which had been the basis of the original agreement. The case was ruled by *Beath & Keay* (*cit. sup.*), which recognised that the amount of compensation might be altered by implied agreement. The Sheriff's interlocutor of 18th October decided nothing as to the amount of compensation due prior to its date.

LORD STORMONTH DARLING—The Lord Ordinary has sustained the reasons of suspension, and has suspended the charge on the ground, as explained in his opinion, that the principle of *Beath & Keay* v. *Ness* (6 F. 168), decided in this Division, applies to and rules this case. In that I agree with him. I think it impossible to read that judgment without seeing that the principle upon which it proceeds is that compensation is only payable during incapacity and in respect of incapacity. If there is a practical admission on the part of the workman that incapacity has ceased, then he cannot claim compensation in respect of incapacity. It is not necessary to say more. But I think it would be desirable to vary the interlocutor reclaimed against by laying our judgment partly on the offer of the employers referred to in article 6 of the complainers' statement of facts and the workman's refusal of that offer. With that alteration I am in favour of adhering to the Lord Ordinary's interlocutor.

LORD LOW—I am of the same opinion. I think this case is ruled by the judgment in *Beath & Keay* v. *Ness* (6 F. 168), which I may be allowed to say seems to me to have been a very well-considered and sound judgment. The only difference which was suggested was that here there had been an application to the Sheriff for review. I do not think that is any real distinction, for all that the Sheriff did was to find that the workman's incapacity had partially ceased, and to reduce his compensation to 1s. per week. The reduction only took effect as from the date of the Sheriff's judgment, and the question as to what was due prior to that date was not affected by the judgment. I therefore think that, with the alterations suggested by Lord Stormonth Darling, the judgment of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK—I agree. I think that the present case is ruled by the decision in *Beath & Keay* v. *Ness* (6 F. 168), with which I entirely concur.

LORD ARDWALL was absent.

The Court found that the compensation due to the respondent was payable only during his incapacity, and further, in respect of his refusal to accept the complainers' offer of £5, 18s. 9d., adhered to the interlocutor reclaimed against, and decerned.

Counsel for Complainers (Respondents)—R. S. Horne—Strain. Agents—W. & J. Burness, W.S.

Counsel for Respondent (Reclaimer)—R. L. Orr, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Thursday, May 16.

FIRST DIVISION.

ACCOUNTANT OF COURT (PENNEY), REPORTER.

Judicial Factor—Accountant of Court—Sheriff—Factors Appointed by Sheriffs to Confirm to Estates of Intestate Persons without Representatives or with Representatives in Minority—Supervision of Accountant—Judicial Factors (Scotland) Act 1880 (43 *and* 44 *Vict. cap.* 4), *sec.* 4 (7) *—Judicial Factors (Scotland) Act* 1889 (52 *and* 53 *Vict. cap.* 39), *sec.* 6.

The Accountant of Court having reported under the Judicial Factors (Scotland) Act 1880, sec. 4 (7) that a diversity of practice existed in the Sheriff Courts on the point whether factors appointed by Sheriff or Sheriff-Substitutes for the purpose of confirming to the estates of persons dying intestate without representatives, or with representatives who are in minority or pupillarity, are subject to the Accountant's supervision, the Court *directed* that such factors should fall under his supervision, and subject to the provisions of the Judicial Factors (Scotland) Act 1889, section 6.

The Judicial Factors (Scotland) Act 1889, sec. 6, enacts—"In addition to the factors specified in the recited Act of 1849, the Accountant shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session, or any of the Lords Ordinary in the said Court, or by any of the Sheriffs or Sheriff-Substitutes in the several Sheriff Courts in Scotland, to hold, administer, or protect any property or funds belonging to persons or estates in Scotland; and all such factors and others shall be and hereby are made subject to the provisions affecting judicial factors of the said recited Act of 1849, and of any Acts amending the same, or in terms of the Judicial Factors (Scotland) Act 1880, and of any Acts of Sederunt made in terms of said Acts; and the Accountant shall see that they duly observe all rules and regulations affecting them for the time: Provided that nothing in this section contained shall be held to apply to executors-dative. . . ."

On March 16, 1907, J. Campbell Penney, chartered accountant, Edinburgh, the Accountant of Court, made report to their Lordships of the First Division of the Court of Session, in terms of the Judicial Factors (Scotland) Act 1880, sec. 4, sub-sec. 7, as follows:—"The Accountant of Court begs to report that in 1896 he first became aware, through a special remit by Sheriff Thoms, that throughout the sheriffdoms appointments of judicial factors were made which were not reported to him and had not therefore come under his supervision.

"These were appointments made in the Commissary Courts for the purpose of confirming to the estates of intestate persons who had left no representatives, or whose children were in minority.

