Thursday, February 10.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

JOHN BROWN & COMPANY, LIMITED *v.* ORR.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. ii* (9)*—Process—Recorded Memorandum of Agreement — Reduction — Competency—Act of Sederunt, June* 26, 1907, *sec.* 12.

In a petition in the Sheriff Court at the instance of a workman for warrant to record a memorandum of an alleged agreement for compensation under the Workmen's Compensation Act 1906, the employers lodged a minute objecting to the genuineness of the memorandum. The Sheriff-Substitute dismissed the minute and ordered the memorandum to be recorded. The employers thereupon brought an action in the Court of Session, concluding for (1) reduction of the recorded memorandum, and (2) declarator that no such agreement had been concluded between them.

Held that, as the employers' remedy was to appeal by way of case stated, the action was incompetent and must be *dismissed.*

Coakley v. *Addie & Sons, Limited,* 1909 S.C. 545, 46 S.L.R. 408, *approved* and *followed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. ii (9) [as applied to Scotland by section 13 of the Act], enacts —"Where the amount of compensation under this Act has been ascertained . . . by agreement, a memorandum thereof shall be sent in manner prescribed by [Act of Sederunt] . . . by any party interested to the [sheriff-clerk], who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register: . . . Provided that . . . (*b*) where a workman seeks to record a memorandum of agreement, . . . and the employer . . . proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording, . . . the memorandum shall only be recorded, if at all, on such terms as the [Sheriff] under the circumstances may think just. . . ."

The Act of Sederunt, 26th June 1907, sec. 12, enacts—"When the genuineness of a memorandum under paragraph 9 of the second schedule . . . is disputed, or when an employer objects to the recording of such memorandum under sub-section (*b*) of said paragraph . . . the person disputing the genuineness, or the employer . . . shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute."

On 28th December 1908 John Brown & Company, Limited, shipbuilders, Clydebank, brought an action against Christopher Orr, packer, Temple Buildings, Glasgow, for (1) reduction of a memorandum of an alleged pretended agreement between the pursuers and defender, which was on 18th December 1908, by warrant of the Sheriff-Substitute [BLAIR] at Dumbarton recorded in the register of Lanarkshire at Glasgow, and (2) declarator that the agreement specified in the said memorandum had not been come to between the parties, and that in point of fact on 18th December 1908 there was no agreement as to compensation then in existence between them in respect of the accident after mentioned.

On 7th August 1908 the defender, while in the employment of the pursuers, sustained an injury to his right hand, in respect of which the pursuers thereafter paid him compensation at the rate of 13s. per week till 31st October 1908. On receiving these weekly payments the defender signed, with a cross, receipts in the following terms:—

"*Clydebank,* 31*st October* 1908.

"Received from John Brown & Company, Limited, engineers and shipbuilders, the sum of thirteen shgs., being compensation due to me in terms of the Workmen's Compensation Act 1906, in respect of injuries which I received through an accident while in their employment; and I acknowledge that my employers and I have agreed that compensation shall be paid to me under that agreement only while the said John Brown & Company, Limited, are of opinion that my incapacity continues; and when they are of opinion that my incapacity has ceased this agreement shall end. Reserving to me my rights otherwise to recover further compensation should I claim to be entitled to it.

"Compensation from 25*th Octr.*
to 31*st* ,, His
CHRIS. X ORR.
Mark."

The pursuers averred—"(Cond. 2) The defender agreed to accept the said compensation each week on the terms which are set forth in the receipt and agreement produced herewith. By signing the said agreement the defender contracted with the pursuers that compensation should be paid by them to him only while the pursuers were of opinion that his incapacity continued, and that when they were of opinion that the defender's incapacity ceased the agreement should end. . . . (Cond. 3) On 31st October 1908 the defender recovered from his incapacity. The pursuers then intimated this to him, and informed him that the said agreement was ended. The defender concurred in this. . . . (Cond. 4) Subsequently, notwithstanding these facts and that the said agreement was at an end, the defender's agents applied in the Sheriff Court of Dumbarton to register an agreement in terms of the Act, alleging that the agreement was "that the respondents should pay the claimant compensation at the rate of 13s. per week in terms of said Act." Notice was sent to the pursuers on the 2nd of November 1908

