whole estate" the testator meant his whole estate heritable and moveable. That being so, when he directs that his whole estate shall be realised and divided, I think that may be viewed as a direct injunction to realise the whole estate without exception. The fact that the will contains a direction to realise differentiates the present case from the case of *Bell* (1906, 14 S.L.T. p. 224), where there was no direction to realise and the trustees had no powers of sale. Here there is a direction to realise, which applies to the testator's "whole" estate. I think therefore, though with some hesitation, that the will may be held to dispose of the share of the insignificant heritable subject to which the testator had a personal right.

LORD STORMONTH DARLING was absent.

The Court answered the first and fifth questions in the affirmative and the sixth in the negative.

Counsel for the First and Second Parties —Munro. Agents—Mackintosh & Boyd, W.S.

Counsel for the Third and Fourth Parties —Chree. Agent—Harry H. Macbean, W.S.

Counsel for the Fifth Party—Taylor Cameron. Agents—Roxburgh & Henderson, W.S.

Friday, January 17.

SECOND DIVISION.

[Lord Dundas, Ordinary.

FIFE COAL COMPANY, LIMITED *v.* LINDSAY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (3), *First Schedule* (1) (*b*), (2) *and* (12), *and Second Schedule* (8) *and* (14) (*b*)—*Suspension of Charge upon Registered Agreement as for Total Incapacity where Reduced Compensation has been Given and Accepted, on Ground that Total Incapacity has again Supervened—Competency.*

To justify a suspension of a charge upon a registered agreement it ought to be shown that without such suspension the complainer would suffer some manifest injustice, and further that the end to be attained by such suspension could not be attained by proceedings under the Act.

In February 1904 a workman was injured, and the compensation payable to him by his employers was fixed by agreement at 15s. 11d. per week, being the statutory maximum for total incapacity. A memorandum of the agreement was duly recorded in July 1905. The workman sufficiently recovered to be able to do light work between 26th September and 9th December 1905, and during that period the employers made payments, which he accepted in name of compensation, of sums at the rate of 7s. 9d. per week from 26th September to 21st October 1905, and at the rate of 5s. a week thereafter till 9th December 1905; the compensation paid representing one half of the difference between the amount which he was then earning and the amount which he was earning at the date of the accident. The workman subsequently refused to accept further payments of 5s. per week, at the end of December, on the ground that he was not able to work continuously even at the light employment, and from January 10, 1906, on the ground that total incapacity had on that date again supervened. In March 1907 he charged his employers upon the registered agreement to make payment to him of 15s. 11d. per week from 10th January. The employers brought a suspension, and argued that the original agreement had been superseded by agreements to pay and accept the lesser rates, that by their acceptance between 29th September and 9th December the respondent was barred from charging at the original higher rate, and that in any case the suspension could not be disposed of without inquiry, as they denied total incapacity.

The Court *refused* to suspend the charge, on the ground that the complainers had a remedy under the statute which they had failed to take, viz., to apply, when the dispute arose in December 1905, for review of the weekly payments.

James Lindsay, miner, George Place, Cowdenbeath, by virtue of an extract registered memorandum of agreement under the Workmen's Compensation Act 1897, dated 6th July 1905, and recorded in the register kept under the Act in the Sheriff Court at Dunfermline on 17th July 1905, and in the Sheriff Court books of the county of Fife at Cupar, for preservation and execution, on 23rd February 1906, charged the Fife Coal Company, Limited, having their registered office at Leven, to make payment of the sum of 15s. 11d. per week as from and after January 10th 1906.

The Fife Coal Company, Limited, brought a suspension.

Execution having been sisted on consignation, and the note passed, a record was made up.

The following narrative of *facts*, as set forth in the averments of parties, is taken from the opinion of the Lord Ordinary (DUNDAS)—"The complainers, the Fife Coal Company, Limited, seek to suspend a charge at the instance of James Lindsay, miner, Cowdenbeath. It appears that, on February 1904, the respondent, while in the course of his employment with the complainers, met with an accident, and claimed compensation under the Workmen's Compensation Act 1897 in respect of his consequent incapacity for work. The parties agreed that the amount should be 15s. 11d. per week, which was the statu-

