It was a payment of £11, 17s. for a certain amount of instruction—enough to enable the lad to obtain a diploma—and it was for his convenience that the payment was made over a certain time. The fact that the payment was spread over a certain period does not appear to me to preclude the company from recovering the balance of the price. It was a slump sum to be paid for instruction to be given. The instruction has been given for a certain period, and it has been tendered for the period during which it was not given. It appears to me that a breach of contract has been committed, and that the appropriate remedy is simply implement of the contract. I have never yet heard of a case where implement in the form of payment of money being the appropriate implement it could not be given.

Our attention was called to the case decided in the English Court of King's Bench, where the very question now before us was decided in the way in which I propose to your Lordships we should decide this case. That decision is not binding upon us, but I agree in the reasoning with which Mr Justice Bray supported the judgment in that case. I therefore move your Lordships to refuse the appeal and to affirm the interlocutor of the Sheriff-Substitute.

LORD JOHNSTON — I concur with your Lordship. I think that this contract is of an exceptional nature and that it is one to which the law to which we were referred, of specific implement as against damages, does not apply. The question raised can be decided on this short ground, viz., that what is to be given on the one side, and what is to be paid on the other, namely, the course of instruction on the one side, and the fee for such course on the other, are each a *unum quid;* that the pursuers have given the course as far as they have been allowed to give it, and have offered and been anxious to give the remainder of the course, and that is implement on their part, whereas the defender has paid only certain instalments of the fee and declines to pay the rest.

It is corroborative of this that the instalments and the payments have no relation whatever to the progress of the course of instruction. They are not periodic payments for instruction during any particular period; they are, for the convenience of the pupil, merely a means to enable him to pay concurrently the one definite fee of £12, 17s. for the course. And, accordingly, I think that there is no question either of specific implement or of damages in this case, but only a well-founded claim for the balance of the fee.

LORD MACKENZIE concurred.

LORD SKERRINGTON—Though we are not called upon to decide the question, I am disposed to think that this contract was conditional on the continued life of the pupil, and upon his health being such as to enable him to receive the course of instruction. But I decline to read into the contract a further condition entitling the pupil at his own hand to say that he declined to let the course of instruction go on. Accordingly I have no doubt that a breach of contract was committed.

As regards the appropriate remedy I have more difficulty, but I agree with the judgment which your Lordships have proposed. I proceed solely upon the very peculiar terms of this contract.

The Court adhered.

Counsel for the Pursuers (Respondents)—Solicitor-General (Morison, K.C.)—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders (Appellants)—A. O. M. Mackenzie, K.C.—C. H. Brown. Agents—W. & W. Finlay, W.S.

Saturday, November 7.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

M'LAUGHLIN *v.* PUMPHERSTON OIL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (9)—*Recording of Memorandum of Agreement—Genuineness.*

A workman objected to the genuineness of a memorandum of agreement for the settlement of compensation under the Workmen's Compensation Act 1906, sought to be recorded by the employer, on the ground that while the memorandum bore that the claim was to be settled for £15, the agent had stipulated in writing for a payment to himself, in addition, of £5, 5s. of expenses. *Held* that the memorandum was genuine, though it omitted to mention the payment of expenses.

Agent and Client — Expenses — Settlement of Action — Agent's Duty to Disclose to Client that Terms of Settlement Included Payment of Expenses.

Where a law agent was authorised by his client to settle a claim under the Workmen's Compensation Act 1906 by payment of a lump sum, and stipulated, unknown to his client, for payment of an additional sum to himself in name of expenses, *held*, in the absence of averment that the sum paid for expenses was excessive, that the client was bound by the settlement.

On 10th February 1912 the Pumpherston Oil Company, Limited, Glasgow, *respondents*, having applied for warrant to record a memorandum of agreement, under paragraph 9 of the Second Schedule to the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between them and Thomas M'Laughlin, labourer, Mid-Calder, *appellant*, the Sheriff-Substitute (ORR) ordered the memorandum to be recorded, and at the request of the workman stated a Case for appeal.

