and deliver to the pursuers the gas producers, gas engines, and others set forth; and that on this being found and declared the defenders Stewart & Company ought to pay the sums mentioned, and the defenders the Beardmores should be decerned to make payment of the sum of £115,134, 6s. 8d., being the sum in the bond. The Lord Ordinary has sisted the action as against the Beardmores, and upon the dependence of the action the pursuers executed an arrestment. There is before your Lordships also a petition for the recal of the arrestments.

I am bound to say I think there is no warrant whatsoever for calling the Beardmores in the principal action along with the defenders Stewart & Company, and concluding *de plano* against them for that sum. They only become liable after the pursuers have failed to recover from the principals the full amount of damage occasioned to them by the non-implement of the contract. The pursuers have got first of all to prove that there has been a breach of contract, and even then, if they recover the full damages from Stewart & Company, they have no need to go against the Beardmores, who are only guarantors. I think the proper interlocutor here is not to sist the action so far as these parties are concerned, but to dismiss it. I think it follows they are entitled to the recal of the arrestments.

I think the defenders ought to get the expenses of the reclaiming-note. If we are wrong on the merits the House of Lords can put us right. But if, on the other hand, our view of the case is right, then of course the defenders have had a substantial success, because the attitude of the pursuers was that there ought to be a proof, which they have not got. As regards the Beardmores, I think they ought to get expenses of lodging their defences and a watching fee for one counsel.

LORD M'LAREN—I am of the same opinion. It is, of course, quite possible that a person who is really a surety may be willing to be bound as principal. We are familiar in banking transactions with such cases, because the banks make it a part of their general policy that both principals and sureties shall be bound to them in the character of principals. But it is perfectly clear on the face of these documents that Messrs Beardmore never undertook the obligations of a principal. They are only responsible in case of the failure of Stewart & Company to execute their contract. It follows, in my judgment, that until that failure is established by a competent process in a court of law or court of arbitration no claim arises against the surety; and the action being premature must, I think, be dismissed together with the arrestments which have been used upon it.

LORD KINNEAR—I concur.

LORD PEARSON—I also concur.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Mackenzie, dated 30th January 1909, along with the closed record as amended and the petition for recal of arrestments, and having heard counsel for the parties, Recal said interlocutor: Of new sustain the third plea-in-law for the defenders and dismiss the action in so far as laid against Mrs Beardmore: Further, dismiss the action as against William Beardmore, and recal the arrestments used against him in terms of the prayer of said petition, and decern: Repel the first and second pleas-in-law for the defenders: Find that it is necessary for the proper disposal of the action that it be ascertained whether under the law of England the clauses of arbitration founded on by the defenders cover the dispute between the parties: Therefore direct the parties to prepare a case setting forth the facts relevant to the ascertainment of said question of law for submission to the superior Courts in England under and in terms of the British Law Ascertainment Act 1859, . . . . and grant leave to the pursuers to appeal to the House of Lords."

Counsel for Pursuers (Reclaimers)—Clyde, K.C.—Morison, K.C.—Mitchell. Agents—P. Morison & Son, S.S.C.

Counsel for Defenders—(Respondents)—Macmillan—Hon. W. Watson. Agents—Davidson & Syme, W.S.

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*Friday, March* 19.

## FIRST DIVISION.

[Lord Guthrie, Ordinary.
[Lord Mackenzie, Ordinary.

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

## FINNIE & SON *v.* FULTON.

*Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (3), *First Schedule* (12), *and Second Schedule* (8) *and* (14) (*b*)—*Competency of a Suspension of a Charge in so far as Relating to* (a) *the Period Prior to the Date of the Granting of the Warrant to Record a Memorandum of Agreement;* (b) *the Period Subsequent thereto—Relevancy of Averment of Acquiescence in Discontinuance of Compensation.*

Apart from such special cases as that of a workman admitting actual payment of compensation or the receipt of full wages from the same employer, the Court will not suspend a charge, proceeding upon a recorded memorandum of agreement, so far as relating to the period subsequent to the date of the granting of the warrant to record the memorandum; while, so far as relating to the period prior to the granting of the warrant, it will not suspend *simpliciter*, but as regards that period will allow a

proof if the complainer relevantly avers that the respondent has acquiesced in either the variation or the discontinuance of compensation, and if the averment is proved, will suspend.

*Opinion reserved* by Lord President as to whether there could be "review," in the sense of Schedule I, section 12, of an unrecorded agreement. The opinions of Lord Adam and Lord M'Laren in *Jamieson* v. *The Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704, *commented on*, and contrasted with the decision in *Dunlop* v. *Rankin & Blackmore*, November 27, 1901, 4 F. 203, 39 S.L.R. 146.

*Expressions of dissent* by the Lord President and Lord Salvesen from the rule laid down in *Steel* v. *Oakbank Oil Company, Limited*, December 16, 1902, 5 F. 244, 40 S.L.R. 205, and *Pumpherston Oil Company Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, and of approval of that in *Morton & Company, Limited* v. *Woodward*, [1902] 2 K.B. 276, as to the date from which payment of compensation "may be ended, diminished, or increased."

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) enacts—Section 1 (3)—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . . 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, section 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, . . . and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

Schedule II, section 8 (as made applicable to Scotland by section 14 (*a*))—"Where the amount of compensatien 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], . . . to the [Sheriff Clerk] for the district in which any person entitled to such compensation resides, who shall, subject to such [Act of Sederunt], 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 [Sheriff Court] judgment: Provided that the [Sheriff] may at any time rectify such register."

Section 14—"In the application of this Schedule to Scotland . . . (*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."

Two cases, actions of suspension of a charge proceeding upon a registered memorandum of agreement under the Workmen's Compensation Act 1897, were advised together.

I. *The Lochgelly Iron and Coal Company, Limited* v. *Sinclair.*—The Lochgelly Iron and Coal Company, Limited, Glasgow, brought a note of suspension of a charge, dated 5th February 1907, at the instance of Daniel Sinclair, miner, Dunfermline, against them. The charge, which was made by virtue of an extract registered memorandum of agreement under the Workmen's Compensation Act 1897, and warrant thereon by the Sheriff of the County of Lanark, dated at Glasgow 20th December 1906, was "to make payment of the sum of £87, 18s. 9d. sterling, being 105 weeks' compensation ending 30th January 1907 at the rate of 16s. 9d. per week, agreed to be paid by you . . ."

Execution having been sisted upon consignation and the note passed, a record was made up.

