if I looked at it in the way of a sympathetic allowance he would give me assistance with the funeral money. (Q) Did you mention several items of loss?—(A) Yes; I said it was a great loss to me one way and another—that there was a new suit of clothes that I had got for my son, and they were lying in the house useless." Mr Park's evidence was to the effect that while not admitting liability, the £6, 10s. was given with the general view of meeting everything in the way of alleged claims. "I gave it to cover everything. I considered that there was to be an action raised, and I wanted to prevent it. I gave them the £6, 10s. to discharge the claim, if any, which the pursuer had through the death of his son."

The Sheriff-Substitute (Erskine Murray) found that the pursuer had failed to prove that he had granted the discharge under essential error: "Finds (4), on the other hand, that while there is no doubt that pursuer signed the document in question, or that the two subscribing witnesses were present, it appears from the evidence that only one of them subscribed at the time, and that his designation was not appended till after the defence was lodged, while the other witness present did not at the time consider it necessary for him to sign at all, but signed his name and added his designation before the document was founded on: Finds in law—(1) that in respect of the designation of the subscribing witness not having been adhibited till after the document was founded on, the document is improbative, though otherwise probative; but (2) that under section 39 of 37 and 38 Vict. the defender has proved that it was subscribed by the granter and witnesses, and therefore though improbative it is not invalid; (3) that in respect of the said valid discharge and waiver of claims, it falls to be held that the present action is excluded; therefore assoilzies defender from the craving of the petition.

"*Note.*—It is clear from the evidence even of pursuer and his brother that more than mere funeral money was in their contemplation—the price of the suit of clothes was distinctly set forward as an element of loss. Further, the pursuer will not swear the document was not read over to him. Park says it was, and considering that pursuer can write pretty fairly he might have been able to read it himself. He might have written it himself had he chosen."

The Sheriff (Clark), for the reasons assigned by the Sheriff-Substitute, adhered to his interlocutor.

The pursuer appealed to the Court of Session, and argued—This document was clearly not probative under the old law, and was not saved by the provisions of the Conveyancing Act 1874. (1) It was not probative under section 38, for it had been founded on in Court—defences had been lodged—before the designation of one of the witnesses was appended. "Founded on" did not necessarily mean produced in Court. There could be no fuller way of founding on a writ than by describing it in a summons and making it the subject of a plea. (2) The defender, on whom the *onus* lay, had failed to prove its execution within the terms of the 39th section. (3) The document was not a discharge of all claims, but only a receipt for funeral expenses. It left other claims standing. The word "waive" did not mean to give up absolutely, but only temporarily. Even if valid under the Act, it was invalidated by essential error on the part of the pursuer.

Authorities—Conveyancing Act, secs. 38 and 39; *Hill* v. *Arthur*, December 6, 1870, 9 Macph. 223; *M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151—Lord Deas, 1158; *Dickson* v. *Halbert*, February 17, 1854, 16 D. 587; *Addison*, February 23, 1875, 2 R. 457.

The defender replied—(1) The document was probative under section 38. The pursuer had not proved that the designation of the witness had not been appended before defences were lodged. Actual production in a process by a party interested in the production was necessary to complete the legal act of "founding on" in a Court. (2) But even if not probative under section 38, it was, at all events, valid under section 39. (3) There was here no relevant averment of essential error. Essential error of the kind averred here must be mutual. The only case of essential error which can be made by one party only must be on misrepresentation.

Authorities—*Millar* v. *Birrell*, November 8, 1876, 4 R. 87; *Thomson's Trustees* v. *Easson*, November 2, 1878, 6 R. 141; *Stewart* v. *Burns*, February, 1877, 4 R. 427; *Hogg* v. *Campbell*, March 12, 1864, 2 Macph. 848.

At advising—

Lord Justice-Clerk—In this case the son of the pursuer was injured, so that he afterwards died from the effects of his injuries, by falling into a hole in the defender's coal-pit, and the question was, Whether the owner or manager was liable in damages under the recent statute? It

has not been necessary to go into the question of liability, because there was put forward for the defender in favour of the claim an agreement in writing between the pursuer and the owner, and that writing is said to be a discharge of all claims raised under this summons. It is in these terms —[*His Lordship here described the discharge above quoted*].

