the conditions of this settlement for supposing that Mrs Bayly intended to put her children to an election. In the first place, it does not by its terms suggest that any alternative is offered to the legatees. The testatrix sets out that she means to exercise the powers committed to her by her father's will, and she does so by making general dispositions applicable equally to all the property she has power to dispose of, whether her father's or her own. There is no room for question that according to the purport of her will she thought that she was validly exercising the power committed to her by her father's will. It turns out that her exercise of the power is invalid, and that her children, who are the objects of the power, must therefore take their grandfather's property by virtue of his own will, and not by their mother's. But no one of them could give legal effect to their mother's invalid exercise of the power unless by mutual agreement with all the others, and to exclude all the children from participating in their mother's estate would be subversive of her plain intention.

I am confirmed in this view by the declaration that the provisions in favour of her children are to exclude any kind of claim against her own estate, or against the estate settled in the antenuptial contract, read along with the immediately following declaration, that what she has done is in exercise of the power competent to her under the trust-disposition of her father. Therefore, having clearly before her mind that she was dealing with three separate properties—her own private estate, her marriage-contract estate, and her father's estate—she says—"If you accept the benefits given to you by me under this will you must take them in full of all claims against my estate or against the antenuptial contract estate;" and she excludes from that condition the third estate with which she was also dealing. It appears to me, therefore, as a mere matter of construction, that she did not intend to make it a condition of the acceptance of her legacies that the children should give up any claim they might have against her father's estate in the event of her appointment of her portion of that estate being ineffectual.

I cannot say that I have any difficulty in coming to that conclusion because of the decision in the case of *Lord Inverclyde's Trustees*. I do not examine that case in detail, because it is not reported, but it is enough to say that the judgment proceeded, as I think this judgment ought to proceed, upon the construction of the will which the Court were then considering, and that the terms of Lord Inverclyde's will were as clearly in favour of the construction which required that his children should be put to their election as I think the terms of the will in the present case are against it.

The Court answered question four in the affirmative and question five (*a*) in the negative.

Counsel for the First Parties—Moncrieff. Agents — Fraser, Stodart & Ballingall, W.S.

Counsel for the Second and Fifth Parties — Macmillan — J. R. Dickson. Agents — Webster, Will, & Company, S.S.C.

Counsel for the Third Party — Hunter, K.C.—Black. Agents—Forrester & Davidson, W.S.

Counsel for the Fourth Parties—Leadbetter. Agents—W. & J. Cook, W.S.

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.

M'EWAN *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (16), *Second Schedule* (9)—*Recording of Agreement—Power of Sheriff to Postpone Recording where Simultaneous Application for Review by Employers on Ground of Recovery.*

A workman on 20th May 1909 presented an application craving the Court to grant warrant to the sheriff-clerk to record a memorandum of agreement. The employers thereupon presented an application for an arbitration to have the compensation payable under said agreement ended as on 30th April 1909, or otherwise to have it diminished. The Sheriff-Substitute, acting as arbiter, on 30th June allowed a proof in the application for arbitration, and appointed it to proceed on 7th July. The workman moved for warrant to record the memorandum "in respect its genuineness was not disputed and no other question of fact arose." The Sheriff-Substitute refused the motion and allowed proof, appointing it to proceed also on 7th July.

Held that the Sheriff-Substitute had acted rightly, and that he was not bound to register the memorandum without awaiting the result of the proof in the counter application. *Diss.* Lord Johnston, who was of opinion that the Sheriff-Substitute was bound to grant warrant to register the memorandum, but that he ought to have superseded extract until his award in the counter application for review was determined.

Opinion (by the Lord President) that the arbiter might also have sisted the application to register until the determination of the application to vary, or, though not so conveniently, might have registered the memorandum but superseded extract until such time as there was a determination in the application to vary or end.

Authorities examined.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I (16)—"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 . . . and the amount of payment shall, in default of agreement, be settled by arbitration under this Act. . . ." Schedule II (9) [as applied to Scotland by section 13 of the Act]—"Where the amount of compensation under this Act has been ascertained . . . by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt], . . . by any party interested, to the [sheriff-clerk], who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register . . . : Provided that . . . (*b*) where a workman seeks to record a memorandum of agreement, . . . and the employer . . . proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording, . . . the memorandum shall only be recorded, if at all, on such terms as the [Sheriff] under the circumstances may think just. . . ."