"After getting an opinion from the then Solicitor-General that these appointments fell under his supervision, the Accountant called upon the Sheriff Clerks to intimate all such appointments to him. This order was complied with, and there have been reported to date 148 such appointments (78 of which came from Glasgow). These have been annually supervised by the Accountant, and in several cases discharges granted at close on report by him in the usual way.

"In the Sheriff Court of Lanarkshire at Glasgow, Alexander Rankine was, in February 1902, appointed 'factor for Christina M'Intyre, who is in minority, and John M'Intyre, Helen M'Intyre, and Duncan M'Intyre, who are in pupilarity.' This was duly intimated to the Accountant. An inventory was lodged, and annual accounts subsequently audited up to 5th September 1906, when the estate was exhausted.

"In November 1906 the usual petition for discharge was presented, which was refused by the Sheriff on the ground that it was an application as executor-dative and not as factor.

"In the Sheriff Court of Lanarkshire at Glasgow, John Meikle was, in June 1903, appointed factor for Catherine Meikle, James Meikle, and John Meikle, children of the deceased James Meikle, mason, Glasgow. An inventory and annual accounts were duly lodged.

"In November 1906, the cautioner having died, the Accountant issued a requisition to find new caution, and in January 1907 he received a letter from the factor that the Sheriff Clerk declined to issue a new bond of caution 'in respect he held the Accountant had no right of supervision over factories of this nature.'

"In the Sheriff Court of Forfarshire, at Forfar, George G. Milne, grain merchant, Montrose, was, in September 1898, appointed factor for the two pupil sons of the deceased Mrs Jane Mitchell, Montrose. An inventory and accounts were duly lodged, and the factor lodged with the Accountant a note for special powers. On the Accountant's report being laid before the Sheriff, he found 'that it was incompetent to grant the authority craved, and refused the crave of the note.'

"In the Sheriff Courts of Aberdeenshire, Ayrshire, &c., no such questions have been raised, and accounts are lodged and discharges granted in the usual way.

"There being thus diversity of judgment and practice in proceeding in regard to these judicial factors, the Accountant craves your Lordships, in terms of section 4, sub-section 7, of the Judicial Factors Act 1880, for a rule deciding whether factors appointed under these conditions fall under his supervision."

Counsel for the Accountant submitted that the factors appointed by the Sheriffs in the Commissary Court fell within section 6, of the Judicial Factors (Scotland) Act 1889, and that the proviso at the end of the section did not apply to them but to executors-dative in their own right. Prior to the passing of that Act the business of the Commissary Court had been transferred to the Sheriff Court, and consequently it must have been intended by the Legislature to bring the factors who were formerly there appointed under the same rules. It had, however to be admitted that different views had been held—Thoms on Factors, p. 517; Dove Wilson's Sheriff Court Practice, 551; Alexander's Practice, p. 54—but these views were wrong. The position of a factor so appointed was that of a factor—*Johnstone* v. *Lowden*, February 15, 1838, 16 S. 541, esp. Lord Gillies at p. 547. His confirmation *qua* executor did not end the factory. It continued till he obtained his discharge *qua* factor—*Johnston's Executor* v. *Dobie*, November 3, 1906, S.C. 31, 44 S.L.R. 34. [*The Accountant of Court*, March 17, 1893, 20 R. 573, 30 S.L.R. 527, was also referred to for form of proposed order.]

At advising—

LORD PRESIDENT—This is a report by the Accountant of Court made in terms of section 4, sub-section 7, of the Judicial Factors (Scotland) Act 1880 "asking the Court to lay down a rule to ensure similarity of practice in the various Sheriff Courts in a matter pertaining to judicial factors"; and the question in controversy which has been raised in practice is, Whether the judicial factors who are appointed in the Sheriff Courts sitting as Commissary Courts with a view to taking the position of executor-dative on the estates which fall to minors, are or are not subject to the jurisdiction of the Accountant of Court.

I need scarcely remind your Lordships that though the practice of appointing factors is partially statutory and partially also a common law practice, the question of the jurisdiction of the Accountant of Court is here a statutory matter, for he is an official created with certain duties, and his duties are laid down in the statute; and the matter comes finally to be nothing more or less than simply what is the proper construction of the 6th section of the Factors (Scotland) Act 1889. That section is in these terms . . . [*Quotes section, ut supra*] . . .