by the Sheriff-Clerk of the said application. (Cond. 5) The pursuers thereupon lodged a minute—a copy of which is produced herewith—objecting to the genuineness of the memorandum presented on behalf of the defender, and stating "that the agreement therein specified was never come to between the claimant and the respondents, and there is no agreement existing between the parties." The pursuers at the debate before the Sheriff-Substitute founded on the receipt and agreement above referred to, which is in common use by them for all such payments, and which is signed by the workmen concerned each week on receipt of payment. (Cond. 6) The Sheriff-Substitute (Blair) heard parties' procurators without any proof (except the production of the receipt) on 4th December 1908, and on 8th December he dismissed the minute for the pursuers and authorised the Sheriff-Clerk to record the alleged memorandum of agreement. . . . (Cond. 7) The pretended agreement set forth in the memorandum lodged on behalf of the defender was never entered into between him and the pursuers. In point of fact the only agreement entered into between them was that embodied in the receipt and agreement which the defender from week to week signed by a "X," and that agreement terminated on 31st October, when the defender's incapacity in the pursuers' opinion ceased, and he was certified by their medical man, as in point of fact he was, fit for work. The defender was at that date informed by the pursuers that he had been certified by the doctor as fully recovered, that his incapacity had ceased, that the agreement was at an end, and that he was not entitled to further compensation. He concurred in all this, and intimated then his ability and willingness to resume his former occupation, and this application on his part to resume work was under consideration by the pursuers when the defender presented his application to record to the Sheriff. There was at the date when the Sheriff-Substitute granted warrant to register the pretended agreement as aforesaid no agreement subsisting between the pursuers and the defender under the Workmen's Compensation Act. . . ."

The pursuers pleaded, *inter alia*—"(1) The pretended agreement referred to in the memorandum condescended upon not having been come to between the pursuers and the defender, decree of declarator and reduction should be pronounced as concluded for. (2) There having been at the date of the Sheriff-Substitute's warrant no agreement between the pursuers and the defender relative to compensation payable under the Workmen's Compensation Act by the pursuers to the defender, decree of declarator and reduction should be pronounced as concluded for."

The defender denied that the receipt embodied the true agreement between the pursuers and himself, which he averred was correctly set forth in the memorandum in question.

He pleaded, *inter alia*—"(1) The action is incompetent."

On 4th October 1909 the Lord Ordinary (GUTHRIE) repelled the defender's first plea-in-law and allowed a proof before answer.

Opinion.—"The defender maintained (*first*) that the action was incompetent; (*second*) that the pursuers' averments were irrelevant.

"1. *Competency.*—The defender argued that if the pursuers desired either to prevent registration of the memorandum founded on by him, or to escape from its effects, their only course, apart from seeking reconsideration under section 16 of the first schedule of the Workmen's Compensation Act of 1906, was to ask the Sheriff to state a case under section 17 (*b*) of the second schedule appended to the Act.

"It is not necessary to consider either the soundness or the obligatoriness on me of the Second Division's decision in the case of *Coakley* v. *Addie & Sons*, 1909 S.C. 545, to the effect that the Sheriff acts judicially, as an arbiter in connection with recording a memorandum under the 1906 Act, and not ministerially as the 'counsellor and leader' of the sheriff-clerk, as it was held he did under the Workmen's Compensation Act 1897 by a majority of Seven Judges in the case of *Binning* v. *Easton*, 8 F. 407. If the distinction taken in the case of *Coakley*, whether founded on the difference between the two Acts of Parliament or on the difference between the relative Acts of Sederunt, is not sound, then it is clear under the case of *Binning* that the pursuers could have taken no appeal at common law, and under the case of *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, October 23, 1906, 1907 S.C. 3, that they could not have the point raised by a stated case, because a stated case can only be asked where a Sheriff is acting judicially as an arbitrator, which it was held in *Binning's* case was not his position under the 1897 Act in connection with the recording of a memorandum. In that view, apart from applying to have the payments reviewed, their only remedy would be action of declarator or of declarator and reduction as in *Hughes* v. *Thistle Chemical Company*, 1907 S.C. 607. But if the distinction taken in the case of *Coakley* is sound, and suppose, as maintained by the defender, the statutory remedy of a stated case, where applicable, impliedly takes away any remedy at common law, it was not open to the pursuers in this case to have taken a stated case. The Sheriff can only be asked to state a case 'on any question of law determined by him.' But the question between the pursuers and the defender is not a question of law but of fact, namely, whether the continuance of the agreement between the parties was or was not dependent on the opinion of the pursuers as to the defender's fitness for work. Following the reasoning of the Lord President in the case of *Binning*, I think the present proceedings are competent, because otherwise if the pursuers' averments are true there would be a denial of justice. . . . [*His Lordship then dealt with the question of relevancy*] . . ."