The Case stated — "The said memorandum of agreement lodged by the respon-

dents was in the following terms:—'The claimant claimed compensation from the respondents in respect of personal injury, viz., right leg severely bruised and strained, caused by accident in the employment of the respondents at their Pumpherston Works on or about 27th October 1911. The question in dispute, which was as to the amount of compensation payable to the claimant, was determined by agreement. The agreement was made on 17th November 1911, and was as follows:—That the respondents should pay to the claimant compensation in respect of said injury at the rate of 13s. 11d. per week during his total incapacity. The said weekly compensation payable to the claimant was reduced by interlocutor of Sheriff-Substitute (Mr Orr) of the Lothians and Peebles at Edinburgh, dated 5th June 1912, to the sum of 8s. per week in respect total incapacity had then ceased. On 28th January 1914 the parties agreed to redeem said weekly payments by payment of £15 sterling. It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of the Lothians and Peebles at Edinburgh.'

"The appellant lodged, on 13th February 1914, a minute of objections in the following terms:—'The claimant disputes the genuineness, and objects to the recording of the said memorandum of agreement in respect that no agreement such as alleged in said memorandum was made by the parties on 28th January 1914.'

"Proof was led before me on 23rd February and 16th March 1914.

"The following *facts* were admitted or proved:—1. In November 1913 the respondents offered the appellant £15 in settlement of his claim, which he refused to accept. 2. On 27th January 1914 the agents for the parties met in Court after a diet of proof had been fixed in the respondent's minute of review, and at the request of the appellant's agent the respondents' agent renewed the offer to pay the said sum of £15, and he also offered to pay a sum of £5, 5s. in name of expenses in full settlement of the appellant's claim. 3. On 28th January 1914 the appellant, at the request of his agent, came to Edinburgh to be examined by his doctor there in preparation for the proof in the said review proceedings, and after being so examined he called on his agent, who then informed him that the respondents had at his request renewed their offer of £15 in settlement of his claim. The agent did not mention that £5, 5s. was to be paid to him for expenses, but he told the appellant that he would receive the £15 without any deduction, except half-a-guinea to his doctor for his examination that day. His agent further informed the appellant (as was the fact) that his doctor had telephoned to him that he could not find anything wrong with the appellant, and that it was a case of taking the £15 or getting nothing. The agent advised the appellant in these circumstances to accept the said offer of £15 in full settlement of his claim. The appellant fully understood the said offer, and after considering it and discussing it with his agent, he agreed to accept it. He intimated this to his agent, and authorised him to accept said offer. The agent thereupon wrote out a mandate in the following terms:—'Edinburgh, 27th Jan. 1914.—I hereby authorise you to accept the offer of £15 in full settlement of all claims at my instance for future compensation from the Pumpherston Oil Company, Limited, in respect of accident sustained by me on 27th October 1911. (Signed) THOS. M'LAUGHLIN. AGNES M. THOMSON, *witness*.' The date 27th was written inadvertently for 28th. Appellant signed this mandate in the presence of the witness after it had been read over to him by his agent in her presence. At the time the said mandate was signed by the appellant his agent informed him that he would require to sign a memorandum of agreement in regard to the matter. 4. On the same day, 28th January 1914, the appellant's agent wrote the respondents' agents in the following terms:—'We had a call from M'Laughlin to-day, when, after considerable pressure, he agreed to accept your offer (without prejudice) of £15 in full settlement of all claims for future compensation by him in respect of his accident, and £5, 5s. in full of our expenses as arranged. We shall be glad to hear from you in course with the memorandum of agreement for M'Laughlin's signature, and with payment.' 5. On 30th January 1914 the respondents' agents wrote the appellant's agent in the following terms:—'We are in receipt of your favour of 28th inst., and now send for signature (1) memorandum of agreement ending the compensation payable to your client, and (2) joint minute taking the action out of Court. In exchange for these duly signed we shall hand you a cheque for £20, 5s. We trust you will find the documents in conformity with the arrangement made.' The letter also enclosed two forms of receipt in the following terms:—(1) 'Woods Cottages, West Calder, 1914.—Received from the Pumpherston Oil Company, Limited, per J. W. Macalister & Dundas, writers, 24 St Vincent Place, Glasgow, the sum of £15 sterling, being, with other payments of weekly compensation already made, in full satisfaction and discharge of all claims for future compensation competent to me under the Workmen's Compensation Act 1906 in respect of injuries, viz., right leg bruised and strained, sustained by me at their Pumpherston Works on or about 27th October 1911, and all such claims are hereby discharged, and I acknowledge that all claims for weekly compensation due to me to this date have been duly paid;' and (2) '2 Queen Street, Edinburgh, 1914.—Received from Messrs J. W. Macalister & Dundas, solicitors, Glasgow, the sum of £5, 5s., being in settlement of all expenses due and for settlement of case *Thomas M'Laughlin* v. *Pumpherston Oil Company, Limited*.' 6. On 31st January 1914 the appellant's agent wrote to him with the said receipt for £15 and the said memorandum of agreement for signature. 7. Notwithstanding that the appellant had agreed to accept said offer of £15 in settle-

ment of his claim, and had authorised his agent to intimate this acceptance to the agents of the respondents, and that this had been done, he, on 3rd February 1914, refused to sign these documents and to accept the sum of £15 in settlement of his claim, and wrote to that effect to his agent.

