but at the end of that time it became apparent that in another twenty-four hours the pursuer would be completely and permanently recovered and as well in every respect as he had been before the accident, and that this prognosis which he made at the time had been in every respect confirmed by the history of the case during the three months which intervened between the accident and the raising of the action, and during the further period up to the date of the trial. Why should a pursuer be entitled to a jury trial as a reward for suppressing facts within his own knowledge which if disclosed would have entirely altered the complexion of the facts averred? On the other hand, if the pursuer had averred that although he had not lost more than a couple of days' work and wages, he had during the three months since the accident exhibited certain symptoms which he had been advised indicated that the effects of the accident might be serious and permanent, I should have thought that the action was one in which the Court might have had a difficulty in refusing a jury trial. As matters stand, however, I think that the case should go back to the Sheriff.

The LORD PRESIDENT (CLYDE), LORD CULLEN, and LORD SANDS concurred.

The Court remitted the cause back to the Sheriff-Substitute.

Counsel for the Pursuer—Garson. Agent—W. A. Farquharson, S.S.C.

Counsel for the Defender — Gilchrist. Agents — Manson & Turner Macfarlane, W.S.

Friday, July 18.

FIRST DIVISION.

[Lord Morison, Ordinary.

PERTH GENERAL STATION COMMITTEE *v.* STEWART.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (4)—*Common Law Action—Motion to Fix Compensation—Timeousness — Reduction of Award—Competency—Bar.*

In an action in the Sheriff Court at the instance of a workman against his employers for damages at common law for injuries sustained by him while in their employment, the defenders were assoilzied with expenses. No motion was made by the pursuer to have compensation under the Workmen's Compensation Act assessed until after the case had been disposed of, nor did the interlocutor assoilzieing the defenders contain any finding or reservation as to their liability to pay compensation under the Act. Before, however, decree for the taxed amount of the defender's expenses had been pronounced the pursuer moved the Court (the defenders opposing the motion), in terms of section 1 (4) of the Act, to assess compensation, and the Sheriff-Substitute thereafter made an award of compensation in the pursuer's favour. The employers—a Stated Case obtained by them on appeal having been dismissed as incompetent—brought an action of reduction of the award of compensation. *Held* (1) that the award was *ultra vires* in respect that the motion to the Sheriff to assess compensation had not been made until after the action of damages had been disposed of by final judgment, and (2) that the employers were not barred *personali exceptione* from reducing the award, and decree of reduction *granted.*

The Workmen's Compensation Act 1906, sec. 1 (4) enacts—"If within the time hereinafter in this Act limited for taking proceedings an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which in its judgment have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act."

The Perth General Station Committee, incorporated by Act of Parliament, *pursuers*, brought an action against James Stewart, labourer, Perth, *defender*, concluding for the reduction of certain interlocutors pronounced by the Sheriff-Substitute and the Sheriff of Perthshire between 1st July 1921 and 10th August 1922 in an action at the instance of the defender for damages at common law resulting from an accident which happened to him while in the employment of the pursuers.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary:—"There has been a very unfortunate series of litigations between these parties, which is all the more regrettable in that the sum involved in the merits of the dispute is altogether out of proportion to the legal expenses which have been incurred. The facts which are material to the decision of this action of reduction are not in dispute. On the 30th June 1919 the defender met with an accident in the course of his employment with the pursuers. They paid him two weeks' compensation, equivalent in amount to that which he might have claimed under the Workmen's Compensation Act, and then ceased the payments. On 12th July 1920 the defender raised an action at common law in the Sheriff Court at Perth against the pursuers to recover a sum of £200 damages on the

ground that the accident was caused by the pursuers' negligence. They denied negligence on their part and pleaded in any case contributory negligence on defender's part, and that the claim was barred because the defender had elected to take and had in fact received compensation under the Workmen's Compensation Act.

"On the 25th April 1921 the Sheriff-Substitute issued an interlocutor in which he found in fact that the accident happened as the defender alleged, that he did not agree to accept compensation under the Workmen's Compensation Act, and that the accident was caused by the joint fault of the pursuers and defender, and he assoilzied the pursuers from the prayer of the initial writ, finding the defender liable in expenses.

