Wednesday, July 6.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

NIDDRIE AND BENHAR COAL COMPANY, LIMITED *v.* HANLEY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (3), *and Second Schedule* (9)*—Act of Sederunt, 26th June* 1907, *sec.* 12*—Recording of Memorandum of Agreement—Discharge Granted by Workman—Determination of Validity of Discharge in Application for Recording.*

Where an application by a workman for the recording of an agreement fixing compensation under the Workmen's Compensation Act 1906 was met by an averment by the employers that the workman had granted a final discharge, to which the workman replied that the discharge, if any existed, was granted under essential error, the Sheriff-Substitute, acting as arbiter, ruled that he could not determine the question of the validity of the discharge in these proceedings, and granted warrant to record the memorandum. *Held* that the arbiter was bound to consider the question of the alleged discharge.

Opinion (*per* Lord Johnston) that the arbiter, if of opinion that the discharge was valid, could either grant warrant to record the award that compensation had been discharged without recording the original agreement, or *unico contextu* grant warrant to record a memorandum of the original agreement and a memorandum of the award that further compensation had been discharged.

Opinion (*per* Lord Kinnear and Lord Salvesen) that the parties had joined issue in the pleadings on this matter, and the respondent, not having objected in his pleadings to the relevancy of appellants' averments that the memorandum had been discharged, was therefore barred from afterwards taking objection.

Coakley v. *Addie & Sons Limited*, 1910 S.C. 545, 46 S.L.R. 408, *distinguished per* Lord Salvesen.

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

The Act of Sederunt of 26th June 1907, to regulate the procedure under the Workmen's Compensation Act 1906, enacts—sec. 12—"When the genuineness of a memorandum under paragraph 9 of the Second Schedule appended to the Act is disputed, or when an employer objects to the recording of such memorandum under sub-section (*b*) of said paragraph, . . . the person disputing the genuineness, or the employer . . . shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the sheriff for settlement by arbitration of the questions raised by the minute."

The Niddrie and Benhar Coal Company, Limited, appealed by way of stated case against a decision of the Sheriff-Substitute (GUY) at Edinburgh in proceedings at the instance of Daniel Hanley, St John's Hill, Edinburgh, against them, under the Workmen's Compensation Act 1906.

The case stated by the Sheriff-Substitute set forth—"The facts proved or admitted, and the procedure which took place in the arbitration, so far as bearing on the questions of law after mentioned, are as follows:—On 8th December 1909 the respondent lodged with the Sheriff-Clerk a memorandum of agreement between him and the appellants, with a request that it should be recorded in the Special Register kept for the purpose. The memorandum narrated that the respondent claimed compensation from the appellants in respect of personal injury caused by accident in the employment of a contractor employed by the appellants at a new shaft near Musselburgh on 31st May 1909; that the question in dispute, which was the amount of compensation, was settled by agreement; that the agreement was made on 16th June 1909; and that it was to the effect that the respondent should receive compensation from the appellants at the rate of 14s. 3d. per week. A copy of the memorandum was intimated to the appellants by the Sheriff-Clerk in terms of paragraph 11 (1) of the Act of Sederunt of 26th June 1907. Within the period of notice the appellants intimated to the Sheriff-Clerk that they objected to the memorandum being recorded on the ground that it was not genuine. The respondent having then applied to the Sheriff for a special warrant to the Sheriff-Clerk to record the memorandum, the appellants lodged a minute, in terms of paragraph 12 of said Act of Sederunt, setting forth their grounds for disputing the genuineness of

the memorandum. These grounds were stated in the minute as follows:—'The said The Niddrie & Benhar Coal Company, Limited, object to the recording of said memorandum of agreement on the ground that it is not genuine, in respect that the period during which compensation at said rate was to be paid was limited by agreement to the period of the claimant's total incapacity for work, and that this was a material term of the agreement entered into between the parties. It is explained and averred that prior to the memorandum of agreement being presented for registration the claimant had signed a final discharge of his claims against the respondents in respect of said accident. The respondents contend that the present application to record a memorandum of agreement is incompetent. It is further explained and averred that in terms of paragraph 12 of the Act of Sederunt of 26th June 1907 this question falls to be settled by arbitration.'