The following *narrative* of the *circumstances* in which the suspension was brought, as set forth in the averments of the complainers, is taken from the opinion of the Lord President:—"The respondent, a workman in the employment of the complainers' company, was injured by an accident in the course of his employment on 12th October 1904. The complainers agreed to pay him, and did pay him, 16s. 9d. per week as compensation. No written agreement was entered into, and no memorandum of the verbal agreement was recorded at the time or soon after. The complainers continued payment to the respondent down to 25th January 1905, when they ceased payment, the respondent having, according to their allegation, completely recovered. The respondent left the mine of the complainers at the time of the accident and has never returned to them. On the compensation ceasing to be paid as agreed, the respondent took no steps to record a memorandum of agreement, but on 27th April 1905 he raised an action against the complainers in the Court of Session concluding for damages at common law. The complainers defended upon the ground that the action was excluded by the fact that the respondent had elected to take and had taken compensation under the Act. A proof was led, and on 8th July 1905 the complainers got decree of absolvitor. Nothing more was done till March 1906, when the respondent applied to the Sheriff-Clerk at Dunfermline for a special warrant to record a memorandum of the agreement, and on 18th May 1906 the Sheriff-Substitute granted warrant to record said memorandum. After a further delay the respondent eventually recorded said memorandum in the register at Dunfermline on 20th November, and in the Sheriff Court Books of the County of Lanark (the county in which the complainers have their registered office) on 20th December 1906. Upon 5th February 1907 he charged the complainers to pay, under the said memo-

randum, 105 weeks' compensation, *i.e.*, from 25th January 1905 up to 31st January 1907."

The complainers pleaded, *inter alia*—"(3) The charger's incapacity having ceased at 25th January 1905 he is not entitled to charge for any compensation under the Workmen's Compensation Act after that date. (4) *Separatim*, the charger is not entitled to charge under said recorded memorandum of agreement for any sum of compensation prior to the date of recording said agreement."

The respondent pleaded, *inter alia*—"(1) The complainers' averments are irrelevant and insufficient to support the prayer of the note. (2) The complainers' averments if and in so far as material being unfounded in fact the prayer of the note should be refused."

On 15th November 1907 the Lord Ordinary (GUTHRIE) pronounced this interlocutor—"Finds that the respondent was not entitled to charge the complainers to make payment to him of any weekly payments as compensation in terms of the statutory agreement entered into between them, for any period prior to 18th May 1906; to that extent sustains the reasons of suspension and suspends the charge accordingly: *Quoad ultra* repels said reasons; recals the sist of execution formerly granted, and decerns; and finds no expenses due to or by either party."

*Opinion.*—"In connection with an accident on 12th October 1904 the respondent was paid compensation for total incapacity by the complainers, in accordance with an unrecorded agreement entered into between them under the Workmen's Compensation Act 1897. Warrant to record the agreement was granted on 18th May 1906. No application for review has been made by the complainers under section 12 of the First Schedule of the Act of 1897.

"The complainers have been charged by the respondent to pay £87, 18s. 9d., being one hundred and five weeks' compensation from 25th January 1905, the last date of payment, to 30th January 1907. The respondent was not in the complainers' service after the accident.

"The complainers maintain that they are not liable in payment of any part of the sum charged for, or otherwise that there can be no claim against them for the period prior to 18th May 1906, the date of the Sheriff-Substitute's warrant to record the agreement. The respondent's case is that even if wholly or partially recovered after 25th January 1905, the complainers remained, and remain, liable under the statutory agreement for the weekly payments, until review, under section 12 of the First Statutory Schedule. Or otherwise he maintains that he acquired a right from the date of the warrant to record, which endures till statutory review.

"In my opinion the respondent's alternative contention is well founded.

"By section 8 of the Second Schedule of the 1897 Act provision is made for recording a memorandum of agreement. The section proceeds--'thereupon the said memorandum shall, for all purposes, be enforceable as a Sheriff-Court judgment.' I see no warrant for holding that a charge can be given on an agreement prior to the date of the warrant to record—*Steel* v. *Oakbank Oil Company*, 5 F. 244; *Cavaney* v. *Pumpherston Oil Company*, 5 F. 963; *Nimmo* v. *Fisher*, 1907 S.C. 890.

"After recording, or warrant to record, it appears to me that the right to payment continues till review under section 12 of the First Schedule, except in three cases—(*first*) where the same employer has actually paid a sum equal to the amount of the weekly payment, whether that payment be made in name of statutory compensation or as wages. If paid as wages it will be held, so far as it goes, to include the statutory compensation—*Beath & Keay* v. *Ness*, 6 F. 168; (*second*) where it is proved that there was an agreement, express or implied, between the employers and the workman that the weekly payments should cease; or (*third*) where it is proved that the workman admitted that the incapacity has wholly ceased.

"In any case, no payment of any kind was made by the complainers to the respondent subsequent to 25th January 1905, and I do not find any averment of agreement, express or implied, between the complainers and respondent that the weekly payments should cease, or any relevant averment of admission that the incapacity had wholly ceased. The authorities do not seem to me to establish the proposition, which I cannot find in the statute, that an employer's liability would terminate on proof that if the workman had chosen he might have earned the same wages as before the accident, or even on proof that in point of fact he did earn such wages from other employers, unless in the latter case it might be held that such conduct on the part of the workman involved what Lord Stormonth Darling called a 'practical admission' by the workman that his incapacity had totally ceased. [See *Nimmo & Company, Limited* v. *Fisher*, 1907 S.C. p. 890.]"

The complainers reclaimed, and the respondent took advantage of their note to reclaim also.

Argued for the complainers (reclaimers)—The agreement was in respect of total incapacity. Not only had total incapacity ceased by 25th January 1905, but the respondent had totally recovered by that date. On the cessation of total incapacity the agreement terminated. Where there was a genuine dispute as to an agreement either ever having existed or being now subsisting, the Court to avoid injustice would give an opportunity of review by a common law process—*Colville & Sons, Limited* v. *Tigue*, December 6, 1905, 8 F. 179, 43 S.L.R. 129; *Blake* v. *Midland Railway Company*, [1904] 1 K.B. 503; *Hughes* v. *Thistle Chemical Company*, 1907 S.C. 607, 44 S.L.R. 476; *Dempster* v. *William Baird & Company, Limited*, 1908 S.C. 722, 45 S.L.R. 432. A suspension was a competent and appropriate method of review, and had been allowed in *Beath & Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R.

