Argued for the Assessor—The erections were not used for the purpose of working or cleaning minerals, and therefore did not fall within the meaning of the exemption. "Working" stone meant quarrying stone, and not planing, polishing, or carving, which were operations usually performed by the builder or stone-mason, but were in no reasonable sense necessary to make it a marketable product—*Gartverrie Fireclay Company* v. *Assessor for Lanark*, March 17, 1897, 24 R. 738. Moreover, it was clear from the terms of the lease, applicable to the later years of its currency (quoted *supra*), that the distinction between working the stone and dressing it was present to the mind of the parties, and the rent stipulated was calculated upon the quantity of undressed stone extracted and sold.

At advising—

LORD KYLLACHY—I assume in favour of the appellants that there is only one lease—in other words, that these subjects are part of the mineral leasehold. But I agree with the Valuation Committee that they are erections or structural improvements within the meaning of section 4 of the Act of 1895, and do not fall within any of the exceptions of that section. The suggestion is that they fall within the exception of sub-section 2, viz., structures used exclusively for the purpose of "working or cleaning minerals," and the way in which Mr Graham Stewart put that point was that the phrase "working or cleaning" covers everything that is necessary to make the minerals saleable. Now, it appears to me enough to say that there is nothing in this case to show that the operations conducted in these separate structures are necessary to make the rock which is here quarried a saleable subject. We cannot therefore assume that that is the fact. And indeed if we look at the terms of the principal lease, these appear to exclude the idea that in the contemplation of parties the rock would not be saleable until dressed and planed in these structures.

On the whole, I am of opinion that the Committee are right, and that the first reason they assign is sufficient for their judgment.

LORD STORMONTH DARLING—I concur, and I shall only add that, as your Lordship has pointed out, the terms of the lease are sufficient to show that this stone could be put on the market without being dressed in these structures, because the royalty was to be calculated upon the price of "all quarry-dressed stone sold and removed (said price to include the cost of all quarrying and blocking operations with hammers and picks, but not the cost of any other manufacturing or dressing by hand or machinery)." Therefore we must conclude that if the appellants chose to erect structures of this kind they did so for their own profit and in order to get a higher price than could be got by adopting the more primitive methods of dressing the stone. That is precisely the kind of case which the Act of 1895 was intended to meet, and it is not covered by the second exception.

The Court were of opinion that the determination of the Valuation Committee was right.

Counsel for the Appellants — Graham Stewart. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Assessor—C. D. Murray. Agents—Constable & Johnstone, W.S.

COURT OF SESSION.

Friday, March 16.

SECOND DIVISION.

[Lord Low, Ordinary.

COCHRANE *v.* DAVID TRAILL & SONS.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (3), *Second Schedule* (8), 14 (*a*) *and* (*b*)—*Act of Sederunt June* 3, 1898, *sec.* 7 (*a*)—*Action to Enforce Agreement—Memorandum of Agreement—Registration of Memorandum—Agreement to Pay Compensation Independent of the Act.*

An action to enforce payment of a claim under the Workmen's Compensation Act 1897 is incompetent.

Opinion (*per* Lord Low (Ordinary) and Lord Justice-Clerk) that an agreement to pay compensation under the Act, although merely verbal, may be enforced by lodging a memorandum of agreement, and obtaining the authority of the Sheriff to register it, and that this may be done at any time, and not only within six months after the accident or death.

Averments upon which *held* that a workman had not relevantly averred an agreement by his employer to pay compensation independently of the Act, but as if liable under it, although not so liable.

Question whether an action to enforce such an agreement is competent.

Opinion (*per* Lord Young) that it is.

Opinion (*per* Lord Young) that such an agreement could only be proved *scripto*.

This was an action at the instance of David Cochrane, lumper, Shore, Kincardine-on-Forth, in the County of Stirling, against David Traill & Sons, stevedores, Grangemouth, and the individual partners of that firm, in which the pursuer concluded (1) for payment of the sum of £4, 4s., and (2) for "payment to the pursuer of the sum of 14s. weekly from and after the 19th day of May 1899, so long as the pursuer shall continue to be totally or partially disabled from and incapable of resuming the work or class of work at which he was employed at the date of the accident" after mentioned, "or until said weekly payment has been diminished or ended or redeemed in terms of sections 12 and 13 of the First Schedule of the Workmen's Compensation Act 1897."

