or at any rate the parts of them through which lines of rails ran, were used for railway purposes, and were possessed by the railway companies working the lines. The use of the ground in question for railway purposes was clear, and the possession for these purposes was sufficient, but the requirement of the Order as regards "property" was satisfied by the fact that the docks were owned by the Clyde Navigation Trustees, who were themselves a railway company. The Railway and Canal Traffic Act 1873 (36 and 37 Vict. cap. 48), section 3, defined a railway company as including "any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament." The lines of rails in the docks were Railway No. 7 of the railways authorised by and constructed and worked under the Clyde Navigation Act 1891 (34 and 35 Vict. cap. xxxviii), and that Act incorporated the Lands Clauses and Railway Clauses Acts. A dock company was held to be a railway in *East and West India Dock Company*, L.R., 38 Ch. Div. 576.

Argued for the respondent — A line of rails running through a dock could not be considered a railway, at anyrate outside the line of rails. The appellant here was not standing between the rails, nor very near them. The definition of "street" in the Order included "harbour," and the offence here took place within the harbour of Glasgow. The exception in the Govan Order was meant to cover only property belonging to and used by a railway company for its own special purposes, not a public place such as a harbour, which was principally used for other purposes. The Clyde Trust was not a railway company. What the appellant here called a railway was in the Clyde Navigation Act described as a railway or dock tramway—*i.e.*, a tramway in a street over which railway waggons could be drawn. The Railways Clauses Act was incorporated purely for the purpose of securing the safety of the public by giving control of the method of working the lines to the Board of Trade.

LORD STORMONTH DARLING—I think the questions in this case are capable of easy solution. If the betting took place in what is defined in the Govan Corporation Order, 1904, as a "street," the appellant was legally convicted. If, on the other hand, the betting took place on property belonging to a railway company and used by the railway company for railway purposes, the case would undoubtedly fall within the exception provided by the Order, and the appellant would be entitled to have this conviction set aside.

I am clearly of opinion that the case before us falls within the former of these alternatives, and that the appellant was rightly convicted.

LORD LOW—I am of the same opinion. If the betting had taken place actually on the railway line, the point might have been one of more difficulty. I think it clear, however, that that was not the place where the offence was committed, and that therefore the accused was rightly convicted.

LORD JUSTICE-CLERK — That is my opinion also.

The Court, without answering the questions, dismissed the appeal.

Counsel for the Appellant — G. Watt, K.C.—T. Trotter. Agents—Bryson & Grant, S.S.C.

Counsel for the Respondent — Wilson, K.C.—M. P. Fraser. Agents—M. J. Brown, Son, & Co., S.S.C.

COURT OF SESSION.

Friday, November 23.

FIRST DIVISION.

[Lord Johnston, Ordinary.

FIFE COAL COMPANY, LIMITED, v. DAVIDSON.

Master and Servant — Diligence — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)*—Diligence on Recorded Agreement — Charge upon Recorded Agreement as Modified by Subsequent Unrecorded Agreement and for Sum so Modified—Competency.*

A workman, under the Workmen's Compensation Act 1897, recorded in the special register a memorandum of a verbal agreement to pay him compensation. By a subsequent verbal agreement not recorded he agreed to accept a smaller sum. His employers having thereafter refused to pay him the reduced amount the workman charged for payment thereof. The charge proceeded on the recorded agreement (which had now been registered in the Sheriff Court books) as modified by the subsequent unrecorded agreement, and the amount in the charge was the sum so modified.

The employers having brought a suspension, *held* that the charge was good, and suspension *refused*, inasmuch as (1) the recorded agreement was not displaced as a ground of charge by the subsequent unrecorded agreement; and (2) it was quite competent to restrict the sum in the charge.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Sched. 1, sec. 12, enacts — "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

Schedule 2, sec. 8, as made applicable to Scotland by sec. 14 (*b*), provides—"Where

the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of Sederunt], . . . to the [Sheriff Clerk] for the district in which any person entitled to such compensation resides, 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 said memorandum shall for all purposes be enforceable as a [Sheriff Court] judgment: Provided that the [Sheriff] may at any time rectify such register." (14) "In the application of this schedule to Scotland . . . (*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 Fife Coal Company, Limited, having its registered office at Leven and carrying on business at Cowdenbeath, brought a note of suspension of a charge made at the instance of John Davidson, miner, Cowdenbeath.