Thomas M'Ewan, coal miner, Blantyre, being dissatisfied with a determination of the Sheriff-Substitute (THOMSON) at Hamilton, acting as arbiter under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in an arbitration between him and William Baird & Company, Limited, coalmasters, Craighead Colliery, Blantyre, appealed by way of stated case.

The Case stated—"The appellant on 20th May 1909 presented a minute craving the Court to grant warrant to the Sheriff-Clerk of Lanarkshire at Hamilton to record a memorandum of agreement, a certified copy whereof was thereto attached, in the special register kept by him in terms of the Workmen's Compensation Act 1906.

"The respondents thereupon presented an application to the said Court for an arbitration to have the compensation payable under said agreement declared ended as on 30th April 1909 or otherwise to have it reduced.

"These two applications having thus come before the Court contemporaneously, I on 30th June 1909 allowed a proof in the application for arbitration and appointed the proof to proceed on 7th July. The appellant moved for warrant to record the memorandum of agreement in respect its genuineness was not disputed and no other question of fact arose. I refused the motion and allowed proof, appointing the same to proceed also on 7th July. The appellant contended that this course was incompetent under the statute, but I decided as I did upon the authority as I conceived of *Archibald Finnie & Son* v. *Fulton*."

The *question of law* was—"Was the Sheriff-Substitute bound by the statute to grant warrant to register the memorandum of agreement without awaiting the result of the proof in the counter application?"

Argued for the appellant—There was no warrant in the Second Schedule (9) or elsewhere in the statute for the refusal of the Sheriff to register the memorandum of agreement. Its genuineness, which meant that it *de facto* had been entered into—*Coakley* v. *Addie & Sons, Limited*, 1909 S.C. 545, 46 S.L.R. 408—was not disputed, and it did not fall under (*b*) or any other of the provisos to paragraph 9 of the Second Schedule, and accordingly it ought to have been recorded—*Coakley* (*cit. sup.*) The dictum of the Lord President in *Archibald Finnie & Son* v. *Fulton*, 1909 S.C. 938, at 942, 46 S.L.R. 665 at 672, did not go so far as the Sheriff had pressed it, and in any case was only *obiter*.

Argued for the respondents—The Sheriff had not absolutely refused to grant warrant to record the memorandum, but had superseded decision on that matter until the result of the proofs was seen so as to avoid duplicate procedure. What he had done had been recognised in *Archibald Finnie & Son* v. *Fulton* (*cit. sup.*) as a proper thing to do.

At advising—

LORD PRESIDENT—The facts as given in this case are that the appellant, whom I shall call the workman, on 20th May 1909 presented a minute craving the Court to grant warrant to the Sheriff-Clerk of Lanarkshire at Hamilton to record a memorandum of agreement, a certified copy whereof was thereto attached, in the special register kept by him in terms of the Workmen's Compensation Act 1906. We are not actually told in so many words what the memorandum was in the case, but I think it is safe to assume that the agreement of which the memorandum was sought to be registered was in ordinary terms—that is to say, was an agreement to pay compensation at a certain rate during incapacity; indeed if it was not in these terms, or equivalent terms, it would not be in accordance with the statute, and any agreement, if it is to be a statutory agreement, ought, so far, to be an echo of the statute. The case goes on to say that the respondents thereupon presented an application to the said Court for an arbitration to have the compensation payable under said agreement declared ended as on 30th April 1909, or otherwise to have it reduced—"reduced" here obviously being used not in the legal sense of reduction but in the sense of to diminish. These two applications, the case goes on to say, having thus come before the Court contemporaneously, the Sheriff-Substitute on 30th June 1909 allowed a proof in the application for arbitration and appointed the proof to proceed on 7th July. The appellant moved for warrant to record the memorandum of agreement in respect its genuineness was not disputed and no other question of fact arose. The Sheriff-Substitute refused the motion and allowed proof, appointing the same to proceed also on 7th July. The appellant contended that this course was incompetent under the statute, but the Sheriff-Substitute decided as he did on the authority as he conceived of *Archibald Finnie & Son* v. *Fulton*, 1909 S.C. 938; and the question put for the opinion of the Court is whether the Sheriff-Substitute is bound by the statute to grant warrant to

register the memorandum of agreement without awaiting the result of the proof in the counter application. I only make one other comment on the words used, that I take it that the meaning of the expression "in respect its genuineness was not disputed" is that the employer did not say that the memorandum tabled had never existed, but that what he did say was that its terms were not applicable to the present state of facts, because the workman had as matter of fact recovered.