The pursuer averred that he was injured on 9th September 1898 by an accident while he was engaged in discharging the cargo of a ship in the employment of the defenders; that his spine had been injured to such an extent as to disable him permanently from work, and that he gave due notice of the accident to the defenders in terms of the Workmen's Compensation Act 1897; that the defenders acknowledged receipt of the notice, but denied all liability, and requested to be informed of the grounds on which it was considered they were liable, and that the pursuer's agent, Mr Anderson, solicitor, Grangemouth, wrote in answer to this request stating the grounds of the claim.

He also averred as follows:—(Cond 5) . . . "To the above letter no reply was made by the defenders, but Mr David Traill, one of the partners of the defenders' firm, informed Mr Anderson a day or two afterwards that liability was admitted, and that the insurance company with which his firm was insured had directed them to pay the half wages to which the pursuer was entitled under the Act. In point of fact the pursuer believes and avers that the defenders had received definite instructions from said company to admit liability. On 7th October 1898—the date on which the first fortnightly payment of half wages under the Act was due—the defenders wrote the pursuer's wife the following letter:—'Grangemouth, 7th Oct. 1898.—Mrs David Cochrane, Keith Street, Kincardine.—Madam,—Referring to your call yesterday, we are in the meantime going to pay you 14s. per week, being your husband's half-wages, counting from the first fortnight after the accident, You can therefore have the money any time. You are entitled to 28s. to-day.—Yours truly, D. Traill & Sons."

He further averred that in accordance with this admission of liability the defenders continued to pay to the pursuer 28s. fortnightly from 7th October 1898 until 7th April 1889, when they stopped the payments, and intimated that they were to make no more; that the pursuer had "challenged the right of the defenders to terminate the payments falling to be made under and in virtue of their admission of liability and the foresaid undertaking by them," but that the defenders refused or delayed to make any additional payments.

The pursuer also averred that about the same time that he gave notice of the accident, he brought an action of damages at common law against the master of the ship on board which the accident occurred; that between the date of the raising thereof and the adjustment of the record the present defenders admitted liability to the pursuer for the accident; that the master of the ship averred, on information supplied by the present defenders, that the pursuer had claimed and was being paid compensation by them under the Workmen's Compensation Act, and that in these circumstances the pursuer, being satisfied that this was a good defence to the action, intimated through his agent that he did not intend to take any further steps in the process, with the result that on 2nd November 1898 the master was assoilzied with expenses.

The defenders pleaded—"1. The action is incompetent. . . . (2) In respect of the provisions of the Workmen's Compensation Act 1897."

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts as follows:—Section 1, sub-section (3)—"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."

Second Schedule—"The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration. . . . (8) Where the amount of compensation under this Act shall have been ascertained or any weekly payment varied, or any other matter decided under this Act either by a committee, or by an arbitrator, or by agreement, a memorandum thereof shall be sent in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment, provided that the county court judge may at any time rectify such register." (14)—"In the application of this schedule to Scotland, (*a*) "sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," sheriff clerk" for "registrar of the county court," and "Act of Sederunt" for "rules of court;" (*b*) any award or agreement as to compensation under this Act may be competently recorded for execution in the Books of Council and Session or Sheriff Court books, and shall be enforceable in like manner as a recorded decree-arbitral."

The Act of Sederunt, dated June 3, 1898, passed in virtue of the powers conferred by the Workmen's Compensation Act 1897, enacts as follows:—Section 7 (*a*) "The memorandum as to any matter decided by a committee, or by an arbitrator other than a sheriff, or by agreement, which is by paragraph 8 of the Second Schedule appended to the Act required to be sent to the sheriff-clerk, shall be as nearly as may be in the form set forth in Schedule A appended hereto. Where such memorandum purports to be signed by or on behalf of all the parties interested, or where it purports to be a memorandum of a decision or award of a committee or of an arbitrator agreed on by the parties, and to be signed in the former case by the secretary, or by at least two members of the committee, and in the latter case by the arbitra-

tor, the sheriff-clerk shall proceed to record it in the special register to be kept by him for the purpose, without further proof of its genuineness. In all other cases he shall, before he records it, send a copy (for which, unless it is supplied to him along with the memorandum, he shall be allowed to charge at the rate of 1s. per sheet) to the party or parties interested (other than the party from whom he received it) in a registered letter containing a request that he may be informed within a reasonable specified time whether the memorandum and award (or agreement) set forth therein are genuine; and if within the specified time he receives no intimation that the genuineness is disputed, then he shall record the memorandum without further proof; but if the genuineness is disputed he shall send a notification of the fact to the party from whom he received the memorandum, along with an intimation that the memorandum will not be recorded without a special warrant from the sheriff."