"Before the process in the action came to an end, viz., on the 7th June, the defender lodged a motion asking the Sheriff-Substitute to allow it to proceed as a claim at his instance under the Workmen's Compensation Act, section 1 (4).

"On the 17th June the Sheriff-Substitute approved of the Auditor's report on the pursuer's account of expenses allowed in his interlocutor of the 25th April.

"On the first July thereafter the Sheriff-Substitute allowed the cause to proceed as a claim under the Workmen's Compensation Act. This interlocutor was appealed to the Sheriff, and he dismissed the appeal as incompetent.

"On the motion of the pursuers—who, it is explained, were desirous of obtaining an appealable interlocutor—the Sheriff-Substitute allowed parties a proof.

"The pursuers again appealed against this interlocutor to the Sheriff, who again dismissed the appeal as incompetent.

"On the 8th day of June the pursuers presented a note of suspension and interdict directed both against the defender and the Sheriff-Substitute, in which they asked this Court to interdict further proceedings under a pretended arbitration under the Workmen's Compensation Act, and in particular from proceeding with the proof therein which the Sheriff-Substitute had allowed.

"Answers were lodged to the note, and I heard parties in the Bill Chamber and refused the note as incompetent and premature.

"I expressed no opinion on the respective contentions of the parties in regard to the meaning and effect of the provisions of the statute. As I explained in a note, I thought that they fell to be disposed of under and in terms of the Workmen's Compensation Act—that is to say, by the Sheriff-Substitute in the first instance, but subject to the provisions and to the schedules to the Act and the appeal therein enacted.

"On 3rd August the Sheriff-Substitute found the defender entitled to compensation, and awarded it under deduction of one-half of the expenses which the pursuers incurred in defending the common law action.

"On the 16th October the pursuers presented to the First Division of the Court of Session a Stated Case on appeal against the Sheriff-Substitute's award. On the 19th January 1923 the Court dismissed the case as incompetent.

"Thereafter on 7th March 1923 the pursuers raised this action of reduction, in which they seek to set aside all the orders of the Sheriff and Sheriff-Substitute pronounced in the proceedings for obtaining a certificate of compensation between 1st July 1920 and 10th August 1922."

The parties averred, *inter alia*—"(Cond. 10) The whole interlocutors in the said action set forth in the summons are null and void. The defender having elected to claim damages from the pursuers at common law, and having brought the said action in which they were assoilzied with expenses, was not entitled to have compensation under the Workmen's Compensation Acts assessed therein in respect (1) that the said action was not brought within the time limited for taking proceedings under the Workmen's Compensation Act 1906, and (2) it had not been determined in said action that the injury sustained by the defender was one for which the defenders would have been liable to pay compensation under the provisions of the said Act. Further, the application by the defender to have compensation assessed was not made timeously. The said Sheriff-Substitute had issued a final interlocutor and had no jurisdiction, and was not entitled to proceed to the assessment of and to award compensation under the said Acts when the application was made. The whole proceedings and interlocutors since 1st July 1921 are *ultra vires* and null and void. With reference to the averments in answer, the proceedings in the action are referred to. . . . *Quoad ultra* the averments in answer so far as not coinciding herewith are denied. . . . (*Ans.* 10) Denied. Explained that on a sound construction of the Workmen's Compensation Act the Sheriff-Substitute was entitled to follow the procedure he has adopted. It was admitted that the accident arose out of and in the course of the defender's employment, and it was established in the proof that the defender was at that date still incapacitated for work as a result of the injuries he had sustained. The pursuers had pleaded that the defender had accepted compensation under the Act, and while it was held that he had not received payments so as to bar a common law claim, the pursuers led evidence to establish, and they did not dispute their liability for, compensation. They never withdrew or qualified the assertion which they supported by proof, and the Sheriff-Substitute was well warranted without making any express finding to hold that there was common assent or judicial admission that the injury was one for which the employer would have been liable to pay compensation under the Act. That question was in fact determined in the action. The word 'dismiss,' as used in section 1 (1) (*a*) of the 1906 Act, is not used technically but generally, and does not exclude an action in which in Scotland absolvitor is the appropriate judgment. In the circumstances averred there has been

on the pursuers' part an undue and excessive accumulation of actions. Explained that articles 1 to 6 inclusive and 9 of pursuers' condescendence are taken verbatim from the condescendence annexed to the said note of suspension and interdict, and the *media concludendi* in both actions are the same. . . ."

