Wednesday, December 6.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

MACELHINNEY *v.* PORTLAND FORGE COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (3)—*Agreement under the Act Accepting Lump Sum and Discharging All Claims—Agreement Inoperative Owing to Refusal of Arbiter Named therein to Act—Competency of Proceedings by way of Arbitration under the Act—Implied Condition.*

A workman who was receiving compensation under the Workmen's Compensation Act 1906 entered into an agreement under the Act with his employers, under which he discharged his claim against them in consideration of, *inter alia*, a "guarantee" of constant employment in their service, any dispute as to the right of the employers to terminate the employment to be submitted to a named arbiter. A memorandum of the agreement was duly recorded. The employers having terminated the workman's employment and the arbiter having refused to act, *held* that the workman was debarred by the agreement, the validity of which was not disputed, from taking proceedings against his employers under the Act.

John MacElhinney, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (ROBERTSON) at Kilmarnock in an arbitration brought by him for compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against the Portland Forge Company, Limited, *respondents*, appealed by Stated Case.

The Case stated—"Parties were heard . . . on the defenders' pleas to competency and relevancy. The defenders had no plea to the merits. The facts admitted were as follows:—1. The pursuer is a furnaceman and underhand, residing at 8 West Langlands Street, Kilmarnock. Defenders are forgers, and carry on business at Portland Forge, Kilmarnock. 2. On 2nd January 1919 the pursuer was working in the defenders' employment at their said works as furnaceman, and had been engaged there for at least eight months previous thereto in defenders' employment, and intermittently over a period of years prior thereto. 3. On said 2nd January 1919 the pursuer, when engaged in the course of his employment in the yard at defenders' works shifting waggons, was accidentally caught between the buffers of two waggons and sustained injuries to his left arm, as a result of which it was amputated at the shoulder. 4. The pursuer claimed and received compensation from the defenders under the Workmen's Compensation Act. Said compensation was paid in weekly payments from the date of the accident till 9th June 1919, when the pursuer and defenders entered into an agreement, which was recorded in the Sheriff Court Books at Kilmarnock on 30th June 1919. Said agreement was in the following terms:—'The claimant received from the respondents the sum of ninety pounds sterling, and the respondents in addition guaranteed and hereby guarantee to the claimant constant employment as a steam-hammerman in their service at the usual weekly wage for that class of work, provided that claimant turns out to his work regularly and at the proper hours fixed by the respondents, and also provided that the claimant performs his work to the satisfaction of the respondents, and provided further that in the event of any dispute arising between the parties as to the right of the respondents to terminate the claimant's employment, all such disputes shall be submitted and referred to, and the same are hereby submitted and referred to, the manager of the Labour Employment Exchange in Kilmarnock and his successor in office, whose decision shall be final and binding on the parties, which sum of ninety pounds, guarantee of employment, together with the weekly payment of compensation already received by the claimant, the claimant agreed to accept and accepted in full settlement and discharge of all claims of whatever nature, present and future, competent to him against the respondents in respect of the foresaid injury.' 5. That following upon said guarantee of employment the pursuer started work in the defenders' service on 16th June 1919 and remained in the defenders' service till 27th April 1921. With the exception of eight days' employment at repair work in May 1921 they have not since employed him. That the pursuer challenged and challenges the right of the defenders to terminate his employment under said agreement, and that the defenders have refused to pay him compensation in terms of the Act. That the arbiter designed in the aforesaid agreement had declined to act.

"In addition to the foregoing facts, which were not disputed, the parties made conflicting averments regarding the termination of the pursuer's employment with the defenders. The pursuer averred that the defenders at 27th April 1921 terminated his employment and discharged him. The defenders denied this. They averred that on 27th April aforesaid their works were closed owing to the coal strike and they were obliged to suspend all their men. That they did not, however, discharge the pursuer but employed him at some repair work for eight days in May 1921, since when they have had no employment for him.

"The pursuer craved an award of the statutory compensation to which he was entitled in consequence of his having been permanently incapacitated for work owing to accident arising out of and in the course of his employment. He claimed compensation for the period from 27th April 1921.

"The appellant's averment was as follows:—The pursuer challenged and challenges the right of the defenders to terminate his employment under said agreement. The arbiter named therein having declined to act in the dispute between the parties as to the right of the defenders to terminate

the pursuer's employment the said agreement has thereby come to an end, and the pursuer as from the date of the termination of his employment is restored to his full statutory rights.

"The respondents pleaded — The only question in dispute between the parties having been determined by the agreement under the Workmen's Compensation Act, duly recorded, the action is incompetent.

