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

conjunct probation, reserving the defender's second plea-in-law," &c.

Opinion.—"This is a petitory action brought in the Court of Session to recover arrears of subscription said to be due to the Fife Fox Hounds, which amount to £25. The first plea for the defender is that the jurisdiction of the Court of Session is excluded by section 7 of the Sheriff Courts (Scotland) Act 1907. That section provides —'. . . [*Quotes, v. supra in rubric.*] . . .'

"The question here is whether this action was competent in the Sheriff Court, and this depends upon whether there was jurisdiction against the defender in that Court. He is the owner of heritage in Fife, but is resident in England. Section 6 of the Sheriff Court Act 1907 provides—'Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . .; (*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.' The present action does not relate to the defender's heritage. It was therefore conceded that without arrestment to found jurisdiction, unless the defender had been personally cited in Fife, in terms of section 6 (*b*), which it was not suggested was possible here, he could not have been sued in the Sheriff Court. No arrestments to found jurisdiction were used in the present case. Therefore there is no jurisdiction in the Sheriff Court.

"I am unable to see (even assuming they could competently have been used) how the pursuers could be under obligation to use arrestments to found jurisdiction. Arrestments could not, however, in my opinion, have competently been used. Section 6 (*c*) of the Act of 1907 makes it possible for the first time to convene a foreigner in the Sheriff Court by an action founded on arrestments *ad fundandam iurisdictionem*. It provides that any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff—'. . . [*Quotes*, v. *supra in rubric.*] . . .'

"The defender here was a person otherwise subject to the jurisdiction of the Courts of Scotland. It is impossible to hold that the jurisdiction of the Court of Session can be taken away by implication. There is jurisdiction over the defender in the Court of Session though not in the Sheriff Court, and therefore arrestments to found jurisdiction could not have been used against him. The result of this is that the action, though for sums not exceeding £25, is competent only in the Court of Session. It is possible that this is not what the framer of the Act intended, but the language is quite explicit.

"The first plea for the defender will therefore be repelled.

"The second plea is that the pursuers have no title or interest to sue the action.

"The action is at the instance of '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.' The statements on record are as follows—The defender was a subscriber of £15 annually to the hounds from the season 1902-1903 down to and including the season 1905-1906. These subscriptions were paid to Messrs Pagan and Osborne as secretaries and treasurers to the Hunt, who in each year sent out circulars intimating that they were directed by the Fife Fox-Hounds Committee to collect the subscriptions for the current year. These circulars had appended the following notice:—'It was unanimously resolved at the meeting of the shareholders and subscribers on the 4th April 1865 that the subscriptions be due and payable on the 1st September in each year, and that any gentleman desirous of withdrawing must give notice on or before the 1st January following, otherwise he will be considered liable for his subscription for the following season.' A circular was sent to the defender in September 1906. On 5th March 1907 he sent a cheque for £5. He explains he went to reside in England in December 1906, and did not hunt with the Fife Hounds that season. The secretaries acknowledged this cheque, pointing out that he was liable for his full subscription for that season in respect he did not give notice of withdrawal within the time specified, and that he was also liable for the following season in respect he did not give notice of withdrawal prior to 1st January 1907. In September 1907 another circular was sent, on which was noted the arrear for the previous season £10, and the subscription for 1907-1908, £15. These are the sums sued for. The pursuers state that Colonel Sprot was master during 1906-1907, and Mr T. H. Erskine during 1907-1908, and as such masters had the beneficial interest in the subscriptions for the seasons above mentioned during which they were the respective masters. The Fife Hounds are owned by certain shareholders, who put the pack at the disposal of a body of subscribers.

"The pursuers aver—'Since 1865 the pack has been under the management of successive masters, to whom the subscriptions collected by the pursuers and their predecessors in office have been handed over; the master for the season, in reliance on the observance of said rule by the subscribers, being satisfied to take the responsibility for the maintenance of the pack in the expectation and on the faith of receiving the subscriptions to be paid upon the basis of the list of subscribers made up as at 1st January in each year for the succeeding season.'