On 9th December 1899 the Lord Ordinary (Low), after hearing counsel in the procedure roll, dismissed the action with expenses.

Opinion—[*After summarising the pursuer's averments*]—"The time has now elapsed within which the pursuer was entitled to take proceedings under the Workmen's Compensation Act, and accordingly he contends that the present action is competent, as it is the only remedy open to him.

"The summons concludes, in the first place, for payment of £4, 4s., being 14s. for each of the six weeks which elapsed between the date when the defenders ceased payment and the raising of the present action; and in the second place, for payment of 14s. weekly so long as the pursuer continues to be disabled from work, or until the weekly payment has been diminished, ended, or redeemed, in terms of the 12th and 13th sections of the first schedule to the Act. The summons is therefore one for payment of compensation under the Workmen's Compensation Act.

"It is clear that there is no warrant under the Act for an action in this Court for payment of compensation. On the contrary, such actions are carefully excluded, and a method is provided for enforcing payment of compensation whether the amount has been fixed by arbitration or by agreement. If there has been an agreement, a memorandum thereof must be sent to the sheriff-clerk to be recorded in a special register to be kept by him for that purpose, and when the memorandum is so recorded, it is enforceable for all purposes as a Sheriff Court judgment.

"It is accordingly the pursuer's own fault that he is not now in a position to enforce payment. If, as he avers, the defenders admitted liability, and agreed to pay him compensation at the rate of 14s. weekly, he ought to have had a memorandum of that agreement registered.

"It was said by the pursuer that there was nothing which he could register, because the agreement was not in writing. If there was no agreement which the pursuer could register, then I am afraid that he has lost his claim under the Act by not taking proceedings within six months of the accident. The defenders, however, have intimated their willingness to waive the objection that six months have elapsed, and to go to arbitration upon the question of their liability.

"I do not think, however, that it is essential that an agreement as to compensation under the Act should be in writing. The Act does not say that the agreement must be in writing, and the provision that a memorandum of the agreement, and not the agreement itself, is to be registered, seems to me to contemplate that the agreement may not be in writing. Further, there is no time limited within which the memorandum must be recorded, and it seems to me that the pursuer might still draw up and record a memorandum.

"Probably, if the pursuer sent a memorandum to the sheriff-clerk, the defenders would object on the ground that there was no agreement. In that case I apprehend that the question whether there had been an agreement or not would require to be settled in the Sheriff Court, or it may be that the pursuer would be entitled to bring an action of declarator in this Court.

"I therefore do not think that the pursuer is without a remedy under the Act, but however that may be, an action solely for payment of compensation under the Act seems to me to be entirely incompetent.

"I shall therefore dismiss the action."

The pursuer reclaimed, and argued—The pursuer was prepared to concede that an action brought in the Court of Session to enforce a claim under the Workmen's Compensation Act 1897 would be incompetent. But this was not an action to enforce a claim under that Act. It was an action to enforce an agreement. The pursuer's claim was only a claim under the Act to this extent, that liability under the Act was admitted, and an agreement to pay certain compensation was consequently entered into between the parties, but this action was founded upon an agreement to pay certain sums fortnightly and not upon the Act. A claim based upon an agreement could only be enforced in an ordinary court of law, and it could not be enforced by proceedings under the Act. Section 1 (3) only applied where proceedings were taken under the Act. Proceedings meant judicial proceedings—*Bennett* v. *Wordie & Company*, May 16, 1899, 1 F. 855. Here no proceedings were taken under the Act, and the arbitration clauses did not apply —*See Symington's Executor* v. *Galashiels Co-operative Store Company, Limited*, Jan. 13, 1894, 21 R. 371.