"In these circumstances I regarded the existence of the agreement as a bar to further proceedings under the Act, and sustained the respondents' plea to the competency of the action."

The *question of law* was—"On the facts as stated was I entitled to hold that the appellant's application was incompetent in respect that he was barred by the existence of the aforesaid agreement from proceeding against the respondents by way of arbitration under the Workmen's Compensation Act 1906?"

In a *note* to his award the arbitrator stated—"The pursuer's arm was amputated in consequence of an injury sustained by him through accident in the course of his employment with the defenders and which is stated in his first plea, though nowhere in his averments, to have arisen out of his said employment. He claimed under the Act, and received compensation in weekly payments till 9th June 1919, when the pursuer and defenders entered into an agreement under the Act, which was duly recorded in the Sheriff Court Books at Kilmarnock on 20th June 1919. It thereupon became enforceable as a recorded decreet-arbitral, Schedule 11 (9) and 11, 17 (*a*). Its terms are set forth in the fourth article of the pursuer's condescendence. They comprise three heads—(1) a lump sum of £90 paid to pursuer; (2) a guarantee by the defenders of 'constant employment' to the pursuer on conditions stated; (3) a provision 'that in the event of any dispute between the parties as to the right of the respondents to terminate the claimant's employment, all such disputes shall be submitted and referred to, and the same are hereby submitted and referred to, the manager of the Labour Employment Exchange in Kilmarnock and his successor in office . . . which sum of £90, guarantee of employment, together with the weekly payments of compensation already received by the claimant, the claimant agreed to accept and accepted in full settlement and discharge of all claims of whatever nature, present and future, competent to him against the respondents in respect of the foresaid injury.' It is not pretended this was not a valid agreement. It is not relevantly averred that the defenders have wrongfully terminated his employment. But they are not now employing him and the selected arbiter has refused to act. In these circumstances the pursuer brings an application for an arbitration under the Act as if there had been no agreement He pleads —'The agreement condescended on having ceased to be operative through the refusal of the arbiter to entertain and determine the dispute between the parties under the agreement, the pursuer is entitled to proceed by arbitration under the Act'; and that was his position at the hearing. I can find no authority for such a proposition in the Act, or in the decisions interpreting the Act. There are cases such as *Ellis* v. *Lochgelly Iron and Coal Company, Limited*, 1909 S.C. 1278, where it has been held that the effect of a discharge is a question arising in the proceedings as to the liability to pay compensation in the sense of section 1 (3) of the Act, and that the arbitrator is within his jurisdiction in determining it. But that is where the discharge or agreement is attacked as being vitiated by such a flaw as would make it void or voidable at common law, *vide* per Lord Kyllachy, *Colville & Sons, Limited* v. *Tigue*, 8 F. 179, at p. 183. Otherwise the existence of the agreement is a bar to arbitration—*Dunlop* v. *Rankin & Blackmore*, 4 F. 203; *Colville & Sons, Limited* v. *Tigue, sup. cit.* What has happened here is that the workman and his employers have entered into an agreement some of the provisions of which appear to be unenforceable. But he and they are equally responsible for this, and if he has any claim it is for breach, and it would appear to be a claim of damages if that is competent—see *Lawrie* v. *Brown & Company, Limited*, 1908 S.C. 705. He has not here relevantly averred a breach. 'Constant' does not, I think, mean 'perpetual,' but merely regular or uninterrupted. The agreement itself negatives the contention that it means perpetual, by referring disputes as to termination to arbitration. But if the action is, as I humbly think, incompetent, I need not do more than sustain the defenders' plea to that effect.

Argued for appellant—The arbitrator was wrong in holding that the application was incompetent. The mere existence of an agreement was not sufficient to bar an application under the Act—*Ellis* v. *Lochgelly Iron and Coal Company*, 1909 S.C. 1278, 46 S.L.R. 960. The real question here was not one of competency, but whether the employers were entitled in the circumstances to plead the agreement as a discharge of their statutory obligation under the Act. They were not entitled to do so. The provision as to arbitration was part of the consideration for which the appellant had granted the discharge, and there was an implied condition that it should be operative, which had failed owing to circumstances not contemplated by the parties. The agreement was not therefore existing and enforceable—*F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2 A.C. 397, *per* Earl Loreburn at p. 403, and could not be pleaded in defence to proceedings under the Act—*Colville & Sons* v. *Tigue*, 1905, 8 F. 179, 43 S.L.R. 129. The fact that the agreement was recorded could not affect the case, as it was not an agreement registrable under the statute—*M'Ewan* v. *William Baird & Company, Limited*, 1910 S.C. 436, *per* Lord Kinnear at p. 442, 47 S.L.R. 430. The appellant was therefore entitled to fall back on his statutory right. Further, the employers were not entitled to found on the agreement when, *prima*

facie, they were in breach themselves by their failure to implement their guarantee of employment.