tory maximum; and this was duly paid from 18th February 1904 to 26th September 1905. A memorandum of this agreement was recorded in the special register in July 1905, and in the Sheriff Court books for preservation and execution in February 1906. The complainers go on to aver that, the respondent having partially recovered and returned to work, the parties on or about 23rd October 1905 by agreement varied the weekly payment, and entered into a new agreement whereby the compensation was fixed at 7s. 9d. per week as from 26th September 1905: that this agreement superseded the prior recorded agreement; and that it was acted upon by the parties for the period between 26th September and 21st October. The complainers further say that on or about 6th November 1905 the parties by agreement again varied the weekly payment and entered into a new agreement whereby the compensation was fixed at 5s. per week as from 21st October; that the agreement of 23rd October was thereby superseded; and that this latest agreement was acted upon by the parties for the period between 21st October and 9th December 1905. At the latter date the complainers proposed to reduce the compensation to 4s. 7d. per week; but the respondent declined to agree to this; and on 10th January 1906 he left their employment, and intimated to them that he was then totally incapacitated for any work whatever. The complainers admit liability to pay compensation at 5s. per week from 21st October 1905, till that rate shall be varied by agreement or review in terms of the Act. But the respondent has charged them for payment at the rate of 15s. 11d. from and after 10th January 1906, his charge being based upon the original agreement, which is the only one which has been recorded. Hence the present suspension."

The complainers pleaded—"(1) The said charge is inept in respect (*a*) that it bears to proceed upon a recorded memorandum of an agreement which has not been binding on the complainers since 26th September 1905, and which was superseded by the foresaid agreements of 23rd October and 6th November 1905; (*b*) that the respondent's right to compensation at the rate charged for ceased from and after 26th September 1905, or at all events from 21st October 1905; and (*c*) that in any event the respondent has not since 21st October 1905 had right to compensation at a higher rate than 5s. per week. (2) The respondent is barred by the foresaid agreement of 23rd October 1905 from claiming from the complainers compensation at the rate of 15s. 11d. per week, and is barred by the foresaid agreement of 6th November 1905 from claiming from the complainers compensation at any higher rate than 5s. per week without either coming to an agreement with the complainers for payment at a higher rate, or having the compensation reviewed and increased upon application to the Sheriff for that purpose, and the said charge should accordingly be suspended. (3) *Separatim*—The respondent not being entitled to recover from the complainers by way of compensation any higher sum than such a sum as, along with the average amount which he is able to earn after the accident, will equal his average weekly earnings before the accident, the amount charged for is excessive, and the charge should in the circumstances be suspended."

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

On 2nd February 1907 the Lord Ordinary (DUNDAS) pronounced this interlocutor—"Repels the reasons of suspension, finds the charge orderly proceeded, refuses the prayer of the note of suspension, and decerns: Finds the respondent entitled to expenses against the complainers: Allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and to report: On the motion of counsel for the respondent authorises the Accountant of Court, on presentation of a certified copy of this interlocutor, to deliver to him the consignation receipt for £6, 9s. 8d., and the Commercial Bank of Scotland, Limited, also on presentation of a certified copy of this interlocutor, to make payment to the respondent of the sum contained in said consignation receipt with all interest accrued thereon."

Opinion.—". . . [*After the summary of the averments of parties above quoted*] . . . The parties are at issue upon two matters of fact, viz. (1) the nature and constitution, if any, of the alleged 'agreements' in October and November 1905, and (2) the alleged incapacity of the respondent as at 10th January 1906. The complainers' counsel moved for a proof on these heads. For reasons which I shall state, I think that motion must be refused. It appears to me that the recent case of *Davidson* (November 24, 1906, 44 S.L.R. 108) has a very material bearing here, and indeed comes near to ruling—though it does not absolutely and in terms rule—the present case. The Court there laid down that a recorded agreement is not displaced as a warrant of charge by a subsequent unrecorded agreement. That pronouncement seems to carry one a long way towards refusing this suspension. But the complainers point to differences in fact which they say are sufficient to distinguish the two cases. In *Davidson* the workman charged his employers in virtue of a recorded agreement for compensation at a reduced rate, fixed by a subsequent unrecorded agreement which he admitted to have been made by the parties, and it was not therefore decided that a charge would be good though it was for a sum greater than that which the charger had agreed to accept by an unrecorded agreement. But the decision and the dicta in *Davidson's* case appear to me to neutralise this suggested distinction. Then the complainers argued that the respondent, by having accepted the lesser rates for periods of weeks, is barred from now charging for payment at the higher rate originally agreed upon. But the respondent avers that his acceptance of these lesser rates was