Argued for the defenders—This was an action to enforce a claim under the Workmen's Compensation Act, and it was consequently incompetent. It was not a claim at common law upon an agreement. There was no relevant averment of an agreement. But even if this was an action to enforce

an agreement to pay compensation under the Act, or to pay compensation as if liable under the Act, although not so liable, it was incompetent, for questions as to the genuineness of alleged agreements fell to be decided by proceedings under the Act before the Sheriff and not in an action—Act of Sederunt, 3rd June, 1898, section 7 (*a*).

At advising—

LORD JUSTICE-CLERK—The pursuer in this case asks that he shall have a decree (1) for payment of £4, 4s.; (2) for payment of 14s. weekly "so long as the pursuer shall continue to be totally or partially disabled from and incapable of resuming the work or class of work at which he was employed at the date of the accident" on which he condescends; and (3), and alternatively, that this shall be continued until said weekly payment has been diminished, ended, or redeemed, in terms of sections 12 and 13 of the first schedule of the Workmen's Compensation Act 1897. These conclusions are not such as are ordinarily dealt with in cases of damages for injury tried in this Court. The practice of this Court is that damages must be ascertained once and for all, and no such procedure as would be involved in the second head I have referred to could take place. It appears very clearly from the third head that what the Court is asked to give effect to in this case is a claim under the Workmen's Compensation Act. And the pursuer in his condescendence makes this plain, for he avers that the defenders admitted liability and paid an agreed-on weekly allowance under the Act, and that it is in consequence of their refusing to make further payments that he now sues. That being so, the difficulty at once arises that the Workmen's Compensation Act regulates the procedure under it. It would be a subversion of the intention of the Act if such cases could be brought into the Court of Session. The Act was intended to provide an extension of the liability of employers of labour for compensation for accidents, and to provide also a simple and summary mode of procedure where compensation under the Act was to be ascertained. The pursuer here founds on an alleged agreement. His proper course in a case of agreement to pay compensation under the Act—which is what he alleges—was, under sub-section 8 of Schedule 2, to go to the registrar, viz., the sheriff-clerk, and to register the agreement, when it would at once become enforceable as a Sheriff Court judgment. I agree with what the Lord Ordinary has said on that matter. The pursuer here did not get the agreement registered, and the time for taking proceedings under the Act has expired, but the defenders have, with commendable consideration for the pursuer, waived their objection based on the expiry of the time, and consent that the matter shall go to arbitration under the statute. Now, should the pursuer decline to proceed in this manner, I think the pursuer, proceeding as he does upon the Act and asking that this Court should deal with his case under the schedule of the Act of Parliament, is asking what this Court cannot grant. The Act has fixed the tribunal for cases occurring under it, and the procedure must be taken before that tribunal, and no other.

I would propose, therefore, that the Court should adhere to the judgment of the Lord Ordinary.

LORD YOUNG—I agree that the conclusions of this action are not supported by the pursuer's statements, and that therefore it has been properly dismissed by the Lord Ordinary. But I do not think it is an action under the Workmen's Compensation Act at all. I regard the action as an action at common law against a party who is not liable under the Act, but who has agreed to pay the sums which he would have been bound to pay if he had been liable under the Act. That is an agreement which may be enforced independently of the Act by conclusions for specific implement or damages. It is in that view that I think the action is irrelevant. The only agreement on which it is based is that referred to in condescendence 5—[*His Lordship read the averment narrated supra, and the letter signed "D. Traill & Sons," there quoted*]. This letter contains no obligation to pay under the Act, or to pay as if liable under the Act, although not so liable. I think the latter would be a contract which would require, according to our law, to be in writing. It would be one of those anomalous contracts (indeed it is unprecedented) which cannot be proved by parole, but can only be proved by writing.

LORD TRAYNER—I agree with the Lord Ordinary. This is an action brought to enforce payment of a claim for compensation under the Workmen's Compensation Act, as the conclusions of the summons and the condescendence plainly show. Such an action I think is incompetent, for we have no jurisdiction to entertain and determine any claim arising under that Act. The pursuer, however, maintained that he was suing, not for compensation under the Act, but for fulfilment of an agreement independent of the Act, under which the defenders bound themselves to pay him all that he here sues for. With regard to that, I shall only say that the averments of the pursuer are not relevant to support such a claim, and that the conclusions of the summons are quite inapplicable to a claim based upon contract or agreement.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defenders—W. Thomson. Agents—Macpherson & Mackay, S.S.C.