113, and *James Nimmo & Company, Limited* v. *Fisher*, 1907 S.C. 890, 44 S.L.R. 631. An application to end the weekly payments would not give them relief, as it would only operate from the date of the finding, although it was true that the contrary had been held in England in *Morton & Company* v. *Woodward*, [1902] 2 K.B. 276. The mere fact that formal steps were not taken by an employer to get rid of an agreement, did not necessarily imply that the agreement still subsisted—*Colville & Sons, Limited* v. *Tigue, Dempster* v. *William Baird & Company, Limited* (*cit. sup.*)

Argued for the respondent—(1) The Lord Ordinary was right in refusing suspension in respect of the period subsequent to 18th May. The memorandum of agreement registered did not specify total incapacity, and was not necessarily in respect of total incapacity—Under Schedule (1) (*b*) a workman might be entitled to fifty per cent. of his average weekly earnings even for partial incapacity. A workman was entitled under an agreement to compensation until the machinery of the Act ended or altered the compensation—*Steel* v. *Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumpherston Oil Company* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724. A suspension was only competent in exceptional circumstances as the receipt of full wages from the same employer, as in *Beath & Keay* v. *Ness* and *Fisher* v. *Nimmo* (*cit. sup.*) It was incompetent in a suspension to inquire into the capacity of a workman — *Fife Coal Company, Limited* v. *Lindsay*, 1908 S.C. 431, 45 S.L.R. 317. [The Lord President referred to *Fife Coal Company, Limited* v. *Davidson*, 1907, S.C. 90, 44 S.L.R. 108.] (2) The Lord Ordinary was wrong in granting suspension in respect of the period prior to 18th May 1906. "Thereupon" in section 8 of the second schedule did not mean "as regards payments subsequently becoming due," which was the sense in which the Lord Ordinary had interpreted it, but merely "on this being done." The section drew no distinction between sums due prior to the date of recording and sums subsequently due, and no distinction could properly be drawn—*Finnie & Son* v. *Fulton* (opinion of Lord Mackenzie in Outer House), the report of which immediately follows. Reference was also made to *Mackay* v. *Rosie*, 1908 S.C. 174, 45 S.L.R. 178.

II. *Finnie & Son* v. *Fulton*.—The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 28th May 1908 refused suspension.

*Opinion*—"This is a suspension of a charge to pay compensation under a Memorandum of Agreement under the Workmen's Compensation Act 1897.

"The material dates are as follows:—The accident happened on 23rd March 1906 and totally incapacitated the respondent for work. The complainers agreed to pay him during his total incapacity a sum of 9s. per week. They paid this sum down to 21st June 1907. Having obtained a doctor's report the complainers on 28th June 1907 refused to pay further compensation on the ground that the respondent was fit for work. On 26th July 1907 intimation was made to the complainers that respondent proposed to record a memorandum of the original agreement of March 1906. On 20th August 1907 the memorandum was recorded in the special register. The memorandum was recorded in the Sheriff Court Books for execution on 18th October 1907. On 27th November 1907 the complainers were charged to make payment.

"The charge sought to be suspended was to make payment of the sum of £9, 18s., being twenty-two weeks' compensation from 28th June to 22nd November 1907 at the rate of 9s. a-week.

"The complainers' case is that the respondent's total incapacity ceased not later than 28th June 1907; that the basis of the agreement was the total incapacity of the respondent; that when this ceased the agreement expired and that the respondent could not two months after its expiry record it in the special register. They therefore want a proof in this Court to determine the question of fact, viz., whether the respondent's total incapacity has ceased, and if so, at what date. This appears to me to be contrary to the provisions of the Act and also to what was decided in this Court in the case of the *Fife Coal Company* v. *Lindsay*, 1908 S.C. 431 The Act provides, sec. 1 (3), that 'if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, 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.' The Act provides that all questions as to a workman's capacity or incapacity can be determined in the summary method provided by the statute. The Court accordingly in *Lindsay's* case held that it was not open to the employer to resort to procedure by way of suspension. The complainers here sought to distinguish the present from *Lindsay's* case because they say that the respondent was certiorated by the fact of his complete recovery before the memorandum of agreement was recorded, and that in *Lindsay's* case the memorandum was put on record before the workman was certiorated of this fact. In putting their point in this way, however, the complainers appear to me to assume in their favour the fact which they ask a proof to enable them to establish. This in my opinion they cannot do. Various considerations were urged on behalf of the complainers as reasons why the present proceedings should be allowed to go on, and, amongst others, as is not unusual in these cases, the injustice that would be worked in consequence of the decisions in *Steel*, 5 F. 244, and *Cavaney*, 5 F. 963. Even if it were the case that the complainers are obliged to pay to the respondent more than the amount which if everything had been done in terms of the statute he would have been entitled to

demand, that is just what happened in *Lindsay's* case. As Lord Low there pointed out, the Court was powerless to prevent the result because the question is not one of common law or of equity but of statutory enactments. Reference was made to a recent decision of the First Division in the *South Hook Fire Clay Company* case, and I have been furnished with a copy of the opinions delivered. That case, however, only decided that in a case where no memorandum of agreement was ever recorded the arbitrator was not right in holding that he could only terminate the compensation as from the date of his interlocutor. It is not an authority for the complainers' argument that it is this Court and not the arbitrator that should review the compensation. Nor do I think that such cases as *Beath & Keay* v. *Ness*, 6 F. 168, and *Nimmo & Company* v. *Fisher*, 1907 S.C. 890, are sufficient to support the complainers' contention.

"I may say that I am unable in a suspension of a charge to draw a distinction between the sums due for the period prior to the date of the warrant for recording the memorandum of agreement and those for the period subsequent thereto. The agreement which was recorded was one by which the employers agreed to pay the workman compensation at the rate of 9s. a week in respect of bodily injury caused to him by an accident which happened on the 23rd day of March 1906. They were therefore bound to pay that sum as from that date. The memorandum of agreement was not recorded until 20th August 1907 in the special register, nor was it recorded in the Sheriff Court Books for execution till 18th October 1907. When, however, it was recorded it appears to me to be a warrant for recovering the sums unpaid prior to the date of recording as well as the sums falling due subsequent thereto.

"I am accordingly of opinion that the suspension is incompetent and that the note should be refused with expenses."