That is a document of a kind which does not recommend itself, in the first aspect, to the consideration of the Court, because I think it is always undesirable that persons in the position of the pursuer should be allowed to enter into written agreements binding themselves and discharging their rights, and that such writings should be taken from them, without sufficient legal assistance, where the persons taking them are in a superior position like the present defender. I make this observation because I think that the document founded on in this particular case is sufficient to bear the contention based upon it, and though we heard a good deal of argument against this view there is no sufficient ground to hold that it is not a valid writ. It is not indeed probative in its inception; it is not holograph; and though written in the presence of the witnesses it is not properly tested in accordance with the formalities of our former practice. But the Conveyancing Act of 1874 has two provisions, namely, in sections 38 and 39, which are said to be sufficient to give to this document its probative character—[*His Lordship here narrated how and at what time the different parts of the document were written in*].

It seems that the attestation was not originally there, and a question has arisen under section 38 whether this document had been founded on in the present action before it was ultimately completed. If that question had arisen under section 38 alone, I should have thought it a very narrow question indeed, but section 39 provides that no informality shall affect a document provided the person using it can prove that it was subscribed by the granter and witnesses. Now, I think it is very clearly proved that this document was in reality written in the presence of the witnesses, and that their designations are all correct, and so there is no ground for objection on the point of solemnity. But, again, it is said that it does not refer to this claim, but to other claims, and that it was only intended to refer to funeral expenses, and therefore that the words in which the pursuer agrees to waive all alleged claims relating to the death of his son relate only to his claims for funeral expenses, to which alone, it is said, the negotiations between the parties applied. But I have carefully considered the evidence, and I am satisfied that the pursuer went to this meeting for the purpose of asking for the funeral expenses, and it seems that Mr Park, the manager, declined to enter on the question of liability, and would not discuss it at all. It further appears on the evidence that the pursuer undertook to accept the sum in the receipt in full of all claims. On this view of the evidence I cannot come to any other conclusion than I have indicated, and coming to that conclusion I do not see that I can allow my disinclination to support a document of this kind to influence my decision against the evidence, and that as by statute it is entirely probative, that the pursuer's claim is thereby discharged.

Lord Craighill—The pursuer, who is also the appellant in this case, sues the defender for damages and *solatium* said to be due to him for the death of his son through fault on the part of the defender.

The first of the defences stated, and the only one which has been disposed of by the Sheriff, is that which is set forth in answer to the condescendence, where it is said that the defender, without admitting liability in any way, gave the pursuer the sum of £6, 10s. in consideration of the loss sustained by the death of his son, for which sum the pursuer granted a discharge in favour of the defender waiving all alleged claims for damages. What is here referred to as a discharge is—(*quoted supra*). Several replies have been offered by the pursuer to this defence. The first is that the so-called discharge is improbative; the second that, truly interpreted, it does not express or imply a discharge of the sum sued for; and lastly, that the discharge was granted in essential error on the part of the pursuer. The Sheriff and the Sheriff-Substitute sustained the defender's plea, and hence the present appeal.

That the paper founded on would have been improbative according to the law of Scotland but for the provisions of the Conveyancing Act of 1874 is not disputed. The question is whether by the terms of that Act it has been rendered probative. That it is now probative in terms of the 39th section of that statute was not admitted, but was not very seriously controverted. What was relied on, however, was this. The discharge quoted above was founded on in the defences, and therefore founded on before it was put into its present form, the fact being that the designation of one of the witnesses was added by a third party after the defences were lodged. And this circumstance gives birth to the question whether the reference in the defences to the discharge is a founding upon the discharge in Court within the meaning of the 38th section. This appears to me to be a point of nicety, not to say difficulty, as well as of importance, and I am well pleased that it is not necessary on the present occasion that this point should be decided, because even were it to be held that the paper referred to was a discharge which in the sense of the statute had been founded on in Court before it was completed as required by section 38, the proof which has been adduced validates the instrument, as provided for by section 39, and consequently the same effect is due to it as would have been due supposing that it was a probative instrument within the terms of section 38. This paper therefore must, I think, be taken to be a valid or sufficient instrument to instruct the purpose for which it was granted.

On the question whether this paper is an out-and-out discharge I have had considerable hesitation in coming to a conclusion. The language which is used is unusual and is ambiguous. What is the meaning of the word "waive" as used in this discharge? That is the first question to be determined. The word has two meanings: the first, generally given in all dictionaries, is "to abandon," the second "to put aside for a time," and were there nothing by which this ambiguity was removed, I should give the benefit of the doubt to the pursuer, the paper having

been prepared by or on the part of the defender. But unfortunately for the pursuer the meaning appears to me to be made plain by the way in which this word is construed on the record. The pursuer does not say that "waive" only meant to put aside for a time; what he says is that the things to be abandoned or discharged were not at all alleged claims against the defender, but only those which were specified at the communings between the parties. Thus, on his own showing "waive" was not the putting aside for a time, but meant that the things to be waived were to be abandoned.

