Wednesday, March 18.

FIRST DIVISION.

[Sheriff Court at Ayr.

M'VIE *v.* GEORGE TAYLOR & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 68), *Second Schedule, sec.* 9 (*d*)—*Codifying Act of Sederunt* 1913, *L, xiii, sec.* 12—*Redemption—Payment of Lump Sum, and thereafter Application to Record Memorandum—Objection on Ground of Inadequacy—Repayment of Lump Sum Made Condition of Inquiry into Adequacy.*

Employers sent to be recorded a memorandum of agreement which set forth that the workman had claimed compensation under the Act at the rate of twenty shillings a week; that the employers had agreed to pay and had paid this for several weeks; that thereafter both parties agreed that the weekly payments should be redeemed for a lump sum of £100. The sheriff-clerk being of opinion that the sum was inadequate refused to record, and referred the matter to the Sheriff-Substitute. The Sheriff-Substitute held that further inquiry was necessary before disposing of the objection to the recording, and as a condition-precedent to such inquiry ordered the workman, who admitted he had received the £100, to consign the £100, less £20 (being the amount of compensation due to the pursuer in the event of the recording being refused), to be available at the order of the Court in the event of recording being refused.

Held that the Sheriff as arbitrator was not entitled to make consignation of the £80 a condition-precedent to inquiry.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), as applied to Scotland by section 13 thereof, and by the Second Schedule (17), enacts—"Second Schedule (9)—Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act . . . by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] . . . to the [sheriff-clerk] 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 memorandum shall for all purposes be enforceable as a [recorded decree arbitral]. Provided that—(*d*) where it appears to the [sheriff-clerk] on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum . . . ought not to be registered by reason of the inadequacy of the sum . . . he may refuse to record the memorandum of the agreement . . . and refer the matter to the [Sheriff], who shall, in accordance with [Act of Sederunt], make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just."

The Codifying Act of Sederunt 1913, book L, cap. 13, section 12, provides—"When the genuineness of a memorandum under paragraph 9 of the Second Schedule appended to the Act is disputed, or when an employer objects to the recording of such memorandum under sub-section (*b*) of said paragraph, or the sheriff-clerk refuses under sub-section (*d*) of said paragraph to record such memorandum, the person disputing the genuineness, or the employer, or the sheriff-clerk, as the case may be, shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute."

John M'Vie, miner's brusher, Whitletts, by Ayr, *appellant*, being dissatisfied with a determination of the Sheriff-Substitute at Ayr (VALENTINE) ordaining him to consign a sum of £80, being part of a sum of £100 paid to him by George Taylor & Company, coalmasters, *respondents*, appealed by way of Stated Case.

The Case stated, *inter alia*—"The appellant, who was in the employment of the respondents, was, by accident arising out of and in the course of his employment, injured on or about 11th April 1912, and in respect of his injury was paid compensation by the respondents at the rate of 20s. per week till 17th July 1913.

"A memorandum of agreement, of which the following is a copy, was, on 24th July 1913, received by the Sheriff-Clerk of Ayrshire from the respondents for registration in the special register of the Sheriff Court of Ayrshire at Ayr—'Memorandum of Agreement—Under the Workmen's Compensation Act 1906—between John M'Vie, miner's brusher, Low Road, Whitletts, by Ayr, claimant, and Messrs George Taylor & Co., coalmasters, Annbank, by Ayr, respondents. The claimant claimed compensation from the respondents in respect of injury to knee, caused by accident in the employment of the respondents in their No. 1 Drumley Pit, Annbank, on the 11th of April 1912. The claim was determined by mutual agreement on the 1st of May 1912, and was as follows:—The claimant claimed compensation at the rate of twenty shillings per week, which the respondents agreed to pay, and have paid up to the 17th of July 1913. Both parties being willing that said weekly payments should be redeemed for a lump sum, they on the 15th of July 1913 agreed as follows:—The respondents agreed to pay, and the claimant agreed to accept, the sum of £100 sterling in redemption and discharge of all weekly payments that might become due in respect of the said accident. It is requested that this memorandum be recorded in the special register of the Sheriff Court of Ayrshire at Ayr. John M'Vie, claimant; for George Taylor & Co., respondents, James Borland; dated this 21st day of July 1913. To the Sheriff-Clerk, Court House, Ayr.' The

signature 'John M'Vie' to the said memorandum is admittedly the genuine signature of the said John M'Vie.