"Answers were lodged by the respondent to said minute, and were as follows:—'Denied that the period during which compensation at the rate specified in the memorandum of agreement was to be paid was limited by agreement to the period of the claimant's total incapacity for work. Explained that compensation at said rate, being half the claimant's average weekly wage, was paid to him by the respondents, and was accepted by him as the compensation to which he was entitled under the Workmen's Compensation Act 1906, beyond which no agreement was come to between the parties. Explained further that the claimant is still totally incapacitated. In addition to the strain received to his back, his heart was seriously affected by the accident. Not known and not admitted that prior to the memorandum of agreement being presented for registration the claimant had signed a final discharge of his claims against the respondents in respect of the accident referred to in said memorandum of agreement. The respondents are called upon to produce alleged discharge. If such discharge were signed by the claimant, it was signed by him in essential error. The receipt dated 8th September 1909 produced by the respondents was signed by the claimant under essential error induced by the respondents. At that date he was still incapacitated, and was not earning full wages. No consideration was paid for the discharge of future claims. The claimant is illiterate and cannot read or write, and only signs his name with difficulty. He was told by the respondents, and he understood and believed, that he was only signing for the compensation due at that date, and signed the receipt on that footing. It should therefore be set aside as a discharge of future claims. . . . . Admitted that this question falls to be settled by arbitration in terms of paragraph 12 of the Act of Sederunt of 26th June 1907. The present proceedings are in terms of said paragraph.'

"On these documents being lodged I allowed a proof, to be taken on 17th March 1910. I heard the proof on that date, and on the same day I issued my award, in which I found in fact that the agreement set forth in the memorandum sought to be recorded—viz., that the respondent should receive compensation from the appellants at the rate of 14s. 3d. per week—was made on 16th June 1909 and was genuine, and I therefore granted warrant to the Sheriff-Clerk to record the memorandum in the Special Register, and found the appellants liable to the respondent in expenses.

"On 15th March 1910 (*i.e.*, two days before the diet of proof) the appellants lodged with the Clerk of Court an application in which they asked the Court 'To grant an order finding that the defender's right to compensation under the Workmen's Compensation Act 1906 ceased as at the 8th September 1909, or at such subsequent date as to the Court may seem just, or alternatively, in the event of the pursuers being unsuccessful in this crave, to grant such award of partial compensation as to the Court may seem just.' The usual statutory warrant to serve this application on the respondent, and appointing him to answer on 24th March 1910, was obtained. When the appellants lodged said application they also lodged with the Clerk of Court a minute of motion in this application to record the memorandum, in which they stated that they 'had instituted arbitration proceedings to determine the question of whether or not the claimant (respondent) had as at 8th September 1909 recovered his earning capacity, and in the event of the Court finding that the memorandum of agreement is genuine they respectfully move the Court to delay the recording of the same pending the result of the arbitration proceedings.' This minute of motion was not laid before me by the appellants until the proof took place in the application to record on 17th March, when the appellants' agent moved me in terms thereof. He did not produce to me the said application for arbitration. It was admitted by respondent's agent that the initial writ had been sent to him on the day before the proof in order that he might accept service, but that he declined to do so, and returned it by post the same day to the appellants' agents. The respondent stated at the proof that the application had not been served on him. It was thus not before me. Looking to the stage which the application to record had reached before said motion was made, to the position of the application for arbitration, and to the fact that a considerable time must elapse before an award could be obtained in said application for arbitration, and that the appellants had had ample opportunity to lodge the said application for arbitration in time to have it dealt with along with the application to record, and to have the proof in both applications taken at the same time, I refused the motion contained in said minute.

"On said 17th March proof was led in regard to the alleged final discharge granted to appellants by the respondent, and referred to in the before-mentioned minute of objections to the genuineness

of the memorandum of agreement, with the object of having the validity of the said discharge determined, and of having a warrant to record said memorandum of agreement refused because of said discharge. It was admitted by the appellants that they had not attempted to record any memorandum of agreement ending the compensation based upon said discharge, nor taken any arbitration proceedings to have the said compensation ended except those which they had initiated two days before the proof as before mentioned. I did not refuse to hear such evidence, but at the close of the proof I ruled that it was not appropriate to the present proceeding to have the validity or invalidity of said discharge tried and determined, and that such a question was only appropriate to an application by the appellants to record a memorandum of agreement ending the compensation based upon said discharge, or to an application by the appellants to review and end the weekly payment, or to a suspension, when competent, of any charge which the respondent might give upon the recorded memorandum of agreement, and accordingly I refused in said proceeding to determine the validity or invalidity of said discharge."