Now, the authority upon which the learned Sheriff proceeded, considering he was bound by it, was a phrase in *Finnie* v. *Fulton* which was used by myself, and which, no doubt, was *obiter*. I said in *Finnie* v. *Fulton* that in that case "there was no undue delay, and far less any such proceeding as to lead the complainers to suppose that the respondent acquiesced in the ceasing of the payment of compensation. The complainers ought to have met the proposal to register with a counter application, to be heard at the same time, to have the compensation varied or ended." When I said "ought," I take it that it was as a counter distinction to what the complainers were doing in that case, which was seeking to suspend; and then comes the *obiter*. As that dictum is only an *obiter dictum*, it is, of course, necessary to consider the matter on its merits now.

I have come to the conclusion that the *obiter dictum*, although it was *obiter*, was a proper dictum, and I have come to the conclusion that the Sheriff exercised quite a proper discretion here, although, as I shall presently point out, he might have done other things. In the first place, I should like to point out that since *Finnie* v. *Fulton* there has been some more authority which bears upon the question, and to which I think it necessary to refer. In the first place, there has been in our own Court, and in this Division, the case of *Donaldson Brothers* v. *Cowan* (1909 S.C. 1292, 46 S.L.R. 920), before Seven Judges, and it overruled the prior cases of *Steel* v. *Oakbank Oil Company* (5 F. 244, 40 S.L.R. 205), and *Pumpherston Oil Company* (5 F. 963, 40 S.L.R. 724), and adhered to the view that had been taken by the Appeal Court in England. The view which it displaced was the view which had been taken by the majority in the cases of *Steel* and *Pumpherston*, namely, that upon an application to review it was not possible to pronounce an effective order except as from the date upon which the interlocutor making a review was pronounced, and *Donaldson's* case decided that it was possible to make an effective order of review date from the date of the presentation of the application. I point out also in passing that *Donaldson's* case, just as the *Steel* and *Pumpherston* cases, was a case where there was an existing registered memorandum—that is to say, there had been a memorandum under which, so to speak, a payment was running—and then the application for review came. But besides the case of *Donaldson Bros.*, there have been two cases in England which had been decided at the time we decided *Donaldson Bros.*, but had been decided so recently at that time that there was only a report of one of them in the Times Law Reports, and no report in the authorised Law Reports. These cases are now reported, and they are *The Upper Forrest and Western Steel and Tinplate Company, Limited* v. *Thomas*, and *Charing Cross, Euston, and Hampstead Railway Company* v. *Boots*, both in [1909] 2 K.B. pp. 631 and 640 respectively, and there is in them a fairly exhaustive discussion of the English method of procedure in such cases. The cases themselves, so far as decisions are concerned, do not absolutely touch the point, but I think they authoritatively show what is the view of the English Court of Appeal upon that part of the statute. They show, I think, conclusively that the English Courts proceed thus—where the County Court judge is applied to at one and the same time to register a memorandum and to vary a payment, their plan is to allow the memorandum to be registered, but to grant a stay of execution in order that the other matter may be taken up, and then, according as the decision in the other matter is one way or another, that stay of execution is either removed or not as the case may be. I do not think it necessary to give the opinions of the Judges, for they are long, and there is no particular one sentence which may be appealed to, but that is the result, without any doubt, that may be taken out of the two cases.

Now it seems to me that that is quite right. The statute provides for a review of payment, and if it provides for a review of payment, it seems to me it must surely mean that that review is to be an effective review, and it really cannot be an effective review if at the same time the Court is absolutely bound to give one of the applicants, namely, the workman, the power of enforcing a payment which nevertheless in a week or two, when the application for review is decided, it may be found he was not entitled to. I am far from going back upon the general scheme of the statute which I had occasion to explain, as it appeared to me, in the *Lochgelly* case (1909 S.C. 922, 46 S.L.R. 665). I still think, as I there expressed it, that if a workman registers a memorandum and by that means gets power of execution, then the only proper way of getting out of the liability which that memorandum imposes is for the employer to end it in the way provided by the statute, viz., by a petition under section 16, and that he cannot get out of it by any other process such as suspension, because if a workman has registered a memorandum (and here I am anticipating what I am going to say in another case), I do not think that an employer coming forward and saying, "I propose to say that it is ended," will have as a right the stopping by means of a suspension of the operation of the old registered memorandum. But if the workman has not chosen to register the memorandum and then comes forward to register it for the first time at a time when it is

possible for the employer to say, as he does here, "You have recovered, and therefore the state of affairs which the memorandum contemplated is no longer the true state of affairs," it seems to me, according to ordinary justice, that the determination of the question of registration must be put off until such time as you find whether the answer of the employer is a good one or not.

