

der to erect certain buildings within a certain time, and found the defender liable in the expenses of the action. The question was whether that interlocutor did or did not dispose of the whole merits of the action, because as the Lord President pointed out—"If this decree is implemented there is an end of the case, and nothing remains but to take the action formally out of Court;" and as Lord Deas added—"If these buildings are erected the operation cannot be undone, so the subject-matter is clearly exhausted by this judgment." The question arose in that case from the fact that there was in the summons an alternative conclusion for payment of a sum of £1500 in the event of the defender failing to complete the buildings in question within a certain time. The Lord Ordinary did not dispose of that alternative conclusion in terms, but he gave decree in terms of the first alternative, and therefore by his interlocutor the whole merits of the case were disposed of.

LORD PEARSON—I am of the same opinion. I think that this is clearly a ten days' interlocutor.

The LORD PRESIDENT was absent.

The Court refused the reclaiming note.

Counsel for Pursuers (Respondents)—Cullen, K.C.—Strain. Agents—Pairman, Easson, & Miller, S.S.C.

Counsel for Defenders (Reclaimers)—W. J. Robertson. Agents—Cuthbert & Marchbank, S.S.C.

Friday, June 21.

SECOND DIVISION.

LOCHGELLY IRON AND COAL COMPANY v. SINCLAIR.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (3)—Schedule I, 12—Schedule II, 8—Memorandum of Agreement—Application for Arbitration—Petition for Review.

A workman injured on 12th October 1904, was, under an agreement between him and his employers, paid compensation until 26th January 1905, when the employers stopped the payments on the ground (not admitted by the workman) that he had recovered from his injuries. The workman thereupon presented an application to the Sheriff for warrant to record a memorandum of the agreement, which was granted after considerable procedure, pending which the employers presented an application for arbitration, in which they requested the Sheriff to find that their liability to compensate the workman ended on 25th January 1905, and to grant an

order declaring his right to compensation to have ended at that date, or, alternatively, to ascertain and fix such weekly payments as might be due under the Act, and to grant an award finding the workman entitled to such weekly payments, beginning the first payment on 1st February 1905 for the preceding week.

Held that the application for arbitration was incompetent, on the grounds (1) that as an original application for arbitration it was excluded by the agreement, of which a memorandum had been recorded—*Dunlop v. Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146, followed; (2) that, as framed, it could not be treated as a petition for review under Schedule I (12).

The Workmen's Compensation Act 1897 section 1 (3) enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), 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 I (12)—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

This was an appeal by stated case against a decision of the Sheriff-Substitute (SHENNAN) in an application for arbitration raised in the Sheriff Court at Dunfermline at the instance of the Lochgelly Iron and Coal Company, Limited (appellants), against Daniel Sinclair, miner (respondent).

The case set forth—"This is an application for arbitration in which the appellants requested the Sheriff as arbiter to find that the appellants' liability to compensate the respondent in respect of an injury sustained by him on or about 12th October 1904, while employed as a miner in the appellants' Lochhead Pit, Raith Colliery, near Lochgelly, came to an end on 25th January 1905, and to grant an order declaring the respondent's right to compensation to have ended as from and after said last-mentioned date, or, alternatively, to ascertain and fix such weekly payments as might be due to the respondent under the Workmen's Compensation Act 1897 in respect of such injury, and to grant an award against the appellants finding the respondent entitled to such weekly payments, beginning the first payment on 1st February 1905 for the week preceding that date, and so on weekly thereafter until such weekly payments are varied or ended by the Court.

"It was admitted that on or about 12th October 1904, and for some time prior thereto, the respondent was in the employment of the appellants as a miner in their

said Lochhead Pit, and that while in the course of his said employment on said date he sustained injuries which incapacitated him from work. It was also admitted that the respondent had been paid compensation at the rate of 16s. 9d. per week from a fortnight after the date of said accident down to said 25th January, since which date payments had been discontinued.