The defender reclaimed, and argued—The action was incompetent, the employers' remedy being to appeal by way of stated case. In ordering the memorandum to be recorded the Sheriff-Substitute was acting judicially not ministerially, and, that being so, his decision was appealable in the ordinary way — *Coakley* v. *Addie & Sons, Limited*, 1909 S.C. 545, 46 S.L.R. 408. The case of *Hughes* v. *Thistle Chemical Company*, 1907 S.C. 607, 44 S.L.R. 476, was a decision under the Act of 1897, and therefore inapplicable. Moreover, where, as here, a statutory remedy existed, the common law remedy was excluded—*Fife Coal Company, Limited* v. *Lindsay*, 1908 S.C. 431, 45 S.L.R. 317. [The Lord President referred to Elliott's Workmen's Compensation Act 1906, p. 389; to the case of *Johnston* v. *Mew, Langton, & Company*, 1907, 23 T.L.R. 607, *affd.* 24 T.L.R. 175, therein cited; and to Rules 45–49 of the Workmen's Compensation Rules 1907, *vide* Elliott (*op. cit.*), pp. 490-2.]

Argued for respondent—The action was competent. In granting warrant to record the memorandum the Sheriff had acted ministerially and not judicially. That being so, there could be no appeal—*Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312. The case of *Coakley* (*cit. supra*), on which the reclaimer relied, was not in point, for that decision depended on sec. 12 of the A.S. of 26th June 1907, which, in so far as it extended the scope of the statute, was *ultra vires*. Alternatively *Coakley* was wrongly decided, and ought to be reconsidered. Reference was made to *Mortimer* v. *Secretan*, [1909] 2 K.B. 77.

At advising—

LORD PRESIDENT—This is an action of reduction of a memorandum of agreement, and it is met by a plea that the action is incompetent, and also by a plea that it is irrelevant. The Lord Ordinary has sustained the competency of the action, but I am unable to agree with the Lord Ordinary upon this matter. I think the action is incompetent.

The precise memorandum of agreement that was registered in this case provided "that the respondents should pay the claimant compensation at the rate of 13s. per week in terms of said Act." Now when the workman proceeded to ask to have this memorandum registered his employers objected on the ground that the agreement actually entered into between them was not an agreement in these terms, but was an agreement which made the compensation payable under it dependent on the will of the employers, viz., that embodied in a receipt which the workman signed, and which, after acknowledging payment, goes on thus—"And I [that is, the workman] acknowledge that my employers and I have agreed that compensation shall be paid to me under that agreement only while the said John Brown & Company Limited are of opinion that my incapacity continues; and when they are of opinion that my incapacity has ceased this agreement shall end." The Sheriff-Substitute, however, did not take the view of the objectors, but, upon consideration of the terms of the receipt and without further proof ordered the workman's version to be registered as a memorandum of agreement under the Act, under which the employers could be charged to pay 13s. a-week until it was put an end to by an application for review.

If this matter was competently before me I confess I should have more than grave doubts as to whether the Sheriff-Substitute was not wrong. My present impression is that he was quite wrong; but the proper course, if the employer was dissatisfied with that judgment, was to have asked the Sheriff to state a case. That would have been in accordance with the provisions of the twelfth section of the Act of Sederunt, which states that "When the genuineness of a memorandum under paragraph 9 of the Second Schedule appended to the Act is disputed, or when an employer objects to the recording of such memorandum . . . . the person disputing the genuineness, or the employer, or the sheriff-clerk, as the case may be, shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute." It is clear that if it was an application to the Sheriff for settlement by arbitration of questions raised by the minute, that would then permit of the stating of a case for a point of law to be determined. The Lord Ordinary has, I think, been led away by the consideration that the appeal which is given upon a case stated is an appeal on law only, and that the real dispute as to the lodging of a memorandum may be a dispute of fact. I do not doubt that. In this particular case it seems to me the dispute was not really a dispute of fact but a dispute of law, because it was a question of construction whether the terms of the document which admittedly embodied the agreement of parties could be made the foundation of the memorandum proposed to be registered by the workman; but of course I can quite understand there might be cases where it was simply a pure question of fact as to whether the two parties had ever come to an agreement. Now, inasmuch as I agree with the case of *Coakley* v. *Addie & Sons* (1909 S.C. 545) in the Second Division, which has decided that the case of *Binning* v. *Easton* (8 F. 407) is no longer law under this present statute, and that the action of the Sheriff is a judicial action when he orders a memorandum to be recorded, if what is involved is a question of fact only, it may be that there may be an appeal to the Sheriff, but I do not see that there could ever be an appeal to this Court, because I cannot conceive that it would not be struck at by the provisions of the Sheriff Courts Act limiting the appeals to this Court to cases of the value of £50.

