matter would have been different—*Parnell* v. *Walter*, July 3, 1889, 16 R. 917, Lord Kinnear at 924, 27 S.L.R. 1. The fact that they chose to call themselves the Rossland Company was quite immaterial. But in any event the present action was incompetent. The Sheriff having granted a warrant to sell it was incompetent to ask him to interdict proceedings under that warrant. The pursuers should have appeared in the poinding and objected there—*Lamb* v. *Wood*, July 20, 1904, 6 F. 1091, 41 S.L.R. 825. Thereafter the only competent action would have been a suspension and interdict in the Court of Session—Mackay's Practice, vol. ii, 211; Graham Stewart on Diligence, p. 354, and cases there cited.

LORD LOW—The main ground upon which the appellants seek to have the interlocutor of the Sheriff recalled and interdict granted in terms of the prayer of the petition is that the articles which were poinded, and which are enumerated in the prayer, were the property of the Rosslund Cycle Company, and not of the individual appellants.

The appellants Ross and Lundy were joint acceptors of the bill in question, and of course are jointly and severally liable thereon, and they carry on business together under the name of the Rosslund Cycle Company, of which they are the sole partners. Now, when all the partners of a firm carrying on business under a descriptive name grant a bill, I see no reason in principle why the bill should not be a good ground of diligence against the assets of the firm if it was in fact granted for the purposes of the firm. In such a case I think that the presumption rather is that the bill is granted for trade purposes (*Yorkshire Building Company*, 5 C.P. Div., p. 109), but it is open to the granters to prove the contrary. That is what the appellants undertook to do in this case, because they aver in the condescendence that the bill was accepted by them in their individual capacities. Not only have they failed to prove that averment, but it is established, and is not now disputed, that the bill was granted in consideration of assistance which the respondent gave them for the purpose of enabling them to obtain stock-in-trade and tools for their business. I am therefore of opinion that the interlocutor of the Sheriff-Substitute should be affirmed.

The LORD JUSTICE-CLERK and LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for Pursuers—Hamilton. Agents—Gardiner & Macfie, S.S.C.

Counsel for Defender—Morison, K.C.—MacRobert. Agent—James Ayton, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

[Sheriff Court at Ayr.

BAIRD & COMPANY, LIMITED *v.* STEVENSON.

Process—Review by Whole Court—Refusal.

A case raised a question under an Act of Parliament which had been repealed, a new Act with varied provisions being substituted. The new Act allowed an appeal to the House of Lords, which had not been competent under the old one. The question had already been decided by both Divisions in the same way, but there had been a dissent in each Division, and the result was the opinion of four Judges against two, a decision in England being also in favour of the minority.

The Court *refused* to send the case to the whole Court and *followed* the previous decisions.

Master and Servant — Workmen's Compensation Acts — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. I, sec.* 12—*Review of Weekly Payment—Date from which Payment may be Ended, Diminished, or Increased.*

The Workmen's Compensation Act 1897, Schedule I, 12, provides—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall in default of agreement be settled by arbitration under the Act."

Held that when an application under the above section to review a weekly payment under the Act is brought before an arbitrator, he can only end, diminish, or increase the payments from the date of his decision in the application.

Steel v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; and *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, *followed*.

Opinions touching the authority of the decisions in connection with the new Workmen's Compensation Act of 1906.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. II, sec.* 8—*Registration of Memorandum of Agreement—Rectification of Register by Sheriff—Limits of Rectification—Petition to Expunge admittedly Correct Memorandum on Ground that Agreement had Terminated at Date of Registration.*

The Workmen's Compensation Act 1897, Schedule II, 8, provides—"Where the amount of compensation under this Act shall have been ascertained, ... by agreement, a memorandum thereof shall be sent to the (in Scot-

land) sheriff clerk for the district in which any person entitled to such compensation resides who shall, . . . on being satisfied as to its genuineness, record such memorandum in a special register . . . and thereupon the said memorandum shall for all purposes be enforceable as a (in Scotland) Sheriff Court judgment: Provided that the (in Scotland) Sheriff may at any time rectify such register."

