Wednesday, November 3.

SECOND DIVISION.

[Sheriff-Substitute at Leith.

GRANT *v.* RAMAGE & FERGUSON, LIMITED.

Master and Servant—Apprentice—Proof—Custom of Trade.

A workman raised an action against a firm of shipbuilders to have them ordained to grant him "a certificate of service in usual and customary form, stating the time during which the pursuer was in their employment as an apprentice shipwright." The pursuer made the following averments:—He entered the defenders' employment on 3rd July 1894 "as an apprentice shipwright." No written indenture was entered into, such not being usual or customary in the trade. He remained in defenders' employment till 6th August 1897, when he was dismissed for refusing to do labourers' work. According to the custom of the trade the term of service for an apprentice shipwright was five years. As a general rule no notice to terminate the apprenticeship during its currency was given or required on either side. According to said custom, in the event of the apprenticeship being interrupted during its currency by the apprentice being paid off, by his dismissal, or by any cause due to the action of the employer, the apprentice was entitled to obtain, and the employer was bound to grant, a certificate of service stating the period of apprenticeship which he had served with that employer in order to enable the apprentice to complete his apprenticeship with another employer.

Held that the action was irrelevant, in respect that the contract averred was one of apprenticeship, which could only be proved by writing.

Alexander Grant junior, apprentice shipwright, Leith, with consent of his father as his curator-at-law, raised an action in the Sheriff Court at Leith against Messrs Ramage & Ferguson, Limited, engineers and shipbuilders, Leith, in which he prayed the Court "to ordain the defenders to grant and deliver to the pursuer a certificate of service in usual and customary form, stating the time during which the pursuer was in their employment as an apprentice shipwright."

The pursuer averred—"(Cond. 1) The defenders are engineers and shipbuilders in Leith, and the pursuer entered their employment as an apprentice shipwright on or about 3rd July 1894. No indenture or written agreement was entered into between the parties, such not being usual or customary in the trade in the case of shipwrights' apprentices. (Cond. 2) The pursuer continued in the defenders' employment as an apprentice shipwright from 3rd July 1894 down to 6th August 1897, when, as after condescended on, he was dismissed from their service. . . . (Cond. 3) On 29th July 1897 work in the defenders' yard was stopped at twelve o'clock noon for the trades holidays, which ended at 9 A.M. on the following Wednesday (4th August), the pursuer, along with a number of other apprentice shipwrights, resuming work at 6 A.M. on the morning of Friday 6th August. About 11·30 A.M. in the forenoon of that day the pursuer, who was then engaged working at his own trade in defenders' yard, was, along with certain other apprentice shipwrights, ordered by his foreman to go and do ordinary labourers' work under the labourers' foreman. The pursuer and other apprentices foresaid refused to do this, such work being outwith the scope of their employment with the defenders, there being, moreover, plenty of work to be done in their own trade. Thereafter a deputation of apprentices, including the pursuer, waited upon Mr Alexander Ramage, the manager of the yard, who ordered them outside the gates unless they consented to be employed at the labourers' work aforesaid. Accordingly the pursuer and the other apprentices left the yard. Upon the following Monday (9th August) the pursuer and several of the other apprentices again waited on Mr Alexander Ramage, when they were told that those who had refused to obey his orders on the preceding Friday were to hold themselves dismissed. Upon the next day, accordingly, the pursuer and the other apprentices referred to lifted their tools, and subsequently received the wages due to them. The defenders, however, refused to grant them certificates of service. (Cond. 4) According to the custom and practice of the trade, the term of service for an apprentice shipwright is five years, the wages given varying from 8s. to 13s. per week, according to the number of years of service. Any off-time, or time during which work is 'suspended,' is made up by the apprentice before the apprenticeship is completed. As a general rule, also, no notice to terminate the apprenticeship during its currency is given or required on either side. According to said custom and practice, the apprentice is, upon fulfilment of his terms of service, entitled to obtain from his employer, and the employer is bound to grant to the apprentice, a certificate of completed service which enables him to apply to the Shipwrights' Society or to employers of labour for an engagement as a journeyman. Similarly, in the event of the apprenticeship being interrupted during its currency by the apprentice being paid off, by his dismissal, or by any cause due to the action of the employer, the apprentice is entitled to obtain, and the employer is bound to grant, a certificate of service stating the period of apprenticeship which he has served with that employer. Such a certificate is necessary in order to enable an apprentice with an uncompleted term of service to obtain another situation in the trade, and to complete his

apprenticeship with another employer. Without such a certificate an apprentice would be compelled to run the entire period of apprenticeship *de novo*. (Cond. 5) The defenders have been requested, but have refused, to grant and deliver to the pursuer the usual and customary certificate of service, and the present action to have them ordained to do so has thus been rendered necessary. In the event of the defenders' continued refusal to grant such a certificate, the pursuer, as above explained, will be unable to obtain another situation in the trade, or to complete his term of apprenticeship, and will be compelled to serve a new term of apprenticeship. This will entail upon the pursuer a loss of time of over three years." . . .