“The said application for arbitration was lodged on 3rd April 1906. At that time there was depending before me a petition by the respondent Daniel Sinclair for a special warrant to record a memorandum of agreement between himself and the appellants, which last-mentioned petition had been presented on 27th March 1906. Accordingly, on 21st April 1906, after hearing parties, I sisted procedure in the application for arbitration to await the issue of the application previously lodged by the respondent Sinclair for warrant to record the memorandum of agreement.

“After sundry procedure I granted the special warrant. On 8th January 1907 the application for arbitration was enrolled, and it was reported to me that the special warrant to record the memorandum had been brought under review of the Court of Session upon a note for an order upon the Sheriff to state a case, and had been confirmed by that Court, and that the memorandum had since been recorded. I accordingly dismissed the application for arbitration on the grounds that as an original application for arbitration it was excluded by the agreement of which a memorandum had been recorded, and that the application was not so framed that it could be treated as a petition for review of the compensation fixed by the agreement.”

The questions of law for the opinion of the Court were—“(1) When an application for arbitration to fix compensation is presented during the dependence of proceedings to have a memorandum of agreement relating to the same compensation recorded, and warrant to record said memorandum of agreement is granted in these proceedings, is it competent to proceed with the said application for arbitration? (2) In the circumstances narrated was the application for compensation rightly dismissed?”

Argued for the appellants—The arbitration was competent, because, viewed as an original application for arbitration, there was no room for objection against it inasmuch as, *firstly*, the workman having admitted that his incapacity had ceased as from April 1905 (see *Lochgelly Iron and Coal Company, Limited v. Sinclair*, October 23, 1906, 1907 S.C. 3, 44 S.L.R. 2), the agreement for compensation terminated at that date, and was no longer in existence as a possible bar at the date of the commencement of the present proceedings, *secondly*, in any case the agreement was incomplete, there being doubt as to its duration, &c., and accordingly an arbitration was competent to clear up and supplement the agreement under section 1 (3). The case of *Dunlop v. Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146, relied on by the

other side, at most only settled that an original arbitration could not be brought where there was a completed and definite agreement in existence. Alternatively, however, the application could be regarded as a petition for review under Schedule I (12).

Argued for the respondent—The Sheriff was right on both points. (1) The proceedings were obviously an original application for arbitration, and could not be treated as an application for review under Schedule I (12). (2) That being so, *Dunlop (cit. sup.)*, settled that an application for arbitration was incompetent where there was an agreement. The appellants' proper remedy would have been an application for review under A.S., section 5, and Schedule I (12). The argument that the agreement could be supplemented under sec. 1 (3) would not stand, because sec. 1 (3) was subject to Schedule I (12), which was expressly available only “in default of agreement.”

LORD STORMONTH DARLING—I think this case may be briefly and colloquially summed up by saying that the employers here have tried to sit upon two stools, and in the opinion of the Sheriff-Substitute have fallen between them. That means that I think the Sheriff-Substitute's judgment is perfectly right on both alternative grounds. He says that he “dismissed the application for arbitration on the grounds that, as an original application for arbitration it was excluded by the agreement of which a memorandum had been recorded, and that the application was not so framed that it could be treated as a petition for review of the compensation fixed by the agreement.” He puts two questions of law which state these two grounds, and I think we must answer these questions, the first in the negative and the second in the affirmative.

There was an agreement here undoubtedly, and there came to be a real question between the parties as to the duration of that agreement. The accident happened on 12th October 1904, and payment was actually made down to 25th January 1905 at the full rate agreed on. Then in the opinion of the employers the total incapacity had ceased, and accordingly they discontinued that payment. The next thing was that the workman presented an application to have the agreement recorded, and the result of that was that it was recorded after considerable procedure. During the course of that procedure the employers apparently woke up and presented a curious kind of application for arbitration of a rather hybrid character. They did that upon 3rd April 1906, and that application for arbitration contained two alternative prayers. One was that, admitting the accident, they asked the Sheriff to find that the agreement, or rather the liability to compensate the respondent, had come to an end from and after 25th January 1905, which was the date when payment under the agreement had actually ceased; and then, alternatively, they asked the Sheriff “to ascertain and fix such weekly payments as might be due to the respondent under the Workmen's Compen-

sation Act 1897 in respect of such injury, and to grant an award against the appellants finding the respondent entitled to such weekly payments, beginning the first payment on 1st February 1905 for the week preceding that date," which, be it observed, was just a week after the actual payment had ceased. That was not in accordance with the workman's view of the agreement, and certainly there is no view upon which it can be said that the agreement warranted the employers in discontinuing payment on 25th January 1905.