Held that the authority given to the Sheriff to rectify the register is limited to correcting incidental mistakes which may have crept into it, and does not, in an application to rectify, empower him to determine questions as to the rights and liabilities of parties under the agreement.

Held, accordingly, that a petition by the employers of a workman to the Sheriff to "rectify" the register by "expunging" therefrom, or "altering or amending" an admittedly correct memorandum of an agreement for the payment of compensation during the workman's incapacity, on the ground that at the date of the recording of the memorandum the workman had recovered, and that the agreement no longer subsisted, was incompetent, and fell to be *dismissed*.

Two appeals from the Sheriff Court at Ayr were before the Court.

I. The *first* was an appeal by William Baird & Company, Limited, in an arbitration under the Workmen's Compensation Act 1897 between the appellants and David Stevenson, miner.

The Sheriff-Substitute (SHAIRP) stated the following case:—"This is an arbitration under the Workmen's Compensation Act 1897, in which the said William Baird & Company, Limited, crave the Court to review the weekly payment of 13s. sterling which they agreed to pay to the said David Stevenson from the 11th day of June 1906 during his total incapacity, as compensation under the said Act in respect of personal injury caused to the said David Stevenson by accident arising out of and in the course of his employment as a miner in the service of the said William Baird & Company, Limited, in their Berryhill No. 2 Pit on or about the 28th day of May 1906, and to end or diminish the said weekly payment as from the 10th day of September 1906, or from any subsequent date, all as the Court might see proper, under and in terms of the said Act, First Schedule, sec. 12, and to find the said David Stevenson liable in the expenses of the arbitration.

"The said William Baird & Company, Limited, paid the said weekly compensation to the said David Stevenson till and including the 10th day of September 1906.

"A memorandum of the said agreement between the parties was on the 3rd day of January 1907 recorded by the said David Stevenson in the special register kept by the Sheriff-Clerk at Ayr in terms of the said Act. On 1st February 1907 the respondent formally claimed compensation from the appellants at the said rate of 13s. per week from and after said 10th September 1906, but appellants declined payment. The application in this arbitration was presented on the 14th day of February 1907. At said date the appellants were making no weekly payment to the respondent.

"In the seventh article of the condescendence annexed to said application the said William Baird & Company, Limited, aver that 'defender's (the said David Stevenson's) incapacity by reason of his said injuries did not last beyond 10th September 1906, and at said date he was able to resume his employment, and to earn as much on an average as he earned before the accident. Defender's (the said David Stevenson's) incapacity then terminated, and his compensation should be ended as from that date. Defender (the said David Stevenson) resumed work on 28th November 1906, and has since been earning as good wages as he did before the accident. His compensation should in any case be ended as at 28th November 1906.'

"In the seventh article of the said David Stevenson's defences the said averments of the said William Baird & Company, Limited, are denied, except that he admits that on 28th November 1906 he obtained light employment from the said William Baird & Company, Limited, in which, however, he had not been able to earn anything like the same wages which he earned before the accident, and it is explained 'that the defender (the said David Stevenson) having obtained light employment is agreeable that the compensation payable under said agreement should, until the further orders of Court, be reduced to the sum of 7s. weekly as from the date when the pursuers (the said William Baird & Company, Limited) agree to accept this offer.'

"The said David Stevenson pleaded that as the said William Baird & Company, Limited, have refused to pay the compensation due to the said David Stevenson since the said 10th day of September 1906, and were when the defences were lodged making no weekly payment to him, the application was incompetent and should be dismissed, but on 19th March 1907, after hearing parties' procurators, I repelled the said plea, and allowed the parties a proof of their respective averments, and the said William Baird & Company, Limited, a conjunct probation, and fixed the 27th day of March 1907 as a diet of proof.

"On 22nd March 1907 a minute was lodged for the said David Stevenson stating that 'in respect he is now medically advised that he is fit to resume his former employment as a miner, the defender (the said David Stevenson) consents to the weekly payments being ended.'