The charge given to the complainers was —"I, Charles Henry, sheriff officer, Dunfermline, by virtue of an extract registered memorandum of agreement, under the Workmen's Compensation Act 1897, between John Davidson . . ., applicant, and The Fife Coal Company, Limited . . ., respondents; which memorandum of agreement is recorded in the register kept for the Sheriff Court at Dunfermline, under the Workmen's Compensation Act 1897, on the fifteenth day of September 1904, and in the Sheriff Court Books of the County of Fife, at Cupar, for preservation and execution, on the twenty-eighth day of July 1905, and in which the respondents agreed to pay the applicant the sum of sixteen shillings and sixpence sterling per week of compensation, which compensation was reduced by agreement between the applicant and the respondents to eleven shillings and sixpence sterling per week, as from twenty-eighth day of September 1904, in His Majesty's name and authority, and in name and authority of the said Sheriff, I, the said Charles Henry, sheriff officer, lawfully charge you, the said Fife Coal Company, Limited, respondents, to make payment of the said sum of eleven shillings and sixpence sterling per week as from and after the thirteenth day of October 1904, and that to the said John Davidson, applicant, within seven days after this my charge, under the pain of poinding. - . ."

The execution of charge was—"Upon the sixteenth day of August Nineteen hundred and five years, I, Charles Henry, sheriff officer, Dunfermline, duly charged the Fife Coal Company, Limited, . . . respondents within designed, to implement the foregoing memorandum of agreement by making payment of the sum of eleven shillings and sixpence sterling per week as from and after the thirteenth day of October Nineteen hnndred and four years, and that to the within designed John Davidson, applicant, within seven days after this the date of my charge, under the pain of poinding in virtue of the foregoing extract registered memorandum of agreement. This I did by . . ."

The complainers pleaded—"(1) The said charge is inept, in respect that it bears to proceed upon a recorded memorandum of agreement which has not been binding on the complainers since 28th September 1904. (2) The said charge should be suspended in respect that it proceeds upon an agreement, no memorandum of which has been recorded, as required by section 8 of the Second Schedule of the Workmen's Compensation Act 1897."

The facts of the case are given in the opinion of the Lord Ordinary (JOHNSTON), who on 13th December 1905 pronounced an interlocutor suspending the charge.

Opinion.—"In this case the respondent Davidson, a miner in the employment of the Fife Coal Company, Limited, was injured on 16th January 1904. He claimed compensation from the company under the Workmen's Compensation Act 1897. There are said to have been four stages in the adjustment of weekly compensation between him and the company, all proceeding upon the footing that his average weekly earnings prior to the accident were 33s. :—(1) On the footing of temporary total disablement the parties at first agreed upon 16s. 6d. per week, being half the average earnings, and therefore the maximum rate under the Act. This agreement was not recorded under the Act, but Davidson received compensation at the above rate from 31st January to 23rd March 1904. (2) On 23rd March he was able to resume work, and for a short time earned 27s. per week, and the parties agreed to vary the rate of compensation by diminishing it to 3s. a-week, and this was paid from 23rd March to 21st April 1904. No memorandum of this agreement was recorded. (3) On 21st April 1904 Davidson again became totally incapacitated, and the parties agreed to vary the compensation by raising it again from 3s. to 16s. 6d. per week, and the latter rate was paid from 21st April to 27th September 1904. A memorandum of this agreement was recorded by Davidson on 15th September 1904, and registered 28th July 1905. (4) On 28th September 1904 the parties again agreed to vary the compensation by reducing it from 16s. 6d to 11s. 6d. per week in respect of Davidson's partial return to work, and compensation at the latter rate was paid up to 12th October. No memorandum of this agreement was recorded.

