THE SCOTTISH LAW REPORTER.

WINTER SESSION, 1905-1906.

COURT OF SESSION.

Friday, October 20, 1905.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

MACDONALD *v.* THE FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule II, sec.* 8—*A.S., 3rd June* 1898, *sec.* 7 (*a*) — *Memorandum of Verbal Agreement — Registration — Genuineness —Special Warrant to Register.*

Held that a Sheriff is bound, under Schedule II, sec. 8, of the Workmen's Compensation Act 1897, and section 7 (*a*) of the relative Act of Sederunt of 3rd June 1898, to grant a special warrant for the registration of a memorandum of a verbal agreement between an injured workman and his employers, fixing the amount of compensation due by the latter to the former, if he is satisfied that it is genuine in the sense of being the agreement actually arrived at by the parties. Whether the parties were labouring under essential error as to their rights when they made the agreement, or whether the agreement is contrary to the statute in respect that it awards the workman too high a rate of compensation, are questions he is neither bound nor entitled to consider.

Opinion reserved upon the question whether a sheriff-clerk would be bound to record a memorandum of a written agreement in which it appeared *ex facie* that the compensation awarded was beyond the maximum which, upon any view of the facts, could be awarded to the workman under the Act.

Section 8 of the second Schedule appended to the Workmen's Compensation Act 1897 provides—"Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of Sederunt], by the said committee or arbitrator, or by any party interested, to the [Sheriff-Clerk] for the district in which any person entitled to such compensation resides, who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall, for all purposes, be enforceable as a [Sheriff Court] judgment: Provided that the [Sheriff] may at any time rectify such register."

(The words in brackets are substituted for their English equivalents in terms of section 14 (*a*).)

The Act of Sederunt of 3rd June 1898 provides as follows:—Section 7 (*a*)—"The memorandum as to any matter decided by a committee, or by an arbitrator other than a Sheriff, or by agreement, which is by paragraph 8 of the second Schedule appended to the Act required to be sent to the Sheriff-Clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. Where such memorandum purports to be signed by or on behalf of all the parties interested, or where it purports to be a memorandum of a decision or award of a committee or of an arbitrator agreed on by the parties and to be signed in the former case by the secretary or by at least two members of the committee, and in the latter case by the arbitrator, the Sheriff-Clerk shall proceed to record it in the special register to be kept by him for the purpose with-

out further proof of its genuineness. In all other cases he shall before he records it send a copy . . . to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine; and if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof; but if the genuineness is disputed, he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff."

Thomas Macdonald, blacksmith, Glasgow, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the Fairfield Shipbuilding and Engineering Company, Limited, praying the Court "to grant warrant to the Sheriff-Clerk of Lanarkshire at Glasgow to record in the special register provided for the purpose a memorandum of agreement, dated 27th July 1904, sent to the Sheriff-Clerk of Lanarkshire aforesaid by the pursuer and his agent Robert Kyle, writer, Glasgow, that the same might be recorded pursuant to paragraph 8 of the second Schedule of the Workmen's Compensation Act 1897, containing the terms upon which the pursuer and the defenders agreed to settle the claim of compensation made by the pursuer against the defenders under said Act; and to find the defenders liable in expenses."

The circumstances which led up to the action were as follows:—The pursuer, while in the employment of the defenders, met with injuries which entitled him to compensation under the Workmen's Compensation Act 1897. Application was made by the pursuer to the defenders for payment of compensation in terms of the Act, and a verbal agreement was entered into between the parties by which the defenders agreed to pay the pursuer the sum of 16s. weekly. The pursuer's wages in the defenders' employment were at the rate of 32s. a-week, but at the time of the accident he had been only one day in their employment, his actual earnings being 6s. 4d. For some time the defenders paid the pursuer 16s. weekly, but ultimately, having come to the conclusion that on a proper interpretation of the Act they were only bound to pay him 3s. 2d., they ceased the payments of 16s. and offered instead payments at the rate of 3s. 2d. The pursuer thereupon raised the action.