"The Sheriff Clerk being of opinion, on information which he considered sufficient, that the sum of £100 was an inadequate sum to be paid by the respondents to the appellant for the redemption of the said weekly payments of 20s., refused to record the memorandum without a special warrant from the Sheriff in terms of paragraph 9 (*d*) of the Second Schedule to the said Workmen's Compensation Act 1906, and he sent notice of his refusal; and on 2nd August 1913 lodged a minute stating the ground thereof, all in terms of paragraphs 11 and 12 of the Act of Sederunt, dated 26th June 1907. . . .

"On 9th September 1913 the respondents lodged a minute craving the Court to grant warrant to the Sheriff-Clerk to record the said memorandum, and a copy of the minute was, on 12th September 1913, served on the appellant.

"Parties' agents were heard on 9th October 1913, and next day appellant's agent was appointed, within seven days thereafter, to lodge a minute stating (1) whether appellant had received from respondents £100, and, (2) if he had received that sum, whether he was willing to consign it with the Sheriff-Clerk before further procedure.

"On 17th October 1913 appellant's agent lodged a minute stating that appellant had received £100, mentioned in the said memorandum of agreement, from respondents, but that he was not willing to consign that sum with the Sheriff-Clerk before further procedure, and craving to be heard again before any further interlocutor or order was issued. . . .

"On 21st November 1913 parties' agents were again heard. The agent for the appellant appeared . . . in support of the objection to the recording of the said memorandum in terms of paragraph 9 (*d*) of the Second Schedule to the said Act, by reason of the inadequacy of the said sum of £100. Parties' agents admitted at the Bar that the agreement, of date 15th July 1913, mentioned in the said memorandum, was a verbal one. I, on 9th December 1913, held . . . that further inquiry was necessary before disposing of the objection to the recording of the said memorandum in respect of the inadequacy of the said sum of £100, and that the appellant was entitled to appear in support of the said objection. I further held that, as a condition-precedent to such inquiry being proceeded with, the said sum of £100, less the sum of £20, said sum of £20 being the amount of compensation *prima facie* due to the appellant (in the event of registration of the said memorandum being refused) for the period from the last payment of compensation down to the said 9th day of December 1913 should be consigned so as to be available at the orders of the Court in the event of registration of the said memorandum being refused; and I further held that in the event of the appellant failing to make consignation as aforesaid the said memorandum should be recorded without further inquiry. I accordingly ordained the said John M'Vie to consign £80 in the hands of the Clerk of Court within seven days after said 9th December 1913, with certification; and appointed the cause to be enrolled for further procedure on 18th December 1913."

The only *question of law* stated for the opinion of the Court in which the appellant insisted was—"2. Whether I was entitled, on the said facts and in the said circumstances, to ordain the said John M'Vie to consign £80 (part of the said sum of £100 paid to him as aforesaid) in the hands of the Clerk of Court before further procedure in the arbitration, with certification as aforesaid?"

Argued for the appellant—The Sheriff had no power to make an order for consignation until he had decided whether the redemption was adequate, and in any case he had no power to make consignation a condition-precedent of further procedure—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule, 9 (*d*), C.A.S. (1913) L, xiii, 11 and 12. The effect of the order, even assuming it could be obeyed, would be to leave the workman for a time without either lump sum or compensation, and that would defeat the object of the Act, which was to secure a means of subsistence for the injured workman—*Rosewell Gas Coal Company* v. *M'Vicar*, December 16, 1904, 7 F. 290, *per* the Lord Justice-Clerk at 291, 42 S.L.R. 233, and First Schedule, sec. 19. The object of the Second Schedule, 9 (*d*), was to prevent such an improvident bargain as was made in *Crossan* v. *Caledon Shipbuilding and Engineering Company, Limited*, May 15, 1906, 43 S.L.R. 852. It was incompetent for the Sheriff acting as an arbitrator under the Act to pronounce a decree by default—*United Collieries, Limited* v. *Gavin*, October 27, 1899, 2 F. 60, 37 S.L.R. 47. The only power or right the Sheriff as arbitrator had in this matter was to say whether or not the memorandum ought to be recorded—*Mortimer* v. *Secretan*, [1909] 2 K.B. 77; *Owners of "Segura"* v. *Blampied*, 1911, 4 But. W.C.C. 192. He might have to make inquiries in order to determine this, but he could not stipulate conditions on which he would do his statutory duty. Reference as to the English practice was made to Workmen's Compensation Rules, dated 1st June 1907, rule 49, (1) to (4).