The pursuers pleaded, *inter alia*—"1. The Sheriff-Substitute having no jurisdiction to proceed to the assessment of and to award compensation in the circumstances condescended on, and the interlocutors complained of being *ultra vires* and null and void, they should be reduced as concluded for."

The defender pleaded, *inter alia*—"3. The action being incompetent both in general and in particular, because suspension and reduction as processes of review are not cumulative but alternative remedies, and because the pursuers have finally exhausted their remedy, if any, under the former process, should be dismissed. 6. *Esto* that the interlocutor of 1st July 1921 was *ultra vires*, the pursuers are barred *personali exceptione* from proponing such invalidity now (*a*) by their failure to take timeous steps to suspend or reduce the said interlocutor so far as it allowed the cause to proceed as a compensation claim; (*b*) by their failure to suspend or reduce the interlocutor of 20th April 1922; and (*c*) by their actings in proceeding to proof and judgment in the said arbitration. 8. In any event, the pursuers not having availed themselves of their statutory rights of appeal, and having acquiesced in the interlocutors complained against, are barred from insisting in the present action."

On 6th July 1923 the Lord Ordinary dismissed the action as incompetent.

Opinion.—[*After the above-quoted narrative*]—"The conclusions of the summons are supported by one general plea-in-law, in which the pursuers maintain that the Sheriff-Substitute had no jurisdiction to proceed to the assessment of and to award compensation to the defender.

"The grounds of the action are set forth in condescendence 10, and are (1) that the defender's common law action was not brought within the time limited for taking proceedings under the Workmen's Compensation Act 1906, and (2) that the Sheriff-Substitute's interlocutor in that action of 25th April 1921 had not determined that the injury was one for which the pursuers would have been liable to pay compensation under the provisions of the Workmen's Compensation Act.

"I think the decision of these questions involves investigation into the proceedings which took place before the Sheriff-Substitute, when the defender is alleged to have made his election, and raise questions of law arising solely on the construction of sections 1 (4) and section 2 of the Workmen's Compensation Act. The Sheriff-Substitute in his various interlocutors dealt with these matters, and disposed of them adversely to the pursuers. He issued a certificate of compensation bearing to be under section 1 (4) of the Act.

"Although I had a full argument on these subjects, I do not think I should express any opinion on them, as it appears to me to be incompetent for a Lord Ordinary in the Court of Session to review any decision of the Sheriff-Substitute either on the facts which he held proved or on the construction of section 1 (4) of the Workmen's Compensation Act, by which a certificate of compensation may be awarded.

"The Workmen's Compensation Act confers no express power on the Court of Session to review the Sheriff's findings in fact or in law made in any application under the statute, and I can see no reason for implying it. The review which the statute gives is a limited right of appeal on case stated to either Division of the Court of Session. The construction of the Workmen's Compensation Act is in my opinion confined to this tribunal, with a right of appeal to the House of Lords. There are, I think, two distinct cases in which an appeal by way of stated case is permitted by the Workmen's Compensation Act—(1) where the Sheriff is acting as arbitrator, and (2) where the statute enacts an appeal against the Sheriff's judgment though he is not sitting as arbitrator.

"In the first case the appeal is expressly provided by rule 17 (*b*) of the Second Schedule. The second case is illustrated by section 14 of the statute. When the workman raises proceedings under the Employers Liability Act or under that statute and at common law the proceedings are brought under the forms and in accordance with the provisions of the Sheriff Court Act 1907. But section 14 of the Workmen's Compensation Act gives a right of appeal against the Sheriff's decision in that class of action by way of stated case on a question of law. And although in that proceeding the Sheriff is not sitting as statutory arbiter, the concluding words of the section apply the provisions of the Second Schedule of the Act to an appeal on a question of law in the form of a stated case as if he were.

