where appeal is not dependent on the Summary Prosecutions Appeals Act 1875, but where appeal is expressly provided by the originating statute to the Court of Session, and the Summary Prosecution Appeals Act is only referred to, rather than incorporated, for purposes of procedure merely, to be dealt with?

In the first place, it is clear, I think, that no transfer of the appeal from the Court of Session to the High Court of Justiciary is effected, for the right of appeal does not depend either upon the Summary Prosecutions Appeals Act 1875 or upon the Summary Jurisdiction Act 1908. And as the appeal is not taken under the latter Act, I cannot see that its appeal procedure, which on examination is entirely inappropriate to appeal to the Court of Session, is to be substituted in the Burgh Police Act 1892 as amended by that of 1903 for that of the Summary Prosecutions Appeals Act 1875. Though that Act may be itself repealed, its repeal does not prevent the appeal procedure described in it being still used in appeals under the Burgh Police Acts.

I think, therefore, that this appeal is competently brought to the Court of Session, and that the proper method of preparing and presenting the appeal has been followed.

LORD KINNEAR—The Lord President concurs in that opinion, and I also concur.

LORD GUTHRIE gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court repelled the respondent's objection to the competency of the appeal, and of new appointed the cause to be put to the Summar Roll.

Counsel for Appellants—Spens. Agent—J. A. Kessen, S.S.C.

Counsel for Respondent—Cooper, K.C.—Forbes. Agent—John Forgan, S.S.C.

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*Friday, March* 18.

## SECOND DIVISION.

[Sheriff Court at Hamilton.

## M'VEY *v.* WILLIAM DIXON LIMITED.

*Master and Servant — Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, Paragraph* 9—*Agreement—Recording Memorandum—Delay—Application to have Compensation Payable under Agreement Ended.*

A workman presented a minute in the Sheriff Court craving a warrant to record a memorandum of agreement in the special register kept by the sheriff-clerk in terms of the Workmen's Compensation Act 1906. Simultaneously the employers of the workman presented an application for arbitration to have the compensation payable under the agreement ended. In the application for arbitration the Sheriff allowed a proof and fixed a diet. Before the proof was taken the workman moved to have the memorandum recorded at once. The employers did not lodge a minute objecting to the memorandum being recorded.

*Held* that the Sheriff was not bound to grant warrant to register the memorandum forthwith, but was entitled to await the result of the proof in the counter application.

*Opinions* (*per* Lord Low and Lord Ardwall) that the employers ought to have lodged a minute stating the grounds on which they objected to the memorandum being recorded.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), as made applicable to Scotland by sec. 13 and Second Schedule (17), enacts—Second Schedule, paragraph 9—"Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of Sederunt], by the committee or arbitrator, or by any party interested, to the [sheriff-clerk], who shall, subject to such [Act], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a [recorded decree-arbitral]."

This was an appeal by way of stated case from a judgment of the Sheriff-Substitute (A. S. D. THOMSON) at Hamilton in an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). The appellant was Thomas M'Vey, coal miner, Dixon's Rows, Blantyre, and the respondents were William Dixon, Limited, coalmasters, Blantyre.

The Case set forth—"The appellant on 29th April 1909 presented a minute craving the Court to grant warrant to the Sheriff-Clerk of Lanarkshire at Hamilton to record a memorandum of agreement, a certified copy whereof was thereto attached, in the special register kept by him in terms of the Workmen's Compensation Act 1906.

"The respondents thereupon presented an application to the said Court for an arbitration to have the compensation payable under said agreement declared ended as on 2nd April 1909, or otherwise to have it reduced.

"These two applications having thus come before the Court contemporaneously, I, on 10th June 1909, allowed a proof in the application for arbitration and appointed the proof to proceed on 7th July. On 17th June a motion was made by the appellant to have said memorandum recorded in respect its genuineness was not disputed and no other question of fact arose. I refused the motion at that stage and continued the application until the 7th July, the date of the proof in the application for arbitration. The appellant contended that this course was incompetent

under the statute, but I decided as I did upon the authority as I conceived of *Archd. Finnie & Son* v. *Fulton*."