The complainers reclaimed, and argued—(1) *As regards the sums alleged to be due subsequent to the date of recording the memorandum.*—The agreement had expired before it was put on record owing to change of circumstances, and the charge therefore fell. The agreement was to pay during total incapacity, and that had ceased. If there was no subsisting agreement at the date of recording, suspension was competent at common law—*Hughes* v. *Thistle Chemical Company*, 1907 S.C. 607, 44 S.L.R. 476; *Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312. The complainers were entitled to prove that the respondent's incapacity had ceased, and the mere fact that an agreement had been recorded would not exclude inquiry—*Blake* v. *Midland Railway Company* [1904], 1 K.B. 503; *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 784, 41 S.L.R. 609. The ordinary common law remedies had only been excluded in so far as the Act had substituted a statutory procedure. There were four stages of that procedure, viz. (*a*) arbitration, (*b*) recording, (*c*) revision, and (*d*) determination of the compensation. If the statutory procedure failed to do substantial justice at any of these stages the ordinary common law remedies were available. The present case was one not provided for by the Act, and the complainers therefore were entitled to the ordinary common law remedy of suspension. The case of the *Fife Coal Company, Limited* v. *Lindsay*, 1908 S.C. 431, 45 S.L.R. 317, relied on by the respondent, was distinguishable, for the respondent here had been certiorated of the fact of his recovery before he recorded the memorandum. Reference was also made to *Johnston* v. *Mew, Langton & Company*, June 11 1907, 23 T.L.R. 607. (2) *As to sums alleged to be due prior to the date of recording*—This question was not dealt with in *Lindsay's* case, and the complainers were therefore entitled to suspend at common law. To hold otherwise would operate injustice which the Act could not have intended. A workman was bound to register his agreement at once, and so long as he refrained from recording it he must be presumed to be satisfied. Sums prior to the date of recording could not be recovered, for an arbiter had no power to decern for arrears due under an agreement—*Colville & Sons, Limited* v. *Tigue*, December 6 1905, 8 F. 179, 43 S.L.R. 129.

Argued for the respondent—The Lord Ordinary was right. The case was governed by that of *Lindsay* (*cit.*), which decided that an employer could not stop payment at his own hand and then prove that the workman had recovered. There was no relevant averment for suspension here as there was in *William Baird & Company, Limited* v. *M'Whinnie*, 1908 S.C. 440, 45 S.L.R. 338. The agreement was still binding, for no proper steps had been taken to set it aside, and having been recorded it operated as a Sheriff Court decree enforceable in like manner—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Second Schedule, secs. 8 and 14 (*b*). The complainers had a special remedy under the statute, and could not avail themselves of the ordinary common law remedies—Workmen's Compensation Act 1897, sec. 1 (3), and First Schedule, sec. 12. That being so, the present suspension was incompetent and should be refused—*Cochrane* v. *Traill & Sons*, March 16, 1900, 2 F. 794, 37S. L.R. 662.

At advising—

LORD PRESIDENT—*Lochgelly Iron and Coal Company, Limited* v. *Sinclair*—[*After the narrative quoted above, his Lordship proceeded*]—Upon this state of facts the Lord Ordinary, Lord Guthrie, has suspended the charge *simpliciter* so far as the period from 25th January 1905 to 18th May 1906 (the date of the warrant to record the memorandum) is concerned; *quoad ultra* he has found the letters orderly proceeded. He has come to this result upon these two general propositions—First, that no recorded memorandum of agreement can warrant a charge for any

sums prior to the date of the warrant for recording; second, that once warrant is granted no suspension is competent, the remedy of the employer being to get rid of the recorded agreement by an application to the Sheriff as arbiter to vary the compensation or hold it as ended in terms of sections 1 and 2 of first schedule.

On the other hand, if the judgment of Lord Mackenzie (Lord Ordinary) in the case of *Finnie*, which follows this case, is correct, there would be no alternative but to find the letters orderly proceeded for the whole period. His Lordship says in that case—"I am unable to draw a distinction between the sum due for the period prior to the date of the warrant for recording the memorandum of agreement and those for the period subsequent thereto." It is obvious that the case thus raises a point of great general importance, and I have given the matter my most careful consideration from the point of view of the general working of the Act.

I think it advisable that I should first consider precisely the steps of procedure contemplated by the Act, and indicate thereafter the points which have been clearly settled by decision. This seems the more necessary as most of the points have arisen under the Act of 1897, under which no appeal to the House of Lords was competent. These decisions, though binding on me, are not binding on the Higher Court. But the actual case before us, though under the older Act, yet being a suspension at common law, is appealable; and further, the rule we lay down in this case will regulate cases under the Act of 1906, under which appeal to the House of Lords is competent.

It is clear that one of the studied objects of the framers of the Workmen's Compensation Act was to avoid litigation as far as possible. Accordingly, section 1 (3), which provides for the settlement of questions as to liability for compensation, only makes arrangement for arbitration "if not settled by agreement." In other words, agreement is, if possible, favoured by the Act. And in practice it is well known that hundreds of cases are settled by agreement and do not come to arbitration at all. If there is not agreement, then there is arbitration, which results, if favourable to the workman, in a finding of the compensation due. It was, however, necessary to provide some means of execution short of raising an ordinary action which the Act, as I have said, sought to avoid. Accordingly, in the 2nd schedule, section 8, provision is made for the registration of a memorandum. In this matter the amount of compensation determined is equally dealt with whether its original ascertainment depended on agreement or on decision by a committee or on arbitration. Now section 8 is framed with a view to English procedure, and provides that the memorandum when registered by the registrar of the County Court should be enforceable as a County Court judgment.

Now I have very great doubts as to whether the framers of this clause ever contemplated that agreements, of which memoranda should be registered, should ever be anything except agreements in writing signed or otherwise authenticated by the parties thereto or their accredited agents. The use of the word genuineness in the section points all this way; and further, the permitting of the registration of a verbal agreement by a memorandum, necessarily composed *ex parte*, opens the door to exactly what the Act wanted to avoid, namely, litigation. For if one party, namely, the workman, arrives with a memorandum which the other, the employer, says sets forth an agreement which he never made, there must then be an inquiry as to which is right. This in England has been held to be an inquiry at law; from the decision of the County Court judge there is an appeal to the Divisional Court; then to the Court of Appeal; and then, if you like, to the House of Lords; whereas all this litigation might be rendered impossible, without any prejudice to the workman, by holding that if there was a signed agreement then it would be registered, but that if not and parties were not at one, then there would be no registration, but the workman must proceed at once to arbitration, under which, be it observed, he would be entitled to get a finding for compensation as from the date of the accident, a memorandum of which finding would then be registered.

That this was the view of the framer of the Scottish application clause is quite clear, had it not been defeated by a curious Parliamentary accident, which if I were using it for interpretation I should have no right to mention, but which, as for reasons presently to be given I am not using it, may be interesting to mention. The Scottish application clause is section 14, and says, after substituting Sheriff Court for County Court and sheriff clerk for registrar—"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."