"On the first ordinary Court day thereafter, viz., on 26th March 1907, I, in respect of said minute, dismissed the said diet of proof, and thereafter heard parties' procurators. At the hearing the law agent of the said William Baird & Company, Limited, asked for a proof of the said averments contained in the said seventh article of their said condescendence. On the authority of *Steel* v. *The Oakbank Oil Company*,

Limited, December 16, 1902, 5 F. 244, and *The Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, I was of opinion that I was only entitled and empowered by said Act to end or diminish the said weekly payments as at the date of my award in the appellants' application. Accordingly on 1st April 1907 I issued an interlocutor in which I held that the said averments were irrelevant, and refused the said motion. I also found in terms of said minute that the said David Stevenson's incapacity had terminated, and I ended the said weekly payments as from the said 1st day of April 1907. Lastly, I found the said David Stevenson liable in expenses to the said William Baird & Company, Limited."

"The *question of law* for the opinion of the Court is—'Whether in the circumstances before narrated the said William Baird & Company, Limited, were entitled to a proof of the averments contained in the said seventh article of their condescendence as craved by their law agent, or whether, on the authority of the abovementioned cases, I was right in refusing to grant such a proof?'"

II. The *second* appeal was in a petition in the Sheriff Court, in which, founding on Schedule II 8 of the Workmen's Compensation Act 1897, William Baird & Company craved the Sheriff "to rectify the special register kept by the Sheriff-Clerk of the County of Ayr, at Ayr, for the purposes of the Workmen's Compensation Act Eighteen hundred and Ninety-seven, by expunging therefrom a memorandum setting forth an agreement between the pursuers and defender, recorded therein on third January Nineteen hundred and seven, or by altering or amending, in such manner as to the Court may seem just, the terms of the said memorandum as set forth in the said special register, or by such other means as the Court may deem necessary."

The facts are sufficiently apparent from the narrative of the Sheriff in the stated case *supra*.

The pursuers averred, *inter alia*—"(Cond. 11) Pursuers desire rectification of said register on the following grounds, viz.—There was no agreement subsisting between the parties on 1st October 1906, the date when the said memorandum was lodged. In any event, there was no agreement subsisting between the parties at the date when the said memorandum was recorded on 3rd January 1907. The pursuers, in or about the beginning of September 1906, requested the defender to submit himself to examination by Dr Stewart, Auchinleck, a duly qualified medical practitioner provided and paid by them. Dr Stewart reported that the defender's incapacity had ceased, and that he was able to resume work as a miner. The said report was communicated to the defender. Defender did not intimate to the pursuers any dissatisfaction with said report and did not submit himself to examination by one of the medical referees appointed under the Act. Pursuers paid compensation at the rate agreed upon down to 10th September 1906. The defender did not thereafter intimate to the pursuers that he claimed any further compensation until 1st February 1907, when he informed them that he claimed compensation at the rate of 13s. a-week as from 10th September 1906. Pursuers aver that defender's incapacity had ceased at 10th September 1906, and that he was then quite able to resume work. They further aver that on 28th November 1906 defender resumed his work in their employment, and that he has since that date earned the average wage of workmen engaged in the same class of work. The agreement originally made between the parties was that pursuers should pay defender compensation at the rate of 13s. a-week during the period of his incapacity. The said period of incapacity had terminated on 10th September 1906, when defender was examined by Dr Stewart, or in any case on 28th November 1906, when defender resumed his work. Accordingly the said agreement had ceased to subsist before the Sheriff granted warrant to record it. The defender has obtained an extract of the memorandum as registered in said special register, and has charged the pursuers thereunder to make payment to him of compensation at the rate of 13s. a-week from 10th September 1906 till the date of the charge. In the circumstances above set forth it has been found necessary to apply to the Court for rectification of the register, and the rectification suggested by the pursuers is that the memorandum recorded in said special register should be expunged or deleted. Admitted that the pursuers have brought a suspension of the charge under the said recorded memorandum, and that they have also applied to the Sheriff as arbitrator under the Workmen's Compensation Act 1897 to review the amount of the compensation payable to defender."