The learned Sheriff-Substitutes who have held that such factors as I have mentioned are not subject to the jurisdiction of the Accountant of Court have gone on somewhat different views; both of them have expressed a doubt whether a factor of this sort falls within the category of the persons recited in section 6, and one of them, whether or not that may be so, thinks that this class of factors falls clearly within the proviso in section 6. Now, it is material to notice that this is evidently an attempt of the Legislature to solve still further than was solved in 1849 the whole question of *quis custodiet ipsos custodes*, and so far as one may take the import of the section concerned, I think there is evinced a desire that factors in general should be put under the very salutary jurisdiction of the Accountant of Court. The factors here in question are certainly factors, and they are certainly appointed by the Sheriff or Sheriff-Substitute, and the only point is whether they are appointed in the Sheriff Court in

Scotland. I have no doubt these factors are appointed in the Sheriff Court, because before 1880 the jurisdiction of the Commissary Court in Scotland had been transferred to the Sheriff Court. The next point for consideration is whether such an appointment of a judicial factor in the Sheriff Court, with a view to his becoming executor, falls within the proviso "that nothing in this section contained shall be held to apply to executors-dative"; and the first thing I ask myself is, Why was that proviso put in? Owing to the wide terms of the principal clause, which is not limited to factors, I do not think the answer is doubtful. If the first clause had only said "factors," there would have been no necessity to put this in. But the clause is not limited to "factors," but goes on to specify "any person appointed to protect any property or funds situated in Scotland." Now that is such very wide language that it might have been supposed to pull in executors-dative. Executors-dative are persons appointed to protect and administer property, and therefore the proviso was put in for the very good reason, pointed out by Lord M'Laren, that there is not the same reason to supervise an executor-dative as a factor, because the executor-dative is looking after his own interests, and is there as a person connected with the estate. When, however, you come to factors appointed to take the position of executors-dative to minors, there is good reason for subjecting them to the scrutiny of the Accountant of Court. The factors in question may have to administer for many years, and there is just the same reason for subjecting them as any other factor to the scrutiny of the Court. There is always a bond of caution in one case as in the other, but years may go and the cautioner may die, and in the end it may be found that the factor has not been administering the estate as he ought. It was to check that that the whole system of supervision by the Accountant of Court was devised, and the underlying reason is as strong in the one case as in the other.

I therefore come clearly to the opinion that the fact that the person who is a factor afterwards becomes executor-dative does not make any difference, and that the fact that he is appointed as executor-dative does not take away the generality that as a factor he is under the jurisdiction of the Accountant of Court.

LORD M'LAREN—I agree.

LORD KINNEAR—I am of the same opinion, and think that the learned Sheriffs who have taken a different view have failed to observe the very obvious distinction between persons decerned and confirmed executor-dative in their own rights and persons so confirmed merely as factor for pupils or minors. If that distinction is kept in view, then I think the construction of the statute your Lordship has explained becomes perfectly reasonable. There can be no reason to suppose that the Legislature intended to deprive pupils or minors of the protection of a factor which is given to others.

LORD PEARSON—I concur.

The Court pronounced this interlocutor—

"The Lords of Council and Session (First Division), in pursuance of the powers vested in them by section 4, sub-section 7, of the Judicial Factors (Scotland) Act, 1880, upon a report made to them by the Accountant of Court, boxed on 16th March 1907, direct and appoint that factors appointed by Sheriffs or Sheriff-Substitutes for the purpose of confirming to the estates of intestate persons who have left no representatives, or whose representatives are in pupillarity or minority, shall fall under the supervision of the Accountant of Court, and shall be subject to the provisions of section 6 of the Judicial Factors (Scotland) Act 1889."

Counsel for the Reporter—Pitman. Agent—Thomas Carmichael, S.S.C.

Tuesday, November 6, 1906.

OUTER HOUSE.

[Lord Salvesen.

BRIDGE *v.* THE CONGREGATION OF THE SOUTH PORTLAND STREET SYNAGOGUE AND OTHERS.

Process — Citation — Church — Unincorporated Society—Who must be called as Defenders?

An unincorporated society, *e.g.*, the congregation of a Jewish synagogue, may be sued in its own name, provided the office-bearers and committee of management are also called in their representative capacity.

On 2nd February 1906 the Reverend Isaac Bridge, residing at 45 Main Street, Gorbals, Glasgow, brought an action of damages against "the congregation of the South Portland Street Synagogue, Glasgow, and Emanuel Isaacs..., president, Jacob Goldstone..., vice-president, Levi Blumenthal..., honorary secretary, and Joseph Goldstone..., treasurer, all of the said congregation; and Joseph Shulman..., Eli Isaacs..., Jacon Harris..., Hyman Capolowitch..., Jacob Rosenheim..., Barnet Lazarus..., Benjamin Lewis..., Barnet Lipshitz..., Simon Michaelson..., and Morris Carnovsky..., being, together with the president, vice-president, honorary secretary, and treasurer, the committee of management and office-bearers of the said congregation, as such committee and office-bearers, and as representing the said congregation," and also against the above-named individual defenders as individuals.

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

The facts of the case, the contentions of the parties, and the authorities relied on, are given in the following opinion of the Lord Ordinary (SALVESEN):—"The pursuer