Now had this section stood alone there could have been no doubt. Your Lordships will observe there is no mention of memorandum; it is an agreement which is to be recorded, and that would only be a written agreement. Standing, therefore, by itself that section would have carried out for Scotland the intention of the framers of the Act. And originally it did stand alone. For section 15 provides that sections 4 and 7 of the Schedule shall not apply to Scotland, and the section I have quoted as section 8 was section 7 as the Bill left the Commons. But in the Lords at the last moment a new section was interpolated dealing with another matter and was numbered 7. This made the old section 7 into section 8, and it was never noticed that section 15 needed a corresponding alteration.

Now this long explanation leads to this. Not long after the Act passed the question was raised as to whether a memorandum

of a verbal agreement could be recorded. The judges in considering this had to consider section 8 as a living section, and as over and above section 14 (*b*). They knew nothing of the history which I have related, and if they had it is even then doubtful whether they would have been entitled to consider it. And accordingly in the case of *Cochran* v. *Traill* (2 F. 794) an opinion was expressed, and in *Traill* v. *Cochran* (3 F. 1091) it was actually decided, that a memorandum of a verbal agreement could be registered. These cases have ruled the practice ever since. And further, the English interpretation of section 8 having gone the same way, the new Act of 1906 is so expressed as to leave no reasonable doubt that memoranda of verbal agreements, though made *ex parte* and contradicted as to veracity, may be registered. The original objections as to the policy of such a course remain untouched, but such is the law, and I must take it as I find it.

The next vital point decided was that such a memorandum could be registered at any time, *i.e.*, no matter how long after the accident, and incidentally that it was an irrelevant objection to registration that the workman had long ago completely recovered (*Cammick* v. *Glasgow Iron and Steel Company*, 4 F. 198; *Dunlop* v. *Renton*, 4 F. 203; and *Baird* v. *Stevenson*, 1907 S.C. 1259).

And lastly, it was decided that a finding in an arbitration varying or putting an end to weekly payments operated only as from the date of the finding pronounced, and not as from the date of application (*Steel* v. *Oakbank Oil Company*, 5 F. 244; and *Pumpherston Oil Company* v. *Cavaney*, 5 F. 963); though here there were two dissentient judges, and the English Court of Appeal have decided the other way (*Johnston & Company* v. *Woodward*, [1902], 2 K.B. 276).

Now as regards the period after the warrant to record the memorandum, I do not think there ought to be any difficulty. However long a workman holds back, the employer knows that the moment the agreement is recorded, he is liable to be charged under it, and I see no hardship in holding that he must be held as content with the situation unless he proceeds to put an end to it in the way provided for by the statute—namely, by an application to the Sheriff as arbiter to vary or put an end to the compensation agreed on. To allow a suspension in such a case would, I think, be to defeat the obvious purpose of the statute. It was so held by the other Division in the case of *Fife Coal Company* v. *Lindsay* (1908 S.C. 431). I respectfully agree with that decision. The only element of hardship consists in the fact that as the decisions of *Steel* and *Pumpherston* stand the employer might have to pay for the period which elapsed before the finding in the arbitration. But inasmuch, as I have already mentioned, as there are two dissentients in the decisions, and there is a decision of the English Court of Appeal the other way, and as my own view at present and that of at least one of your Lordships is with the dissentient judges, that decision, if it is not settled by the House of Lords, will have on the most suitable occasion to be reconsidered by a Court of Seven Judges.

As regards the period anterior to the warrant to record, the argument stands otherwise, and I am not able to agree with either Lord Ordinary. It does not indeed seem to have been argued to them that there was any course open except a suspension *simpliciter* on the one hand, and to find the letters orderly proceeded on the other. To either of these courses there seem to me insuperable objections. If the first were taken, *i.e.*, if it were laid down that no recorded memorandum could authorise a charge for compensation for a period before the date of the warrant to record, then in every case the employer might defeat the workman's right to compensation from the beginning of the period after the accident until he had time to get his agreement recorded. And indeed, so far as I see, the same result would follow even when the award was made under an arbitration, which in some cases might cut out several weeks, and is obviously not intended by the Act. If, however, the letters must be held orderly proceeded (with a few exceptions such as, *e.g.*, actual payment, or the receipt of full wages by the same employer, and other special cases such as *Nimmo*, 1907 S.C. 890), then still graver consequences arise. For then it is possible for a workman to lull his employer into security by acquiescing in the payment of modified compensation or in the stopping of compensation altogether; he may go away and earn full wages with another employer, and then after, say, ten years he may suddenly register his memorandum and charge for the whole period. I will assume that there can be shown to be no question of the "genuineness" of the memorandum as registered, *i.e.*, it truly represents the agreement made shortly after the accident to pay compensation at a certain rate while incapacity continued. And to this the employer would have no relevant defence. There would be an obvious and glaring injustice, and I have no hesitation in saying that I agree with Lord Salvesen, whose opinion in this case I have had the advantage of perusing, in saying that if we so found we should open the door to floods of unjust claims.

It was argued that it was the employer's business in all cases when he paid compensation, and when he ascertained the workman had wholly or partially recovered, to make an application for review under section 12 of the 1st schedule. I have grave doubts as to whether there can be "review" in the sense of section 12 of an unrecorded agreement. I am aware that an opinion in favour of the competency was pronounced by Lord Adam and concurred in by Lord M'Laren in *Jamieson* v. *Fife Coal Company* (5 F. 958). But that case is, I think, hopelessly at variance with the case of *Dunlop* v. *Rankin* (4 F. 203), and I should wish to reserve my opinion on this point, and as

to which case was right. I will assume the competency, and will then only say that I do not think we could pronounce a more unfortunate decision than to give effect to the argument I have just quoted. For it would come to this, that in every case there must be an application to the Sheriff; for otherwise, the employer once paying compensation could never be in safety unless he got the compensation formally varied or put an end to. Such has not been the practice. Hundreds of cases have been settled by the employer voluntarily, *i.e.*, under agreement paying the workman compensation during disablement, and then simply stopping it when the man recovered. Every one of these cases in the present might be reopened; and for the future there would be no case without formal procedure.

For these reasons I am against the view of both Lords Ordinary. But there remains another way which does not seem to have been argued before them, and which seems to me the true solution of the question. It is not to find the letters orderly proceeded, and not to suspend *simpliciter*, but to allow a proof where the complainer avers that the respondent has acquiesced in either the variation or the discontinuance of compensation, and if that averment is proved to suspend. The averments in the present case are a good instance of such an averment, and illustrate well the injustice of all inquiry being shut out. I am, of course, *hoc statu*, entitled to assume that the averments are true. The workman after the accident obtained compensation. It was compensation voluntarily paid by the employers for a certain period. He recovered, and they stopped the compensation. His next step is to raise an action at common law, a step absolutely inconsistent on his part with the idea of there being a subsisting agreement to pay compensation. On that action being dismissed he again does nothing for many months, and then, suddenly changing his attitude, he registers a memorandum, and upon registration charges the employers to make payment for a period of over two years under an agreement which he now for the first time alleges to exist. All this, however, is upon the assumption that the complainer's statements are true. They are not admitted by the respondent, and some are denied categorically. It would therefore, I think, be just as unjust to the respondent to suspend *simpliciter* without ascertainment of facts, just because the sum charged for is for a period anterior to the warrant to recover the memorandum.