The *questions of law* were—"(1) Were the appellants entitled to have the validity or invalidity of said discharge determined as findings in fact and in law in the said application for warrant to record the memorandum of agreement? and (2) Did the before-mentioned application of the appellants for arbitration to review and end the weekly payment entitle them to resist unconditional registration of the said memorandum of agreement pending the result of the said arbitration proceedings?"

Argued for the appellants—The Sheriff ought to have determined the validity of the discharge in the application to record the memorandum. Under the Act of Sederunt of 26th June 1907 it was competent to consider the genuineness of the memorandum, and this was tantamount to a question of genuineness under Schedule II (9) of the Act. It was a living agreement that was contemplated by the statute, and the question as to whether the agreement had been discharged was a relevant matter for consideration—*Ellis* v. *Lochgelly Iron and Coal Company, Limited*, 1909 S.C. 1278, 46 S.L.R. 960; *M'Ewan* v. *Wm. Baird & Company, Limited*, 1910 S.C. 436 (*per* Lord Kinnear at p. 443), 47 S.L.R. 430. Further, the respondent had invited the Sheriff *qua* arbiter to deal with the validity or invalidity of the discharge. The arbiter therefore was bound to determine the matter, because it came before him of consent. If respondent objected he should have stated in his pleadings that the appellants' position was irrelevant. The effect of the course adopted by the Sheriff would be, if the respondent were successful, that the workman would get compensation up to the date of the application to review, subject to the right of the appellants to suspend. In any event the application for review entitled the appellants to oppose the application to record. This was decided in *M'Ewan* v. *Wm. Baird & Company, Limited* (*cit. sup.*). That case and the present were practically on all fours except with regard to the informality of citation. As a matter of fact, however, both the Sheriff and the workman knew of the application for review. The respondent's argument would inflict great hardship on the master, because the workman could charge for all the intervening period, and the master would probably find it impossible to recover the money. It was really a question of bar, because if the workman had not received compensation for some weeks he would be barred from pleading prejudice by a further delay of a few weeks especially when he had signed a complete discharge — *M'Vey* v. *William Dixon, Limited*, 1910 S.C. 544, 47 S.L.R. 463; *Charing Cross, Euston, and Hampstead Railway Company* v. *Coutts*, [1909] 2 K.B. 640, *per* L.J. Buckley at p. 646.

Argued for the respondent—There were only two answers to an application by the workman to record a memorandum—(1) that it was not genuine; (2) that it was not entitled to be recorded on the grounds set forth in Schedule II (9) *b* and *d*. There was no doubt that this was a genuine document and it was impossible for the appellants to bring themselves within either proviso of Schedule II (9). Thus the Sheriff had no option to withhold the recording of the memorandum—*M'Ewan* v. *Wm. Baird & Company, Limited* (*cit. sup.*), *per* Lord Johnston at 1910 S.C. p. 445. The proper method for the appellants to adopt was to record the discharge, because the discharge was really a varying or redemption of the weekly payments. In *Ellis* v. *Lochgelly Iron and Coal Company, Limited, cit. sup.*, there was no agreement between the parties as to compensation. The respondent brought himself in terms within the principle of *Coakley* v. *Addie & Sons, Limited*, 1909 S.C. 545, 46 S.L.R. 408, approved in *M'Ewan* v. *Wm. Baird & Company, Limited, cit. sup.*, and in *Donaldson Bros.* v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920. The discharge could have no effect unless the employer applied to end the compensation because of the discharge. Any delay was the employers' fault, and they must suffer. *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665, stated the employers' remedy against a workman who lay by and then recorded a memorandum.

At advising—

LORD KINNEAR—The Sheriff-Substitute in this case has declined, or at least delayed, to decide a question properly before him and within his jurisdiction, and I must say that I think that the grounds upon which he has done so are not valid. The parties are, in my opinion, entitled to his judgment upon the question they have put before him, and there is no reason why they should not obtain it.