"When a workman raises an action of damages in the Sheriff Court under the Employers' Liability Act or under that Act and at common law, it is, I think, competent for him to exercise the right to claim compensation conferred under section 1 (4) of the statute.

"In that event the words of section 14 of the statute in regard to an appeal appear to be sufficiently wide to give the parties a right to appeal to either Division of the Court of Session by way of stated case on any question of law which might arise in the application for a certificate of compensation under sub-section 4 of section 1.

"The important consideration for the present question is to notice that every other mode of appeal to the Court of Session is expressly excluded by section 14. The leading purpose of this section was to abolish the right of appeal to the Court of Session for jury trial in cases where the Employers' Liability Act was invoked—the appeal, that is to say, under section 6 (1) of the Employers' Liability Act 1880 and section 9 of the Sheriff Courts Act 1877.

"But this right of appeal remains to the workman when his action of damages is exclusively laid at common law, and in that case the procedure for obtaining the certificate of statutory compensation is regulated exclusively by section 1 (4) of the statute.

"When I considered the arguments of the parties in the note of suspension and interdict I had read the concluding words of this sub-section as having the same effect as the concluding words of section 14. It has now been authoritatively decided that an appeal to either Division of the Court of Session from the Sheriff's decision issuing or refusing a certificate of compensation under section 1 (4) of the statute is incompetent—*Stewart*, 1923 S.C. 556.

"I am unable to find any provision of the statute which warrants the view that the Sheriff's decision on this subject can be reviewed by the Lord Ordinary in an action brought before him. My opinion is that the statute excludes all review of the Sheriff's judgment on the facts, and that review of his decision on points of law is confined to appeal by way of stated case to either Division of the Court of Session.

"It was, however, strongly contended by the learned counsel for the pursuers that this action was competent at common law. It was argued that the statute gave the right to either party to obtain the opinion of either Division of the Court of Session on every question of law which the Sheriff decided, and that the present action was now the only form of process by which this could be accomplished.

"I am not impressed with this argument. I think the statute makes provision for appeal where appeal is intended, and if the statute does not permit an appeal on a question of law arising in the proceeding for the issue of a certificate of compensation under section 1 (4), the presumption is that the exercise of this jurisdiction by the Sheriff or Lord Ordinary is intended to be privative.

"It was also argued that the proceeding for obtaining a certificate of compensation was tacked on to an action in the Sheriff Court at common law, and that an action to set aside a Sheriff Court decree on a review of the merits of the judgment was always competent, and that this view was supported by the opinion of Lord Kincairney in the case of *Taylor* v. *M'Gavigan*, 23 R. 945, and by the judgment of the Second Division in the case of *Mathewson* v. *Yeaman*, 2 F. 373. It seems to be very doubtful whether the decision in *Mathewson's* case supports the argument, because Lord Young definitely laid it down that an action for reduction of an interlocutor pronounced in the Sheriff Court in order to review the merits of the Sheriff's judgment would not be entertained.

"However that may be, I think the argument does not aid the pursuers in this case. When the defender elected to claim compensation under section 1 (4) the common law action in the Sheriff Court automatically came to an end, and the proceedings thereafter for obtaining a certificate of compensation were conducted solely under the provisions of the Workmen's Compensation Act.

"Lastly, the pursuers argued that this action for reduction was competent in this Court because the award of the Sheriff-Substitute was pronounced by the exercise of a jurisdiction not warranted by the Workmen's Compensation Act. It is in a sense true that the questions of law which are in issue here do raise a question of the Sheriff's jurisdiction to entertain the defender's application under section 1 (4), but in substance the points raised are only questions of law arising on the just construction of the sections of the Workmen's Compensation Act, and if this action is competent in this case, then an action of reduction in the Court of Session would arise in every case in which the Sheriff erroneously decided whether an action arose out of or in course of an employment, or who were the dependants of a deceased workman within the meaning of the Act.