The *question of law* for the opinion of the Court was—"Was the Sheriff-Substitute bound by the statute in the circumstances above stated to grant warrant to register the memorandum of agreement without awaiting the result of the proof in the counter application?"

Argued for the appellant — There was no dispute as to the genuineness of the memorandum, and none of the exceptions to the necessity for recording provided by the statute (Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule, paragraph 9) or by the Act of Sederunt (A.S., 26th June 1907, sec. 11) were present. That being so, the Sheriff was bound to grant warrant for recording—*Coakley* v. *Addie & Sons*, 1909 S.C. 545, 46 S.L.R. 408. The Sheriff had not sisted the application in exercise of his discretion, but because an application for review had been presented. But that fact did not deprive the appellant of his statutory right to have the memorandum recorded—*Finnie & Son* v. *Fulton*, 1909 S.C. 942, 46 S.L.R. 665. The appellant's contention involved no hardship to the employer, because weekly payments could be varied or ended as from the date of the application for review—*Donaldson Brothers* v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920.

Argued for the respondents — If the Sheriff ultimately held that the appellant had recovered, the weekly payments would be ended as from the date of the application for review—*Donaldson Brothers* v. *Cowan*, *cit. sup.*, overruling *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. If the appellant were entitled to have the memorandum recorded at once he would be in a position to charge for sums of money which might never become due, and the remedy of suspension was not open to the employer—*Fife Coal Company, Limited* v. *Lindsay*, 1908 S.C. 431, 45 S.L.R. 317; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665. There was nothing in the statute to compel the Sheriff to deal with the case at once or within any definite time, and the Court had always a certain amount of discretion in the matter of procedure. Accordingly the course taken by the Sheriff was competent and justifiable. *Coakley* v. *Addie & Sons, Limited*, *cit. sup.*, was distinguishable.

At advising—

LORD LOW—Although it is not so stated in the case the employers must have given notice to the sheriff-clerk that they objected to the memorandum of agreement being registered, otherwise the matter would never have come before the Sheriff at all.

Now if the employers were objecting to registration, their proper course, in terms of section 12 of the Act of Sederunt, was to lodge a minute stating the grounds of their objection, and until they had done so the question was not properly submitted to the arbitration of the Sheriff. If, however, the employers had lodged a minute I have no doubt that it would have been competent for the Sheriff to appoint the question whether the memorandum should be recorded to be heard along with the application for review of the weekly payment. Therefore the only objection which can be taken to the course which the Sheriff followed is that the appropriate procedure was not adopted. That objection might have been fatal if it had been imperative upon the employers to lodge their minute within a given time and that time had expired. But the Act of Sederunt does not fix any time within which the minute must be lodged, and the procedure may still be put in shape by the employers lodging a minute before the date fixed for hearing the two applications. I do not think that the workman has been prejudiced by the memorandum not being recorded at once, while the employers might have been prejudiced if that had been done. Accordingly I am of opinion that we should answer the question of law in the negative.

LORD ARDWALL—I am of opinion that we ought to answer the question of law in the negative. To do otherwise I think would be to hold that the statute had the effect of depriving the Sheriff-Substitute of all discretion as to procedure in deciding whether a memorandum of agreement should or should not be at once recorded. I do not think it is necessary to go into the abstract question of the right of either workman or employer to have a memorandum of agreement recorded as soon as presented, and still less do I desire to infringe in any way upon the procedure prescribed by the statute and Act of Sederunt with reference to objections to recording a memorandum. The present case is not altogether a satisfactory one so far as procedure is concerned, because the case does not inform the Court as to the nature of the objection to recording the memorandum, and it is plain that the respondents did not take the course which I think they ought to have taken of lodging a minute stating what the objection was. But it appears *ex facie* of the case that the minute craving a warrant to record the memorandum of agreement, and an application to have the compensation payable under the agreement declared ended, came before the Sheriff-Substitute contemporaneously, and in these circumstances I think it was quite within his competency to direct that the two applications should proceed *pari passu*, so that neither party should get an advantage over the other by having his application taken up first. I accordingly regard what the Sheriff-Substitute did as a mere piece of procedure or process, and within his competency as arbiter or judge on both applications, and I think it unnecessary to go into any refinements regarding the abstract rights of parties under the statute or Act of Sederunt.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent.