Accordingly, what the Sheriff has done in this hybrid application is to find that while the application for recording the memorandum at the instance of the workman was in dependence he could not deal with the application for arbitration, first, because if it were to be regarded as an application for arbitration *de novo* it was excluded by the decision of this Court in *Dunlop v. Rankin & Blackmore*, 4 F. 203, where Lord Moncreiff laid it down (explaining the whole decision) that "under the Act, section 1(3), where a question as to the amount or duration of the compensation has been settled by agreement, there is no room for arbitration; it is excluded." Now plainly Lord Moncreiff meant, and the Court meant, that the question as to the amount or duration of the compensation included the very question Mr Strain has argued the employers wished to raise, namely, whether they were entitled to bring it to an end at their own hand when they found the incapacity had ceased. They did not take any of the proceedings which the Act prescribes for bringing the weekly payment to an end. Therefore I think the Sheriff was undoubtedly right in holding that, viewed as an application for an original arbitration *de novo*, he could not deal with it while the application for recording the memorandum of the agreement was pending before him. In the same way, I think that he was perfectly right in saying that once that was before him and settled in favour of the agreement it was impossible to hold that the application for arbitration could be otherwise than dismissed. Therefore I think the Sheriff was right on both grounds, and that we must answer the stated case accordingly.

LORD LOW—I concur. I should be very slow to throw out an application made to the Sheriff as an arbiter under the Act merely on account of a defect in the form of the application, and accordingly if the application which was presented to him upon 3rd April 1906 had been in substance an application to review the weekly payment under the 12th section of the first schedule, I should not approve of its being thrown out merely in respect of the form in which it was framed. But I think there is a question here of substance and not of form at all. I think that in substance this application was not, and was plainly not intended to be, an application for review of the weekly payment under the 12th section, and accordingly I am of opinion that the

Sheriff-Substitute was right in coming to the conclusion that it was so framed that it could not be treated as a petition for review, and therefore that he was right in dismissing it.

LORD ARDWALL—I agree, I think it is quite plain that this application as presented proceeds upon the footing that there had been no antecedent agreement between the parties. That there was an antecedent agreement is certain. I agree with the Sheriff-Substitute that once an agreement has been entered into, arbitration proceedings—original arbitration proceedings—under this Act are out of place. There is no suggestion from beginning to end of this application, as recited in the stated case, that it was brought for the purpose of putting an end to the payment under a subsisting agreement, or of diminishing that payment as from and after 25th January 1905. On the contrary, both in substance and in form it appears to be simply an application for an original arbitration under this Act. Now, that being so, I consider it entirely out of place, standing the agreement between the parties. I therefore consider that the Sheriff-Substitute treated the matter entirely rightly in holding that it was an original application for arbitration both in substance and in form, and that as such it is excluded by the agreement of which a memorandum has been recorded. With regard to this being considered to be a petition for review, it is not, either in substance or in form, an application for review under the 12th section of the first schedule appended to the Act of 1897, which is the only method prescribed by the statute for having such payment ended or continued on a diminished scale. On these grounds, I am in favour of affirming the judgment of the Sheriff-Substitute.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the negative, and the second in the affirmative.

Counsel for Appellants—Horne—Strain.
Agents—W. & J. Burness, W.S.

Counsel for Respondent—Crabb Watt,
K.C.—A. M. Anderson. Agent—C. Strang
Watson, Solicitor.