The pursuer's next point is that the things to be waived being only alleged claims, this means that the claims specified in the communings were all that were discharged. This, I think, is not really the case upon the true construction of the word used. That word appears to me to be not equivalent to "specified," but the equivalent of "not admitted;" that is to say, the claims waived were claims made or alleged by the pursuer, but were claims which were not admitted by the defender.

On the last question, that of alleged error on the part of the pursuer, I think the judgment of the Court must also be against the pursuer. Be it that the pursuer was in error, still it is not suggested that this was induced by fraud or misrepresentation on the part of the defender, and error influencing one party is not a ground on which an instrument like this discharge can be invalidated.

The result is that in my opinion the pursuer's appeal ought to be dismissed; but I feel it right to add that it is to be regretted this discharge was taken from the pursuer for the consideration which it expressed, and the defender having achieved success on the defence which has been sustained will do more in his own interest as an employer of labour should he, there being no imputation on his honesty or fair dealing, receiving back the £6, 10s., waive even this plea.

Lord Rutherfurd Clark—The important question here is that under section 38 of the Conveyancing Act, and I confess that it is to me a difficult and doubtful point which I am glad to be relieved of the obligation of having to decide by the provisions of the following section, for however much the question may be doubtful under section 38 whether this document has been founded on in Court, there is no doubt that looking to the evidence here it is a probative document under section 39. That being so, I confess it removes all my difficulty, for I can see no difficulty whatever in pronouncing as to the meaning of the document. It is clear in the first place that it is a discharge of all claims, and in the next place I see no possible ground on which it should not receive its full and plain effect. I am therefore of opinion that the Sheriff's judgment should be affirmed.

Lord Young was absent.

The Court found "that in granting the document founded on by the defender, the pursuer discharged the defender of all claims on account of the death of his son;" "that the document was valid and probative in law;" therefore dismissed the appeal.

Counsel for Pursuer (Appellant)—Campbell Smith—Rhind. Agent—William Officer, S.S.C.
Counsel for Defender (Respondent)—Darling. Agents—H. B. & F. J. Dewar, W.S.

Thursday, February 8.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

DRYER AND OTHERS *v.* BIRRELL AND OTHERS.

Marine Insurance — Warranty—"No St Lawrence"—Construction of Warranty.

A ship was insured under a time policy which contained the warranty "No St Lawrence between 1st October and 1st April." Between these dates she called at ports within the Gulf, but not within the River St Lawrence, and she was subsequently lost within the period for which the policy was current. *Held*, on a proof, (*rev.* judgment of Lord M'Laren) that there was no general understanding of merchants by which the warranty applied to both the River and the Gulf; that it was therefore ambiguous, and must be strictly construed against the underwriters who founded on it; and that they were therefore not freed by the ship having been within the Gulf during the specified period from their obligation to indemnify the shipowner. Lord Craighill *dissented*, on the ground that the words "No St Lawrence" were not ambiguous, and applied to both River and Gulf.

This was an action raised by H. B. Dryer, merchant, St John's, Newfoundland, and others, owners of the barque "L. de V. Chipman," against Walter Birrell and others, the underwriters with whom the ship had been insured under a time policy of insurance in which she was valued at £3000. The pursuers concluded against the defenders for their several proportions of the sum of £3396, 15s. 10d., being the amount of average loss and total loss under the said policy. The vessel was insured from and during the space of twelve calendar months, commencing on the 29th May 1878 and ending on the 28th May 1879, both days inclusive, as employment might offer, in port and at sea, in docks and on ways, at all times, in all places, and on all lawful trades and services whatsoever. On the margin of the policy there was written the following warranty, viz:—"Warranted no St Lawrence between 1st October and 1st April." The "Chipman" during the period for which she was insured carried a cargo of iron from Cardiff, in Wales, from which she sailed in September, to Charlottetown, Prince Edward's Island, in the Gulf of St Lawrence; after discharging this cargo she loaded at Souris, Prince Edward's Island, also a port in the Gulf of St Lawrence, a cargo of oats and deals, with which she sailed on 14th December 1878 for Queenstown or Falmouth in the United Kingdom for orders. During this voyage she was totally lost by perils of the sea in the open Atlantic on 11th January 1879.

The pursuers averred—"By long established custom the warranty expressed in said policy, 'Warranted no St Lawrence between 1st October and 1st April,' has been and is understood among underwriters and owners of vessels insuring the same to mean that the vessel insured shall not during the period specified be sent to or be in the river St Lawrence. The said warranty is, and has been for a very long period, so understood by underwriters and owners of vessels insuring the