of inquiry I think it would be decidedly inadvisable upon a question of relevancy to shut out all inquiry upon every branch of the case. I think the Lord Ordinary or the Sheriff, or the jury under the direction of the Lord Ordinary or the Sheriff, may all be trusted, if there is no case at common law, so to find. If we simply recal the interlocutors beginning with the 7th July interlocutor and going on to the 2nd August, then the interlocutor standing will be that of 1st July allowing a proof, and it is quite clear that there will be no opportunity for the pursuer to have the case removed under section 30 for jury trial in the Court of Session, because of course the days are long ago run out. Therefore the pursuer has here asked us to recal the interlocutor also of 1st July 1910 and to remit to the Sheriff of new to allow a proof to the parties in order that he may bring up that interlocutor for removal to this Court for jury trial. If I thought that the position of the days having run out could be clearly attributed to any wrong step on the part of the defenders I think it would be part of our duty to take advantage of the power we have to deal with any interlocutor and to see that the form of interlocutor technically did not interfere with the right which, *prima facie*, the pursuer would have. But I am unable to see that the defenders are mixed up in this matter at all. On 1st July the six days commenced to run. The pursuer chose to wait till the very last day, and then he chose to make what we now know to be a perfectly incompetent motion. I cannot see why when that incompetent motion has been finally got rid of he has any claim to say now—"You must really give me some more days in order to let me make a competent motion which I would have made if I had known that the motion I made was incompetent." I think this is his affair, and that we must stick to the words of the statute.

I propose that we should recal the interlocutor of 7th July and remit the case to the Sheriff. The effect will be that he will go on with the proof allowed by the interlocutor of 1st July 1910. As regards expenses, I suggest that there should be no expenses of this appeal, because the defender has been, of course, successful in getting rid of this inept interlocutor which told him to go to trial before a jury, but then he has been unsuccessful in his argument that the case was a bad case altogether and could not be gone on with at all. At the same time I think we should tell the Sheriff—because I do not think we need deal with it by interlocutor—I think we should tell the Sheriff that there ought to be no expenses allowed to either party for the procedure which took place between 7th July and 2nd August, because while the pursuer's motion was quite incompetent it is quite clear that the defender never woke up to the fact that it was incompetent, because he seems to have quite gladly taken part in the discussion as to what was the precise form of question to be put before the jury.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD MACKENZIE had not yet taken his seat in the Inner House.

The Court recalled the interlocutors subsequent to 1st July 1910, affirmed the interlocutor of the Sheriff-Substitute of that date, and remitted to him to proceed, and found no expenses due in regard to the appeal.

Counsel for the Pursuer (Respondent)—M'Kechnie, K.C.—A. A. Fraser. Agents—Galbraith, Stewart, & Reid, S.S.C.

Counsel for the Defenders (Appellants)—Munro, K.C.—Aitchison. Agent—Robert Miller, S.S.C.

Friday, November 25.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

BROWN *v.* GLENBOIG UNION FIRE-CLAY COMPANY, LIMITED.

Sheriff—Process—Appeal—Master and Servant—Competency—Removal of Cause from Sheriff Court to Court of Session for Jury Trial—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, c.* 51), *sec.* 30—*Workmen's Compensation Act* 1906 (6 *Edw. VII, c.* 58), *sec.* 14.

The Sheriff Courts (Scotland) Act 1907, sec. 30, enacts—"In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . . . . it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried. . . . ."

The Workmen's Compensation Act 1906, sec. 14, enacts—"In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the Sheriff Court, and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of

Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law. . . . ."

The father of a deceased workman raised an action in the Sheriff Court against his son's employers for damages in respect of the death of his son, laid alternatively at common law and under the Employers' Liability Act 1880. The Sheriff on appeal having allowed a proof in so far as the action was laid under the Employers' Liability Act, the pursuer, in virtue of section 30 of the Sheriff Courts (Scotland) Act 1907, required that the cause should be remitted to the Court of Session, and moved in the Single Bills for an order for issues to have the cause tried by jury there. The defender objected to the competency of the appeal in consequence of the provisions of the Workmen's Compensation Act 1906, sec. 14.