Argued for the respondents—The Sheriff as arbitrator had power to make the order for consignation. The matter was committed to his discretion by section 9 (*d*) of the Second Schedule, which expressly contemplated his making orders with regard to money already paid. The order was in accordance with justice, and in harmony with rule 51 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51). In substance the objection, on the ground of inadequacy, to the recording came to be really the objection of the workman *ope exceptionis*. Thus it had been held that a workman was himself entitled to lodge a minute objecting on the ground of inadequacy to the recording of a memorandum—*Burns* v. *William Baird & Company, Limited*, 1913 S.C. 358, 50 S.L.R. 280. It

was only just that the money paid should be consigned in Court, for if the arbitrator were to hold after inquiry that the lump sum was inadequate, then the whole agreement would go by the board, and the employers would not be entitled to apply the lump sum paid as payment in advance of sums due in the future—*Hosegood & Sons* v. *Wilson*, [1911] 1 K.B. 30; Adshead Elliott on the Workmen's Compensation Act 1906 (6th ed.), at p. 458. The English rules had no application in Scotland—*M'Guire* v. *Paterson & Company*, 1913 S.C. 400, 50 S.L.R. 289.

LORD PRESIDENT—I think the arbitrator here has gravely erred in his view with regard to his statutory duty.

On the 11th April 1912 the appellant suffered an injury from an accident arising out of and in the course of his employment. His employer has admitted liability and paid him compensation at the rate of 20s. a-week until 15th July 1913, when the parties agreed that the respondent (the employer) should pay, and the workman should accept, the sum of £100 in redemption and discharge of all weekly payments that might become due in respect of the said accident. A memorandum of that agreement was prepared and was submitted to the Sheriff-Clerk for registration.

Now by a certain provision made in the Second Schedule of the Workmen's Compensation Act the Sheriff-Clerk is authorised to interpose in order to protect the workman against improvident bargains. The provision is expressed in the 9th section of the 2nd Schedule. It runs thus (I read it short)—Where it appears to the sheriff-clerk, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum ought not to be registered by reason of the inadequacy of the sum, he may refuse to record the memorandum of agreement sent to him for registration, and refer the matter to the Sheriff, who shall, in accordance with the Act of Sederunt, make such order, including an order as to any sum already paid under the agreement, as in the circumstances he may think just.

In this case the Sheriff-Clerk, acting upon information which he thought justified his conduct, came to the conclusion that the memorandum of agreement ought not to be recorded in consequence of the inadequacy of the sum which was accepted. Under these circumstances it was his duty—and he performed it—to refer the question to the arbitrator in order that he might inquire into the facts and decide whether or no the sum which the workman had agreed to accept was adequate or inadequate.

The statute, I think, makes it perfectly plain that the first duty—and the only duty—of the arbitrator in a case such as this is to consider and decide whether on the ground of inadequacy the memorandum of agreement ought not to be recorded. He has that question, and that question only, to consider, for I agree entirely with the judgment of the Master of the Rolls in *Mortimer* v. *Secretan*, [1909] 2 K.B. 77, where he said that "the learned Judge (the arbitrator) has no power or right to do anything more than to say"—whether the memorandum submitted for registration was one which ought or ought not to be recorded—"aye or no, this agreement is one which ought to be recorded, or it is one which ought not to be recorded." Now when the question was referred to the arbitrator in this case, he came to the conclusion that further inquiry was necessary before disposing of the objection to the recording of the memorandum in respect of the inadequacy of the said sum of £100. He ought, therefore, having come to that conclusion, to have proceeded to make the inquiry, but instead of proceeding to make the inquiry he ordered the workman, as a condition-precedent to his (the arbitrator's) performance of his statutory duty, to consign £80 out of the £100 which had been received by him in terms of the agreement. In other words, he deliberately set up an obstacle against the performance of his own statutory duty—an obstacle which, in this case we are told, is fatal and final, but whether so or not was one which he was not authorised by the statute to set up.