The Court answered the question of law in the negative.

Counsel for Appellant—Constable, K.C. —Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondents — Horne — Strain. Agents—W. & J. Burness, W.S.

## HIGH COURT OF JUSTICIARY.

*Thursday, March* 10.

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

### ANDERSON *v.* MACDONALD.

*Justiciary Cases — Poaching Acts — Evidence—Poaching Prevention Act* 1862 (25 *and* 26 *Vict. cap.* 114), *sec.* 3—*Conviction on Evidence of One Witness—The Game (Scotland) Act* 1832 (2 *and* 3 *Will. IV, cap.* 68), *sec.* 1.

The Poaching Prevention Act 1862, sec. 3, enacts—"Any penalty under this Act shall be recovered and enforced . . . in the same manner as penalties . . . under the Act second and third William IV, cap. 68." The Game (Scotland) Act 1832 (2 and 3 Will. 4, cap. 68), sec. 1, provides that anyone who trespasses in pursuit of game may be convicted thereof "on proof on oath of one or more credible witness or witnesses."

*Held* that the whole procedure provided by the Game (Scotland) Act 1832 was incorporated by the Poaching Prevention Act 1862, and that in a prosecution under the latter Act the evidence of a single witness, if believed, was sufficient for conviction.

The Game (Scotland) Act 1832 (2 and 3 Will. IV, cap. 68), sec. 1, enacts—" . . . If any person whatsoever shall commit any trespass by entering or being in the day time upon any land without the leave of the proprietor, in search or pursuit of game . . . such person shall, on being summarily convicted thereof before a justice of the peace, on proof on oath of one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, forfeit and pay such a sum of money, not exceeding two pounds, as to the justice shall seem meet, together with the costs of the conviction. . . ."

The Poaching Prevention Act 1862 (25 and 26 Vict. cap. 114), enacts—Section 2—"It shall be lawful for any constable or peace officer in any county, burgh, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, . . . and should there be found any game . . . upon such person . . . to seize and detain such game . . . and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear . . . before a sheriff or any two justices of the peace . . . and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game . . . or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds." . . . Section 3—"Any penalty under this Act shall be recovered and enforced in England in the same manner as penalties under the Act first and second William IV, chapter 32, and in Scotland under the Act second and third William IV, chapter 68, and in Ireland under the Petty Sessions (Ireland) Act 1851, when not otherwise directed in this Act."

William Macdonald, labourer, 15 Celt Street, Inverness, was charged in the Sheriff Court there, on 10th November 1909, at the instance of William Anderson, Procurator-Fiscal, on a complaint which stated that he was on the 28th October 1909 found by William M'Lennan, constable in the Inverness Burgh Police, on Ness Walk in the burgh of Inverness, coming from land where he had been unlawfully in search or pursuit of game, or aiding or abetting some other person or persons who had been unlawfully on land in search or pursuit of game, and having in his possession five rabbits which had been obtained by unlawfully going upon land or lands to the complainer unknown in search or pursuit of game."

The accused was acquitted by the Sheriff-Substitute (J. P. GRANT), whereupon the Procurator-Fiscal took a case for appeal.

The Case stated—"The respondent pled not guilty, and evidence of one witness, viz., the said William M'Lennan, constable, Inverness Burgh Police, was led. This witness deponed that he met the accused in a public place having five rabbits in his possession at 5 a.m. on the morning libelled; that he challenged the accused with having come from land where he had been unlawfully in pursuit of game, and that the accused answered, 'It is only five rabbits; you should not be so hard on a poor man.' There was no evidence to show that the accused had any implements for poaching in his possession, or that he had come by the rabbits unlawfully, beyond his own admission in the terms stated.

"The agent for the respondent did not lead evidence, but pled that the evidence led was insufficient to convict, and particularly that one witness was insufficient to convict under the foresaid Act 25 and 26 Vict. cap. 114, and that although in certain other poaching statutes one witness was mentioned as sufficient the said Act was silent on this point, and that therefore the ordinary rule of evidence must prevail, and asked the Court to find the respondent not guilty; and the Sheriff-Substitute pro-