The case sets out that the respondent Daniel Hanley, a workman in the employment of the Niddrie and Benhar Coal Com-

pany, lodged with the sheriff-clerk a memorandum of agreement between him and the appellants, with the request that it should be recorded in the register kept for that purpose. The memorandum set out that he had claimed compensation from the company in respect of personal injury, and that the amount of compensation was settled by agreement to the effect that he should receive compensation from the company at the rate of 14s. 3d. a-week. The appellants put in an answer in which they stated two different objections to the registration of the memorandum. In the first place, they said it was not a genuine memorandum in the sense of the statute, in respect that the period during which compensation at the rate fixed was to be paid was limited by agreement to the period of the claimant's total incapacity for work, and that he had ceased to be totally incapacitated. The second ground was, that prior to the memorandum being presented for registration the claimant had signed a final discharge of his claims against the company in respect of said accident.

The answer of the workman was that the discharge founded upon was not a valid discharge inasmuch as it was signed by him under essential error induced by the respondents, because he says he is an illiterate person who cannot read or write and only signs his name with difficulty, and he was told by the respondents, and understood and believed, that he was only signing a receipt for the amount of compensation due at the moment, and that he was induced to sign a discharge of all future claims.

Now I think that the company's answer raised two quite different questions. The first objection, as I read the statement, was, not that the agreement was in its terms limited, but that, inasmuch as it was an agreement for compensation during incapacity, its force had been spent by the incapacity having come to an end; and if that had been the only objection before the Sheriff-Substitute, I think it would have raised a question which at all events required his consideration—whether it was a good objection to the immediate registration of the memorandum, or whether it was not necessary, that the compensation fixed by the agreement should be varied or terminated by arbitration before the employer could be relieved of his obligation to pay the sum fixed. But it was unnecessary for the Sheriff-Substitute, and it is unnecessary for us, to decide that question in view of the other objection stated by the appellants, namely, that the claimant had discharged his whole claim. In substance the objection is that he is seeking to enforce the claim, and, for the purpose of enforcing it by diligence, to obtain the registration of a memorandum, while he has already given a complete and effective discharge of all claims.

Now that is a question of fact and law which the parties are fully entitled to bring before the Sheriff-Substitute, and which I think he was bound to decide. I do not think that the necessity for his deciding it as arbitrator depends entirely upon the Act of Sederunt at all, because it is, to my mind, fixed by the first section of the Act of Parliament itself, sub-section 3—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act or as to the amount or duration of compensation, if not settled by agreement, it shall be settled by arbitration in accordance with the second schedule." The objection is not to the registration of an existing agreement. It is that the man is barred from making any claim by having granted a final discharge; and whatever be the extent of the right conferred upon a workman to register his agreement, he may be debarred from exercising those rights just as he is debarred from exercising any other right competent by rule of law by giving a discharge of his claim in respect of such rights. To insist that an agreement to pay compensation shall be recorded after it is alleged to have been discharged without having it first determined whether it has been discharged or not appears to me to amount to a denial of justice which the statute before us will not countenance.

But not only has it appeared to me plain that there was thus a question raised for the Sheriff-Substitute's decision which he was bound to decide, but the parties agreed themselves that there was such a question that must be decided by arbitration, that is, by the Sheriff-Substitute as arbitrator. The company add a species of plea to their answers, "that, in terms of paragraph 12 of the Act of Sederunt, this question falls to be settled by arbitration"; and the workman in his answer agrees that the question falls to be settled by arbitration.

Now that plain question as to the liability to pay compensation in respect of the accident, on the one hand, and the freedom from liability in respect of the discharge on the other, is one which I think the Sheriff-Substitute was bound to decide. What the Sheriff-Substitute did was to order a proof, and so far he was perfectly right. And he tells us that on the day fixed the proof was led in regard both to the genuineness of the original agreement and to the alleged final discharge granted to the appellants; and therefore he had the matter fully before him. But then he declined to decide it, apparently because he thought it was so mixed up with the question of the respondents' right to claim that the compensation should be altered or ended, that he could not or ought not to decide this question (which appears to me to be an entirely separate and distinct one) until he was in a position to dispose of an application for arbitration on the footing that the respondents were entitled to have the compensation altered. I cannot agree with the learned Sheriff-Substitute that that was at all a necessary or proper course to pursue. I think the question of the discharge stands entirely separate from the question raised by the application for review of compensation, and that as the Sheriff-Substitute had

heard evidence upon that separate question of discharge, he was bound to decide the question submitted to him by the parties.

