

Saturday, June 17.

## FIRST DIVISION.

[Sheriff Court at Dundee.]

DONALDSON v. JOHN SHARP & SON,  
LIMITED.

*Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1) and (3), Schedules I (17) and II (9)—Agreement for Redemption of Weekly Payments—Application to Record Memorandum—Agreement "Conditional on its being Approved by a Curator ad litem to be Appointed by the Court"—Death of Workman before Appointment of Curator—Application by Executor-dative to have Memorandum Recorded.*

A workman lodged with the sheriff-clerk, with a request that it be recorded, a memorandum of agreement under the Workmen's Compensation Act 1906 whereby his employers agreed to pay him a lump sum in full settlement of all claims competent to him against them. As the workman was a minor the agreement was declared to be conditional on its being approved by a curator *ad litem* to be appointed by the Court. The workman having died before the appointment of a curator, his executor-dative, who had been sisted as applicant in his place, claimed that the memorandum should be recorded and that as executor he was entitled to payment of the lump sum. *Held* that the agreement was invalid in respect that the condition requiring approval by a curator *ad litem* had not been fulfilled, and that warrant to record it had been rightly refused.

In an arbitration under the Workmen's Compensation Act 1906 between David Donaldson, executor-dative of the late Alfred Donaldson, Dundee, *appellant*, and John Sharp & Sons, Limited, jute spinners, Dundee, *respondents*, the Sheriff-Substitute (MALCOLM) refused warrant to record a memorandum of agreement between the said Alfred Donaldson and the respondents, and at the appellant's request stated a Case for appeal.

The facts as set forth in the Case were as follows:—"1. Alfred Donaldson, a minor workman in the employment of the respondents, was on 3rd February 1921 at Bower Mills, Dundee, belonging to the respondents, injured by accident arising out of and in the course of his employment. 2. The respondents paid said Alfred Donaldson compensation under the Workmen's Compensation Act 1906 at the rate of 17s. 6d. per week from the date of the accident until 10th September 1921. 3. On 7th September 1921 a memorandum of agreement between Alfred Donaldson and the respondents was lodged by Alfred Donaldson with the Sheriff-Clerk with a request that it be recorded. The said memorandum of agreement is in the following terms:—"The claimant claimed compensation from the respondents in respect of personal injury consisting of the loss of the tip of the first

finger and the whole of second, third, and fourth fingers and part of the palm of the left hand, caused by accident while in the employment of the respondents at Bower Mills, Dundee, on 3rd February 1921. The question in dispute which was as to the duration of the incapacity of the claimant was settled by agreement which was made on 3rd September 1921 and which was as follows:—(1) the respondents paid the claimant compensation at the rate of 17s. 6d. per week (being 10s. plus 7s. 6d. war addition) from 3rd February 1921 (date of accident) to 10th September 1921; (2) that the respondents should pay into Court in terms of paragraph 17 of the First Schedule to said Act the sum of £375 in full settlement and compromise of said question and of all claims competent to the claimant against the respondents in respect of said accident at common law or under any statute, but this agreement was conditional on its being approved by a curator *ad litem* to be appointed by the Court to the claimant; and (3) that the respondents pay the sum of £8, 8s. to the claimant's law agent in respect of the expenses incurred by the claimant in connection with said claim and all proceedings following thereon. It is requested that this memorandum be recorded in the special register of the Sheriff Court of Forfarshire at Dundee. Dated this seventh day of September Nineteen hundred and twenty-one.' Due intimation of the application to record and in terms of C.A.S., lxiii, 11, specifying 15th September 1921 as the expiry of the period within which objections might be lodged was made to the respondents. 4. The genuineness of said memorandum of agreement was not disputed by the respondents at the time, and no objections to the recording of it were lodged by them prior to the death of Alfred Donaldson after mentioned. 5. The said Alfred Donaldson died intestate on 2nd October 1921 from causes unconnected with the accident, no curator *ad litem* having been appointed and the memorandum not having been recorded. At the date of the said agreement and down to the date of his death he had no curator, his father being insane and an inmate of an asylum. Consequent on his death the respondents by minute marked 13th October 1921 lodged objections to the recording of the memorandum of agreement. The appellant as executor-dative of said Alfred Donaldson was on 14th November 1921 sisted as applicant in his place, and claims that the memorandum of agreement should be recorded, and that as executor he is entitled to payment of the sum agreed on as therein stated."

