COURT OF SESSION.

Wednesday, June 2.

FIRST DIVISION.

[Sheriff Court at Falkirk.

KANE *v.* JOHN G. STEIN & COMPANY LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (3)—*Application for Award—Competency—Averments Instructing Agreement or No Agreement—Codifying Act of Sederunt*, 1913, *L, xiii*, 2.

In an application for an award of compensation under the Workmen's Compensation Act 1906, a workman stated—"The defenders admitted liability to pursuer in respect of said accident and the said injuries sustained by him, under said Workmen's Compensation Act 1906, and paid pursuer compensation at the rate of 10s. per week up to and including payment for the week ending 9th December 1914, since which date the defenders refuse to continue payment." The arbitrator dismissed the application on the ground that the averments instructed an agreement. *Held*, on appeal, that the averments did not instruct an agreement, and that the application should therefore be entertained.

Observations per Lord Skerrington on the procedure where the employer for a time has paid as compensation a sum agreed on by the parties, but has ceased to pay, and has repudiated further liability.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (3), enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

The Codifying Act of Sederunt 1913, L, xiii, enacts—"2. An application for the settlement by arbitration of any claim for compensation under the Act shall not be made unless and until some question has arisen between the parties, and such question has not been settled by agreement. The application shall state concisely the question which has arisen."

James Kane, *appellant*, raised proceedings against John G. Stein & Company, Limited, *respondents*, in the Sheriff Court at Falkirk for an award of compensation under the Workmen's Compensation Act 1906, in respect of injuries sustained by him while in their employment. The Sheriff-Substitute (DEAN LESLIE) as arbiter, after hearing parties, found that the appellant's averments instructed that the respondents' liability to pay compensation had been settled by agreement, accordingly dismissed the application as incompetent, and stated a Case for appeal.

The Case stated—"The appellant's condescendence in the action is as follows:—1. 'The pursuer is a labourer, and resides at Main Street, Edenderry, Ireland, and the defenders are brick manufacturers, carrying on business as such at Bonnybridge.' 2. 'On or about 26th August 1914, and for some time prior thereto, the pursuer was engaged in defenders' employment as a labourer in their Bonnybridge Fireclay Works, Bonnybridge.' 3. 'On or about said 26th August 1914, while pursuer was engaged in the ordinary course of his said employment with defenders he sustained personal injuries by accident arising out of and in the course of said employment, viz., injuries to right hand, involving amputation of the fourth and fifth fingers of said hand, in consequence of which he has been and is presently incapacitated from work, and entitled to compensation therefor under and in terms of the Workmen's Compensation Act 1906.' 4. 'The defenders admitted liability to pursuer in respect of said accident and the said injuries sustained by him under said Workmen's Compensation Act 1906, and paid pursuer compensation at the rate of 10s. per week up to and including payment for the week ending 9th December 1914, since which date defenders refuse to continue payment, and the questions which have now arisen between the parties are as to (1) defenders' liability for further compensation; and (2) the amount of such compensation.' 5. 'The pursuer is still incapacitated for work, and as defenders refuse or delay to resume payment of his compensation he has been compelled to bring the present application.'

"The application was heard by me on 1st February 1915. The agent for the respondent contended that as the averments of the appellant in his condescendence disclosed an agreement between the parties in terms of section 1 of the Workmen's Compensation Act 1906, the application was incompetent and ought to be dismissed. The agent for the appellant admitted that the amount of compensation was agreed upon, but contended that his averments did not disclose a completed agreement between the parties. I found that the appellant's averments instructed that the respondents' liability to pay compensation had been settled by agreement. I therefore found the application incompetent and dismissed it, and found the appellant liable to the respondents in expenses, modified at one guinea."

The *questions of law* for the opinion of the Court were—"1. Whether the appellant's application for arbitration is incompetent? 2. Whether, on the averments of the appellant, I was justified in dismissing the application without allowing a proof?"