"In the end of October 1904 the parties came to differ, not only as to Davidson's earning capacity, but also as to the measure of the company's liability to supplement, and consequently from 12th October 1904, though certain sums of compensation have been tendered, none have been accepted. I am not called upon to come to any deter-

mination either as to Davidson's earning capacity, or as to the measure of the company's liability, as the question raised between the parties in the present suspension admits of being determined upon other grounds.

"On 16th August 1905 Davidson charged the company to make payment to him of 11s. 6d. per week as from and after the 13th of October 1904. The charge is in process, and its terms require to be carefully examined—. . . [*His Lordship related the terms of charge, ut sup.*] . . .

"This I understand to be the charge left with the complainers, but also in process is the execution of charge returned by the officer. It was not referred to in argument, and I can only say that its irregularity betrays the difficulty which the officer evidently had in framing his execution to cover what he was attempting to do.

"The company have suspended the charge as inept. Their ground of suspension is that the only warrant for such charge is a memorandum of agreement recorded in terms of the statute; that from and after 28th September 1904 Davidson could no longer charge under the agreement made on 21st April and recorded on 15th September 1904, as it had been superseded by the agreement made on 28th September 1904, and that he could not charge upon the latter agreement because no memorandum of it had ever been recorded; and further, that he was not entitled to use the recorded agreement as a warrant to charge for the restricted compensation of the subsequent unrecorded agreement. In this contention I think that the company are well founded.

"On the face of the execution of the charge itself, the validity of the charge appears to be very doubtful. If the charge had proceeded on the recorded agreement, and simply restricted the sum charged for to a less sum than contained in the agreement, the charge on the face of it might have been unexceptionable. But the way in which the second agreement is introduced renders it doubtful what really was the warrant for the charge. But I do not proceed on this as my ground of judgment.

"These memoranda of agreement draw their operative force from the statute and its relative schedules; and on an examination of these I have come to the conclusion that each agreement for compensation or for variation of compensation stands by itself, and to have statutory effect must be recorded. Once an agreement to vary is entered into, and a memorandum of it recorded, the previous agreement ceases to be operative. Till it is recorded, the previous agreement stands as the only statutory agreement. The recording of the previous agreement cannot supply the want of recording of the agreement to vary. The agreement to vary is no mere codicil or postscript to the original agreement, and cannot come under its wing so as to get the benefit of its recording. The Act (60 and 61 Vict. chap. 37) provides that if in any employment to which the Act applies, personal injury by accident is caused to a workman his employer shall be liable to pay compensation to him in accordance with the first schedule to the Act. The first schedule, section (1) [*b*], provides that 'The amount of compensation under this Act shall be, where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of the workman's average weekly earnings, such weekly payment not to exceed one pound'; section (2) provides that, in fixing the amount of the weekly payments regard shall be had to the difference of the amount of the weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident; and section (12) provides that any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act. With a view to such review, section (11) provides for medical examination of the injured workman.

"The second schedule contains provisions for settling by arbitration, *inter alia*, questions of compensation. Section (8) provides that, where the amount of compensation under this Act shall have been ascertained or any weekly payment varied under this Act, either by an arbitrator or by agreement, a memorandum thereof shall be sent by the arbitrator, or by any party interested, to the sheriff-clerk for the district in which any person entitled to such compensation resides, who shall record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a Sheriff Court judgment. And section (14) [*b*] further provides that 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 scheme of the statute I understand to be this—let the compensation be ascertained either by arbitration or agreement, verbal it may be, then any party interested may make that formal by recording a memorandum in the special register, but the rules made under the statute provide for such notice as will ensure the correctness of record so to be made. But this recorded memorandum only constitutes the agreement. To make it effective as a conventional decree it must be registered in the ordinary books of Court.

