have been the position. But that is not the position of this trust. The obligation imposed upon the trustees here is to retain the whole of the trust-estate, and only pay over the residue of the funds after the purposes of the trust have been fulfilled—that is to say, only when the event occurs in which the trustees must be in a position to pay over to the children the sum of £3000, neither more or less. This is the duty of the trustees under the marriage-contract, and what they wish to be in a position to do. Now, as was pointed out, if they are to have left in their hands £3000, and nothing else, and if they have nothing in bank beyond the £3000, how are they to provide £3000 to the children in the event of that £3000 becoming by the date of payment, not £3000, but only £2000 or £2500? That would not be implement of the obligation under their trust-deed. Their duty is, when the event occurs, to be in a position to produce £3000, and I do not see how they can do that except by doing what the marriage-contract says they should do, retain in their own hands the whole trust-estate until all the provisions are sufficiently secured. In my opinion merely to leave them with £3000 in their hands is not sufficient security for payment of these provisions, and I understand Mr Lees to admit that if that view of the case is not taken, he cannot say that the money in the hands of the trustees, or the whole security—for that is the position of it—would leave more than a margin as a security to meet the obligations of the trustees in future—to pay the £3000. That is my view of the case, and I agree with your Lordship.

LORD M'LAREN—The children of the defender Mr Henderson are entitled under their father's marriage-contract to a provision of £3000 payable at his death. That is the extent of the father's obligation. They are further entitled during his lifetime, in security of these provisions, to have conveyed to the trustees the surplus remaining of their father's interest under his father's trust-settlement. The obligation to give security was not fulfilled through circumstances to which I need not further refer, and this action is instituted by the marriage-contract trustees for the purpose of enforcing the obligation to give security. The defence is that although the stipulated security has not been given, yet the defender had given equivalent security to the satisfaction of the trustees when the demand was made. It may be that it was sound trust administration when the defender, in the opinion of the trustees, was unable at the time to restore the money, to take from him the best security that could be got, and no doubt the trustees were entitled to do this in their own interest, because in the event of his policies of insurance not being paid from any cause the trustees would be liable for their omission to get in the security fund. But then I am afraid that now, when the defender is believed to be in more prosperous circumstances and an action is brought against him for fulfilment of the marriage-contract obligation, it is no defence to say that by an arrangement between him and the trustees he had substituted something different from what his children were entitled to have. I agree with your Lordship in the chair that the determining consideration here is that the children have never discharged their right to the security—have never done anything to relax or impair the obligation in their favour contained in the marriage-contract. In that state of circumstances the trustees, I think, are within their rights in taking steps to enforce the obligation.

Of course, if the money is paid, it follows that those policies of insurance which were substituted for the prescribed security must be restored to Mr Henderson.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Of new repel the defences: Find that the defender is bound to make payment to the pursuers of the sum of £961, 9s. 9d. sterling as concluded for, with interest thereon at the rate of five per cent. per annum from 2nd December 1898, but without interest prior to that date: Find the pursuers entitled to expenses to the date of the interlocutor: Allow an account thereof to be lodged, and remit the same to the Auditor to tax and to report: *Quoad ultra* continue the cause."

Counsel for the Pursuers—Ure, Q.C.—Macphail. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Defenders—Lees—Berry. Agents—Hagart & Burn-Murdoch, W.S.

Thursday, November 1.

FIRST DIVISION.

COCHRANE *v.* DAVID TRAILL & SONS.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched.* 2, *sec.* 8—*A. S., 3rd June* 1898, *sec.* 7 (*a*)—*Application to Sheriff for Warrant to Register Memorandum of Agreement—Sheriff as Arbitrator—Appeal.*

In dealing with an application for a warrant to register an agreement under the provisions of the Workmen's Compensation Act 1897 the Sheriff is not acting as an arbitrator under the Act, and consequently it is not competent to bring his decision under review by means of a case stated for appeal under the Act.

Opinion (*per* Lord Adam)—That under section 8 of Schedule 2 of the Workmen's Compensation Act, and section 7 (*a*) of the Act of Sederunt, 3rd June 1898, the Sheriff, when the genuineness of a memorandum of agreement sent for registration is dis-

puted, must confine himself to the question whether the memorandum is genuine, and that he is not entitled to insist, as a condition of registration, on payment of expenses incurred in a previous action arising out of the same accident.