The pursuers pleaded—"(1) The agreement founded upon by pursuers and set forth in the memorandum libelled having ceased to subsist at the date when the said memorandum was presented for registration, the said special register should be rectified accordingly. (2) The agreement founded upon by pursuers and set forth in the memorandum libelled having ceased to subsist as at the date when warrant was granted to record it, the said special register should be rectified accordingly."

The defender pleaded, *inter alia*—"(3) The pursuers' averments being irrelevant and insufficient to support their pleas the action should be dismissed."

On 1st April 1907 the Sheriff-Substitute (SHAIRP) pronounced the following interlocutor:—". . Sustains the third plea-in-law stated for the defender, and accordingly dismisses the action. . . ."

Argued for the appellants—1. *In the Stated Case*—The cases of *Steel* v. *Oakbank Oil Co., Limited*, December 16, 1902, 5 F. 244, 40 S.L.R. 205, and *Pumpherston Oil Co., Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, which decided that in an application for review under Schedule I (12) the Sheriff's award could not go back beyond the date of his decision, were wrongly decided, and the present case

should be sent to the Whole Court for the reconsideration of these decisions, in which the correct view of the law had been taken by the dissenting Judges, the Lord Justice-Clerk and Lord M'Laren, following the decision of the Court of Appeal in England in *Morton & Co., Limited* v. *Woodward*, [1902] 2 K.B. 276. There were two questions calling for determination. Firstly, Could the Sheriff's award go back to the date of the application for review? It could—see opinions of the Lord Justice-Clerk and Lord M'Laren referred to *supra*, and the decision in *Morton*. Secondly, Could it date back to the period at which the workman's incapacity ceased? It could. This was the reasonable inference to be drawn from the opinions of the Lord Justice-Clerk and Lord M'Laren, and from the opinions in *Morton*, in which the question was not directly raised. The scheme of the Act was to give compensation only during incapacity (see particularly Schedule I (11)), and the Court had always endeavoured to interpret the Act in accordance with that scheme—*Cammick* v. *Glasgow Iron and Steel Co., Limited*, November 26, 1901. 4 F. 198, 39 S.L.R. 138; *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113; *Nimmo & Co., Limited* v. *Fisher*, 15 S.L.T. 14; *Colville & Sons, Limited.* v. *Tigue*, Dec. 6, 1905, 8 F. 179, 43 S.L.R. 129. Ultimately it was admitted the appellants could arrive at the result they desired (viz., the limitation of their liability to pay compensation to the period of incapacity) by means of a suspension. That, however, was calling in a common law remedy into statutory arbitration proceedings, and was quite unnecessary, seeing that the "review" provided by section 12 of Schedule I was perfectly general and entirely unlimited as regarded time. The cases of *Niddrie and Benhar Coal Co., Limited* v. *M'Kay*, July 14, 1903, 5 F. 1121, 40 S.L.R. 798, and *Strannigan* v. *Baird & Co., Limited*, June 7, 1904, 6 F. 784, 41 S.L.R. 609, were also referred to. 2. *In the Petition* — Under Schedule II (8) the Sheriff was empowered to rectify the register at any time. The expunging of an agreement for compensation, which owing to the recovery of the injured person was no longer operative, was clearly "rectification." The section was in no way limited—See *Hughes* v. *The Thistle Chemical Co. and Others*, March 2, 1907, 44 S.L.R. 476, *per* the Lord President.