"There are many cases in which this Court in the exercise of the power which Lord President Inglis described as 'its super-eminent jurisdiction' will set aside the awards or decisions of arbiters or inferior judges which have been vitiated by a fundamental nullity or by some transgression of duty or by a refusal to perform it. But this Court has not, I think, ever set aside the judgment of an arbiter simply because he came to an erroneous decision on a question of law which it was his duty to determine. In my opinion it was the duty of the Sheriff to decide the questions raised in the condescendence, and this Court cannot set aside his judgment upon them in an action of reduction.

"I ought in conclusion to notice that the defender submitted an argument in support of his plea of *res judicata*. I do not think this plea is well founded. In the case of *Menzies* (20 R. (H.L.) 110) Lord Watson, citing the case of *Gillespie* v. *Russell* (3 Macq. 759), said the dismissal of an action upon relevancy without any inquiry into the merits can never be *res judicata*. By a parity of reasoning the refusal of a note of suspension and interdict in the Bill Chamber on the ground of incompetency cannot in my opinion be *res judicata* of the merits of the question which it was brought to try in the Court of Session.

"I shall accordingly find that it is incompetent upon the grounds set forth in the condescendence to set aside in the Court of Session the interlocutors of the Sheriff in granting the certificate of compensation under section 1 (4) of the Workmen's Compensation Act 1906 and mentioned in the conclusions of the summons, and therefore dismiss the action with expenses."

The pursuers reclaimed, and argued—Pursuers had from the commencement of proceedings stated and maintained their objection to the workman's motion as being too late. Accordingly they were not barred from suing the present action. The Sheriff-Substitute being *functus* in the case when the motion was made had no jurisdiction to deal with it—*King* v. *Edinburgh Collieries Company, Limited*, 1924 S.C. 167, *per* Lord

President at p. 173, 61 S.L.R. 148; *Stewart* v. *Perth General Station Committee*, 1923 S.C. 356, 60 S.L.R. 194.

Argued for defender—The pursuers were barred from suing the present action. Having elected to appeal to the Sheriff and not having proceeded further they were barred from starting a new remedy by reduction —*Tough's Trustee* v. *Edinburgh Parish Council*, 1918 S.C. 107, 55 S.L.R. 146. The application to the Sheriff was timeously and competently made in terms of section 1 (4) of the Act. The following authorities were referred to:—*Henderson* v. *Glasgow Corporation*, 1900, 2 F. 1127, 37 S.L.R. 857; *Baird* v. *Higginbotham & Company, Limited*, 3 F. 673, 38 S.L.R. 479; *Quinn* v. *John Brown & Company, Limited*, 1906, 8 F. 855, 43 S.L.R. 643; *M'Kenna* v. *United Collieries, Limited*, 1906, 8 F. 969, 43 S.L.R. 713; *M'Gowan* v. *Smith*, 1907 S.C. 548, 44 S.L.R. 384; *Slavin* v. *Train & Taylor*, 1912 S.C. 754, 49 S.L.R. 93; *Page* v. *Burtwell*, [1908] 2 K.B. 758; *Cribb* v. *Kynoch Limited*, [1908] 2 K.B. 551; Elliot, Workmen's Compensation Act (7th ed.), p. 201.

Lord President (Clyde)—In July 1920 the workman raised an action against his employers in the Sheriff Court in which he concluded for damages in respect of injuries he had suffered while in their employment. The action was based upon common law grounds alone. In April 1921 the Sheriff-Substitute found against the workman on the ground of his contributory negligence, assoilzied the employers and found them entitled to expenses.

Some weeks thereafter, but before the employers' account of expenses had been taxed and decerned for, the workman for the first time sought to have recourse (under sub-section (4) of section 1 of the Act of 1906) to his statutory rights to compensation by tabling a motion before the Sheriff-Substitute to assess the compensation in his favour. For the reasons indicated and on the authorities cited in a recent case between these parties (*Perth General Station Committee* v. *Stewart*, 1923 S.C. 356) this motion came too late; and the Sheriff-Substitute being *functus* in the case (except for the limited purpose of decerning for the taxed expenses) had no power or jurisdiction to entertain it.