Counsel for the respondents was not called upon.

LORD SKERRINGTON—The question of law put to us by the arbitrator is open to the criticism to which it was subjected by the appellant's counsel, but its meaning is not doubtful. The arbitrator has in substance decided that the agreement between the appellant and the respondents, which is recited in paragraph 4 of the Stated Case, debars the appellant from proceeding against the respondents by way of arbitration under the Workmen's Compensation Act 1906. We have to decide whether the arbitrator was entitled to reach this conclusion. As the case was argued to the arbitrator, and as it was argued to us, the only question between the parties was one as to the construction of the agreement. The arbitrator was not asked to determine whether the agreement, though valid so long as it was acted on by both parties, was invalid and unenforceable to any further extent as being in effect an attempt to deprive the workman of the benefits secured to him by the statute and in violation of the third section thereof. Accordingly no such question was raised or could competently have been raised in the appeal, and I reserve my opinion in regard to it.

The agreement is a simple one and it presents no difficulties of construction. In consideration of a lump sum of £90 paid to him by the respondents and of a "guarantee" by them in his favour of "constant employment as a steam hammerman in their service at the usual wage for that class of work," together with the weekly payment of compensation already received by him, the appellant accepted the same "in full settlement and discharge of all claims of whatever nature, present and future, competent to him against" them in respect of his injury. The so-called "guarantee" of employment was subject to three provisos, to the last of which it was stated that the appellant attached much importance, viz., that "in the event of any dispute arising between the parties as to the right of the respondents to terminate the claimant's employment, all such disputes shall be submitted and referred to, and the same are hereby submitted and referred to, the manager of the Labour Employment Exchange in Kilmarnock, and his successor in office, whose decision shall be final and binding on the parties." The manager of the said Exchange in office for the time being has declined to act as arbiter. Accordingly the appellant now maintains that the agreement has been "frustrated" and that the parties are therefore relegated to the statutory rights which he somewhat imprudently purported to discharge. I had difficulty in understanding upon what ground counsel maintained that his client was entitled in the events which had happened to shake himself free from his agreement; but in the end he settled down to the view that the agreement when fairly construed must be read as if the discharge by the workman was subject to the implied condition that it should cease to be operative if the arbitration machinery brought into existence by the agreement should become unworkable. This contention involves in my opinion an illegitimate extension of the doctrine of implied conditions and I have no hesitation in rejecting it.

For these reasons I think that the arbitrator correctly construed the agreement by which the workman chose, prudently or imprudently, to barter away his statutory right to compensation for £90 and a so-called guarantee of employment, and accordingly that the appellant must remain bound by the agreement notwithstanding that the guarantee is worthless.

Counsel suggested that there was another ground upon which the appellant might get rid of his agreement, viz., that the respondents being themselves in breach of it could not found upon it. Admittedly no such argument was presented to the arbitrator, and there are no findings in fact which support it.

For these reasons I think that we ought to find that the arbitrator was entitled to hold that the workman was barred by the terms of the agreement from proceeding against the respondents by way of arbitration under the Workmen's Compensation Act 1906.

LORD CULLEN—I am of the same opinion. The appellant's claim for compensation was settled by an agreement, the validity of which has not been challenged, between him and his employers in the terms mentioned in the Stated Case, and a memorandum of that agreement was recorded. The appellant received the £90 mentioned in the agreement and was given employment for nearly two years. Thereafter the respondents ceased to give him employment. The appellant challenged and challenges their right to do so. Whether the respondents have broken the agreement or not is not *hujus loci*. *Esto* they have done so, it appears to me that the appellant's remedy, if he has one, must take the form of proceedings of one kind or another based on the agreement. If the refusal to act on the part of the arbiter nominated in the agreement puts an obstacle in the way of such proceedings that is a misfortune for the appellant. It remains, however, that the agreed-on terms, *quantum valeant*, were accepted by him, and that in consideration of the stipulations in his favour he granted a discharge of his claims under the Act; and if these stipulations have in part turned out less satisfactory than he expected that gives him no good ground in my opinion for seeking an award of compensation from the arbitrator as if no agreement had ever been made. I am unable to read into the agreement an implied condition to the effect that the parties should be restored to their antecedent positions in the event of the arbiter nominated therein refusing to act. I accordingly agree that the question should be disposed of as your Lordship proposes.

LORD SANDS—I concur.

The LORD PRESIDENT did not hear the case.