Argued for appellant—The arbiter was wrong in holding that the pursuer's averments instructed an agreement between the parties in terms of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (3). Such an agreement must deal with (1) liability to pay compensation, (2) amount of compensation due, (3) dura-

tion of payment—*Freeland* v. *Summerlee Iron Company, Limited*, 1913 S.C. (H.L.), 8, *per* Lord Shaw at p. 11, 50 S.L.R. 518, at p. 519; *Wishart* v. *Gibson & Company*, 1914 S.C. (H.L.) 53, *per* Lord Shaw at p. 62, Lord Sumner at p. 70, 51 S.L.R. 516, at p. 522 and p. 525. If parties failed to agree on any one of these items, either party could go to arbitration —C.A.S. 1913, L, xiii, 2. Arbitration was excluded only where there was no question —*Field* v. *Longden & Sons*, [1902] 1 K.B. 47. The parties here were at variance as to the duration of compensation and as to present liability, and arbitration was necessary—*Strannigan* v. *William Baird & Company, Limited*, June 7, 1904, 6 F. 784, *per* Lord Kinnear at p. 793, 41 S.L.R. 609, at p. 614.

Argued for respondents—The pursuer's averments, as contained in article 4, set out an admission of liability under the Act and an agreement to pay compensation. That meant an agreement under all the terms of the Act—*Pearson* v. *Babcox & Wilcox, Limited*, 1913 S.C. 959, *per* Lord President at p. 963, Lord Johnston at p. 966, 50 S.L.R. 790, at p. 792 and p. 793. Where there was agreement there could be no arbitration—*Colville & Sons, Limited* v. *Tigue*, December 9, 1905, 8 F. 179, *per* Lord Kyllachy at p. 183, 43 S.L.R. 129, at p. 132. But the employer was not without a remedy, as he could apply for review under Schedule I, section 16 of the Act. In the circumstances of this case the pursuer should record a memorandum of agreement and charge upon it.

LORD PRESIDENT—I entertain no doubt that this application for arbitration made by a workman asking an award of compensation under the statute is competent, and that the decision of the arbitrator throwing it out was incompetent and cannot be supported. It is said that the appellant's own averments disclose that he had effected an agreement with his employers under the statute, and accordingly that he is now precluded from going to arbitration in order that this claim may be settled. I am quite unable to spell out of the averments set out in the 4th article of the Stated Case an agreement, under the statute, between the workman and his employers. As I read that statement, it means no more than this, that the employers admitted liability under the Act—in other words, they admitted that the personal injuries which the workman sustained arose out of and in the course of an accident which befell him during his employment, but no more, for the appellant then goes on to allege that his employers paid him 10s. a-week up to a certain date and then ceased to make any further payments.

We were urged to construe that very plain and simple statement as necessarily meaning that the employers agreed to pay the appellant the sum in question per week under and in terms of the Workmen's Compensation Act. If that were its meaning, then I agree that, on the authority of the case of *Pearson*, 1913 S.C. 959, 50 S.L.R. 790, we might hold—probably might be compelled to hold—that there was averred a complete agreement between the workman and his employers relative (1) to the amount, and (2) to the duration, and accordingly that we had before us an agreement complete in all particulars embracing liability, amount, and duration. Indeed I think it is now quite well settled that an agreement on the part of employers to pay a certain sum per week in terms of the Workmen's Compensation Act is sufficient relative both to amount and to duration, for the reason given by Lord Kinnear in *Pearson's* case, that the element of duration does not enter into the question of agreement at all, because the Act fixes that the compensation is to endure during the incapacity, and therefore the term of the duration of the compensation is fixed once and for all by the statute itself.

I am quite unable, however, to read the averments by the appellant in the sense for which the respondents contend. I think his averments clearly disclose—if they are true, and we must at the present stage assume that they are—that there may be a dispute between him and his employers (1) as to his capacity or incapacity, and (2) as to the amount to be paid to him on the assumption that he is still incapacitated on account of the accident, and accordingly that the arbitrator should have proceeded to arbitration under the statute. If these views are sound I propose that we should answer both questions put to us in the negative.

LORD SKERRINGTON—The appellant, who is a workman, met with an accident upon 26th August 1914, and he was paid compensation by his employers, the respondents, at the rate of 10s. a-week up to and including the week ending 9th December 1914, since which date his employers have refused to make any payment to him.

The appellant alleges that questions have arisen between the parties as to (1) his employers' liability for further compensation, and (2) the amount of such compensation. In answer to a question which I put to the learned counsel for the respondents, he admitted that this allegation on the part of the workman was perfectly true, and that a genuine dispute had arisen between the workman and his employers in regard to these two questions. The respondents' counsel further admitted that these questions could not competently be decided by a court of common law, but must be decided by arbitration in terms of the Workmen's Compensation Act.