If that is the substance of it, it does not really very much matter in what particular way you do it so far as forms of process are concerned, because I conceive it can be done, as far as I can see, in three ways. It can be done in the way in which it was done here—by the Sheriff simply saying, "I will take up these two applications on the same day, and after I have had a proof I will see where I am." I confess I do not think there was much to prove, although he actually ordered a proof, in the process of registration of the memorandum, for I do not know exactly what the parties were going to prove in it, but I do not think that much matters if there was something about which there must be proof in the application to terminate or vary, and therefore I think that the way he did it, simply putting off the two applications to the one day, was a perfectly competent way. But he might have done it in another way. He might quite competently have sisted the application to register until the determination of the application to vary. And upon further consideration I think there is even another way he might have done it, which I do not think is incompetent, although not so convenient, and that is that he might have registered the memorandum but superseded extract until such time as there was a determination in the application to vary or end.

In saying that I have almost recalled some words which I used in the case of *Donaldson*. In *Donaldson's* case, as I have already mentioned, the *Charing Cross* case had been recently decided, and we had a short report of it in the Times Law Reports, and I pointed out that there is a difference of procedure in the two countries, and I said this—"In other words, using our own law language, where we proceed in this country by suspension they proceed by a stay of execution; and the stay of execution seems, according to their practice, to be granted by the judge who ordains the registering of the memorandum. I need scarcely say we have nothing of that sort. The memorandum must be either registered or not registered, but if registered there can be no rider attached to the registration, any defence that there might be to the charge thereto ensuing being raised in a suspension." Now I do not altogether wonder that I used these words, although upon reconsideration I do not think they are completely accurate. The reason I used them was that I was there thinking of the registration of a decree in the way in which we are familiar with it—that is, registration of consent, for under the Scotch part of the statute a memorandum is to have the effect when registered of a decree-arbitral. Now when you register of consent it is a mere formal act—the putting the memorandum on the register; and if no question was raised before the sheriff-clerk then I take it the sheriff-clerk would for the moment act merely in a ministerial capacity, and could not append any condition to the registration. But now that it has been decided in *Coakley* (1909 S.C. 545, 46 S.L.R. 408), in which decision I agree, that under this recent Act when the County Court Judge or Sheriff-Substitute comes to act in a disputed case then his determination to have the memorandum registered is a judicial act, I do not doubt that it would be possible for him to adject to the interlocutor which authorised the registration of the memorandum a provision that extract should be superseded to a certain time, and that provision, if added, would really be precisely upon all fours with the stay of execution which seems to be granted in England, and to this extent I wish to correct my words in *Donaldson*.

On the whole matter, I come to the conclusion that if a workman has got an agreement which is capable of registration, he can always register it at once, and if so, under the decisions that we have already given, it will only be got rid of by a proper application to vary. But if he chooses not to register his memorandum until such time as the employer can come forward and *unico contextu* say he objects to this because the workman has recovered, it is right that the two matters should be taken up at once. All we are here deciding is that the Sheriff-Substitute was not bound to register the memorandum *de plano*. He was quite right not to do it till he had seen what happened in the application to vary. We are not deciding that he could not register the memorandum, and for this very good reason that it would depend upon facts which we do not know. Let me put the matter hypothetically. Supposing a workman had been paid for some time, and then the employer had *de facto* stopped paying, and then after a certain interval of time the workman presented a memorandum for registration and was countered by an allegation that he had recovered—the result of the proof in the application to terminate on the ground that he had recovered might not be that he had entirely recovered but that he was still partially incapacitated, and the Sheriff might vary the compensation as from a certain date, and, that date being the date of the application, it is quite clear that there might still be a hiatus during which the workman had got no payment, and it might be quite right that his memorandum should be registered in order that he might get it. If the workman had been paid right up to the date on which his application was presented, or up to the date at which the Sheriff found that he had completely recovered, it would be perfectly useless to register the memorandum, because there would be nothing to charge for under it, the compensation having been ended by the interlocutor in the petition to vary, and there being no arrears to get.

Accordingly I think that the question should be answered in the negative.