I am therefore of opinion that we should sustain the Lord Ordinary's interlocutor so far as it repels the reasons of suspension, *i.e.*, for the period subsequent to 18th May 1906; and that as regards the rest we should recal the interlocutor and remit to him to allow the complainers a proof of their averments and to the respondent a conjunct probation, and thereafter to dispose of the case as accords.

II. *Finnie & Son* v. *Fulton*—In this case it only remains for me to apply the principles I have just expressed in the *Lochgelly* case. I do not find here any relevant averments for suspension of the charge. The facts are that the complainers agreed to pay, and did pay, compensation at a certain rate from 23rd March 1906, the date of the accident, down to 21st June 1907. At the end of the next week, having obtained a doctor's report, they refused to pay any more. On 26th July the respondent intimated he would thereupon record his agreement, and this was done upon 20th August. In this it seems to me there was no undue delay, and far less any such proceeding as to lead the complainers to suppose that the respondent acquiesced in the ceasing of the payment of compensation. The complainers ought to have met the proposal to register with a counter application to be heard at the same time to have the compensation varied or ended.

So far as argument was based on the speciality of the particular wording of the agreement I agree with the view of the Lord Ordinary and have nothing to add to what he says. On the general result I think his interlocutor is right and must be affirmed, though, as explained, I reach this result on different grounds from his Lordship.

LORD KINNEAR—I agree with your Lordship's opinion both as to the general exposition of the law and as to the special application of it to the cases before us.

LORD SALVESEN—*Lochgelly Iron and Coal Company* v. *Sinclair*—On 12th October 1904 the respondent, while in the employment of the complainers, met with a serious accident by which for the time being he was incapacitated for work. The complainers admitted liability under the Workmen's Compensation Act 1897, and paid him compensation at the rate of 16s. 9d. per week, being one-half of his average weekly wages prior to the accident. The payments continued till 25th January 1905, when the complainers aver that the total incapacity ceased, although this is denied by the respondent. Acting on their own view of the matter the complainers stopped further payments.

The respondent thereupon raised an action at common law in the Court of Session for damages in respect of his injuries. The summons was signeted on 25th April 1905, and after proof had been led the Lord Ordinary found that the action was excluded by the respondent having elected to take, and having taken, compensation under the Workmen's Compensation Act. This judgment was acquiesced in. It implied an agreement between the complainers and the respondent that the respondent was to receive compensation from them under the Workmen's Compensation Act.

On 17th February 1906 the respondent lodged a memorandum of the agreement between him and the complainers, and presented it for registration in the Sheriff Court Books of Lanarkshire. The complainers objected to the memorandum being recorded, but after sundry proceedings the

Sheriff-Substitute on 18th May 1906 pronounced an interlocutor granting warrant to record the memorandum. The Sheriff-Substitute refused to state the case, and the complainers thereafter lodged a note to the First Division praying for an order on the respondent to show cause why a case should not be stated. This note was refused on 23rd October 1906. The complainers allege that in his answers to this note the respondent admitted that his total incapacity ceased in April 1905, but they aver, and offer to prove, that the respondent had in fact wholly recovered from the effects of the accident on 25th January 1905, at least to the effect of enabling him to earn the same wages as he earned before the accident. This latter statement is denied; but *quoad ultra* the respondent refers to the proceedings before the First Division, from which it may be inferred that the statement as to what his answers contained is not really controverted. The respondent has now charged the complainers on an extract of the memorandum of agreement to make payment to him of 16s. 9d. per week as from 25th January 1905 to 30th January 1907. This charge is based upon the view that the liability to pay compensation under the Workmen's Compensation Act once established by agreement continues until on an application to the Sheriff the liability has been altered or ended in the manner prescribed by section 12 of the first schedule, and the Lord Ordinary has sustained this view, so far as relates to the proportion of the sum charged for applicable to the period subsequent to 18th May 1906; *quoad ultra* he has suspended the charge. Both parties reclaimed, the complainers maintaining that they are under no liability to pay any part of the sums charged for, the respondent seeking to have the note of suspension refused *in toto*.

The question is one the general importance of which can scarcely be exaggerated. The argument for the respondent assumes that if a workman has been injured in the course of his employment and has been in receipt of compensation under the Workmen's Compensation Act for any period however short and has then entirely recovered, the employer will nevertheless be liable to continue to pay him weekly the maximum compensation whenever the workman chooses at whatever distance of time to record a memorandum of agreement under which he originally received it. In other words, although the intention of the Act was that the workman should be paid only during incapacity, according to this view the workman would be entitled to receive compensation after incapacity had entirely ceased until it was judicially declared to be ended. The Act has been in operation for eleven years, during which no decision involving this proposition has been pronounced; but it would be a mistake to assume that the fact that a new Act has now come into operation makes the question one of small practical importance. On the contrary, it may be safely affirmed that it would apply to many, if not indeed to a majority, of the cases in which compensation has been paid under the former Act; and if it were sustained would inevitably create a crop of claims of a dishonest character. Indeed, the extent of the evil which a decision on the lines of the respondent's contention would produce will at once become apparent when regard is had to the ordinary way in which claims for compensation have hitherto been settled.

The object of the Act was to minimise as much as possible judicial procedure. Accordingly as soon as an accident occurred to which the Act admittedly applied it was, as a rule, in the interests of both parties that the amount of compensation payable should be fixed by agreement. The employer thereby avoided any proceedings at common law or under the Employers' Liability Act, and the workman obtained immediate relief without the necessity of proving fault. The vast majority of small accidents were accordingly settled by the employer paying compensation under the Act and continuing such payments until he had information that the injured man had entirely recovered from its effects. The payments were then stopped, and the stoppage acquiesced in by the workman. The fact of recovery was in the ordinary case capable of instant ascertainment, as, for instance, when the workman had resumed his former employment and was earning the same wages as he had received before the accident. If, however, the contention of the respondent is well founded, a man who was injured in 1898 and received compensation for a few weeks and then resumed his former employment would be entitled now to record the original agreement and charge the employer to pay him half wages during the period of ten years during the whole of which he had been receiving full wages. The only possible answers which the employer could make to such a claim would be (1) that the agreement to pay compensation had been terminated by mutual consent, or (2) that he had himself been paying the workmen his wages; when on the authority of *Beath & Keay* v. *Ness* (6 F. 168) he would escape on the ground that such payments must be held as including any compensation legally due. Such a defence would only apply to the comparatively rare case of the workman resuming employment with his previous employer and continuing in it. No doubt an agreement to end the compensation would readily be inferred in the case figured owing to the long acquiescence of the workman in the stoppage of the compensation, but it would always be a difficult thing to determine what period of acquiescence would be sufficient, for that might vary infinitely according to circumstances, and might give rise to endless litigation which it was the object of the Act to avoid.