The Court found in answer to the question of law that the Sheriff-Substitute as arbitrator was entitled to hold that the appellant was barred by the terms of the agreement referred to in the case from proceeding against the respondents by way of arbitration under the Workmen's Compensation Act 1906.

Counsel for the Appellant—Wark, K.C. —Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents — Gentles, K.C.—W. A. Murray, Agents—Carmichael & Miller, W.S.

Friday, December 8.

SECOND DIVISION.

[Dean of Guild Court Glasgow.

PORTER *v.* CAMPBELL'S TRUSTEES AND OTHERS.

Property—Building Restriction—Superior and Vassal — Self-contained Lodging — Conversion into Four Separate Lodgings.

A feu-contract contained a clause binding the feuar to build, complete, and finish on the steading of ground feued "a self-contained lodging . . . and thereafter to maintain and uphold in good condition . . . and to rebuild . . . the same, if and when necessary, of the same height, elevation, and outward style of architecture . . . with the said lodging." These conditions and restrictions were declared to be real burdens upon the steading of ground.

The proprietor of a dwelling-house upon the steading, who derived his title from the feuar, obtained a lining from the Dean of Guild for alterations on the house, then in single occupation, which, while not in any way affecting its structure or elevation, would allow of its being occupied by four independent and separate occupiers but would not prevent it at at any time being again put into single occupation.

In an appeal at the instance of a co-feuar and also of the superior of the ground, both of whom objected to the proposed alterations, *held—aff.* the Dean of Guild, and following *Buchanan* v. *Marr*, (1883) 10 R. 936, 20 S.L.R. 635, and *Miller* v. *Carmichael*, (1888) 15 R. 991, 25 S.L.R. 712—that the proposed alterations did not involve a contravention of the restriction in the feu-contract.

Arthur Porter, 70 Cambridge Street, Glasgow, proprietor of the dwelling-house No. 11 Great Western Terrace, Kelvinside, Glasgow, presented a petition to the Dean of Guild Court of Glasgow for a warrant and decree of lining authorising him to make certain alterations in order to increase the occupancy of the house.

Robert V. D. Campbell and others, the marriage-contract trustees of Mr and Mrs Alexander Campbell, proprietors of the adjoining dwelling-house No. 10 Great Western Terrace, and James William Anderson and others, the testamentary trustees of James Whitelaw Anderson, the superiors of the subjects forming the said Great Western Terrace, lodged objections.

The *facts* as found by the Dean of Guild were as follows:—"(*First*) that the petitioner is proprietor of the subjects No. 11 Great Western Terrace, Kelvinside, Glasgow, which consists of a dwelling-house of four storeys and attics and basement hitherto occupied as a single house or establishment; (*Second*) that he proposes to make certain alterations thereon, all as shown on the plan, in order to increase the occupancy of these subjects; (*Third*) that the alterations proposed, and for which the petitioner now asks authority, are shown coloured red and blue on the said plan; (*Fourth*) that the alterations are entirely internal, and if carried out will not in any way alter or affect the structure or elevation of the existing building, and that the alterations proposed will allow of its being occupied by four independent and separate occupiers but will not prevent it at any time being again put into a single occupation; (*Fifth*) that the proposal of the petitioner is opposed by the superiors and the proprietor of No. 10 Great Western Terrace; (*Sixth*) that the objectors maintain that the proposed alterations are an infringement of the petitioner's title . . .; (*Eighth*) that the subjects belonging to the petitioner were feued under a feu-contract between James W. Anderson, manufacturer in Glasgow, on the one part, and Robert Young, merchant in Glasgow, on the other part, dated 1st and 5th August, and recorded G.R. (Barony and Regality of Glasgow) 16th December 1874 . . . (*Ninth*) that under the said feu-contract it is provided that the said Robert Young binds and obliges himself and his heirs and assignees 'to build, complete, and finish a self-contained lodging with a sunk area of 12 feet in breadth, with retaining walls of said sunk area and the carriageway and retaining walls thereof hereinafter referred to, all conform to the elevation and other plans showing the exterior workmanship prepared by Messrs Alexander and George Thomson, architects in Glasgow, and subscribed by the parties as relative hereto, and thereafter to maintain and uphold in good condition and repair in all time coming, and to rebuild and form the same upon the same foundation or site, if and when necessary, and of the same height, elevation, and outward style of architecture, and of the like class or quality of external material, and of the same style of workmanship with the said lodging: Declaring that in construing the preceding clause with reference to the erection or rebuilding of said lodging it shall be read so that the external architecture of said lodging shall correspond in all respects with the architecture of the rest of the terrace, and shall line with steading number one of said terrace, and shall be at