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WINTER SESSION, 1906–1907.

COURT OF SESSION.

Friday, October 19, 1906.

FIRST DIVISION.

[Lord Dundas, Ordinary.

GLEN'S TRUSTEES *v.* THE LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE COMPANY, LIMITED.

(Reported *ante* June 14, 1906, 43 S.L.R. 684.)

Expenses—Process—Precognitions—Correspondence — Instruction of Counsel — Copies of Correspondence and of Precognitions Sent instead of Memorial to Counsel for Preparation of Defences.

In an action against an insurance company to recover a sum of money under an accident policy on the ground of the death of the insured, the defender's agents sent counsel for the preparation of defences (which included pleas of waiver, *mora*, and suicide) copies of the correspondence between parties and of precognitions on the question of the insured having committed suicide. No memorial was sent. The case having been decided in the procedure roll in favour of the defenders with expenses, and this judgment having been upheld in the Division, the Auditor taxed off the cost of the copies of correspondence and of precognitions sent to counsel.

Held that the copies of correspondence and of precognition, coming in place of a memorial, fell within the award of expenses, and that the Auditor was wrong.

The case is reported *ante ut supra.*

Francis Walter Allan, shipowner in Glasgow, and others, Thomas Glen's testamentary trustees, sued the Lancashire and Yorkshire Accident Insurance Company, Limited, for a sum of money under an accident policy on the ground of the death of the insured, William James Glen.

The defenders pleaded, *inter alia*—"(1) The right to recover under the policy founded on having lapsed, and being barred by the terms of the policy, the action ought to be dismissed. (2) Any claim under the said policy having been waived and departed from by the deceased Thomas Glen, the action ought to be dismissed. (3) The pursuers being barred by *mora* and taciturnity from insisting in their claim, the action ought to be dismissed. (4) The late Mr William James Glen having committed suicide, the pursuers are not entitled to recover anything under the policy."

On November 4, 1905, the Lord Ordinary, after a discussion in the procedure roll, sustained the first of these pleas, dismissed the action, and awarded the defenders expenses. To his interlocutor the First Division adhered on June 14, 1906.

The Auditor in taxing the defenders' account of expenses taxed off the following items:—

"Making two copies of the following papers to instruct counsel:—

	£.	s.	d.
(1) Correspondence between the defenders and others, 66 shs.	7	8	6
(2) Precognitions of Captain Carswell and others, 4 shs.	0	9	0
(3) Precognitions of R. W. Roy and others, 5 shs. .	0	11	3
(4) Correspondence between Messrs Gill & Pringle, Messrs Mackay & M'Intosh, and Messrs Davidson & Syme, 14 shs. . .	1	11	6
	£10	0	3"

The copies of correspondence and of precognitions charged for in these items had been sent to counsel for the preparation of defences. No memorial was charged for, none having been sent.

The defenders lodged a note of objections to the Auditor's report, and in the Single Bills argued—Looking to their pleas of waiver, *mora*, and suicide it was necessary for defenders to instruct counsel fully for the preparation of defences, and that could only be done by a memorial or by sending to them copies of the correspondence between the parties. The defence of suicide made it necessary to send to counsel the copies of precognitions taken. No charge had been made for the taking of them. The correspondence and precognitions were in fact only the equivalent of a memorial. The charges taxed off by the Auditor should therefore be allowed and the objections sustained.

Argued for the pursuers—The charge for copy of precognitions should not be allowed, as no proof necessitating them had been ordered—*Malcolm* v. *Moore*, December 18, 1901, 4 F. 369, 39 S.L.R. 259. The charge for copies of a correspondence, which was *ex parte* and entirely useless, had been rightly taxed off. There were two real points in the case—the interpretation of the policy and the question of suicide—and on these the copy correspondence sent to counsel had no bearing. The Auditor had applied his mind to the matter and his decision on it should not be set aside—*Dobell, Beckett, & Company* v. *Neilson*, February 25, 1905, 12 S.L.T. 747.

LORD M'LAREN—This matter is of small value as the sum involved is only £10, 0s. 3d. The objection is to the disallowance of a charge for copies of certain documents as material for the preparation of defences. It must be remembered that counsel in preparing defences have a duty to the Court only to state such as are necessary, and in doing so they must exercise discrimination. Consequently full information as to the facts of the case and the views of the parties should be submitted to them. It is settled practice that the cost of preparing a memorial to counsel to enable them to draw defences is a proper charge. Following that analogy, if instead of drawing a memorial an agent sends the original documents, leaving counsel to find the material facts for himself, or if he sends copies of them, and the cost of the copies does not exceed what might legitimately be charged for preparing a memorial, I think the cost of the copies sent should be allowed as coming in place of a memorial. As to the charge for copies of the precognitions, it may have been necessary to send such to enable counsel to exercise his discretion as to the advisability of drawing a special defence such as suicide. On the whole matter it seems to me that £10 is not an excessive sum for the preliminary information that is to be laid before counsel in preparing for a case of this nature. Even if it were slightly in excess of the possible cost of a memorial, as to which we are not in a position to make an exact estimate, I should not be inclined to cut down the charge. I am therefore for sustaining the objections.

LORD PEARSON and LORD JOHNSTON concurred.

The LORD PRESIDENT and LORD KINNEAR were absent.

The Court sustained the defenders' objections to the Auditor's report and allowed them the expenses of the discussion modified to two guineas.

Counsel for the Pursuers and Reclaimers—W. J. Robertson. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Respondents—Hon. W. Watson. Agents—Gill & Pringle, W.S.

Tuesday, October 23.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

SINCLAIR *v.* THE LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant—Process—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. II,* 8, *and* 14 (*c*)—*A. S. 3rd June* 1898, *sec.* 7 (*a*)—*Application to Sheriff for Warrant to Register Memorandum of Agreement—Sheriff Acting as Arbitrator or not—Appeal by Stated Case—Competency.*

A Sheriff-Substitute in granting or refusing a special warrant for the registration of a memorandum of an alleged agreement as to the payment of compensation under the Workmen's Compensation Act 1897, is not acting as arbitrator, and consequently an appeal from his decision by way of stated case under the Act is incompetent.

Binning v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312, and *Cochrane* v. *Traill & Sons*, November 1, 1900, 3 F. 27, 38 S.L.R. 18, *commented on* and *followed.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. 3, provides—"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 II, sec. 8, as made applicable to Scotland by section 14(*a*), provides—"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 [Act of Sederunt] by the said committee or arbitrator or by any party