LORD KINNEAR — I agree with your Lordship. I think it material that the only question we have to determine is whether the Sheriff has taken a proper and competent course in allowing a proof of the questions which were raised before him by the workman on the one hand and the employer on the other. What the procedure which he should follow may be when the facts have been ascertained is not before us, and we can form no opinion on it, but in the meantime what he has said is—"I shall allow both parties to bring the facts on which they rely before me before I determine the issue." I think the Sheriff's course of procedure is perfectly just and proper and that it is within the statute.

I agree with what your Lordship said at the outset, that we are bound to assume—although we have not the details before us—that the agreement which this workman wants to register is an agreement to pay him compensation during incapacity, because if it lays upon the employer any further obligation then it is not an agreement under the statute, and therefore is not registrable under the statute. An employer may if he likes agree to give his workman compensation upon different terms than those which the statute has fixed, but if he does that then the provision of the statute which enacts that an agreement according to its terms may be recorded, and being recorded shall have the force of a County Court judgment, has no application. I take it, therefore, that the agreement of which the Sheriff was asked to order registration was an agreement for compensation during incapacity.

But when it was presented for registration the employer maintained that it was inoperative because the incapacity had ceased. I say that is the employer's position, because the Sheriff has stated that one of the employer's points is that the compensation ought to be ended. If that be so, that means that the incapacity has ceased, because there is no other ground upon which the employer can insist on the termination of the compensation. But it is proper to observe that that is not the sole point that is brought before the Sheriff, according to the statement he gives of the employer's contention. What he says is that when the workman asked for warrant of registration the respondents presented an application to have the compensation declared ended as at 30th April 1909, or otherwise to have it reduced, which, I agree with your Lordship, does not mean anything but diminished. Now upon that statement of the fact of the application one can see that there might be totally different questions of fact raised and different conditions of fact brought before the Sheriff within the respondent's contention. He might prove that the man had partially recovered and therefore that the compensation should be diminished. In that case, I suppose, he would be entitled to say—"There is an agreement for compensation, but the amount of compensation ought to be varied." On the other hand, he may say—"The man has completely recovered and is earning full wages or able to earn them," and in that case his position would be that the agreement had become entirely inoperative. The Sheriff has not stated in detail any specific statement of facts which had been made before him by the employer, or indeed by the other party either, but he has said quite enough to show that the question upon which he has given his decision is the question merely of procedure, whether he shall decide one or other of these questions *de plano*, or whether he shall have the facts ascertained before deciding either of them. It appears to me that it might turn out (I do not say more) that as a result of the respondent's proof the agreement which he originally entered into had ceased to be operative altogether, and in that case I think he would be entitled to say "It ought not to be recorded because it is plain it is at an end. It was a perfectly good agreement, and the memorandum was a perfectly correct memorandum for a time, but it is no longer an existing or operative agreement, and therefore it ought not to be put upon the register so as to give it the effect of a judgment which may be enforced by the use of diligence."

I do not know if it is absolutely necessary at present to consider what is the best procedure to be adopted when an employer maintains that an agreement originally good has been exhausted by a change in circumstances for which the agreement itself provides, but I thoroughly agree with what your Lordship has said as to the various methods in which the Sheriff could proceed, and as to that I have nothing to add. For the purpose of the present case I think the Sheriff has taken a perfectly proper and competent course in having the facts ascertained as he proposes before deciding either of the applications.

LORD JOHNSTON—I have found great difficulty in extracting from the stated case the precise course taken by the Sheriff, and arriving at what moved him to put the question as framed. What we find is that on 20th May 1909 the injured workman M'Ewan presented in the Sheriff Court at Hamilton a minute craving warrant to record a memorandum of agreement to pay compensation in terms of the Workmen's Compensation Act 1906. There is no indication that the employers objected to the recording of the memorandum, as they might have done under the second schedule to the Act, section 9, if they had either objected to its genuineness or maintained that the workman had in fact returned to work and was earning the same wages as he did before the accident.

What did happen was, that on the workman craving warrant to record, the employers, William Baird & Co., Ltd., presented an application for review of the compensation payable under said agreement, and to have it declared ended as at

30th April 1909, or otherwise to have it reduced.