It is true that the opinions expressed in the case just referred to were *obiter*, because the case itself (which took the form of a stated case under the Workmen's Compensation Act 1906) was thrown out as incompetent. But any question about the timeousness of such a motion as this, proponed after the case had been finally disposed of, had already been settled by previous decisions in the negative. The point turns on the construction of a by no means happily framed enactment and the reconcilement of its terms with the ordinary forms of judicial procedure. Having heard further argument on it in the present case, I see no reason to doubt the soundness of the opinion I indicated in the previous case or of the previous decisions upon which that opinion proceeded. There is no difference in this matter (either in the Sheriff Court or in this Court) between an interlocutor giving judgment after a proof and an interlocutor applying the verdict of a jury trial, or so far as that goes an interlocutor giving judgment on appeal. In all these cases the motion must be made in time to reserve, or preserve, the jurisdiction of the Court in which the case is being tried for the purposes of the very special process of assessment permitted under sub-section (4) of section 1. That is why a motion craving that such assessment should be made, unless presented before the active jurisdiction of the Court in the action is spent, comes too late, with the result that the workman is conclusively held to his statutory option of remedy at common law (or under the Employers' Liability Act) in preference to statutory compensation. Moreover, an interlocutor in favour of the employer which *simpliciter* dismisses or assoilzies is a different thing from one which dismisses or assoilzies subject to a reservation of the pending action for the purpose of assessing the statutory compensation, and it is only justice that the employer should have the opportunity of appealing from a dismissal or absolvitor clogged with such a reservation. If as was contended by the respondent in the present case the motion might be tabled at any time before extract of the decree of dismissal or absolvitor, the employer might find himself deprived of his right of appeal. Nor is any injustice done to the workman by requiring the motion to be made timeously in the sense above explained, for even if he has omitted to make it in time he can always present an appeal against the dismissal or absolvitor, and while not insisting on the appeal on the merits, use it for the purpose of tabling the motion before a final decision of the merits has been pronounced against him.

What happened was that as soon as the workman tabled his motion the employers challenged its competency—or rather the power of the Sheriff-Substitute to entertain it—on the ground, *inter alia*, that it came too late. But in the beginning of July 1921 the Sheriff-Substitute, after hearing parties, issued an interlocutor allowing the proceedings to go on as a claim under the Workmen's Compensation Act 1906. This was wrong for the reasons above referred to, and the employers took an appeal to the Sheriff-Principal. The Sheriff-Principal found himself in this dilemma—either he was dealing with an appeal in the common law action or he was dealing with procedure under the Workmen's Compensation Act. If the appeal was in the common law action he held it bad for want of leave —Sheriff Courts (Scotland) Act 1907, section 27. If on the other hand it was an appeal in the course of procedure under the Workmen's Compensation Act, then it was incompetent, inasmuch as that Act only allows appeal in certain circumstances, and then only by way of stated case to the Court of Session. The Sheriff-Principal therefore refused the appeal and the employers did not carry it further.

The case accordingly went back to the

Sheriff-Substitute, and the Sheriff-Substitute allowed proof of a minute which the workman had lodged. A second appeal was then taken by the employers to the Sheriff-Principal, and the Sheriff-Principal, adverting to the difficulties which had rendered the former appeal abortive, held this second appeal incompetent and referred in his note to the decision in *Slavin* v. *Train & Taylor*, 1912 S.C. 754.

The case again went back to the Sheriff-Substitute, and at that stage the employers presented a note of suspension and interdict against the workman and against the Sheriff-Substitute in the Bill Chamber, which came before Lord Morison. The purpose of the suspension and interdict was to prevent any further proceedings in pursuance of the workman's motion. The grounds of the note included, but were not confined to, the non-timeousness of the workman's motion, and in the condescendence the employers stated their intention to raise the present action of reduction. In these circumstances Lord Morison (in the Bill Chamber) took the view that whatever might be the competent and appropriate method of remedy, it was not proper meanwhile to interfere with the Sheriff-Substitute by way of interdict, and the note of suspension and interdict was thrown out before it reached the Court of Session.