not in virtue of agreements to vary, as alleged by the complainers, but merely a matter of voluntary and temporary modification, and without prejudice to his right to demand the full amount originally agreed upon, in the event—which he says has occurred—of his becoming once more totally incapacitated. Now these, as already pointed out, are just the matters of fact upon which the parties are at issue, viz., the alleged agreements and the alleged incapacity. Now I think that to allow a proof in this Court upon either of these heads would be to run plainly counter to the policy of the Workmen's Compensation Act 1897, which aims at providing summary and inexpensive methods of inquiry where parties do not agree on matters of fact. It is provided—section 1 (3)—that 'if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act, . . . or as to the amount or duration of compensation under this Act, the question if not settled by agreement shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act.' Now, all questions as to the alleged constitution of agreements to vary can, failing agreement, be brought to the sharp and speedy test afforded by Schedule II (8), by the party interested presenting such agreement to be recorded. Similarly, all questions as to a workman's capacity or the reverse can be speedily determined, failing agreement, by the statutory machinery. The present suspension does not, of course, take the form of 'any proceedings under this Act.' But where the Act provides specific and effective machinery for determining the questions at issue I do not think that one of the parties is at liberty to have these raised and expiscated in a process which might run its course through the courts up to the House of Lords. The complainers say that hardship will result if the suspension is refused. But the truth, in my opinion, is that the complainers have, or had, the remedy in their own hands, and have themselves to blame if, by not resorting to it, they are obliged to meet a claim which they could otherwise have defeated. There was nothing, so far as I see, to prevent them from recording the alleged subsequent agreements, if they were genuine, as provided by Schedule II (8), or from setting afoot the machinery of Schedule I (12) to have the payment reviewed. The former of these remedies was pointed out by Lord Ardwall in *Davidson's* case in the last paragraph of his opinion, and I agree with and adopt his Lordship's observations. I may add that I think it is clear that the complainers, and not, as was suggested in argument, the respondent are the 'party interested' within the meaning of Schedule II (8). During the discussion the following cases were referred to—*Colville*, 1905, 8 F. 179; *Steel*, 1902, 5 F. 244; *Cavaney*, 1903, 5 F. 963; *Morton*, 1902, 2 K.B. 276; *Binning*, 1906, 8 F. 407; *Blake*, 1904, 1 K.B. 503; *Beath*, 1903, 6 F. 168; *Cammick*, 1901, 4 F. 198; and *Dunlop*, 1901, 4 F. 203. I do not think it necessary to analyse or to comment upon these cases—though some of them at least have a material bearing on the questions here raised — further than to say that *Blake's* case, decided in England, to which the complainers' counsel referred, seems to me to be adverse and not favourable to their argument. Upon the whole matter I am of opinion that the complainers, in resorting to this procedure by way of suspension, have taken a course which, however ingenious, is not in the circumstances open to them to adopt, and that the suspension must be refused."

The complainers reclaimed, and argued—(1) The respondent was barred from charging the full amount in the recorded agreement by the subsequent agreements whereby lesser sums were accepted in name of compensation. These subsequent agreements operated as contracts to replace the recorded agreement—*Fife Coal Co., Limited* v. *Davidson*, 1907, S.C. 90, *per* Lord Kyllachy at p. 94, 44 S.L.R. 108. (2) The respondent was not, they averred, totally incapacitated, and accordingly could not claim the maximum amount, for that *plus* what he could earn would make him better off than before the accident, contrary to *Beath and Keay* v. *Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113; *Nimmo & Co.* v. *Fisher*, 1907, S.C. 890, 44 S.L.R. 641. They were entitled to a proof of this averment. The workman was charging for the full amount and ignoring the subsequent agreements, and this differentiated the case from *Fife Coal Co., Ltd.* v. *Davidson* (*cit. sup.*) (3) The suspension and the inquiry were competent, because where an injustice would be otherwise done they were entitled to a common law remedy—*Blake* v. *Midland Railway Co.*, [1904] 1 K.B. 503; *Beath and Keay* v. *Ness* (*cit. sup.*); *Nimmo & Co* v. *Fisher* (*cit. sup.*)—especially as the respondent had by charging upon the registered agreement invoked the aid of the common law. The suggested remedy of application for review under sec. 12 of the First Schedule would have been inconsistent with their position that the new agreements superseded the registered agreement. As to the suggested remedy of registering the new agreements under section 8 or section 14 (*b*) of the Second Schedule, it would have been useless to attempt to do so, for the Sheriff, who could not take a proof as to a disputed verbal agreement—*Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312—would have refused (following Lord Salvesen's opinion in *Hughes*, *cit. inf.*) to register it. It was true that they could then have brought an action of declarator that the verbal agreement had superseded the recorded agreement, and for reduction of the latter — *Hughes* v. *Thistle Chemical Co.*, 1907, S.C. 607, 44 S.L.R. 476—but if so they were entitled to raise the same question in a suspension.