Anyway, as far as the question is concerned with which we have here to deal,

I am clearly of opinion that the remedies for an improper registration of a memorandum are remedies which must be sought within the statute now that it has been decided that the action of the Sheriff is not ministerial but properly judicial, and impliedly that the common law remedy of reduction is excluded.

Accordingly I think that the interlocutor ought to be recalled and the plea of incompetency sustained.

LORD KINNEAR—I agree with your Lordship, and have nothing to add.

LORD PRESIDENT — Lord Dundas also agrees with that opinion.

LORD JOHNSTON, who was absent at the hearing, delivered no opinion.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuers (Respondents) — Munro—Stevenson. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for Defender (Reclaimer) — Hunter, K.C. — Mair. Agents—Macpherson & Mackay, S.S.C.

Wednesday, February 23.

SECOND DIVISION.

PAGAN & OSBORNE *v.* HAIG.

Jurisdiction—Court of Session—Sheriff—Privative Jurisdiction—Action for Less than £50*—Defender Resident in England but Owner of Heritage in Scotland—Competency in Court of Session—Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *secs.* 6 *and* 7.

The Sheriff Courts (Scotland) Act 1907, enacts—Sec. 6—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff—. . . (*c*) Where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction. (*d*) Where the defender is the owner or part owner, or tenant or joint tenant, whether individually or as a trustee, of heritable property within the jurisdiction, and the action relates to such property or to his interest therein."

Sec. 7—"Subject to the provisions of this Act and of the Small Debt Acts, all causes not exceeding fifty pounds in value exclusive of interest and expenses competent in the Sheriff Court shall be brought and followed forth in the Sheriff Court only, and shall not be subject to review by the Court of Session."

An action for £25 having been brought in the Court of Session, the defender maintained that it was incompetent on the ground that the Sheriff had privative jurisdiction in causes under fifty pounds value. The defender was resident in England but was the owner of heritage in Fife. The action did not relate to his heritage. The defender argued that the pursuers might have founded jurisdiction against him in the Sheriff Court by arrestment.

Held that the Sheriff Court had not jurisdiction, and that the action was competent only in the Court of Session.

Title to Sue—Unincorporated Society—Instance—Competency of Action.

An action was raised by P. & O., "Honorary Secretaries and Treasurers for the Fife Fox Hounds, as mandatories of the shareholders and subscribers to said Fife Fox Hounds, specially authorised by and acting on behalf of the said shareholders and subscribers," with the concurrence of the masters. The summons concluded for certain sums due as subscriptions to the said unincorporated body of shareholders and subscribers. The defender pleaded that the pursuers had no title or interest to sue the action.

The Court *allowed* the pursuers a proof that they had been given the requisite authority to sue, *reserving* the defender's plea of no title.

This action was raised by "Pagan & Osborne, writers, 12 St Catherine Street, Cupar, Fife, Honorary Secretaries and Treasurers for the Fife Fox Hounds, as mandatories of the shareholders and subscribers to said Fife Fox Hounds, specially authorised by and acting on behalf of the said shareholders and subscribers, with the concurrence of Colonel Alexander Sprot, of Stravithie, in the county of Fife, and Thomas H. Erskine, Esquire, Grangemuir, in the County of Fife, masters of the said hounds for the seasons 1906-1907 and 1907-1908 respectively, for their interest, against John Haig, Lovel Hill, Windsor Forest, Berkshire, heritable proprietor of" certain subjects situated at Windygates, in the parish of Markinch and county of Fife. In it the pursuers sought to recover (1) £10 and (2) £15, with interest, these sums being as averred arrears of subscription to the Fife Fox Hounds.

The defender, *inter alia*, pleaded—"(1) The jurisdiction of the Court of Session is excluded by section 7 of the Sheriff Courts (Scotland) Act 1907. (2) The pursuers having no title or interest to pursue the present action, the action should be dismissed with expenses. (3) The pursuers' averments being irrelevant, the action should be dismissed."

The *averments and nature of the case* are narrated in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who pronounced on 3rd February 1910 this interlocutor—"Repels the defender's first plea-in-law; before answer, allows the parties a proof of their averments and to the pursuers a