I am therefore of opinion that we ought to answer the first question in the affirmative. I am not quite satisfied with the exact terms of that question, but I think, in substance, the appellants are entitled to an affirmative answer, and that, that being answered, it is unnecessary to consider the second question.

LORD JOHNSTON — The order of events with which we are concerned in this case is that Hanley, a workman in the employment of a contractor doing work for the Niddrie and Benhar Coal Company, Limited, was injured on 31st May 1909. Compensation at the rate of 14s. 3d. a-week, being half wages, was paid down to 8th September 1909 in terms of an agreement made on 16th June 1909. Payment ceased after 8th September, and nothing was done by either party until 8th December 1909. So far I think there is no dispute. Both parties differ as to the terms of the agreement.

On 8th December 1909 the procedure out of which the present questions arise was commenced. On that day the workman lodged with the sheriff-clerk a memorandum of the agreement, as he alleged it, to be recorded in terms of the statute. The company intimated that they objected to the genuineness, and in due course lodged a minute setting forth their grounds for so doing and for objecting to the recording. They stated (1) that the memorandum was not genuine because it omitted a material part of the agreement, viz., a term to the effect that the agreed-on compensation was limited to the period of the workman's total incapacity, and (2) that prior to the memorandum being presented for registration the workman had signed a final discharge of his claim.

In answer the workman (1) denied the alleged limitation, and (2) denied knowledge of the alleged discharge, and stated that he was illiterate, and that "if such discharge was signed by the claimant, it was signed by him in essential error."

Both parties expressly admitted that the question thus raised between them fell to be settled by arbitration in terms of paragraph 12 of the Act of Sederunt of 26th June 1907.

The Sheriff as arbitrator allowed a proof to be led on 17th March 1910, and after proof issued an award in which he found that the agreement set forth in the memorandum "was made on 16th June 1909, and was genuine," and granted warrant to record.

The proof which was led on 17th March covered the question of the alleged final discharge. The Sheriff explains the course which he took thus—It was admitted by the company that they had taken no steps to record a memorandum of agreement ending the compensation based on the alleged discharge. He did not refuse to hear the evidence, but at the close of the proof ruled that it was not appropriate in the proceedings to record the memorandum of agreement, to try and determine the validity of the discharge, but that it was only appropriate to entertain such question (1) in an application by the company to record a memorandum of agreement ending the compensation based on said discharge; or (2) in an application by the company to end the compensation by way of a statutory proceeding for review; or (3) in a suspension when competent of a charge on a recorded memorandum of agreement.

If the Sheriff was as hidebound, as he assumed, by the statute and the statutory procedure, it would be an undoubted misfortune, and might be productive of grave injustice. Admittedly an agreement to pay compensation existed at 8th September 1909. *Ex hypothesi* it may have been discharged on that date. Yet notwithstanding such allegation of discharge, and without determining its existence or validity, though he had the materials before him in the proof led, the Sheriff considered himself bound to record the agreement, and thus put the workman in a position to enforce it. And proceedings to that end could not be stayed except by suspension. That suspension would in the circumstances have been competent, follows, I think, from the analogy of the decision in the *Lochgelly* case (1909 S.C. 922), because prior to recording there would have been not merely acquiescence in discontinuance of payment, but, as alleged, a discharge. But the necessity for suspension would have to be deplored.

Now the course taken by the Sheriff seems to have been the more undesirable, when I go back to 15th March 1910, two days before the proof, and state that on that date statutory proceedings were initiated by the company for review of the compensation, and either ending or diminishing it. And when they lodged this application, the company lodged also a minute in the workman's application for recording a memorandum of the agreement, stating that they had initiated these proceedings for review, and that they moved the Court, in the event of the Court finding that the memorandum of agreement was genuine, to delay the recording of the same pending the result of the proceedings for review. At the proof on 17th March this motion was submitted to the Sheriff, but the workman's agent having refused any facilities, it was impossible that the application for review could also be before the Sheriff, the induciæ not having expired. The Sheriff accordingly, looking, as he says, to the stage which the application to record had reached, to the fact that the application for review was not yet before him, that considerable time must elapse before an award in the application for review could be obtained, and that the company had had ample time to lodge their application for review in order to have both applications taken at the same time, most unfortunately, as I think, refused the motion. I say unfortunately, for he thereby created an inconsistent situation, productive of delay, expense, and

probable injustice. He went on with the inquiry in the application to record, in which was involved the question of discharge, and having inquired, refused to dispose of the question of discharge. And he relegated to a later inquiry the application for review, which might also be made to include the question of discharge, without putting any stay upon the enforcement of the agreement to pay compensation.