Before dealing with the precise question raised it is desirable to see what has actually been decided. In the first place, it has been held both in Scotland and England that a memorandum of agreement may be recorded at any time, although when the memorandum is presented for registration

the circumstances have entirely changed. That was so held in the case of *Cammick* (4 F. 198), where the applicant admitted that he had resumed work and was receiving higher wages than before the accident, and that nothing was due to him in name of compensation at the date of the application; and in the immediately following case of *Dunlop* (4 F. 203), where it was held that when an agreement has been come to for payment of compensation under the Act the workman's only remedy in a case where he disputed the employer's right to stop payment was to register a memorandum of his agreement. In that case the workman had presented an application for arbitration which was held to be incompetent. The same decision was pronounced in the case of *Blake* (1904, 1 K.B. 503), where it was held that the registrar could not refuse to register the memorandum merely because owing to altered circumstances the workman was no longer entitled to the amount of compensation fixed by the agreement, but that his only duty was to ascertain whether the memorandum actually represented the agreement which had been entered into. In all these cases the interval between the date of the stoppage of payment of the compensation money and the date of the workman's application was comparatively short; but the decisions in no way proceeded upon this fact. The registrar is bound to record the agreement if it is ascertained to have been entered into as a historical fact, and the only ground upon which he can refuse to record it is that the memorandum is not genuine —that is to say, does not correctly represent the facts.

One other matter has been conclusively settled by authority. Where the employer's liability to pay compensation has been judicially ascertained either by an award of the arbitrator or by its equivalent a recorded memorandum of agreement, such liability can only be terminated by the judgment of the arbitrator on an application made to him by the employer. On this matter all the judges who took part in the following three decisions—*Steel* v. *Oakbank Oil Company*, 5 F. 244; *Cavaney* v. *Pumpherston Oil Company*, 5 F. 963; and *Morton* v. *Woodward*, 1903, 2 K.B. 276—were absolutely agreed. There is no doubt a conflict between the Scotch and English tribunals as to the date on which the cesser of liability takes place, the former holding that it can only operate from the date of the actual decision, while the view taken in England is that the arbitrator has jurisdiction to review the payments as from the date of the application. If the question is to be still open, I should have no difficulty in concurring with the reasoning of the English judges in the case of *Woodward*, and with the opinions of the dissenting judges in the two Scotch cases. The leading purpose of the Act was to provide for payment of compensation during incapacity only; and while it provided a very summary and inexpensive mode for recovering such compensation and established a tribunal by which alone the amount of compensation could be reviewed or ended, there is nothing in the language of the section which affords any obstacle to the construction put upon it by the dissenting judges in Scotland or the Appeal Court in England. That being so, I should have thought that the ordinary rule which, to adopt the language of the Master of the Rolls, applies to all other legal procedure, would have applied here—namely, that the Court will decide the dispute when it is formulated, and not as at the date when it is able to give its attention to the matter. The other view is open to the manifest objection that for a period, which may be long or short according to the promptitude of the tribunal in dealing with the matter, the workman shall receive as matter of right compensation during a period when he was in fact not incapacitated, the arbitrator being unable to give effect to his own judicial determination. This matter is, however, not of importance in the present case.

The cases above referred to justify the Lord Ordinary in sustaining the regularity of the charge for the period subsequent to 18th May 1906. It is true that on the complainer's statement this results in their having to pay a sum of over £50 to which the respondent has no claim. For this, however, they have themselves to blame. When the memorandum of agreement was recorded at the respondent's instance notwithstanding their objections, they ought at once to have presented an application to have the agreement ended. There was then what is equivalent to a decree against them for the sum contained in the memorandum, and that decree they were bound to implement until they took the only available method of having it reviewed or ended. That is the ground of judgment in both the Scotch cases above referred to; and looking to the provisions of the statute it seems to me to be unassailable. On any other view it would be competent to ascertain by evidence in a suspension of the charge not merely whether the workman had completely recovered from his injury, but also whether he had recovered to such an extent that the compensation ought to be materially diminished, questions which I think can only be determined by the statutory tribunal, and in the summary method prescribed.

In the three cases referred to the Courts were dealing either with the effect of a recorded agreement or of an award by the arbitrator, and with compensation due subsequent to the date of recording. There is no decision that when an agreement is recorded it shall operate retrospectively; and, in my opinion, the grounds upon which the cases of *Steel* and *Cavaney* were decided are not applicable to such a case. There is no presumption that the employer is in default at all during the period prior to the memorandum of agreement being recorded. Up to that time his liability depends not upon any judgment of the Court but upon an informal agreement between him and his employee. No doubt the employee has the right of converting

that agreement into what is equivalent to a decree of court by presenting a memorandum of the agreement for registration; but until he does so the employer is surely entitled in the ordinary case to assume that he has acquiesced in the stoppage or reduction of the payments of compensation. As there is a duty upon the employer to at once present an application for review when the agreement has been recorded, there would be little injustice in holding that there was a duty upon the employee when he conceived that payment of compensation had been improperly stopped at once to avail himself of his remedy by recording the agreement. An application for registration is of the simplest and most inexpensive kind, and the warrant can be obtained on the shortest possible notice. On the other hand, if the workman acquiesces in what his employer does, even although such acquiescence is not such as to be conclusive proof of an agreement, he puts the employer at a disadvantage. For one thing, he deprives his employer of his statutory right to have the question of the workman's state of health ascertained by a a medical referee. After an interval of time, during which the workman's health may have suffered from other causes, such a reference cannot be of the same value as it would have been when the dispute actually emerged. But further, until the agreement is recorded there is no occasion for the employer to take any steps to have it reviewed or ended; and indeed there is authority for saying that it is not competent for him to do so. No doubt he might himself present a memorandum of the agreement for registration and follow it up by an immediate application to have it put an end to on the ground that the workman had recovered; but why he should do so when he has every reason to expect that the workman acquiesces in his decision it is difficult to understand. If the respondent's contention had been upheld—that this is the only way by which the employer can definitely determine his liability once constituted—the Court would have impliedly laid down a rule that judicial proceedings of some kind must be resorted to in every case where compensation has been paid under the Act; for the cases in which the workman would voluntarily subscribe an agreement putting an end to his right to receive compensation might be expected to be far from numerous. Such a view would involve an enormously increased burden upon employers in the way of legal expense without conferring any legitimate corresponding benefit upon the workman. The true view seems to me to be that if and so long as the workman does not choose to enforce his agreement in the simple and summary manner provided by the Act, he must in general be held as acquiescing in the stoppage of the compensation. On any other view an endless vista of litigation would be opened, resulting necessarily in great injustice to employers, which but for the inaction of the workman they would not have been exposed to. If, as I am prepared to hold, following the decided cases, the employer after an agreement has been recorded must pay compensation at the full rate notwithstanding that incapacity has ceased in respect of his failure to avail himself of the statutory method of ending his liability, it seems equally to follow that a workman cannot take advantage of his own failure to record a memorandum by which the employer has been misled, to subject the employer to a liability which is contrary to all justice and is in direct violation of the spirit of the Act.