In the end the Sheriff-Substitute found the workman entitled to statutory compensation and assessed its amount, and the employers then presented a Stated Case to the Court of Session. That was the Stated Case which came before us last year. We found ourselves unable to entertain that Stated Case. It expressly bore to be presented in an arbitration under the Act of 1906, but for the reasons explained in the former case it was plain that it was not an appeal from proceedings in which the Sheriff-Substitute was acting as statutory arbitrator—Workmen's Compensation Act 1906, Schedule II, Paragraph 17 (*b*). Nor was it suggested that it could be entertained as an appeal in the common law action under section 14, since repealed (Workmen's Compensation Act 1923, section 24 (10)), because that form of appeal was allowed only in an action raised either (*a*) under the Employers' Liability Act 1880, or (*b*) under said Act, and, alternatively, at common law. For some reason which I do not profess to understand it was not allowed in an action raised purely at common law, but such was the will of the Legislature. The workman's action, it will be remembered, was raised under the common law alone.

Nothing daunted, the employers have now brought this action of reduction. It is founded on the single plea that the Sheriff-Substitute had in the circumstances no jurisdiction to assess statutory compensation, and that the proceedings which followed on the workman's motion were *ultra vires*. It will appear from what I have already said that this plea is well founded. The Lord Ordinary's view was that this action was substantially a proceeding for review. But with deference to the Lord Ordinary it is in no sense a proceeding for review; on the contrary, its object is cassation, not review. The basis of the action might indeed be said to be that there is nothing to review, because nothing effective was or could be done by the Sheriff-Substitute in the circumstances in which he acted. There were other grounds upon which the reduction was supported, but I need say nothing about any of them, for it is not necessary to do so for the disposal of the case. But I will say that some of them touch questions of procedure under the Act which are difficult, and which may yet require solution.

It was argued for the workman that the pursuers are barred *personali exceptione* from suing the present action by their failure to take timeous steps to suspend or reduce the Sheriff-Substitute's interlocutors. I do not think there has been any such failure. They had at the very initiation of the proceedings tabled their objection to the workman's motion as being too late, and cited the authorities upon which that objection depended. There are no prescribed forms of pleading for the very special form of proceeding permitted under sub-section (4) of section 1 of the Act; but I think the employers sufficiently protested against the exercise by the Sheriff-Substitute of a jurisdiction which they disputed, and they did so *in limine*. I do not think that a party necessarily loses his right to relief against proceedings which are *ultra vires* and *funditus* null because having tabled his protest he does not immediately thereafter insist on suspension or reduction. Finally, it was contended for the workman that the employers were barred by their actings, and particularly by their non-insistence in the appeals they presented to the Sheriff-Principal, from resorting to the remedy of reduction. But the case is one of fundamental nullity, and I do not think the employers did anything to bar their natural remedy by reduction.

My opinion accordingly is that the pursuers are entitled to have the whole proceedings set aside.

Lord Skerrington—Section 1 (4) of the Workmen's Compensation Act 1906 is difficult to construe. There have, however, been several decisions in regard to it, and I think that there has been established a working rule—I do not say the best possible rule—which has become familiar to the profession and which ought not to be disturbed. It is this—that if a workman who is the pursuer in an action of damages irrespective of the Workmen's Compensation Act, wishes to take the benefit of section 1 (4) he must make his motion while his action of damages is still a living action, and that it will be too late if he does not make the motion until after an interlocutor has been pronounced which unconditionally and unreservedly disposes of the action of damages, leaving nothing to be done in the action except the duty of approving or disapproving of the Auditor's report on expenses and granting decree therefor.