David Cochrane, a lumper in the employment of David Traill & Sons, stevedores, Grangemouth, met with an accident in the course of his employment, whereby he was permanently disabled from work. He brought an action against his employers in the Court of Session, concluding for payment of the sum of £4, 4s., and of the sum of 14s. weekly so long as his disablement should continue. On March 16th 1899 this action was dismissed, and Cochrane was found liable in expenses. The case is reported as *Cochrane* v. *David Traill & Sons*, 37 S.L.R. p. 662. On 4th January 1900 Cochrane lodged with the Sheriff-Clerk at Falkirk a memorandum purporting to be a memorandum of agreement between him and David Traill & Sons, under the provisions of section 8 of Schedule 2 of the Workmen's Compensation Act 1897.

That section enacts as follows :—"When the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter settled under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent in manner prescribed by rules of court by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rule, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment, provided that the county court judge may at any time rectify such register."

By section 14 of the same schedule it is provided—"In the application of this schedule to Scotland (*a*) 'sheriff' shall be substituted for 'county court judge,' 'sheriff court' for 'county court,' 'action' for 'plaint,' 'sheriff clerk' for 'registrar of the county court,' and 'Act of Sederunt' for 'rules of court;' (*b*) any award or agreement as to compensation under this Act may be competently recorded for execution in the Books of Council and Session or Sheriff Court Books, and shall be enforceable in like manner as a recorded decree-arbitral."

The Act of Sederunt, June 3, 1898, passed in virtue of the power conferred by the Workmen's Compensation Act, provides as follows—Section 7 (*a*) "The memorandum as to any matter decided by a committee, or by an arbitrator other than a sheriff, or by agreement, which is by paragraph 8 of the second schedule appended to the Act required to be sent to the Sheriff-Clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. When such memorandum purports to be signed by or on behalf of all the parties interested, or when it purports to be a memorandum of a decision or award of a committee, or of an arbitrator agreed on by the parties, and to be signed in the former case by the secretary, or by at least two members of the committee, and in the latter case by the arbitrator, the Sheriff-Clerk shall proceed to record it in the special register to be kept by him for the purpose, without further proof of its genuineness. In all other cases he shall, before he records it, send a copy . . . to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine, and if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof; but if the genuineness is disputed, he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff."

On the Sheriff-Clerk communicating with Messrs David Traill & Sons they disputed the genuineness of the memorandum, and the Sheriff-Clerk accordingly refused to register it.

Cochrane applied to the Sheriff for a special warrant to register the memorandum.

Before the Sheriff (RUSSELL BELL) Messrs David Traill & Sons maintained that the application should not be sustained until Cochrane had paid the taxed expenses of his action in the Court of Session.

The Sheriff sustained that plea, and at the instance of Cochrane stated a case for appeal under the Act. The question of law was—"Whether it was competent for the Sheriff as arbitrator to make it a condition of entertaining the present application, that the expenses of the foresaid action in the Court of Session should be paid?"

Argued for the appellant—The Sheriff had no power to make payment of expenses a condition of registration; all he was entitled to do was to consider the genuineness of the memorandum. The objection to the competency of the present form of appeal was bad, because (*a*) it had not been stated in the Single Bills, (*b*) it had been waived by both parties revising and adjusting the special case, and (*c*) it was ill-founded, because in all his actings under the Workmen's Compensation Act the Sheriff was an arbitrator, and could therefore state a case for appeal.

Argued for the respondent—1. The appeal was incompetent in the form adopted. The Act provided a stated case as the method of appeal from the decision of a sheriff as arbitrator, and it could only be used in such cases. Here the Sheriff was not an arbitrator, but an administrative officer. 2. Alternatively, if the appeal was competent, the Sheriff was right. The competency of the appeal was only conceivable on the assumption that the Sheriff in considering the registration of a memorandum of

agreement was acting in the capacity of arbitrator. In that capacity he had equitable powers, and was entitled to insist on payment of expenses incurred in what was practically the same action—*Irvine* v. *Kinloch*, November 7, 1885, 13 R. 172—*MacMurchy* v. *Maclullich*, March 21, 1889, 16 R. 678. That principle was recognised in the Act in the provision (sec. 1, sub-sec. 4) whereby compensation might be assessed in the course of an unsuccessful action for damages, in which case the Court was authorised to deduct the expenses in the action from the compensation awarded. That right of the employer could not be evaded by the workman by bringing an independent application under the Act—*Edwards* v. *Godfrey* [1899], 2 Q.B. 333.