The defenders opposed the action, and pleaded, *inter alia*, "Essential error." The Sheriff-Substitute (DAVIDSON) allowed a proof, by which the facts set forth above were established. On the 31st January 1905 he issued the following interlocutor:—"Having heard parties' procurators and considered the proof and productions, grants warrant as craved."

Note.—". . . I think the authors of the Act really meant (though they did not say so) that the compensation payable should either be ascertained by proceedings before an arbiter or by agreement, and that the result in each case was to be recorded. I might refer to the case of *Keeling*, 116 L.T. Journal 595, where an agreement was ordered to be registered, although it had been admittedly superseded by a subsequent one. Having got this length then, that a genuine agreement was arrived at (and this cannot be seriously disputed) the question remains whether the respondents can competently resist the recording of it on the ground that it was come to on their part in error as to their true legal rights. A very able argument, founded on several authorities, was submitted on this head for the respondents. But I do not think the Court can give any effect to their contention at this stage at anyrate. The direction of the Act is perfectly simple, and the duty of the Clerk and the Court is purely administrative. Once satisfied that an agreement has been made, I have no power to refuse to order its registration. . . . ."

The defenders appealed to the Sheriff (GUTHRIE), who on 15th March pronounced the following interlocutor:—"(1) Finds that the pursuer, on 28th March 1904, while in the defenders' employment, was injured in the course of his employment in one of his eyes, and claimed compensation under the Workmen's Compensation Act 1897: (2) Finds that he was paid compensation by the defenders through their insurers at the rate of 16s. per week for twelve weeks conform to receipts in process, each of which bears that the payments were the weekly payments to which he was entitled under the Workmen's Compensation Acts 1897 and 1900, for the personal injury caused by said accident: (3) Finds that the pursuer's wages in the defenders' employment were at the rate of 32s. a-week: (4) Finds that he had at the time of the accident been one day in the employment, his actual earnings being 6s. 4d.: (5) Finds that the weekly payments aforesaid were made and received by the parties while they were in error as to their rights under the Workmen's Compensation Acts, and that it cannot, from the receipts produced or from other evidence in the cause, be inferred that there was a genuine agreement to the effect stated in the memorandum libelled: Therefore recals the interlocutor of 31st January last; refuses the petition, and decerns.

Note.—"There is no such plea for the pursuer, but it was argued that the appeal is incompetent in respect that the granting of the warrant is merely an administrative act. Sheriff Davidson seems to have held this opinion, probably founding on dicta in *Cammick*, 4 Fr. 198. But although certain opinions were there expressed, the First Division case of *Cochrane* v. *Traill*, 3 Fr. 27, 1091, was not overruled, and it remains as a direct authority to the effect that the application under Schedule II, sec. 8, and the Act of Sederunt of June 3, 1898, sec. 7, is an ordinary Sheriff Court process. Lord Adam in the latter case indicates that the Sheriff has to determine the question whether an agreement for which registra-

tion is sought is or is not a genuine agreement, and it may not be unreasonable in many cases that the application should follow the usual course of a Sheriff Court action. So accordingly it was, I think, decided. And although the considerations of expedition and finality which no doubt moved the Second Division Judges in *Cammick* v. *Glasgow Iron and Steel Company* may be more in accordance with the policy of this statute, yet it is nothing new to find anomalies and even absurdities in its enactments.

"It was argued that if this case is an ordinary Sheriff Court action, section 11 of the Sheriff Court Act 1877 applies, and the agreement, if there be an agreement, may and ought to be set aside *ope exceptionis* on the ground of mutual error. It is hardly necessary, perhaps, to found on that section, as it may be said that there is no agreement that can be set aside until the pursuer establishes in this proceeding that there is an agreement. However that may be, I find that as the parties were alike in error in making the payments there can be no legitimate inference that they agreed to pay during the inability of the pursuer the sum claimed in the memorandum, or if such an inference is made it is made only to be set aside or negatived on the ground of mistake.