Such being the questions between the parties, the appellant presented an application to have them decided by arbitration. One would have thought that the employers would have welcomed this application as being the only competent method of settling a dispute which had to be settled. Instead of doing so they have taken up the position that the application must be dismissed—in other words, that the workman must resort to some other procedure in order to initiate an arbitration under the Workmen's Compensation Act. It was explained to us by the respondents' counsel what the procedure

was which in his view the workman should resort to. The workman, he told us, ought to present an application to the arbitrator to have recorded an alleged, or what I would prefer to call an imaginary agreement, said by the learned counsel to have been entered into between the workman and his employers. When that agreement had been recorded the next step was for the workman to charge his employers to pay under it. The employers would then suspend the charge, and would in their turn present an application to the arbitrator to review the compensation as fixed by the agreement.

If this procedure is really necessary the result is much to be deplored. For my part I should never sanction such procedure unless I was driven to it either by the express language of the Act of Parliament or by some express decision.

I am happy to say that in the present case there is no necessity for following that course. The workman has come into Court stating a plain case which requires arbitration, and he has not alleged any agreement whatsoever between him and his employers. I accordingly agree with your Lordship in the chair.

LORD CULLEN—I agree with your Lordships in thinking that the appellant's averments are not to be read as necessarily disclosing an agreement which can exclude this application, and I therefore concur in the answers which your Lordship proposes to give to the questions.

LORD JOHNSTON was absent.

LORD MACKENZIE was presiding at a sitting of the Railway and Canal Commission.

The Court answered the questions of law in the negative.

Counsel for Appellant — Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Respondents — Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, June 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'KINNON *v.* J. & P. HUTCHISON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of the Employment*"—*Seaman Drinking Water Containing Solution of Caustic Soda.*

A seaman while on board ship at Spezzia was injured by drinking out of a can belonging to another seaman. The can contained a solution of caustic soda, and was found on a cool part of the deck. It was the custom for the crew to draw water from the pump and to set it in cans to cool in different places through the ship. This practice was sanctioned by the ship's officers. *Held* that there was evidence on which the arbitrator could competently find that the respondent met with an accident arising out of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought in the Sheriff Court at Glasgow, between Michael M'Kinnon, seaman, Glasgow, *respondent*, and J. & P. Hutchison, shipowners, Glasgow, *appellants*, the Sheriff - Substitute (A. S. D. THOMSON) found the respondent entitled to compensation, and stated a Case for appeal.

The Case stated—"The case was heard before me and proof led, when the following *facts* were established—1. That the respondent was a seaman on the s.s. "Fastnet," belonging to the appellants, on 16th August 1913. 2. That on said date, while the vessel was in the harbour of Spezzia, Italy, the respondent, who was a seaman on said vessel, in the employment of the appellants, by mistake drank from a tin, which he thought contained drinking water, a solution of caustic soda which the boatswain had put into the tin for the purpose of cleaning it. The tin was the property of the boatswain and the donkeyman, who messed together. They used it for brewing tea. 3. That as the result the respondent was badly burnt in the mouth and throat, and sustained severe and permanent injuries which completely incapacitate him for work. 4. That drinking water could at any time be obtained by the crew from the pump, which was situated amidships or somewhat abaft thereof; but as the water was warm to the taste, it was the practice of the crew to take it in tins or cans to a cool place, and leave it to cool, and partake of it as required. This practice was sanctioned by the officers, but it was never done by their orders. 5. That there was a good deal of give-and-take, so that it was quite common for one man to drink water which had been carried from the pump by some other man. 6. That the respondent found the tin referred to on the deck immediately below the forecastle head, where there was sometimes a draught of air through the hawse holes, and thinking it contained water which had been set there to cool, drank of it. 7. That the respondent's wages were £5, 10s. a-month, and his keep while on board, which may be estimated at 11s. 3d. a-week, his average weekly earnings having been in all £1, 16s. 3d. 8. That the respondent was discharged from the vessel on its return to Glasgow on 9th September 1913. 9. That the respondent caused a claim for compensation under the Act to be made to the appellants on 15th September 1913, but that he did not raise the present process under the Act until 4th September 1914. He explains the delay by the prolonged suffering and illness due to the accident. The appellants are now unable to trace many of the crew. The captain has died, and some evidence has probably been lost, which it might have been most desirable to have had.

"I *found* upon these facts that the accident arose out of and in the course of the respondent's employment with the appellants, and awarded compensation accord-