"The action is thus based on implied contract, the contract being between an

unincorporated body, the shareholders and subscribers to the Fife Fox Hounds, represented by a committee on the one hand and the defender on the other. The averments are in my opinion relevant. The objection taken by the defender is, that if there is an implied contract it is to pay to the shareholders and subscribers of the Fife Fox Hounds, or their committee, and that it is not they who sue for payment. No doubt it would have been more regular if the instance had been similar to that in the case of the *Renton Football Club* v. *M'Dowall*, 18 R. 670. There the action was at the instance of the Renton Football Club and certain persons described as the president, the vice-president, the match secretary, the honorary secretary, and the treasurer of the club, together with seven other persons described as members of committee, and five other persons described as members of the club. The action was for reduction of a minute of the business and professional committee of the Scottish Football Association expelling the pursuers' club. It was held that the pursuers were entitled to a proof of their averments that they were duly authorised at a meeting of the club to sue the action. The same course, it was argued, should be taken here. In that case Lord M'Laren stated that it was clear an unincorporated society has not a title to institute an action of this kind in its name without further addition. 'Various reasons may be given for this rule, but it is sufficient to give one, and that is, that in the event of a decree for expenses being given against the society, or in the event of a counter action being brought against the society, under the designation which it has given to itself, there would be no person against whom a decree *ad factum præstandum* could be given, and it would be impossible that such a decree could be carried into execution in the ordinary way.' After saying that the insertion of the name of every member was not necessary, his Lordship added—'It is undoubtedly the right of the defenders to see that, in addition to the instance of the society itself, they should have the instance of certain persons who are responsible for the proper prosecution of the action, and for giving obedience to the decrees that may be given under it or under any counter action that may be joined with it.'

"It has not been suggested that Messrs Pagan & Osborne are not fit persons to be responsible for the proper prosecution of the action or for giving obedience to any decree that may be pronounced. They must prove that authority was duly given them to prosecute the action. If they do so, then they will bind those giving their authority, who will be liable equally with them for expenses. If they fail to prove authority, then they will themselves be liable for the expenses, and it was not suggested that they would not pay them. The defender cannot therefore suffer prejudice if the action is allowed to proceed at their instance as mandatories of the shareholders and subscribers. The concurrence of Colonel Sprot and Mr Erskine does not, of course, make the instance any better. It is obviously convenient that an action with such an instance should be allowed to proceed, and in my opinion there is sufficient authority to justify such a course being adopted here. In *Bow and Others* v. *Patrons of Cowan's Hospital*, 4 S. 280, Lord Glenlee pointed out that a corporation, as well as an individual, may appoint a commissioner to sue on their behoof, and all that is needed is sufficient evidence of the commissioner's authority. In *Cheyne and Mackersy* v. *Little*, 7 S. 110, two individuals were appointed at a meeting as cashiers for a bank, with power to sue for debts in their name. It was stated in argument that the session papers show the bank was an unincorporated society. Actions were instituted in their names against certain of the parties, and it was held that they had a title to sue. The House of Lords case referred to in the judgment was apparently that of the *Commercial Banking Company of Scotland and Others* v. *Pollock*, 3 W. & S. 344. *Creighton* v. *Rankine*, 16 S. 447, which was founded on by the pursuers here, especially for the observations of Lord Medwyn, cannot be regarded as of assistance to them. The case went to the House of Lords and was decided (as regards this point) on a different ground—see 1 Rob. 99. *Jameson* v. *Watson*, 14 D. 1021, is an authority for the pursuers, because there a factor or commissioner was appointed by the partners of an unincorporated company in terms of their contract, for the purpose of winding up the company. He sued a third party, who was not bound by the contract, and his title to do so was sustained. Lord Murray there pointed out that the decision went further than the law had yet gone.

"I am accordingly of opinion that the pursuers are entitled to sue as mandatories if they prove that authority was duly given. The expedient course will, I think, be to repel the defender's first plea, and to allow a proof before answer on the whole case, reserving the defender's second plea."

The defender reclaimed, and argued—(1) The Court of Session had no jurisdiction. The value of the cause was less than £50. The jurisdiction of the Court was expressly excluded by section 7 of the Sheriff Courts Act of 1907 (*v. supra, in rubric*). The pursuers were not without a remedy, as they could found jurisdiction in the Sheriff Court by arrestment — *Maule & Son* v. *Page & Co. and Others*, Nov. 19, 1909, 47 S.L.R. 110. (2) The pursuers had no title to sue. A person could not be appointed to sue in his own name as mandatory of another. The mandatory must sue in the name of his principal. The pursuers had no beneficial interest in the subject-matter, and were not the people who should have raised the action. If the pursuers were right, no difficulty would ever have arisen with regard to suing by unincorporated societies, because a mandatory would always have been appointed to sue for them. There had however been much difficulty and a