The view that acquiescence in the stoppage of the compensation only affects the workman during the period that it continues must also in many cases have been to the workman's advantage. When the compensation payments ceased the workman may have been earning full wages; and an arbitrator at that time, if applied to, would have ended the liability; but it not infrequently happens that an injury from which a man appears to have recovered perfectly, at least to the effect of enabling him to earn full wages, may subsequently produce at least partial incapacity; and it is much better for the workman that he should not be foreclosed by any premature finding on this subject, but should be permitted to acquiesce in the stoppage without surrendering his claim to future compensation should circumstances emerge entitling him to further payment. The absence of any previous case of this nature makes it highly probable that employers and workmen have throughout acted upon this view of the Act; and it would be most unfortunate if a different rule were now to be established contrary to fairness and good sense.

I would only add that in the only case in which the effect of an unrecorded agreement to pay compensation has been considered—*Colville & Sons, Limited* v. *Tigue*, 8 F. 179—Lord Low took a similar view; and although the other judges of the Second Division decided the case upon different grounds, they did not express any dissent from Lord Low's opinion. At page 190 he says—"I can findnothing in the Act which, when there is only a recorded agreement to pay compensation during incapacity, compels the employer to continue payment after the incapacity has in fact ceased. The Act recognises agreements for payment of compensation; and it nowhere provides that such agreements shall, as regards the rights and liabilities of parties, be in a different position from any other agreement." The logical result in this case would appear to be, as the parties are not agreed on the facts, that there should be a proof, as your Lordship in the chair has held, but I desire to say, speaking for myself, that if the complainers establish the facts alleged by them, and indeed if the respondent fails to show any good reason why he did not avail himself earlier of his statutory remedy, I should be prepared to hold, whether on the ground of personal bar or acquiescence or both combined, that the respondent's claim for any other compensation than he has obtained under the present judgment would be excluded.

LORD M'LAREN—The case I heard was that of *Finnie & Son* v. *Fulton*. I have had an opportunity of reading the Lord President's opinion in the two cases and I concur both in your Lordship's general views and in the application of them to the case I heard.

LORD PEARSON—I also concur in your Lordship's decision as to *Finnie & Son* v. *Fulton*, and in your Lordship's opinion so far as applicable to that case.

LORD M'LAREN and LORD PEARSON were absent at the hearing of the *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*.

The Court, in the case of *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, pronounced this interlocutor—"... Adhere to the said interlocutor in so far as it repels the reasons of suspension for the period subsequent to May 18th, 1906; *quoad ultra* recal the said interlocutor and remit to the Lord Ordinary to allow the complainers a proof of their averments, and to the respondents conjunct probation, and thereafter to proceed as accords; finds no expenses due to or by either party in respect of the reclaiming note"—and in the case of *Finnie & Son* v. *Fulton* adhered.

Counsel for the Reclaimers (Complainers) (The Lochgelly Iron and Coal Company, Limited)—Horne—Strain. Agents—W. & J. Burness, W.S.

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

Counsel for the Reclaimers (Complainers) (Finnie & Son)—Constable, K.C.—Horne. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent (Fulton)—Munro—Mair. Agents—Macpherson & Mackay, S.S.C.

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*Friday, March* 19.

## FIRST DIVISION.

[Lord Mackenzie, Ordinary.

## HIGHLAND RAILWAY COMPANY *v.* INVERNESS MAGISTRATES.

*Superior and Vassal — Railway — Lands Clauses Consolidation (Scotland) Act* 1845 (8 *Vict. c.* 19), *sec.* 126—*Statutory Title—Part only of Estate Taken—Superiority of that Part—Compensation—Mora.*

The Lands Clauses Consolidation (Scotland) Act 1845, enacts—Section 126—"The rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in no wise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors; provided always, that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this Act."

The corporation of a burgh, which claimed to be the superiors of certain lands to part of which a railway company had acquired a statutory title in 1874, brought an action against the railway company for declarator that the railway company should either pay compensation for loss in respect of the superiority of the land so taken or redeem the feu-duties and casualties applicable thereto.

*Held—following Magistrates of Elgin* v. *Highland Railway Company*, June 20, 1884, 11 R. 950, 21 S.L.R. 640—that, although no relation of superior and vassal was created between them and the defenders by the statutory title of the latter, and although the company had obtained possession, yet the pursuers, provided they could produce a title, had a right to compensation, which right they had not lost by mere lapse of time; inquiry *allowed*.

The Magistrates of Inverness brought an action of declarator against the Highland Railway Company that the company were bound to pay compensation in respect of the superiority of, or otherwise to redeem the feu-duties and casualties appertaining to, certain portions of land (Needlefield, Gairbreeds, &c.) acquired by the defenders from Baillie of Leys under the Highland Railway Act 1865, of which land the pursuers claimed to have been superiors.

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) On a sound construction of the statute founded on by the pursuers, the defenders are not liable in either compensation or redemption to the pursuers, and should be assoilzied accordingly. (4) The pursuers' claim is excluded by reason of *mora* and taciturnity. (7) In any event, no apportionment of said feu-duties and casualties having been made, the present action is premature and should be dismissed."

The *facts* of the case and the *averments* of parties appear in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 3rd February 1909 allowed the pursuers a proof and repelled the second and seventh pleas-in-law for the defenders.

*Opinion.*—"This action by the Magistrates of Inverness against the Highland Railway Company is for compensation for loss of feu-duties and casualties in respect of land to which the company obtained a statutory title under the Lands Clauses Act 1845, and of which the pursuers say they were superiors.