The pursuer pleaded, *inter alia*—"(1) The defenders being bound, in accordance with the custom and practice of the trade, to grant and deliver to the pursuer a certificate of service as condescended on, the pursuer is entitled to decree in terms of the first conclusion of the petition."

The defenders pleaded, *inter alia* — "(1) The action is irrelevant."

On 18th October 1897 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—"Sustains the first plea-in-law for the defenders, dismisses the action, and decerns."

Note.—"The Sheriff-Substitute is unable to sustain the relevancy of this action. By the law of Scotland a contract of apprenticeship, which is the contract here alleged and founded on, can only be constituted by writing. It is admitted, however, on the part of the pursuer that 'no indenture or written agreement was entered into between the parties.' Further, the contract set forth in the fourth article of the condescendence is wanting in the characteristics essential to a contract of apprenticeship, and must be regarded as one of service merely. Under such a contract a master is not bound to give his servant a character. Consequently he cannot be compelled to grant a certificate in the terms demanded by the pursuer."

The pursuer appealed, and argued—The action was relevant. The Sheriff-Substitute had dismissed the action on the ground that the pursuer was an apprentice, and that an apprentice must have a written indenture. But it was an unfair reading of the record, and contrary to the express averments in condescendence 1, to hold that he had averred that he was an apprentice requiring an indenture. What he had averred on record amounted to this, that he was a workman called an "apprentice shipwright" by the usage of trade. His contract was not a contract of indenture but a contract of service, with certain conditions imported into it founded on the usage and understanding of the trade. Such a contract was perfectly legal, and had been recognised in *Hamilton* v. *Outram*, June 5, 1855, 17 D. 798, opinion of Lord Deas, p. 800. It was a contract made in the ordinary course of trade, and incorporated the usage and custom of the trade to which it related.—Bell's Comm. 7th ed., i. 457, 465. One of these conditions was that the master was bound to grant a certificate of service to the apprentice shipwright on dismissing him. The master had unjustifiably dismissed the pursuer in the present case because he had refused to do work without the scope of his employment. The pursuer was therefore entitled to a proof.

Argued for defenders—The action was irrelevant, and the interlocutor of the Sheriff should be affirmed, because (1) the contract set forth on record was one of apprenticeship, and a contract of apprenticeship must be based on writing; and (2) even if there were such a custom, it was not enforceable at law, but an imperfect obligation like the obligation to grant a character to a servant—*Fell* v. *Lord Ashburton*, December 12, 1809, F.C. Further, it was not averred on record that the custom was known to both parties or that the custom formed any part of the contract.

LORD JUSTICE-CLERK—It is now admitted that the pursuer is not an apprentice. He had no indenture, and was working in that yard under an arrangement by which all connection between him and his master might be brought to a conclusion at any time without any breach of contract. It was explained to the Court that the words "apprentice shipwright" must be taken, not in the ordinary sense, but in a sense peculiar to this particular trade. It would require very distinct averments to support a case of that kind as one to be dealt with. There are no such averments here, and I am in favour of affirming the judgment of the Sheriff-Substitute.

LORD YOUNG—The pursuer designs himself as an apprentice shipwright, and in the prayer of his petition he concludes for an order on the defenders to grant him a certificate of service in usual and customary form; and in the condescendence he states that he entered the defenders' service as an apprentice shipwright on 3rd July 1894, and continued in their employment as an apprentice shipwright until 6th August 1897. It is stated by the defender in answer that the pursuer was not an apprentice at all—that there was no contract of apprenticeship. The pursuer's reply to this, made not upon record but in argument, was that he was not an apprentice in the ordinary sense of the term, and that there was no contract of apprenticeship in the ordinary sense of the term between him and the defenders, but that the only contract between them was one according to usage in Leith, which was not a contract of apprenticeship at all but a contract of pleasure—that he should serve in the shipyard and learn his trade as long as the master chose to keep him, but that the latter might dismiss him at any time. Well, that is a complete answer to the case presented upon record. The case presented upon the record is that there was a contract of apprenticeship which, according to our law—and the authorities are quite distinct upon that—must be a written contract or indenture for a specified period, and cannot