"In these circumstances I found that the agreement set forth in the said memorandum of agreement lodged for the respondents was entered into between the parties and is genuine, and I granted warrant to record the same, and found the appellant liable in expenses to the respondents."

The *question of law* for the opinion of the Court was—"On these facts was the arbiter entitled to hold that the agreement set forth in said memorandum of agreement was entered into between the parties on 28th January 1914, and that said memorandum of agreement is genuine?"

Argued for the appellant—The agreement set forth in the memorandum was for payment of £15, but the real agreement was for £20, 5s. Where agreement come to between the parties was embodied in writing, as in the present case, the arbitrator was not entitled to record a memorandum in different terms—*M'Lean* v. *Allan Steamship Company, Limited*, 1912 S.C. 257, 49 S.L.R. 207. Further, by accepting a lump sum in name of expenses without disclosing that fact to his client the agent had put himself in a position where his interest conflicted with his duty, and the contract made by him for his client in these circumstances was bad—*Shipway* v. *Broadwood*, [1899] 1 Q.B. 369.

Counsel for the pursuers were not called upon.

LORD GUTHRIE—The question put to us by the Sheriff is whether on the facts stated he was entitled to hold that the agreement set forth in the memorandum of agreement was entered into between the parties on 28th January 1914, and that the memorandum of agreement was genuine. Mr Patrick has maintained that, in view of the facts laid before us and the documents embodied in the Sheriff's findings, the memorandum of agreement was defective because it did not record the actual agreement entered into between the parties. The memorandum of agreement contains this sentence—"On 28th January 1914 the parties agreed to redeem said weekly payments by payment of £15 sterling." Mr Patrick says that that is not a full statement of the agreement, because as appears from the letter of 28th January there was also a stipulation to the effect that the respondents' agents should pay the appellant's agent five guineas in full of his expenses. But the function of the memorandum of agreement under the statute is to deal with a claim for compensation, and in the present case the claim for compensation in respect of the injuries received by the accident was settled for £15. I therefore do not agree with Mr Patrick that the memorandum should have contained something additional to, and outside of, the settlement of the claim for compensation —namely, the agreement that the agent should receive five guineas in full of his expenses.

Mr Patrick, however, shadowed a case which would have raised a very important question. He said that for aught he knew —I do not think he was prepared to go further than that—the five guineas which were to be paid to the agent might have been in excess of the fees which the agent's work required. If a case of that kind was to have been made out, it should have been made before the Sheriff. We are told that the original agent who wrote the letter of 28th January 1914 was not the agent who conducted the appellant's case before the Sheriff, and, consequently, if the appellant had such a case as I have indicated, it would have been quite competent to have put the original agent into the witness-box and to have forced him to produce his books in order to show that in point of fact the fees when properly taxed did not amount to five guineas. If the Sheriff had so found, then I think a very serious question would have arisen, but it does not arise on the facts as we have them.

On the facts as we have them the case comes to this, that not only is it proposed to insert in the memorandum something which I do not think the Act contemplated, but it appears that the appellant has no interest whatever to raise this question. His contention is that he should have got £20, 5s., but in the case before us we must assume that he would have had to pay at least five guineas to his agent out of the total sum he received. It is clear from the Sheriff's statement that the appellant was in this position, that he was content to take £15 in settlement of his claim (whether it was an honest claim, looking to what we are told about the evidence his own doctor was prepared to give, we do not require to decide), and that he knew that he was to get the £15 without any deduction except half-a-guinea to his doctor for his examination that day. He must have known that his agent was not to go without his fees, and so he must have known that these fees were to be paid by the other side.

Therefore in these circumstances—reserving the serious question which might arise on another state of facts—I think the Sheriff had no course open to him except to hold, as he did, first, that the agreement was entered into between the parties, and second, that the memorandum was genuine.