At advising—

LORD ADAM—This case bears to be a case stated by the Sheriff of Stirling in the matter of an arbitration between the appellant and respondents under the Workmen's Compensation Act 1897.

From the facts set forth in the case it appears to be a case stated in an application to the Sheriff at the instance of the pursuer (appellant) to grant warrant to record in the Special Register of Court kept for the purpose an alleged memorandum of agreement between the pursuer and defenders, sent for registration by the pursuer in terms of the said Act and relative Act of Sederunt.

It further appears that the memorandum of agreement had been sent to the sheriff-clerk for registration, but that he, after communicating with the respondents, refused to register it on the ground that its genuineness was disputed.

It further appears that the Sheriff sustained a plea to the effect that the application should not be entertained until the appellant had paid to the respondents the taxed expenses of an action in the Court of Session relating to the same matter, in which he had been unsuccessful; and the question of law which we are asked to answer is, whether it was competent for the Sheriff as arbiter to make it a condition of entertaining the application that the expenses of that action should be paid?

The provisions which regulate the registration of a memorandum will be found in paragraph (8) of the second schedule of the Act, which enacts that where the amount of compensation under the Act shall have been ascertained, either by a committee or by an arbitrator or by agreement (as in this case), a memorandum thereof shall be sent, in manner prescribed by Act of Sederunt, by said committee or arbitrator, or by any party interested, to the sheriff-clerk of the district in which the person entitled to such compensation resides, who shall, subject to the rules prescribed by Act of Sederunt, on being satisfied of its genuineness, record such memorandum in a special register.

Section 7 (*a*) of the Act of Sederunt provides that where, as is alleged in this case, the compensation has been settled by agreement, and the memorandum does not purport to be signed by or on behalf of all parties interested, the sheriff-clerk shall communicate with the other party or parties interested, and if it shall appear that the genuineness of the memorandum is disputed, shall send a notification of the fact to the party from whom he received the memorandum, with an intimation that the memorandum will not be recorded without a special warrant of the Sheriff.

The Sheriff-Clerk having ascertained that the genuineness of the memorandum was disputed, refused to register it without a special warrant of the Sheriff—hence the present application.

It appears to me to be clear that the only issue raised under such an application is the genuineness of the memorandum. It is only after the amount of compensation has been determined that the memorandum is sent for registration, and the Sheriff has no power to increase or diminish the amount, or to attach conditions to its registration. If he is satisfied of its genuineness he must grant warrant to register it.

It further appears to me that the application is in no sense an application to the Sheriff as arbitrator under the Act.

The cases in which there may be arbitration under the Act will be found in section 1 (3), where it is provided, that when any question arises as to the liability to pay compensation, or as to the amount or duration of compensation, it shall, if not settled by agreement, be settled by arbitration; in section 1 (*a*) (2) of the first schedule, where it is provided that, in the case of an accident resulting in death, the amount of compensation payable to persons partially dependent on him shall, in the absence of agreement, be determined by arbitration; in section 5 of the same schedule, where it is provided that any question as to who is a dependent, or as to the amount payable to each dependent, shall, in the absence of agreement, be settled by arbitration; and in sections 12 and 13 of the same schedule, which provide respectively that in the case of a weekly payment being reviewed, or redeemed on payment of a lump sum, the amounts payable shall, in default of agreement, be settled by arbitration.

These are the only cases, so far as I know, of arbitrations under the Act, but there are no such questions raised in this case—the only question being whether a certain memorandum shall be registered or not.

The application is accordingly, in my view, simply an application to the Sheriff in the exercise of his ordinary common law jurisdiction; and the procedure therein must be regulated by the forms and rules appropriate to such proceedings. If it is sought to bring under review an interlocutor or judgment of the Sheriff, that must be done in the ordinary way. Under section 14 (*c*) of the second schedule it is only where an application is made to the Sheriff as arbitrator that it is competent for the parties to require him to state a case on any question of law determined by him. But, as I have already said, that is not the nature of the present application.