be proved by parole at all. I have no difficulty in agreeing with your Lordship that the case cannot be changed from that stated upon record to that stated in argument, counsel having chosen not to amend the record. Taking the record as it stands, I think the Sheriff's judgment ought to be affirmed. I should like to add, that even if the case argued to us had been that set out upon record I should have more than doubted the relevancy of it, if it were admitted that no previous case could be found in which the Court had ordered a master to grant a certificate of attendance to a boy or man, or anybody else in his service, where there was no written contract. But we do not require to consider that here, it being sufficient for judgment that the case as presented on record has not been supported in argument.

LORD TRAYNER—I think that the pursuer cannot get decree in terms of the conclusion of his action. It was admitted at the bar that the pursuer never was an apprentice; and therefore we cannot give a decree ordaining the defenders to give a certificate (contrary to the fact) that the pursuer has served them in that character.

LORD MONCREIFF—I concur. I think that the contract put forward in the conclusion of the action and on record is a contract of apprenticeship, although the pursuer seeks to import a term or condition said to be constituted by custom. A contract of apprenticeship can only be constituted and proved by writing, although custom—supposing it to be competent to import it into a written contract if one existed—might be proved by parole. But there is no writing here, and the pursuer is conscious of the difficulty in which he is placed, because he now seeks to make out that the contract which he entered into was not a contract of apprenticeship. I think it is too late for him to take up that position.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for Pursuer—Shaw, Q.C.—W. D. Murray. Agents — Shiels & Macintosh, S.S.C.

Counsel for Defenders—Salvesen—Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, November 3.

FIRST DIVISION.

[Sheriff of Fife and Kinross.

M'INTOSH *v.* COMMISSIONERS OF LOCHGELLY.

Process—Appeal—Appeal for Jury Trial.

Where the subject-matter of a Sheriff Court action, appealed for jury trial to the Court of Session, is such that if the action had originated in the Court of Session it would naturally go to a jury, the Court will send the case to a jury.

This rule applied in an action for payment of £100 as damages for personal injury, where the defender contended that the determination of the cause depended upon the construction of an intricate series of statutes, that the action was of a trivial and purely local character, and that therefore it should be sent back to the Sheriff.

Adam M'Intosh, newsagent, Kirkcaldy, raised an action in the Sheriff Court at Kirkcaldy against the Commissioners of the burgh of Lochgelly for £100 damages for personal injuries sustained by him. He averred that on 2nd September 1896, while walking along a footpath within the burgh of Lochgelly after dark, his foot came in contact with a large flat stone opposite a shop door, in consequence of which he fell and struck his face against the stone and was thereby injured. He further averred —(Cond. 4) "The said footpath is under the charge and control of the defenders, and is looked after and attended to by their employees. They were bound to have it in a safe condition for foot-passengers both at common law and under statute, and in particular under the Burgh Police (Scotland) Act 1892, sections 128, 130, 141, and 142." He also averred that the night was very dark, and that (Cond. 5) "Notwithstanding the dangerous condition of the footpath owing to the position of said stone, the defenders, who have charge of the lighting of the streets of the said burgh, took no steps to light the place in question, and did nothing which would disclose to a passenger the presence of the said stone, or in any way warn him of the dangerous condition of the place. . . . The defenders were bound, both at common law and under statute, and in particular under section 99 of the Burgh Police Act 1892, to have the place where the said accident happened lighted at the said hour, and their failure to do so was gross fault on their part."

In answer to the pursuer's averments in Conds. 4 and 5, the defender denied that the footpath in question was looked after by their employees, and averred that the highway of which it formed part was vested in and maintained by the Kirkcaldy District Committee of the County Council of Fife, and that it had not been taken over by them under sections 141 and 142 of the Burgh Police Act 1892. They also denied that they were under any obligation to light the spot at which the accident happened, and explained that they had made provision for lighting the burgh in terms of the Burgh Police Act 1892, but that under the discretion which they were given by section 99 of that Act, the lamps in the burgh had not begun to be lighted for the season 1896-97 on the night of the accident.

The defenders pleaded that the case was irrelevant.

The Sheriff - Substitute (GILLESPIE) allowed a proof before answer, and the pursuer appealed for jury trial.