Argued for the respondent—1. *In the Stated Case*—The case was ruled by *Steel, cit. supra*, and *Pumpherston Oil Co., cit. supra*, which were rightly decided and required no re-consideration. Neither of these cases, not even the opinions of the dissenting Judges, afforded any support to the view that the Sheriff's review could date back to the period at which the incapacity ceased. All that the Lord Justice-Clerk and Lord M'Laren said was that in their opinion it could date back to the period at which the application for review was brought, and that was the utmost that was decided by the English case of *Morton, cit. supra*. But on this point they were clearly wrong, the recorded memorandum of agreement being equivalent to a decree of Court, and remaining in force until an alteration had been affected by the Court, which could only take place at the moment when the Sheriff pronounced his decree. 2. *In the Petition*—The petition was incompetent; that was really the opinion of the Lord President in *Hughes, cit. sup.* The total "expunging" of a memorandum was not "rectification" within the meaning of Schedule II (8), rectification being confined to the bringing of the recorded agreement into conformity with the actual agreement. Section 8 had nothing to do with the merits of the dispute between employer and workman. The appellants were virtually asking the Sheriff to do that which even the Court of Session could not do, viz., review his own judgment. See *Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312; *Lochgelly Iron and Coal Co., Limited* v. *Sinclair*, 1907, S.C. 3, 44 S.L.R. 2; *Blake*, [1904] 1 K.B. 503; *Macdonald* v. *Fairfield Shipbuilding and Engineering Co., Limited*, October 20, 1905, 8 F. 8, 43 S.L.R. 1.

LORD JUSTICE-CLERK—This case raises the same question which has already been decided in both Divisions of the Court in the cases of *Steel* and *Cavaney*. The decision in both cases was by a majority only, and was contrary to an English decision, and in this Division I dissented from the judgment. Although I have been unable to see ground for altering the opinion which I formed in the case which was decided here, I should be prepared to bow to the decisions pronounced in the Divisions, and in respect of the law laid down in these decisions to answer the question in this case in accordance with these decisions. But had the present Act of Parliament been still the code dealing with such matters I might have been moved by the fact that, as I believe, your Lordships share the doubts I had as to the soundness of these judgments, and might in that view have been inclined to concur in sending the case to be dealt with by the Whole Court. But as there is now a new Act under which all such questions can be finally decided for both countries by the House of Lords—which was not possible under the old Act—I agree that it would be wrong to cause more litigation and expense in a case the decision of which could have no bearing upon any question of interpretation or practice under the new Act.

I therefore concur in what is proposed by your Lordships.

I concur also in the view expressed by your Lordships as to the action of the Sheriff-Substitute upon the application to rectify the register.

LORD STORMONTH DARLING—We have here to deal (1) with a stated case under the Workmen's Compensation Act 1897, and (2) with a petition to rectify the special register kept by the Sheriff-Clerk of Ayrshire for the purposes of that Act. The material facts are, that the accident happened on 28th May 1906; that the employers at once ad-

mitted liability under the Act and agreed to pay the workman at the rate of 13s. a-week (being one-half of his weekly earnings) during the period of his incapacity; that these weekly payments were made down to 10th September 1906; that the employers then discontinued them, alleging that incapacity had ceased; that the workman had the memorandum registered on 3rd January 1907; that the employers instituted an arbitration for review of the weekly payments on 14th February 1907; that on 22nd March 1907 the workman lodged a minute stating that he was now medically advised that he was fit to resume his former employment as a miner, and consenting to the weekly payments being ended; and that the Sheriff in that arbitration, on 1st April 1907, found, in terms of the said minute, that the workman's incapacity had terminated, and he ended the weekly payments as from the date of his award on 1st April 1907. He fixed that date on the authority of *Steel* v. *Oakbank Oil Company, Limited*, 5 F. 244, and *Pumpherston Oil Company, Limited* v. *Cavaney*, 5 F. 963. In doing so, there is no doubt that the Sheriff was right, because he was bound by these judgments, none the less that one Judge in each case dissented (the Lord Justice-Clerk in *Steel's* case and Lord M'Laren in *Cavaney's*), and none the less also that a case in the English Court of Appeal (*Morton & Company, Limited* v. *Woodward*, 1902, K.B. 276) had been decided the other way, and was accordingly in both *Steel* and *Cavaney* disapproved.