The two applications were practically simultaneous, and were treated by the Sheriff as simultaneous. The course which he took was this. He allowed proof in the application for review; and a motion for warrant to record having been made under the application to that effect, he refused it, I must assume *in hoc statu*, and allowed proof—of what does not appear, and I am at a loss to surmise—both proofs to proceed on the same day. He gives as the reason for taking this course a statement *obiter* by your Lordship in the chair in the case of *Finnie & Son* v. *Fulton* (1909 S.C. at p. 942), to the effect that "the complainers ought to have met the proposal to register with a counter application, to be heard at the same time, to have the compensation varied or ended." But your Lordship does not say what would have been the measure of the relief which this course would have given to the complainers in that case, or what the consequent procedure should have been, and your Lordship had had no occasion to form any determinate view on these subjects.

But accepting your Lordship's suggestion that it was open to the employers to meet the application for warrant to record by an application for review, and finding that it had been so met in this case, the Sheriff seems to me to have been somewhat puzzled how he was to proceed in order to work the matter out. His refusal of the motion for warrant to record, and allowance of proof where there was nothing to prove, was certainly a wrong and even an unmeaning order. But having regard to the question put, to which I shall immediately revert, I think it was intended to have the practical effect of sisting procedure, or rather of keeping the procedure pending in the application for warrant to record, until the application for review was disposed of, under the impression that the award in the employer's application for review might make a new starting point, obviating the necessity of recording the memorandum of the original agreement. And this is borne out by the question put, which does not really fit the procedure, but is, "Was the Sheriff-Substitute bound by the statute to grant warrant to register the memorandum of agreement without awaiting the result of the proof in the counter application?"

On the facts of this case as stated, and if he had no other course open to him in matter of procedure than that which he took, I think there can be little doubt that this question must have been answered in the affirmative. But the case has been taken as sufficient to raise the general question left indeterminate by your Lordship's remark *obiter* in *Finnie & Son* v. *Fulton* (*supra*), viz., What is to be the result of the employer's meeting the workman's application for warrant to record by an application for review, and what procedure is it incumbent on the Sheriff to take in such circumstances?

The subject which this case touches is one of importance in the operation of the Act. But it is one on which parties have now through various recent decisions got clearer light than they formerly had to assist them.

The Act of 1906, sec. 1, assumes that any question arising under the Act as to liability to pay compensation or as to the amount or duration of compensation, will *primo loco* be settled or endeavoured to be settled by agreement, and only failing agreement will go to arbitration under the Act.

The second schedule appended to the Act, sec. (9), provides further, as regards Scotland, that where the amount of compensation under the Act has been ascertained, *inter alia*, by agreement, a memorandum thereof shall be sent by any party interested to the sheriff-clerk, who shall on being satisfied as to its genuineness record it in a special register, and thereupon it shall be enforceable as a recorded decreet-arbitral. There are only two things which under this section of the schedule can stay the hand of the sheriff-clerk, viz., dispute as to the genuineness of the agreement, or proof under sub-section (*b*) by the employer that the workman has returned to work and is earning as high wages as before the accident. Where there is an objection to recording stated, the intervention of the Sheriff is provided for by Act of Sederunt, 26th June 1907, and the recording then does not take place except on his warrant.

Now it has been decided—*Traill* v. *Cochrane* (3 F. 1091, 38 S.L.R. 848)—that a memorandum of a verbal agreement could be recorded under the 1897 Act, and the Act of 1906 is so expressed as to leave for the future no reasonable doubt on this point. Further, delay on the part of the workman, and even his recovery, is no relevant objection to recording such memorandum—*Cammick* v. *Glasgow Iron and Steel Company*, (4 F. 198, 39 S.L.R. 138), and other similar cases. The employer has only two courses open to him where the workman presents a memorandum of agreement for registration. He may apply for review or he may resist registration under the 9th section of the second schedule of 1906. But I find nothing in the statute or its schedules to justify the suggestion that if the employer does not take advantage of the 9th section, he can by mere application for review, as part of the statutory procedure contemplated, either prevent or stay registration.

It has been suggested that an application for review in ordinary form, as here, involves the contention that the incapacity of the workman has ceased and therefore that the agreement is ended, and that this is equivalent to objecting under section (9) to the genuineness of the memorandum of agreement, in respect that there is no longer any agreement of which there could be a memorandum. That is as much as to say that there cannot be a genuine memorandum of an agreement which it is alleged has ceased to be operative. I do not think that this is the natural meaning

of the word genuineness, nor its meaning as used in the statutory schedule. The precise shade of meaning to be attributed to "genuineness" depends on the collocation. But it always involves in some sense the opposite of fabricated. Here it imports merely that the memorandum truly represents the agreement actually and really come to between the parties, and not an *ex parte* make-up or concoction; and this is in accordance with the judgment of the Second Division of the Court in *Coakley* v. *Addie & Company* (1909 S.C. 545, 46 S.L.R. 408). I cannot therefore understand how an application to review and declare the agreement ended at the date when the application for warrant to register was made can be treated as an objection to the genuineness of the memorandum, which if sustained will justify refusal of warrant to register.