I am of opinion, therefore, that this stated case should be dismissed as incompetent, and therefore that we cannot entertain the question of law which we are asked to decide. Perhaps, however, what I have had occasion to say may sufficiently indicate what my answer to the question would have been if competently before us.

The LORD PRESIDENT and LORD M'LAREN concurred.

The LORD PRESIDENT intimated that LORD KINNEAR, who was present at the hearing but absent at the advising, concurred.

The Court dismissed the appeal as incompetent, and found neither party entitled to expenses.

Counsel for the Appellant — Salvesen, Q.C.—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondents—Glegg—W. Thomson. Agents—Macpherson & Mackay, S.S.C.

Friday, November 2.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DUNDAS *v.* LIVINGSTONE & COMPANY.

Reparation—Slander—Privilege—Malice—Charges Made against Employee by Employer to Guarantee Company—Issue—Slander—Malice in Issue.

A traveller raised an action of damages for slander against a firm of whisky merchants. The pursuer averred that he had been engaged by the defenders at a salary with a commission on sales, and as a condition of his employment insured the defenders with a guarantee company against embezzlement by himself; that in the following year his remuneration had been changed from salary and commission to commission alone; that thereafter he had left the defenders' employment on account of charges being made against him of retaining sums collected by him for the defenders; that an accountant, acting on behalf and by instructions of the defenders, had made an accusation against the pursuer to the guarantee company of misappropriating these sums, and had intimated a claim under the policy; that thereupon a statement of sums so alleged to have been misappropriated by the pursuer was sent to the guarantee company; that the defenders were well aware that the policy had been rendered void by the change in the terms of the pursuer's remuneration, and that they had no claim under the policy; that they were actuated in acting as they did by a desire to discredit the pursuer with the insurance company, and to hamper him in obtaining other employment, in which he might use his knowledge in competition with them; and that they made these charges knowing well that the pursuer was not guilty of embezzlement or dishonest appropriation, but that the whole question between him and them was merely one of accounting.

Held that a *prima facie* case of privilege was disclosed on record, and that malice must be inserted in the issues for the trial of the cause.

Francis Dunnett Dundas, commercial traveller, Leith, raised an action for £500 as damages for slander against Messrs Livingstone & Company, wholesale whisky merchants, Musselburgh, and Robert Lumsden, accountant, Edinburgh, jointly and severally or severally.

The pursuer averred that in September 1898 he was engaged by the defenders Livingstone & Company to travel for them in the North of Scotland at a salary, with a commission on all sales; that as a condition of his engagement he insured the defenders with the Life and Health Assurance Association, Limited, against embezzlement by himself, conform to policy dated 31st January 1899; that in May 1899 the pursuer's remuneration was by arrangement altered from salary and commission to commission alone; that thereafter he left the employment of the defenders Livingstone & Company in consequence of charges made against him of not accounting for all the money received by him on their behalf. He further averred as follows:—"(Cond. 12) On 26th September 1899 a letter was written by the defender Lumsden, on the instructions and on behalf of the other defenders, to the Life and Health Assurance Association, Limited, with which the firm had been insured against embezzlement by pursuer. Said letter intimated that there were suspicions of irregularities in connection with pursuer's accounts. Said letter inferred, and was intended and understood to infer, a charge against pursuer of having embezzled money collected by him for the defenders Livingstone & Company. At the date of said letter the defenders were no longer insured with the said company, the policy having been avoided by the change in the terms of pursuer's remuneration from salary and commission to commission alone as from 8th May 1889. (Cond. 13) On a date between the 6th and 13th October 1899 the defender Lumsden, acting on behalf of and with instructions of the other defenders, called at said Insurance Company's office, 41 George Street, Edinburgh, and intimated to Mr Mitchell, the cashier to the company, that pursuer had embezzled or misappropriated considerable sums of money belonging to Livingstone & Company, and that he wished to make a claim under the policy, or used words to that meaning and effect. (Cond. 14) Following thereupon a statement was sent on 24th October to said company of sums alleged to have been misappropriated by pursuer. Said statement, which is referred to for its terms, is erroneous in the respects herein-