great deal of discussion with regard to instance in such cases. The Fife Fox Hounds should have sued in its own name with the addition of three members of the association—*Renton Football Club* v. *M'Dowall*, March 13, 1891, 18 R. 670, 28 S.L.R. 464. The following authorities were referred to—*Bow* v. *Patrons of Cowan's Hospital*, Dec. 6, 1825, 4 S. 276 (280); *Cheyne & Mackersy* v. *Little*, Dec. 2, 1828, 7 S. 110, 4 F.C. 603; *Commercial Banking Company of Scotland* v. *Pollock's Trs.*, July 28, 1828, 3 W. & S. 365; *Gemmells* v. *Barclay*, Nov. 19, 1830, 9 S. 33; *Creighton* v. *Rankin*, May 26, 1840, 1 Rob. 99, Feb. 6, 1838, 16 S. 447; *London, Leith, Edinburgh & Glasgow Shipping Co.* v. *M'Corkle*, June 19, 1841, 3 D. 1045; *Jameson* v. *Watson*, July 15, 1852, 14 D. 1021; *Somerville* v. *Rowbotham*, June 27, 1862, 24 D. 1187; *Antermony Coal Co.* v. *Wingate*, June 30, 1866, 4 Macph. 1017, 2 S.L.R. 164; *Gray* v. *Pearson*, 1870, L.R. 5 C.P. 568; *Evans* v. *Hooper*, 1875, 1 Q.B.D. 45.

Argued for the pursuers—An unincorporated society had no *persona standi in judicio*, and had not a title to institute an action in its name without further addition. It was necessary to have the instance of persons who were responsible for the proper prosecution of the action, and for giving obedience to the decrees that might be given under it, or under any counter action—Lord M'Laren in *Renton Football Club* v. *M'Dowall* (*sup. cit.*) But in Scottish practice, differing in this matter from English, a mandate could be given to sue—*Bow* v. *Patrons of Cowan's Hospital* (*sup. cit.*); *Low* v. *Lord Arbuthnot*, June 1, 1826, 4 S. 651; *Gemmells* v. *Barclay* (*sup. cit.*); *Creighton* v. *Rankin* (*sup. cit.*), *per* Lord Medwyn; *London, Leith, Edinburgh & Glasgow Shipping Co.* v. *M'Corkle* (*sup. cit.*); *Jameson* v. *Watson* (*sup. cit.*); *Cheyne & Mackersy* v. *Little* (*sup. cit.*); *Commercial Banking Co.* v. *Pollock's Trs.* (*sup. cit.*); *Somerville* v. *Rowbotham* (*sup. cit.*) The pursuers were clearly most proper persons to be selected to sue as mandatories for subscriptions.

A reply on the question of jurisdiction was not called for.

LORD DUNDAS—In this reclaiming note we have had several pleas argued to us by counsel for the defender, the first being that " . . . [*quotes, v. sup.*] . . ." On that plea your Lordships thought that it was not necessary to call for any reply, because it appeared to all the members of the Court that the Lord Ordinary's judgment was plainly right, and in regard to that matter I am content to say that I adopt entirely the reasoning of the Lord Ordinary, and I need say no more.

The second plea, however, is one that requires to be treated with greater detail. It is that " . . . [*quotes, v. sup.*] . . ." The manner in which the Lord Ordinary has dealt with that plea is that he has neither sustained nor repelled it, but has allowed the parties a proof before answer, reserving the effect of the plea-in-law. I have come to think that that is the right way to deal with the plea, and that we should adhere to the course adopted by the Lord Ordinary. It is no doubt often difficult, as is shown by the reported decisions, to determine precisely the proper instance which should be adopted by an unincorporated society or association or club or the like when it is the pursuer in an action, or the precise manner in which such an association ought to be sued when it is the defender. It is well settled, I think, that an unincorporated society cannot sue simply in its own name, but that it must have joined with its name, if it uses it, the names of other persons, officials, or members of the association; but I think that the character and quality of such additional or supplementary instance must vary according to the whole circumstances of the particular club or association which is under consideration at the time; and I do not think it would be possible to lay down any hard and fast rule specifically expressing what must be done in the way of addition to the society's name which would suit all cases that could be imagined. I am rather disposed to agree with the Lord Ordinary when he says that he thinks it would have been more regular if the instance here had been similar to that in the case of the *Renton Football Club*, where the club itself sued, and also certain persons who were described as the president, vice-president, the match secretary, the hon. secretary and the treasurer of the club, together with seven other persons described as members of committee, and five other persons decribed as members of the club; and in that case the Court allowed the pursuers a proof in order to enable them to establish that these persons did occupy the positions alleged, and possessed proper authority to sue the action. But the substance and the test of the rules upon this matter are I think well expressed by a sentence in the opinion of Lord M'Laren in the *Renton Football Club* case, which the Lord Ordinary quotes—" It is undoubtedly the right of the defenders to see that in addition to the instance of the society itself they should have the instance of certain persons who are responsible for the proper prosecution of the action and for giving obedience to the decrees that may be given under it or under any counter action that may be joined with it." There I think you have the substance of the rules that exist and the kind of test which may be applied in any particular case; and the Lord Ordinary proceeds, and I think justly, to apply the test here, and to find it sufficiently complied with. Messrs Pagan & Osborne, who sue, are not outsiders or unknown persons. They are the hon. secretaries and treasurers of the Hunt; and it has not been suggested that they are not fit persons to be responsible for the proper prosecution of the action, or for giving obedience to any decree that may be pronounced. Of course they must duly prove the terms and character of the mandate they hold, and from whom they hold it, but that is another matter. I think the instance under which this case has been brought may be just another mode of complying with the con-