"It appears to me, therefore, that the statute does not contemplate that any agreement shall be enforced under the statute except the last recorded agreement, which on being recorded may then be registered for execution, and that it does contemplate that, to make it enforceable by diligence, the agreement to vary must itself be recorded and registered just as much as the original agreement. At 16th August

1905, the date of charge, the only thing on which a charge by Davidson could proceed was the memorandum of agreement recorded on 15th September 1904, and registered 28th July 1905, for 16s. 6d. of weekly compensation. Nothing for the time could have prevented him charging upon an extract of that registered recorded memorandum as upon an extract decreet. If the company desired to prevent him so doing, it was open to them to present to the sheriff-clerk a memorandum of the agreement to vary, but until they did so no judicial cognisance could be taken of the variation. But on the other hand, Davidson, though he might have charged upon the recorded and registered memorandum of agreement for the full 16s. 6d., could not at his own hand transform that memorandum into a substitute for a memorandum of variation if he wished to charge for the agreed-on reduced amount any more than he could have done so if he had wished to charge for an agreed-on increased amount.

"In my opinion, therefore, the charge is inept, as proceeding without competent warrant, and falls to be suspended as craved."

Davidson reclaimed, and argued — The charge was for less than the recorded agreement would have authorised. That could not invalidate it. The charger could restrict the amount as he pleased. A *pluris petitio* only invalidated a charge *quoad excessum* —*Davidson* v. *Dunbar*, May 31, 1821, 1 S. 43; *Dick* v. *Murison*, November 13, 1841, 8 D. 1; *Wilson* v. *Stronach*, January 9, 1862, 24 D. 271. There was, again, nothing wrong in the form of charge, for there was no statutory form under the Workmen's Compensation Act. The warrant for the charge was also good. It was the recorded agreement which by the statute was enforceable in like manner as a recorded decree-arbitral. Such recorded agreement remained of force till superseded by another recorded agreement or a decree of the Sheriff. The complainers should have recorded the subsequent agreement, or if they were dissatisfied with its terms, should have gone to the Sheriff and got the memorandum modified, as provided by section 12 of the First Schedule—*Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724. Reference was also made to *Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312; and to *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, October 23, 1906, 44 S.L.R. 2.

Argued for the respondents—The Lord Ordinary was right. The recorded agreement being superseded was dead. The employers had no interest to record the subsequent agreement. An agreement to pay compensation, whether recorded or not, was terminated *ipso facto* by a subsequent agreement. Davidson was personally barred from suing on the recorded agreement. Section 8 of the Second Schedule laid down specifically how a workman was to proceed. The parties here were not in the region of ordinary decrees, but under the special and highly technical rules of the Act. To hold that registered memoranda after being superseded by verbal agreements could still be enforced would be to lay a heavy burden on large employers like the Fife Coal Company, who had about 5000 of these applications yearly.

LORD KYLLACHY—This case has been very well argued on both sides, and I am sure that Mr Lippe has said everything that could have been said, not only in favour of the Lord Ordinary's judgment, but also in support generally of his clients' contention. It appears to me, however, that the Lord Ordinary has proceeded, if I may say so, upon too technical, and indeed upon too subtle, a view of the provisions of the statute. His view and the view of the suspender appear to be this—that because the charge proceeds upon a recorded agreement, and it appears on the face of the charge that there has been a new agreement for a smaller amount of compensation, the original recorded agreement is thereby altogether displaced as a ground of charge. Now, I cannot myself accede to that view of the matter. It is probably true, as the Lord Ordinary indeed holds, that the recorded agreement until it is displaced by a new agreement, or by a variation by the Sheriff under section 12, is the measure of the workman's rights. But there is nothing, so far as I see, in the statute to prevent the workman if he chooses from restricting his charge under the original agreement. He may do so simply because he chooses to do so, or he may do so because of some outside transaction or if you please some other agreement by which he considers himself bound. I see nothing in the Workmen's Compensation Act to prevent that. I see nothing to prevent such restriction of a charge under this Act as would be competent under other statutes or at common law. Nor does it seem to me to make any difference that the outside agreement might have been recorded, and if recorded would have displaced the original agreement. Not being recorded it operates simply as a contractual restriction of the original agreement, operating just as if it had taken the form of an undertaking by the workman that in order to avoid circuity he should only charge for a restricted amount. It appears to me that there is nothing in the statute to prevent such a restriction, and I am therefore of opinion that the suspension must be refused.