"A good deal was said on the effect of error in law. But it seems to be clear that the mistake under which the parties laboured was as to what in fact their rights were under the statutes, and that even in England the Courts would set aside a contract on the ground of such a mistake. *A fortiori* in Scotland it is laid down by Professor Bell (Principles 11) that error in law as well as in fact will invalidate a contract, although it may not always entitle to restitution after it is fulfilled. The statement is by Professor Bell himself, not by his editor; it is according to the authorities, and it has never, I think, been doubted. Here restitution is not sought by the defenders, and it is the pursuer who seeks to set up a contract founded on error. It would be contrary to good conscience to allow this to be done."

The pursuer appealed to the Court of Session, and argued—Neither the fact that the agreement may have been entered into by the parties under essential error as to their rights under the Act, nor that it may have provided for a rate of compensation in excess of that exigible under the Act were grounds upon which the Sheriff could refuse to register a memorandum. As to essential error, the maxim *ignorantia juris neminem excusat* was applicable, the ignorance here being ignorance of the public law of the country and not of a mere private right—*Cooper* v. *Phibbs*, 1867, 2 E. and I. App. Cases, 149, Lord Westbury at p. 170. And as to the objection that the agreement provided undue compensation, the answer was that under section 8 of the second Schedule of the Act, and section 7 of the Act of Sederunt, the Sheriff had no concern with the contents of the agreement but was bound to register it if satisfied that it was genuine, *i.e.*, embodied accurately the terms of the arrangement actually arrived at by the parties—*Cammick* v. *Glasgow Iron and Steel Company, Limited*, November 26, 1901, 4 F. 198, L.J.-C. at p. 201, 39 S.L.R. 138; *Cochrane* v. *Traill & Sons*, November 1, 1900, 3 F. 27 and 1091, Lord Adam at p. 30, 38 S.L.R. 18. If the agreement were incorrect it could be reviewed in the manner provided by Schedule I, 12, Schedule II, 8 of the Act.

Argued for the respondents—The pursuer was only entitled to 3s. 2d. per week—*Grewar* v. *Caledonian Railway Company*, June 19, 1902, 4 F. 895, 39 S.L.R. 687; *Cadzow Coal Company, Limited* v. *Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40. It was *a priori* improbable that it was intended by the Legislature that an agreement demonstratably not in accordance with the Act should be recorded. This was confirmed by the language of section 8 of Schedule II, which provided for the recording of an agreement in one event only, viz., "where the amount of compensation under this Act shall have been ascertained." Until therefore the true amount of compensation had been ascertained there was no agreement capable of being recorded. "Genuine" both in the Schedule and Act of Sederunt meant "true," not only in the sense of accurate as to what took place between the parties but accurate under the Act. If this agreement were registered the respondents would have no means of redress, the remedy provided by section 12 of Schedule I being only available where there had been a change of circumstances—*Crossfield & Sons, Limited* v. *Tanian*, [1900] 2 Q.B. 629. The Sheriff's reasoning on the question of essential error was sound and should be adopted.

LORD KYLLACHY—In this case the Sheriff-Substitute granted warrant for the recording of the agreement, and the first question for our consideration is whether the Sheriff-Substitute's determination is subject to review. If it were necessary to decide that question, we should require to postpone the decision until the issue of another case which is now before Seven Judges, and in which judgment has not yet been pronounced. But in the view which I take, it appears to me that even if the competency of the appeal here from the Sheriff-Substitute to the Sheriff were affirmed, there are no grounds for disturbing the judgment of the Sheriff-Substitute. The question before the Sheriff-Substitute was simply the genuineness of the agreement, and it appears to me that even now no grounds have been stated going to impeach its genuineness. The genuineness of the agreement is admitted. It is admitted to be as much a genuine agreement as if it had been in writing and signed by both parties. The objection to it stated by the respondents is only this, that although in fact made between the parties, it was induced by essential error—in other words, that although a genuine agreement, it was not a valid agreement, either as being induced by essential error or as being an agreement which upon examination of the whole facts would be

found to be contrary to the provisions of the statute—contrary in this sense, that it awarded the pursuer undue compensation. That being so, it does not appear to me to be possible to doubt that the Sheriff-Substitute was right in granting the special warrant which is in question. His only error was in allowing proof, or rather in allowing, as I think he did, a proof going beyond the question of genuineness. It was, I apprehend, his duty, as soon as it was admitted or proved that the agreement was a genuine agreement—genuine in the ordinary sense of the term—to have at once granted his warrant. In other words, he was not, I think, either entitled or bound to go behind the agreement, and after a proof of the whole facts, to consider and decide whether the agreement was consistent with the various decisions of the Courts, English and Scottish, as to the construction of the Workmen's Compensation Act.