There remains to consider the alternative course provided by sub-section (*b*) of section (9) of the 1906 schedule. I agree with your Lordship's remark in *Donaldson Brothers* v. *Cowan*, 1909 S.C. at p. 1298, that the power thus given for the first time to the employer to resist the registration of a memorandum is a very limited power, because it is only to apply when the employer proves that the workman has returned to work and is earning the same wages as before the accident. I cannot think that it was intended so to limit it; and I think that it is unfortunate that it has been so limited. But the words are precise, and I cannot assume that they are a mere paraphrase for "when the employer proves that the incapacity has wholly ceased." There are many cases where incapacity has wholly ceased and where the employer is entitled to have the agreement ended, in which, whether from his own fault or his misfortune, the workman has not returned to work or is not earning the same wages as before the accident. In none of these cases is the sub-section of any assistance to the employer.

If the employer is in a position to resort to sub-section (*b*), there is no doubt that the recording of a memorandum can be opposed, and the control of the recording is given to the Sheriff, for it "shall only be recorded, if at all, on such terms as the Sheriff, under the circumstances, may think just."

But where, as here I must assume is the case, all that the employer can say is that incapacity has ceased, there appears to me to be no ground under the statute for refusing or even staying the recording.

It is, however, said that the decision in the recent English case of *Charing Cross, &c. Railway Company* v. *Boots*, [1909] 2 K.B. 640, supports an opposite conclusion. I have carefully read the decision, and I see nothing to except to in the judgment of the majority of the Court, allowing for the difference of practice in England and Scotland. But the case is inapplicable to the present, in respect that the employers there could and did resort to the form given them by section (9) sub-section (*b*) of the 1906 schedule. That is made clear by the narrative and by the second paragraph of the judgment of the learned Master of the Rolls. And that being the real nature of the case before the Court, I can give no weight to a casual expression of Buckley, L.J., bearing on the term "genuineness" of the memorandum. The immediately preceding case of *Upper Forest Company* v. *Thomas*, [1909] 2 K.B. 631, has also been referred to. In its facts it is *in pari casu* with the present, for the employer did not seek to bring himself under section (9) subsection (*b*). This matter does not, however, affect the judgment on the point at issue, and is not considered by the Bench.

Assuming, then, that the employer has no resource but to meet an application for warrant to register by an application for review, it must be remembered that that remedy is now more effective than it was before the decision in *Donaldson Brothers* v. *Cowan* (1909 S.C. 1292, 46 S.L.R. 920), by which the English rule was adopted that the award in an application for review may draw back to the date of the application. Still there is room for some injustice resulting from recording under the statute while an application for review is pending. The workman gets an enforceable decree, on which he may charge and recover payment of money to which he may prove ultimately not entitled. He may recover (*a*) for a period prior to the date of the application for review, and (*b*) for a period subsequent to that date and pending the issue of the award.

Now standing the decision in the *Lochgelly* case (1909 S.C. 922, 46 S.L.R. 665) and *Donaldson Brothers* v. *Cowan* (*supra*), I do not see how consistently he can be prevented recovering for the first of these periods. But be that as it may, it would be a great injustice to make the employers pay for the latter period and take their chance of obtaining repetition from the workman in the end of the day, as in this case they took no avoidable risk. If, therefore, it be thought proper in the exercise of the inherent power of the Court to stay recording by superseding extract, which I think would meet the distinction drawn by Buckley, L.J., in the *Charing Cross* case, where he says—at p. 646—"If that order means not that execution of the judgment for enforcement of the agreement shall be stayed, but that execution of the order for registration of the agreement be stayed, I think it is right"—then I should on that ground, but on that alone, concur in the result which your Lordships have reached. But I would require to answer the question to the effect that the Sheriff was bound to grant warrant to register the memorandum, but that he ought to have superseded extract until his award in the counter application for review was pronounced.

LORD M'LAREN was absent.

The Court answered the question of law in the negative.

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