If he had been going to dispose of the question of the validity of the discharge in the proceeding before him, there might be something to say for the justice of this course. But as he refused to deal with that question its injustice becomes apparent.

It is not to be wondered at that the company have taken a case for appeal, which puts the following questions, viz., stating them in brief:—1. Were the company entitled to have the validity of the alleged discharge inquired into in the application to record? and 2. Were the company entitled to resist unconditional registration of the memorandum of agreement pending disposal of the application for review?

In fact we have to consider what could and what ought the Sheriff to have done on 17th March 1910, when, in the circumstances which I have explained, he had at the same time before him both an application to record, met with a challenge of its genuineness and an allegation of discharge, and also an intimation that proceedings for review would immediately be before him, and a motion that in respect thereof he should at least delay the recording.

The first thing that strikes one is that if the validity of the discharge was not to be inquired into and determined in the application to record, there was nothing into which to inquire and no relevant ground for opposing the recording, for this reason, namely, that limitation of the compensation to the period of total incapacity could not be a material term of the agreement going to its genuineness, in respect that it must be implied whatever the terms of the agreement might be. I need only refer to Schedule I to the Act, head (1) (*b*), and Lord Kinnear's opinion in *M'Ewan's* case (1910 S.C., at p. 442). Whether the term is expressed or implied there must always be the question capable of arising, whether total incapacity has been reduced to partial incapacity, and whether incapacity, total or partial, has ceased. On the Sheriff's view, therefore, there was on 17th March 1910 nothing to inquire into, and nothing to prevent the recording if he could not entertain the question of the validity of the discharge. Could he, then, entertain the question of the validity of the discharge in the proceedings to record?

The Act of 1906, section 1 (3), says that "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act," "or as to the amount or duration of compensation under this Act," the question, if not settled by agreement, shall be settled by a statutory arbitration. Now there was a proceeding under the Act. For there was an application to record, which being opposed, was a judicial, not a merely ministerial proceeding (*Coakley* v. *Addie & Sons*, 1909 S.C. 545). And a question whether further compensation had been discharged was certainly a question whether there was any liability to pay compensation under the Act, and equally a question as to the duration of compensation. It appears to me, therefore, that when in the proceedings for recording, the Sheriff found that this question had arisen, he was bound to deal with it as arbiter under the statute, and to deal with it in, or at least in relation to, the proceedings for recording.

But then how was he afterwards to deal with the application to record with reference to his determination on this subsidiary, and I think preliminary, question. If he found that there was no valid discharge, his course was simple. Unless there was any other reason to the contrary he would direct the agreement to be recorded. If, however, he found that there was a valid discharge, is there anything in the statute or its schedules which should prevent him taking a practical course which would do effectual justice? It is clear that if a memorandum of the agreement is to be registered, and so have the force of a registered decree-arbitral and be warrant for diligence, injustice may be done, if the discharge is not so dealt with as to be an effectual answer to any attempt to enforce the agreement.

The second schedule to the Act (head 9) supplies an answer to the difficulty assumed to arise. It provides not merely for the registration of a memorandum of agreement or an award for payment of compensation, but it says also, where "any other matter has been decided under the Act," a memorandum thereof shall be sent to the sheriff-clerk and shall be recorded, and shall be enforceable as a decree-arbitral. The question whether further compensation is discharged is a matter which *ex hypothesi* has been decided under the Act, and a memorandum thereof is therefore registrable.