ditions Lord M'Laren desiderated where an unincorporated society or club is suing; and I may add that in my opinion a suit in the name of mandatories on behalf of and duly appointed by such societies has been recognised in our Courts, and several instances have been put before us which, though not identical with the present case, are sufficient warrant to justify us in taking the course the Lord Ordinary has proposed. For myself I am not disposed to think that this case raises any wide or general consideration as to how such societies are entitled or bound to sue; because I cannot help thinking that each case, as I think I said before, must really be determined largely upon its own special considerations, the general consideration which must always be kept in view being such as is indicated by Lord M'Laren, viz., that the other party must have somebody to whom he can fairly look as the responsible antagonist in the cause. I therefore think that as regards the defender's second plea the Lord Ordinary's interlocutor is correct, and that enough has been averred by the pursuers to entitle them to go to proof on their averments that they have authority to represent the society, as they allege they have.

Upon the whole matter I think the interlocutor reclaimed against is a sound and discriminating one, and ought to be adhered to.

LORD ARDWALL—I agree with what has been said by my brother Lord Dundas. I must confess I had at first some doubts as to the soundness of the proposition that an unincorporated society of persons could put forward a person or persons as mandatory or mandatories to sue for them and on their behalf, but I think several of the cases which have been quoted, and particularly the cases of *Cheyne & Mackersy* v. *Little* (7 S. 110) and *Jameson* v. *Watson* (14 D. 1021) are both authorities for the proposition that a mandatory or factor or commissioner can sue for an unincorporated society and in their name. Of course it comes to be a question in every particular instance whether the Courts will authorise such a course to be followed, and I think that is a matter in which we ought not to lay down any general rule. In this particular case the gentlemen who are put forward as mandatories are not people picked up at random, off the street so to speak. They have held the position of hon. secretaries and treasurers of this association or society, or whatever it may be called, viz., the subscribers and shareholders of the Fife Fox Hounds, for many years. They are officially the persons who collect the subscriptions for that society, and to whom under the contract constituted by the rules of the society such subscriptions are payable by the members. Therefore it seems to me that they are beyond all question proper persons to select to be mandatories for the purpose of suing for any subscriptions payment of which is refused. Then not a suggestion has been made against them personally as not being good for any expenses that may be found due by them, or not being suitable persons to take charge of and be responsible to the Court for the conduct of the litigation. In these circumstances they aver that they have a special mandate to sue this action. That is a matter for proof, and that proof has been allowed by the Lord Ordinary, and in my opinion rightly allowed; so I cannot in the circumstances of the case listen to the argument put forward for the defender that we should throw the case out at this stage on the plea of no title to sue.

The LORD JUSTICE-CLERK concurred.

LORD LOW was absent.

The Court adhered.

Counsel for the Pursuers (Respondents)—Johnston, K.C.—J. A. Christie. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defender (Reclaimer)—Sandeman, K.C.—Smith Clark. Agents—W. & F. Haldane, W.S.

HIGH COURT OF JUSTICIARY.

Friday, February 25.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Low, and Lord Dundas.)

H. M. ADVOCATE *v.* GILLAN.

Justiciary Cases—Habitual Criminality—Proof—Previous Convictions of Crime—Extract Conviction with Schedule of Previous Convictions — Application to Accused of Extract Convictions—Prevention of Crime Act 1908 (8 *Edw. VII, c.* 59), *secs.* 10 (2) *and* 17 (3)—*Criminal Procedure (Scotland) Act* 1887 (50 *and* 51 *Vict. c.* 35), *secs.* 66 *and* 67.

In a trial of a person charged on an indictment containing "and you are a habitual criminal," *held* that an extract conviction, with schedule of previous convictions attached, was not in itself evidence to establish such previous convictions against the accused for the purpose of proving habitual criminality under the Prevention of Crime Act 1908, sec. 10 (2), but that these might each be competently proved against the accused by production of separate extract convictions, and that, under the Criminal Procedure (Scotland) Act 1887, sec. 66, without producing witnesses to apply them to the accused, provided that they were duly included in the list of productions annexed to the indictment, and that the accused had not given notice of objection thereto.

Justiciary Cases—Habitual Criminality —"Leading Persistently a Dishonest or Criminal Life"—Prevention of Crime Act 1908 (8 *Edw. VII, cap.* 59), *sec.* 10 (2).