But this stated case is avowedly brought in the hope of getting the two cases in Scotland reconsidered by the Whole Court, and undoubtedly the circumstances might well warrant such a proceeding, both on the ground of the importance of the question involved, and also on the ground that there were dissenting opinions in each Division of this Court, and a divergence of opinion between the Appeal Courts of the two countries. There are, however, two considerations of a practical kind which I think are sufficient to prevent us from taking that course. The one consideration is that the Act of 1897 is repealed except to a limited and temporary extent, and the Act of 1906, which has taken its place, provides for an appeal to the House of Lords, which the other did not. There is now therefore provision made for a simpler and more authoritative judgment on what may be made a test case affecting an Imperial Statute, than any which could be furnished by a larger tribunal confined to one of the three kingdoms. The other consideration is, that although the Act of 1906 does not deal expressly, as it very well might have done, with a question which had been the subject of conflicting decisions in England and Scotland, it does contain a certain number of new provisions which, in the course of working out the new Act, may be found to affect materially the vexed question of when incapacity must be held to have ceased, as affecting liability to pay compensation. It is not necessary to say more about an Act which has just come into operation than that this is a reasonably possible result. I refer particularly to paragraphs 15 and 20 of the first schedule and paragraph 9 (*b*) of the second schedule. At all events I think it would be a highly inconvenient proceeding to send a case to the Whole Court on the construction of an Act which is no longer law for the future. For these reasons I think we should in the stated case find that the Sheriff was right in refusing to allow the proof which the appellants asked.

In the petition to the Sheriff to rectify the register under the proviso at the end of paragraph 8 of the second schedule to the Act of 1897, I think the Sheriff was also right. The appellants' object in presenting that petition was to reach, by a different route, the same end as by their stated case. There are scattered through the decisions in this country a few suggestions that the Sheriff's power to rectify the register might be appealed to for this purpose. But it is a significant fact that no single decision in any of the three kingdoms can be cited as supporting that contention; and it seems to me that the very idea of rectifying the register points clearly to correcting some incidental mistake which has crept into the register, and not to altering the whole basis on which the existing entry proceeds. I am therefore for affirming the interlocutor of the Sheriff-Substitute in this action also.

LORD LOW—In regard to the question raised in the stated case, it is plain that the interlocutor pronounced by the Sheriff-Substitute was in conformity with the cases of *Steel* v. *The Oakbank Oil Company* and *The Pumpherston Oil Company* v. *Cavaney*. In both of these cases it was held that in an application for review of weekly payments the arbitrator can only end, diminish, or increase the payments from the date of his decision in the application. The case of *Steel* was decided in this Division and that of *Cavaney* in the First Division, the Lord Justice-Clerk dissenting in the former case and Lord M'Laren in the latter. Further, in *Steel's* case Lord Adam was sitting in this Division, the Court consisting of the Lord Justice-Clerk, Lord Young, and Lord Adam. The latter was also sitting in the First Division when *Cavaney's* case was decided, and the result was that, taking the two Divisions together, four Judges were in favour of the view which was upheld and two against it. In these circumstances, as the question is undoubtedly one of great difficulty and of much importance, I confess that, although I have formed no independent opinion upon the merits, I have much sympathy with the desire of the appellants that the question should be reconsidered. Seeing, however, that judgments to the same effect have been pronounced by both Divisions, it is plain that reconsideration would require to be by the Whole Court, and I agree with Lord Stormonth Darling that in the circumstances it is inexpedient that that course should be adopted.

The judgments in *Steel* and *Cavaney* were pronounced in December 1902 and June 1903 respectively, and since these dates they have been regarded and followed as settling the law so far as the Act of 1897 was concerned, and now that that Act has been repealed and a new Act has come into operation, it seems to me that it would be most undesirable to review a rule which has been in operation for so considerable a period in regard to an Act which has now expired. That consideration might not have been so strong if it had been plain that the question of the date at which an arbitrator can deal with weekly payments was precisely the same under the New Act as it was under the Old. In regard to that it is sufficient to say that changes have been introduced in the New Act which may have an important bearing on the question. Further, even if it should turn out that the question is precisely the same under the New Act as under the Old, a judgment of the Whole Court would not be final, because under the New Act there is an appeal to the House of Lords.