At first sight it seems hard on the pursuer that the interlocutor of the Sheriff-Substi-

tute dated 25th April 1921, which disposed of the whole merits of the case, did not contain any words securing to him an opportunity to claim compensation under the Act of 1906. The hardship was, however, more apparent than real. The workman's solicitor might, while addressing the Sheriff upon the evidence in the action of damages, have requested that the judgment, if it should be unfavourable to his client, should reserve his right to claim compensation under the Act of 1906. Or again, when he read the interlocutor of 25th April 1921 unconditionally deciding the action of damages unfavourably to the workman, he might have appealed either for the purpose of having the judgment reconsidered on its merits or for the purpose of asking for an opportunity to institute proceedings under section 1 (4).

I think that, looking to the decisions, we have no course open except to hold that the proceedings in the Sheriff Court subsequent to 25th April 1921, which resulted in the assessment of compensation to the injured workman, were *ultra vires* and void, and must therefore be set aside.

With regard to the other matters to which your Lordship has referred, I have nothing to add to what has been said.

LORD CULLEN—When we had before us formerly the appeal by way of Stated Case relating to this unfortunate accident, the timeousness of the workman's motion for assessment of compensation was very fully canvassed in the argument, and in disposing of the case I ventured to say in my opinion that I thought the authorities relating to section 1 (4), and particularly the case of *Slavin* v. *Taylor* (1912 S.C. 754), necessitated the view that the workman's motion on 7th June 1921 came too late. Having given my best consideration to the argument addressed to us to-day by Mr Stevenson, I remain of that opinion. If it be right, then it follows that the Sheriff-Substitute, when he pronounced the interlocutors which are brought under reduction, was *functus officio*, and that these interlocutors were pronounced without jurisdiction, so that the pursuers are entitled now to have them reduced.

I am unable, like your Lordship, to see any sufficient ground for sustaining the sixth plea-in-law for the defender in this action to the effect that the pursuers are barred *personali exceptione* from pursuing the reduction—a plea in support of which no authority was cited to us.

LORD SANDS—This has been a very protracted litigation. I confess when the case was last before us I had some hopes that the pursuers would be content with having elicited from the Court pronouncements in law in support of the general propositions which it was their interest to maintain, and that they would have been content to let this particular case rest as it had been decided by the Sheriff-Substitute. For reasons which I have no right to criticise because I have not the materials for judgment before me, matters have not taken that course. And now after a considerable interval and much procedure the case is again before us for consideration. The grounds of the Lord Ordinary's interlocutor have not been supported in argument, and as the case has been presented to us I find no reason for differing from the conclusion in law at which your Lordships have arrived, and I concur in the judgment.

The Court recalled the interlocutor of the Lord Ordinary and granted decree of reduction.

Counsel for the Pursuers—Hon. W. Watson, K.C. — Robertson, K.C. — Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defender—Mackay, K.C. — W. H. Stevenson. Agents — J. Miller Thomson & Company, W.S.

Thursday, July 17.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court at Cupar.

M'LEOD *v.* MAGISTRATES OF ST ANDREWS.

Reparation — Negligence—Safety of Public —Footpath Crossing Public Golf Links— Pedestrian Hit by Golf Ball—Liability of Magistrates of Burgh—Relevancy.

A girl aged eleven brought an action against the magistrates of a burgh and a player on a golf course over which the magistrates exercised an administrative control, for damages for permanent disfigurement caused by her being struck by a golf ball driven by the player. She averred that she and her mother had taken lodgings in the burgh, and that while walking on a path running parallel to the line of the first hole she sustained the injuries in question, that the path was in dangerous proximity to the line of play, that balls were frequently driven on to or across the path, and that this danger was known to the first defenders, that these defenders put up notices requesting the public not to cross the course but to keep to the paths, and that these notices constituted an invitation to the public to use a part of their property which they knew to be dangerous. The action was defended by the magistrates. *Held* (by a majority of Seven Judges, *diss.* Lord Hunter and Lord Anderson) that the pursuer had stated a sufficient case for inquiry, and proof before answer *allowed.*

Barbara M'Leod, Dennistoun, Glasgow, *pursuer*, brought an action in the Sheriff Court at Cupar against the Magistrates and Town Council of St Andrews and Shereef Mohammed Emin, student, St Andrews, jointly and severally or severally, *defenders*, for payment to the pursuer of £200 damages.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer is the pupil daughter, aged