LORD PEARSON—I am entirely of the same opinion. It is not disputed by the employers here, and indeed it is specially averred by them on record, that there was a new agreement reducing the 16s. 6d., which was the full amount under the statute, to 11s. 6d.; but that agreement was not recorded either in the Special Register or in the Sheriff Court books for execution. Accordingly, in my view, nothing stood in the way of a charge on the original extract registered memo-

randum except a subsequent agreement, not recorded, reducing the amount payable per week. Now to a large extent I agree with what the Lord Ordinary says as to the position of an unrecorded agreement to vary the amount of compensation. The Lord Ordinary says—"Once an agreement to vary is entered into and a memorandum of it recorded, the previous agreement ceases to be operative. Till it is recorded the previous agreement stands as the only statutory agreement." But I cannot hold that a charge is bad because it takes account of a subsequent agreement, admitted by both parties, to the effect of charging for payment of a less amount than the recorded agreement would have warranted. It appears to me that a creditor is always entitled to restrict his charge for payment to a sum less than the amount of his debt, without reason assigned; and if he does state the reason, as was done in this case, I do not see why that should be supposed to affect the validity of the charge. The case is totally different from the case put by the Lord Ordinary of a workman charging for an agreed-on increased amount. The Lord Ordinary puts that as a parallel case, but it is obvious that there could be no warrant for that until the second agreement is registered. But where it is a case of restricting the amount it appears to me that so long as no other agreement is registered, the agreement originally registered subsists as a warrant of charge, either for the full amount or subject to such restriction as the charger sees fit to make.

The opposite view was rested upon what was to me a new view of the statutory procedure, namely, that a new agreement displaces a recorded memorandum of agreement to all effects whether the new one is recorded or not. I think there is no warrant for that in the statute.

I should like to reserve my opinion on the larger question which we might have had to decide, namely, whether or in what cases it is competent to suspend a charge proceeding on a registered memorandum of agreement.

LORD ARDWALL—I agree with both your Lordships. The charge proceeds upon a recorded agreement under the Workmen's Compensation Act 1897, which is declared by section 8 of the second schedule attached to that Act to be for all purposes enforceable as a Sheriff Court judgment. Therefore the charge has proceeded in order so far as that goes. But it is said to be a bad charge because of a subsequent unrecorded agreement between the parties. Mr Lippe for the complainers admitted that the foundation of that contention was that there was something of the nature of personal bar against an employee charging on a decree which was in itself for a larger sum than he had subsequently agreed to accept. But any objection of that sort to this charge is quite displaced by the fact that the charger here restricts the amount in the charge to a sum stated as the amount due under the alleged unrecorded agreement, and that being so there is no room for a plea of personal bar on the part of the complainer. There can, of course, be no doubt that it is open to any person to restrict a charge to what he considers the amount lawfully due to him. I therefore think that there is here no legal ground of complaint.

But further it is said there is great hardship involved here, because if this charge is given effect to large employers of labour will never know the extent of their liabilities if amending agreements are not registered by the employees. I would point out in answer to that that under section 8 of the second schedule of the Workmen's Compensation Act 1897 it is provided that "where the amount of compensation under this Act shall have been ascertained or any weekly payment varied under this Act, either by an arbitrator or by agreement, a memorandum thereof shall be sent by the arbitrator or by any person interested to the Sheriff-Clerk for the district in which any person entitled to such compensation resides, who shall record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a Sheriff Court judgment." So that it is competent for an employer to send to be recorded a memorandum of any agreement to vary the terms of a former one, and if it is duly registered it would of course displace the former one. The remedy is thus in the hands of employers themselves. But until such registration is made, it seems to me that the original memorandum of agreement, being the only one recorded in the Sheriff Court books, must be given effect to, and that it is not displaced or suspended by any subsequent agreement, verbal or otherwise, that is not on the register.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR were absent.

The Court recalled the Lord Ordinary's interlocutor and refused the suspension.

Counsel for Complainers and Respondents—Hunter, K.C.—Lippe. Agent—W. & J. Burness, W.S.

Counsel for Respondent and Reclaimer—Watt, K.C.—Wilton. Agent—P. R. M'Laren, Solicitor.