I also agree that the Sheriff-Substitute was right in dismissing the application for rectification of the register. It is not now disputed that the memorandum which was registered correctly states the terms of a verbal agreement which was come to by the parties, whereby the employers admitted their liability under the Act, and the amount of the weekly payments was fixed. When application was made by the workman for registration of the memorandum, the employers disputed its genuineness, and in terms of the Act of Sederunt the matter came before the Sheriff-Substitute, who after allowing certain amendments to the memorandum granted warrant to the Sheriff-Clerk to record it.

Now it has been settled by the case of *Binning* v. *Easton & Sons* (8 F. 407) that the granting or refusing by the Sheriff of a warrant to record a memorandum of an agreement is a ministerial act which cannot be reviewed. It is further to be remembered that if the Sheriff Clerk under the Act, or the Sheriff under the Act of Sederunt, is satisfied as to the genuineness of the memorandum it is imperative to record it. It must be taken therefore in this case that the memorandum was properly recorded.

The question, however, is, whether the employers are entitled to have the register rectified by deletion of the memorandum therefrom? There may be cases in which the power given to the Sheriff to rectify the register would justify him in altogether expunging therefrom a memorandum which had been registered, but I do not think that this is one of them. By the agreement the employers agreed to pay the workman a certain amount weekly during incapacity, and they aver that they did so; but that before the memorandum was recorded the incapacity had entirely ceased, and accordingly they had stopped making the weekly payments. They therefore plead that the agreement set forth in the memorandum having "ceased to subsist at the date when the said memorandum was presented for registration, the said special register should be rectified accordingly"—that is, by expunging the memorandum.

If that plea be well founded, it seems to me that the result would be very anomalous. I have already pointed out that the Sheriff, when he was satisfied that the memorandum was genuine, was bound to grant warrant for its registration, but the employers' contention is that he could at any time thereafter order it to be taken out of the register if he was of opinion that it had been implemented and could no longer be enforced by the workman. I do not think that such a course would be competent, because in my judgment the authority given to the Sheriff to rectify the register does not, in an application to rectify, empower him to determine questions as to the rights and liabilities of parties under the agreement. I agree with the view expressed by Lord Kyllachy in the case of *Binning*, in regard to the statutory register. He said—"Without excluding the common law rights of parties to enforce their agreements in any competent manner, the scheme of the statute was to provide a short and inexpensive road to the statutory register, which, once reached, should confer a *prima facie* right to summary diligence." If that view be sound, then registration of a memorandum of an agreement settled nothing as to the rights and liabilities of the parties, except in so far as it confers a *prima facie* right upon the workmen. But after all, that only means that the onus is laid upon the employer to show that the agreement has been implemented, and in my opinion his remedies at common law are in no way excluded.

Besides the application for review of the weekly payments and the petition for rectification of the register, we were informed that the employers had brought a suspension of a charge upon the registered agreement which was depending in the Outer House. If we had followed the course of ordinary minutes of debate in the stated case it would probably have been advisable to do the same thing in the petition and in the suspension, in which case the Lord Ordinary might have been asked to report the latter proceedings. As, however, we are not following that course, there is nothing to be gained by interfering with the ordinary procedure in the suspension.

LORD ARDWALL concurred.

The Court pronounced the following interlocutors:—

In the Stated Case—"Answer the question of law therein stated by declaring that the arbitrator was right in refusing to grant the proof asked for by the appellant—therefore affirm the refusal. . . ."

In the Appeal—"Dismiss the appeal and affirm the said interlocutor appealed against. . . ."

Counsel for the Appellants—The Dean of Faculty (Campbell K.C.)—Horne. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Respondent—Munro—Mair. Agents—Macpherson & Mackay, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

FARRELL *v.* BOYD.

Reparation — Slander — Privilege — Malice —Facts and Circumstances Inferring Malice—Medical Examination—Police—Wrong Diagnosis on Insufficient Examination by a Police Surgeon—Relevancy.