LORD SALVESEN—I agree. The facts are very unfavourable to the appellant. It appears that he was in receipt of a sum of compensation in respect of incapacity which had resulted from an accident, and that an application had been made to have that compensation terminated. A proof was allowed, and on the day after the diet had been fixed the appellant, at the request of his agent, came to Edinburgh to be examined by his doctor in preparation for the proof. After the examination was made the doctor informed the appellant's agent that he could find nothing wrong with the appellant and that if he went on with the case he

would get nothing. The appellant's agent thereafter informed the appellant that he had an offer of £15 to settle the claim for compensation, and that if he were willing to receive that sum he would get it without any deduction except half a guinea to his doctor for his examination that day. On that statement the appellant authorised his agent "to accept the offer of £15 in full settlement of all claims at my instance for future compensation from" the respondents. The proposed memorandum of agreement simply records that on "28th January 1914 the parties agreed to redeem said weekly payments by payment of £15 sterling," and is silent as to the subsidiary arrangement which was made between the agents for the respective parties to the effect that the appellant's agent's claim for expenses should be settled by a payment of five guineas. But it must have been known to the appellant that expenses would be incurred, and he had the intimation of his agent that no deduction would be made in respect of these expenses from the money which he was to receive.

In these circumstances, and in view of the fact that no evidence was led in the Court below to show that five guineas was in excess of the expenses that the appellant's agent had reasonably incurred in the proceedings which he had taken on behalf of his client, I cannot hold that the settlement is vitiated by the mere fact that the amount of expenses which that agent was to receive from the respondents was not communicated to the appellant. There is nothing else that can be relied upon in support of the appellant's case, and his proposition is as broad as this, that no agreement of this nature can receive effect unless the exact sum of expenses which the appellant's agent is to receive from the respondents is communicated to the appellant. I do not think that is a ground for voiding the settlement.

It would have been a very different matter, as Lord Guthrie pointed out, if it had been alleged and proved that whereas the agent's account would not upon taxation have amounted to more than two guineas, he had taken three guineas additional from the respondents with a view to influencing the settlement by his client to the prejudice of that client. The Court would regard such a case with very great disfavour, because it might well be said that as the respondents were willing to pay £20, 5s. in settlement of the client's claim for compensation and the agent's claim for expenses, the client was being cheated by his agent out of a part of the sum which he was entitled to get from the respondents, and that the settlement was a fraud upon him. But no such case is suggested here. In the course of the debate the appellant's counsel stated that his client thought he was getting £15 in full settlement of his claim, but under liability to his agent to pay expenses —that is to say, that under this settlement he is getting more than he thought he was getting. I do not see what interest the appellant has to maintain the contention which he is now putting forward, and I think the arbitrator was justified in the conclusion at which he arrived.

LORD JUSTICE-CLERK—I am of the same opinion. We have had a very able argument from Mr Patrick, but he did not convince me that there was anything improper in the procedure in this case. The memorandum deals with the amount of compensation which is to be paid to the workman in respect of injury, and the expenses incurred in proceedings with reference to the compensation is no part of the compensation. As Lord Salvesen expressed it, the matter of expenses is subsidiary, and while it may form part of a compromise, it does not affect the compensation which is offered and accepted as full compensation.

If it was to be suggested that there was practically a bribe to the appellant's agent in the form of an offer of his expenses, then that would have to be specifically stated and specifically proved, but no suggestion of that kind was made to the Sheriff. We must take the facts as we have them, and so taking them I have no doubt about the result.

The two cases quoted to us do not seem to bear upon this matter at all. One was a case in which a bribe was offered to a veterinary surgeon to obtain an opinion about a horse. The other case was one in which it was held that when there is an agreement in writing the memorandum must be recorded precisely in the terms of the written agreement. Neither of these authorities appears to me to bear upon this case, and I entirely concur with your Lordships in the result at which you have arrived.

LORD DUNDAS was sitting in the Extra Division.

The Court answered the question of law in the affirmative.

Counsel for the Pursuers—Horne, K.C.—Gentles. Agents—R. & R. Denholm & Kerr, Solicitors.

Counsel for the Defender—Christie, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Thursday, November 5.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

BURT *v.* THE FIFE COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, rule* (3)*—Capacity—Partial Incapacity—Suitability of Employment—Loss of One Eye.*

A miner having lost the use of an eye claimed and received compensation for a certain period, after which the arbitrator terminated compensation in the meantime. The miner subsequently craved review and an award of partial compensation upon the ground that he was entitled to refuse to work at the face. The arbitrator awarded partial compensation in respect of the applicant's