I do not for a moment doubt that, after he had considered and decided the question which the statute prescribed, namely, whether the memorandum ought or ought not to be recorded, he could deal with the £100 payment that had been made. That is expressly provided in the 9th section of the Second Schedule. If the arbitrator considered, after taking such inquiry as he thought necessary, that the memorandum of agreement ought to be recorded—that the lump sum was adequate-then, I presume, he would not deal with the lump sum in his award. It had been paid, and there was an end of it. But, on the other hand, if he came to the conclusion that the memorandum ought not to be recorded in respect that the lump sum was inadequate, then, and then only, it would be the duty of the arbitrator to consider what order or finding he should make regarding the payment that had been already made. In other words, he would consider whether or no all or a portion of that payment ought to be set against the compensation which the employers would otherwise be paying. But the arbitrator, as has been pointed out, declined to consider his statutory duty until the workman had performed a condition which the arbitrator had no right or duty to impose upon him.

Accordingly I come to the conclusion without any hesitation that the second question put to us ought to be answered in the negative. We are not called upon to answer the first question at all.

LORD JOHNSTON—I entirely agree with what your Lordship says. I think that the learned arbitrator has created a condition-precedent to what is set out in the 9th section, and that that is the simple answer to the position that he has taken.

LORD MACKENZIE—I am of the same opinion. It is evident from the argument that we have heard in this case that if the arbitrator comes to be of opinion that a memorandum of agreement should not be

recorded in consequence of the inadequacy of its terms, there may be questions as to the precise effect and extent of any order he may make under the provisions of Schedule II, sub-section 9 (*b*), more particularly with reference to the provisions of Schedule II, section 10, and the provisions of Schedule I, section 19. No such question arises at this stage of the case.

I agree that it was not within the competency of the arbitrator to make it a condition-precedent to going on with this inquiry that the workman should consign the sum of £80.

LORD SKERRINGTON—I concur.

The Court pronounced this interlocutor—

"Find it unnecessary to answer the first question of law in the case: Answer the second question in the negative: Recal the determination of the Sheriff-Substitute arbitrator so far as it finds that as a condition-precedent to inquiry the sum of £80 should be consigned by the appellant and ordains the appellant to consign the said sum in the hands of the Clerk of Court; and remit the cause to the Sheriff-Substitute to proceed as accords."

Counsel for the Appellant — Patrick. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Tuesday, March 10, *and Friday, March* 20.

FIRST DIVISION.

(Before Seven Judges.)

WALKER AND OTHERS *v.* WHITWELLS.

WHITWELLS *v.* WALKER'S TRUSTEES AND OTHERS.

Writ—Authentication—Signature as Witness after Death of Granter of Deed—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.

A testatrix on June 25, 1913, dictated a testamentary writing to her son, a doctor. It was signed by the testatrix in presence of (1) a nurse, who then and there signed as a witness, but did not add her designation and address, and (2) the son, who, however, did not then subscribe, being ignorant that the subscription of one witness was insufficient. The testatrix died on 1st July 1913, and at the date of her death the testamentary writing bore to be subscribed by the testatrix and by one witness. On 24th July 1913 the son signed his name as witness; the word "witness" and his designation, and also the designation of the nurse, were subsequently added. In a petition presented under section 39 of the Conveyancing (Scotland) Act 1874, *held* (by Lord President, Lord Dundas, Lord Salvesen, and Lord Mackenzie —*diss.* Lord Johnston, Lord Guthrie, and Lord Skerrington) that the testamentary writing was duly subscribed by the testatrix as maker thereof, and by the nurse and son as witnesses attesting the subscription of the testatrix.

Tener's Trustees v. *Tener's Trustees* June 28, 1879, 6 R. 1111, 16 S.L.R. 672, *approved* and *followed*.

Appeal to the House of Lords—Expenses—Pupil.

In a petition under section 39 of the Conveyancing (Scotland) Act a Court of Seven Judges, by a majority of four to three, held that a deed had been subscribed by a person as a witness attesting it. The father of a pupil child, who in the event of the decision having been the other way would have been entitled to one-seventh share of the residue, presented a note in which he craved an order on the trustees ordaining them to make payment to him of a sum to enable him to appeal to the House of Lords.

The Court *refused* the prayer of the note.

Crum Ewing's Trustees v. *Bayly's Trustees*, 1910 S.C. 994, 47 S.L.R. 876, *distinguished*.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) enacts—Section 38—"It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or 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—"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."