It has, no doubt, been argued that when this agreement is examined, not with reference to what appears on its face, but with reference to the whole facts disclosed in the proof, it was an agreement contrary to the just construction of the statute, and therefore as a statutory agreement null and void. But it is, I think, vain to suggest that it was the intention of the statute that questions of this sort should be considered by the Sheriff-Substitute. Against that it seems conclusive that the Sheriff-Substitute performs exactly the same function as the Sheriff-Clerk performs if a written agreement purporting to be signed by both parties is tendered to him to be recorded. The Sheriff-Clerk in such a case would plainly not be entitled or bound to inquire what the facts were, what the workmen's wages were, what his "average weekly earnings" were, or what was the true construction of the statute as applied to these facts. His duty would plainly be to record the agreement *de plano*, and that being so the position of the Sheriff-Substitute differed only in this respect, that there being here no written agreement, but only a verbal agreement, and the parties being in dispute as to whether that agreement was truly made, he (the Sheriff-Substitute) had to be satisfied before he granted his warrant that the agreement was truly in fact made.

I say nothing as to what the result would be if there were a written agreement, and if upon the face of that agreement it appeared that the compensation awarded was beyond the maximum which upon any view of the facts could be awarded to the workman under the Act. In that case a totally different question would arise. Possibly in that case the Sheriff-Clerk might refuse to record, but such a case is not likely to occur, and I reserve my opinion upon it until it does occur.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred.

LORD LOW had not yet taken his seat in the Division.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed the interlocutor of the Sheriff-Substitute of 31st January 1905.

Counsel for Appellant—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondents—Dewar, K.C.—A. Moncrieff. Agents—Drummond & Reid, W.S.

Wednesday, October 25.

SECOND DIVISION.

[Dean of Guild Court, Edinburgh.

IRELAND *v.* THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH.

Burgh—Dean of Guild—Building Regulations—Height of Buildings—Side Street — Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict. cap. cxxxvi*), *sec.* 44 — *Edinburgh Improvement and Municipal and Police (Amendment) Act* 1893 (56 *and* 57 *Vict. cap. cliv*), *sec.* 34, *sub-sec.* 5—*Edinburgh Improvement and Tramways Act* 1896 (59 *and* 60 *Vict. cap. ccxxiv*), *sec.* 87 (7)—*Edinburgh Corporation Act* 1900 (63 *and* 64 *Vict. cap. cxxxiii*), *sec.* 80.

The Edinburgh Municipal and Police (Amendment) Act 1891, by section 44, subsequently amended by later Acts, provides that the sanction of the Magistrates and Council is required before buildings in any existing street or court be increased in height beyond certain limits. The Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, section 34 (5), adds this proviso —"Provided further that the height of houses or buildings which are in or which abut on any lane or side or back street shall not, to the extent of 40 feet backward from such lane or side or back street, measured from the face of the wall of such houses or buildings, exceed the height of one and a-half times the width of the lane or side or back street, unless otherwise sanctioned by the Magistrates and Council."

The Provost, Magistrates, and Council of the City of Edinburgh opposed the granting of a warrant to erect buildings fifty feet high in a street which, being only 120 feet long, formed a *cul de sac* and was 40 feet wide, on the ground that their sanction (which they had refused) was necessary for building to a height exceeding the width of the street.

Held that the street was a side street within the meaning of section 34, subsection 5, of the Edinburgh Improvement and Municipal and Police (Amendment) Act 1893, and that the sanction of the Magistrates was not required.

The Edinburgh Municipal and Police (Amendment) Act 1891, sec. 44, provides:—