"The mere fact that a medical man makes a wrong diagnosis on an insufficient examination, and adheres to it when it is brought to his knowledge that other medical men take a different view, does not necessarily imply either malice or recklessness."

Conduct of and *language* used by a police surgeon in examining, and expressing his opinion on his examination of, a police constable *held* not to imply malice or recklessness so as to overcome the privilege protecting him in the execution of his duty.

Title to Sue—Bar—Police—Bye-Law Governing Employment whereby Action without Consent Forbidden.

Constables in the Glasgow Police Force are appointed subject to certain bye-laws, No. 20 of which provides—"No member of the force shall prosecute any person in any court of law for any alleged assault committed on him in the execution of his duty or for alleged defamation of character; nor shall he prosecute any servant of the police establishment for any alleged debt or damage, without in every case first obtaining the written consent of the chief-constable . . ."

Held (*per* Lord Ordinary, Salvesen) that failure to obtain consent did not affect the title to sue, but only rendered the member of the force raising an action without such consent subject to the discretion of the chief-constable; and that even where the action was against another member of the police establishment, at least where it was not averred that such other member was subject to the same bye-law.

On June 15, 1906, Francis Farrell, police constable, Glasgow, raised an action against John Adam Boyd, M.B., C.M., surgeon to the Glasgow Corporation Police Force, to recover £1500 as damages for slander.

The pursuer, who held his position of constable subject to certain bye-laws (*v. sup. second rubric*), averred that in conducting a prisoner to prison on 9th March 1906 he had sprained his ankle, but not realising the seriousness of his accident had remained on duty till unable to do so on the 11th; that he had then reported the injury and had been examined on the 12th by the defender who had at that time, said the injury was a severe sprain, and had ordered him to call on the 22nd at the Central Police Office. "(Cond. 4) On 22nd March the pursuer called at the Central Police Office and saw the defender. The defender again examined him. In the course of his examination he asked the pursuer if he had ever suffered from venereal disease. The pursuer denied that he ever had, and the defender thereupon said—'None of your damned lies. You must have had it, and that is the effect of it in your ankle just now. That is what I call gonorrhœal rheumatism.' The pursuer thereupon attempted to explain how the injury had happened as above set forth, and that it did not happen as the defender apparently supposed. The defender, however, would not listen to him and again said—'None of your damned lies. I have had my eye on you for some time. I have seen as fly men as you before; you are not going to do me. That is the effect of venereal disease, and possibly you may lose your foot through the effects of your whoring.' The pursuer thereafter again protested against the defender's conclusions, and emphatically denied that he had ever been affected in the way indicated by the defender. The defender, however, still refused to listen and said he would report the pursuer's conduct to the Superintendent of the Division. He also ordered the pursuer to return to the Central Police Station on Thursday, 29th March. . . . (Cond. 5) On Thursday, 29th March, the pursuer called again and was examined by the defender. He then informed the defender that he had been examined by Dr . . ., Glasgow, who was of opinion that the injury was only a severe sprain. The defender immediately retorted—'It is nothing of the kind. It is gonorrhœal rheumatism. I have seen too much of this in the infirmaries not to know what it is.' The pursuer again protested, and denied that he was or could possibly be suffering from this disease, but the defender again took no notice of his protestations and denial. He instructed him to return in a fortnight and then dismissed him. (Cond. 6) The pursuer accordingly again called on 12th April, and the defender thereupon repeated his statements as to the nature of the pursuer's injuries in spite of the pursuer's protests. He also used abusive and violent language to the pursuer, calling him amongst other things 'a bloody scoundrel.' (Cond. 7) About the beginning of April the defender reported to the Chief-Constable regarding the pursuer's injuries in the following terms—'He suffers from gonorrhœal rheumatism.' The said statements to pursuer himself, and said report regarding him to the Chief-Constable, are of and concerning the pursuer, and are false, calumnious, and malicious. They conveyed, and were intended by the defender to convey, the meaning that the pursuer had been leading a loose and immoral life, and that in consequence thereof he had contracted