Is it necessary under the statute that warrant to record the memorandum of the original agreement should be granted *unico contextu* with the warrant to record a memorandum of the Sheriff's determination that further compensation has been discharged? I am disposed to think from what is said by the Lord President in *M'Ewan's* case (1910 S.C. 440) that he would have held it perfectly competent in that case for the Sheriff to have considered both the applications that were before him, and to have pronounced an award on either, which would have done justice in the circumstances, with the possible result of not granting warrant to record the memorandum of the original agreement at all, but only of the award on review. But in his Lordship's absence I must not do more than say that that is my own opinion. If so, it would be equally competent to grant warrant to record the award that

compensation was discharged, without recording the original agreement. But it would be equally effectual if, *unico contextu*, warrant was granted to record a memorandum of the original agreement, and to record a memorandum of the award that further compensation had been discharged. For the former could not be enforced standing the latter. Whichever course the Sheriff may take, I am clearly of opinion that it was his duty in or in relation to the application to record, to determine the question whether further compensation was discharged, and therefore that the first question should be answered in the affirmative.

With this answer to the first question I do not think that we are required at present to pronounce any opinion on the second question stated.

LORD SALVESEN—The question in this case depends, in my opinion, on the terms of section 9 of the second schedule and the relative Act of Sederunt of 20th June 1907, section 12. So far as the Act itself is concerned, there are only two grounds expressly stated on either of which the arbiter may refuse to record the memorandum. These are (first) that he is not satisfied of its genuineness; and (second) that the employer states in the course of the proceedings that the workman has in fact returned to work and is earning the same wages as he did before the accident. I am disposed to think, agreeing so far with the opinion of Lord Low in the case of *Coakley* (1909 S.C. p. 545), that when the statute speaks of the agreement being genuine, the most obvious meaning is that the amount of compensation under the Act has been ascertained by agreement, and that the memorandum correctly sets forth the terms of the agreement. But I also think it is clearly implied that the agreement is a subsisting agreement, because the object of the recording of the memorandum is to enable the workman to do diligence upon it; and it is impossible to suppose that the statute contemplated that in the face of an objection by the employer that the agreement had come to an end by a final discharge signed by the workman of all claims which he originally had under it, that nevertheless the arbiter should be bound to record it. Assuming the validity of the discharge I cannot imagine a more futile proceeding than to permit the memorandum to be recorded in order that it may be the foundation of diligence when such diligence, if used, would fall to be immediately suspended. It must not be left out of account in construing the Act that the Legislature desired so far as possible to avoid litigation before the ordinary courts of law, and to leave to the arbiter the final determination of all questions of fact on which parties were at issue. I do not think it is in any degree stretching the meaning of the word genuine to hold that it covers the case of an agreement which is accurately set forth as matter of history but which has ceased to be operative in consequence of the parties to it having so agreed. In my opinion, therefore, the Sheriff-Substitute ought to have decided whether the discharge was valid in the proceedings which took place before him as arbiter on the application to record the memorandum.

There is another ground on which I would have reached the same conclusion, namely, that the parties joined issue on this matter of fact before the arbiter; and that it was too late, after the whole evidence had been led, to raise any question as to whether it was competently before him. The respondent ought in his answers to have pleaded that the validity of the discharge founded on could not be competently inquired into in that proceeding, and had the arbiter been of this opinion the employer could then have proceeded at once with an application to review or terminate the compensation. I cannot doubt that with the consent of both parties the arbiter was entitled to determine the question in the existing process without putting parties to the expense of further procedure. Now here it is admitted that it never occurred to those who represented the respondent that the matter might not be there determined until after the proof on both sides had been closed, when the arbiter in the course of the hearing suggested a doubt as to the question of competency. I think the workman must be held by the course which he took to have consented to its being so dealt with, or, at all events, that he is barred by his failure to object to the relevancy of the averments relating to the discharge as an answer to the recording of the memorandum, and by allowing the whole evidence on the subject to be led without objection from afterwards raising the question of the competency of these proceedings.

Great reliance was placed by the respondent on the decision in *Coakley's* case, but it appears to me to be inapplicable to the facts of the present. There was no discharge in that case; and the sole question was whether the memorandum should be recorded in view of the fact that the workman when he presented his application was admittedly no longer incapacitated. I agree with Lord Low that proviso *b* of paragraph 9 of the schedule impliedly excludes such an objection. That, however, does not touch the question which we have here to decide.

I am accordingly of opinion that the first question of law falls to be answered in the affirmative, and that it is not necessary to answer the second.

The LORD PRESIDENT was absent.

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