The Case further stated—"At the time when the minute of objections for the respondents of 13th October 1921 was lodged there was no claimant in the process, said Alfred Donaldson, the original claimant, having died and the appellant not then having been sisted, and accordingly I allowed the minute for the respondents of 13th October 1921 to be received, reserving all questions of competency. At the hearing on 9th December a preliminary contention on

behalf of the appellant was stated against the competency of the respondents' minute in respect that, not having been lodged within the period specified as stated in article 3 above, the objections to the recording of the memorandum of agreement were non-timeous. I repelled this contention, and on the merits I held that the alleged agreement being conditional on its being approved by a curator *ad litem* to be appointed to Alfred Donaldson, that condition was a suspensive one, and it not having been fulfilled and being now impossible of fulfilment, the agreement is inoperative and invalid and should not be recorded."

The *questions of law* for the opinion of the Court included the following:—". . . 3. Was I right in holding that the agreement is invalid in respect that the condition therein requiring approval by a curator *ad litem* had not been fulfilled, and in refusing the application for warrant to record the memorandum?"

In a note the arbitrator stated—" . . . Respondents object to the memorandum being now recorded on the ground that the agreement was conditional on its being approved by a curator *ad litem* to be appointed to Alfred Donaldson—a condition which was not fulfilled and which is now impossible of fulfilment. In my opinion the objection is well founded. The condition is an express term of the agreement. It is a substantive part thereof, and was intended to have operative effect; it was in fact an act of prudence on the part of respondents to have inserted it for their protection. It was admitted by claimant's agent at the debate that had a curator *ad litem* been appointed it would have been open to him to have refused approval, and that had he done so the agreement would have lapsed. That admission seems to me to be conclusive of the case. However adequate the sum agreed on may appear to be, and however improbable it may be that a curator *ad litem* would have withheld approval, I cannot assume his approval, nor substitute the probability of his approval for the lack of it; nor can I depart from the terms of the agreement by waiving the condition and holding it *pro non scripto*. The condition is in its nature suspensive, and it being now impossible of fulfilment the agreement itself does not become operative."

"I was referred to two cases decided in the English Courts, in which as in the present case the death of the workman had taken place between the entering into the agreement and the recording of it. In the first of these, *Price v. Westminster Brymbo Coal and Coke Company*, 1915, 2 K.B. 128, it was held that where a valid agreement has been entered into for the redemption of a weekly payment, the subsequent death of either party before registration does not prevent the agreement from being recorded. The basis of the judgment, however, is that the agreement was a valid one, and on that ground the case is distinguishable from the present one, in which it is because the agreement was incomplete and therefore invalid that I hold it cannot be recorded. The second case was that of *The King v. Regis-*

*trar of Bury County Court*, 1918, 2 K.B. 312, in which the decision turned on the meaning and effect of one of the rules applicable to the Workmen's Compensation Act in England—a rule which so far as I know has no counterpart in Scotland in the Act of Sederunt or elsewhere. The case is further distinguishable in this respect that it turned upon the effect of a general statutory provision or condition, not a term of the agreement, whereas the present case depends on the effect of a provision or condition expressed in the agreement itself as an integral part of it.

"The decision in the English case of *Popple v. Frodingham Iron and Steel Company*, 1912, 2 K.B. 141, to which I was also referred, has little or no bearing on the present one. The third condition enunciated by Buckley, L.J., with reference to agreements, p. 147, and his remarks thereon, p. 148, are, however, apposite to the question of the validity of the agreement here. He states that there must be an agreement to pay in terms similar to a County Court judgment so as to be enforceable as a County Court judgment, that it must not be contingent on an event the occurrence of which would have to be proved as a condition-precident to issuing execution. According to that test the agreement in the present case is invalid.

"I hold, therefore, that the agreement being incomplete and incapable of completion, the application to record it must be refused. . . ."

Argued for the appellant—It was not an essential condition of the agreement that a curator *ad litem* should be appointed. Such a condition could not have been intended to apply after the appointment had become unnecessary or impossible. The condition was resolute not suspensive—*Pirie v. Pirie*, 1872, 11 Macph. 941; *Ward v. Walker*, 1920 S.C. 80, 57 S.L.R. 121; *Jack v. Roberts & Gibson*, 3 Macph. 554; Bell's Prin., secs. 47 and 49; *Hendry v. United Collieries, Limited*, 1909 S.C. (H.L.) 19, 46 S.L.R. 780.

Argued for the respondents—All that vested in an injured workman was a right to a weekly payment. The Act gave the employer the right to redeem this by a lump sum. Here there could be no completed agreement for such redemption until the approval of a curator *ad litem* had been given. The memorandum must conform exactly with the terms of the agreement come to by the parties—*M'Lean v. Allan Line Steamship Company, Limited*, 1912 S.C. 256, 49 S.L.R. 207; *Popple v. Frodingham Iron and Steel Company*, [1912] K.B. 141, per Buckley, L.J., at p. 147; *Smith v. Petrie*, 50 S.L.R. 749, Lord Dunedin at p. 751; Ersk. iii, 1, 6; Bell's Prin., secs. 49 and 1785. Counsel also referred to *Dunlop v. Rankine & Blackmore*, 4 F. 203, 39 S.L.R. 146; and *Scott v. Long Meg Plaster Company*, (1914) 7 B.W.C.C. 502.