Held that it was competent to remove the cause to the Court of Session for jury trial there.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, and the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 14, are quoted in the *rubric, supra.*

David Brown, miner, Carnquean Square, No. 2, Glenboig, raised an action in the Sheriff Court at Glasgow against The Glenboig Union Fire-Clay Company, Limited, having their registered office at 48 West Regent Street, Glasgow.

The claim of the pursuer was—"(1) For damages at common law laid at £600 in respect of the death of his son David Brown, who was a drawer in the employment of the defenders, his wages being 22s. per week, and who was killed through the fault and negligence of the defenders on or about 18th January 1910, in consequence of a fall of stone from the roof of the mine in which the said deceased David Brown was working at the time, the said David Brown being, as defenders well knew, entirely inexperienced in the work at which he had been set; or, otherwise (2) for payment of £195 under the Employers' Liability Act 1880, in respect that the deceased was at the time of his death conforming to the orders of William Mills and John Beattie, who were superintendents in the sense of the Act, and who knew, or should have known, that the deceased was entirely inexperienced in the work at which he had been set."

On 21st July 1910 the Sheriff-Substitute (BOYD) allowed a proof. The defenders appealed, and on 7th November the Sheriff (MILLAR) dismissed the action in so far as it was laid at common law, and to that extent recalled the interlocutor of the Sheriff-Substitute, but *quoad ultra* he adhered to the interlocutor.

The pursuer then, in virtue of section 31 of the Sheriff Courts (Scotland) Act 1907, moved to have the cause tried by a jury in the Sheriff Court, but on 10th November the Sheriff-Substitute refused the motion. Thereupon, on 12th November, the pursuer, in virtue of sec. 30 of the same Act, required the cause to be remitted to the First Division of the Court of Session for trial by jury there, and on the case appearing in the Single Bills he moved for an order for issues.

The respondents (defenders) objected to the competency of the appeal, and argued—The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 14, applied directly to this action, and therefore it could not be removed to the Court of Session for jury trial nor appealed there save by stated case. It was true that that section used the words "where *a workman* raises an action . . . . in respect of any injury," and in this case it was the father of the injured workman and not the workman himself who had raised the action, but by the previous section (13) any reference to "workman" included persons for whose benefit compensation was payable and therefore included the pursuer. "Compensation" used in this section (13) was not restricted to "compensation" under the Workmen's Compensation Act, but included "compensation" under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), because (*a*) section 14 itself expressly dealt with actions under the Employers' Liability Act, and (*b*) the word "compensation" was used throughout sections 1 to 6 of the Employers' Liability Act to denote payments due under that Act. Accordingly, the Workmen's Compensation Act 1906, sec. 14, had not been repealed by the Sheriff Courts (Scotland) Act 1907, and it applied to this action and rendered it incompetent to have the cause brought up to the Court of Session. Originally the Employers' Liability Act 1880, sec. 6 (3), was the statutory provision for actions under that Act being commenced in the Sheriff Court and for their subsequent removal to the Court of Session, and it had been repealed by the Workmen's Compensation Act, 1906, sec. 14. Even if it should be maintained that the latter section was impliedly repealed by the Sheriff Courts (Scotland) Act 1907, the repealed section of the Employers' Liability Act would not be revived, and it need not therefore be considered. The motion should therefore be refused.

Counsel for the appellant (pursuer) were not called on.

The Court without delivering opinions ordered issues.

Counsel for the Pursuer and Appellant—Watt, K.C.—Aitchison. Agents—Balfour & Manson, S.S.C.

Counsel for the Defender and Respondent—Paton. Agents—St Clair Swanson & Manson, W.S.