LORD MACKENZIE—In this case I think the Sheriff-Substitute was right and that the third question should be answered in the affirmative.

The question is one which turns upon the

true construction to be put upon the agreement. The respondents' counsel admitted that there was a closed bargain, but contended that it contained a condition which has never been purified. In this I think he was right. The minor never was in a position to claim until the curator *ad litem* approved of the agreement. If this is so it is not possible to hold that on his decease a right which he himself never possessed was transmitted to his executor. The right which vested in the workman was to a weekly payment and this right remains. The language of the agreement ought, in my opinion, to be taken literally.

LORD SKERRINGTON—The Workmen's Compensation Act 1906 contains its own peculiar provisions for relieving injured workmen (specially including those under any legal disability) from improvident agreements in regard to compensation and for relieving both workmen and employers from agreements obtained by fraud or undue influence or other improper means; and it may be that in a suitable case either party may also appeal to the common law for a remedy. There is, however, nothing in the statute to prevent employers and workmen from stipulating in their agreements for the adoption of some precaution which is not required by the statute but which if adopted would render any subsequent challenge of the agreement very improbable. That is what the parties did in the present case by providing that their agreement "was conditional on its being approved by a curator *ad litem* to be appointed by the Court to the claimant." Obviously this precaution was one which would not have been chosen if the workman had not happened to be a minor, and it was also one which it would be impossible for either party to make use of if the minor should happen to die before a curator *ad litem* had been appointed (as actually happened), or if such an appointment, having duly been made, should fall owing to the ward dying or attaining majority before the curator had signified his approval of the agreement. These considerations, however, prove no more than that the parties (very naturally, as I think) did not attempt to legislate for every possible contingency, but were content that if their agreement should prove inapplicable to the actual circumstances each party should be relegated to his rights and obligations under the statute. On the other hand it seems to me to do violence both to the language and to the spirit of the agreement to argue (as did the appellant's counsel) that the workman's executor was in a different position from his author, whose contractual rights and obligations at the time of his death were undoubtedly subject to a proper suspensive condition. In my judgment the arbitrator has come to a correct decision upon the third question of law—the only one which we were asked to answer.

LORD CULLEN—I am of the same opinion. The agreement between the minor workman and his employers which the appellant seeks to enforce expressly stipulated that it

was conditional on its being approved by a curator *ad litem* to be appointed by the Court to the minor. This stipulation appears to me to make a condition suspensive of the efficacy of the agreement. The condition was never purified. The workman died in minority. During his lifetime he never was in a position, standing the said condition unpurified, to enforce the agreement as one entitling him to receive payment *simpliciter* from his employers of the sum of £375, and I am unable to see how he could on his death transmit to his executor-dative a right which he himself did not possess.

LORD PRESIDENT—I concur.

The Court answered the third question of law in the affirmative, and found it unnecessary to answer the first and second questions.

Counsel for Appellant—Fenton—Crawford. Agents—Wallace, Begg, & Company, W.S.

Counsel for Respondents—Wark, K.C.—Burnet. Agents—Alex. Morison & Company, W.S.

Saturday, June 17.

## FIRST DIVISION.

[Sheriff Court at Stirling.]

### CLARK v. LORD ADVOCATE.

*Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—"Arising out of and in the Course of the Employment"—Injury to Employee's Eye Caused by a Careless Gesture on the Part of a Fellow Servant in the Course of his Employment.*

A post office employee while ascending a stair in the course of his employment was about to pass a fellow employee who was descending in a heedless or careless manner. The latter waved his hand to a third employee standing on the landing above, and in so doing, and without intending to touch the claimant whose approach he had not noticed, struck his eye with one of his fingers and injured it. At the place where the accident happened the stair was so constructed that two persons passing required to exercise care. *Held* that the accident was one arising out of as well as in the course of the employment.

James Key Clark, post office sorting clerk, St Ninians, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (DEAN LESLIE) in an arbitration under the Workmen's Compensation Act 1906 between him and the Lord Advocate acting on behalf of the Postmaster-General, *respondent*, appealed by Stated Case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, under which the appellant applied to have it found that he was totally incapacitated for work as the result of an accident while in the employment of the respondent. . . . I found the following facts proved or