Argued for the respondent—There was no relevant averment of an agreement to accept reduced compensation permanently. The receipts merely showed acceptance of a reduced rate for certain particular weeks. Such acceptance could only bar the respon-

dent from claiming full compensation for these particular weeks, but he was putting forward no such claim. Nor was it averred that the respondent was earning anything, but merely that he could earn something. The question of his capacity to earn could not be competently raised in a suspension. In *Beath & Keay* v. *Ness* and *Fisher* v. *Nimmo & Co.* (*cit. sup.*) there were, practically, admissions that incapacity had ceased, and the ground of judgment was that in these circumstances the workman's claim was unconscionable. Here disputes as to the amount and duration of compensation had arisen in January 1906, and under section 1 (3) of the Act such questions must be settled by arbitration. If distinction were attempted, and it were said that the disputes were regarding the existence of the verbal agreement, that was similarly a matter to be settled by arbitration—*Field* v. *Longden & Sons*, [1902] 1 K.B. 47, Collins. M.R., at p. 54. The complainers had alternative remedies open to them under the Act, and in these circumstances the suspension was incompetent. If they had believed they could establish an agreement to accept 5s. per week, their proper course was to register it under section 8 of the Second Schedule, as was done in *Cammick* v. *Glasgow Iron and Steel Co., Limited*, November 26, 1901, 4 F. 198, 39 S.L.R. 138; *Dunlop & Rankin* v. *Blackmore*, November 27, 1901. 4 F. 203, 39 S.L.R. 146; *Blake* v. *Midland Railway Co.* (*cit. sup.*)—or under section 14 (*b*) of the Second Schedule. If, on the other hand, they knew they could not substantiate any such agreement, then they should have proceeded under section 12 of the First Schedule for review of the registered agreement. It was for the party who wished the subsisting agreement varied to make application. The subsisting agreement was not the verbal one alleged, but the registered agreement. A registered agreement was in a higher position than a mere verbal agreement—*Colville & Sons, Limited* v. *Tigue*, December 6, 1905, 8 F. 179, Lord Low at p. 189, 43 S.L.R. 129—and was not displaced as a warrant of charge by a subsequent unrecorded agreement—*Fife Coal Co., Limited* v. *Davidson* (*cit. sup.*) A renunciation or variation of a decree-arbitral could only be proved by writ or oath—Dickson on Evidence, sec. 627; *vide* also *Binning* v. *Easton & Sons*, *cit. sup.* Lord Kyllachy at 8 F. 415. *Hughes* v. *Thistle Chemical Co.* (*cit. sup.*), was merely a corollary of *Binning* v. *Easton & Sons* (*cit. sup.*), and decided that since the latter mentioned case had determined that when a Sheriff decided that an agreement should be recorded an appeal did not lie against his decision, an action of reduction might be brought to prevent injustice being done. Here, on the contrary, as above pointed out, the complainers did have a remedy under the statute. [*Powell* v. *Main Colliery Co., Limited*, [1900], A.C. 366, referred to.]

At advising—

LORD JUSTICE CLERK—I concur with the view at which the Lord Ordinary has arrived in this case. There was a recorded agreement entered into between the complainers and the respondent by which his compensation was fixed at 15s. 11d., and it is for that sum that the complainers have received a charge. Their ground of suspension is that the charger agreed at various times to accept, and did accept, a less amount, and this is not disputed. But the only recorded agreement is that for 15s. 11d., and the charger alleges that he is again totally incapacitated, and therefore entitled to enforce the recorded agreement until it is either varied by the recording of another agreement or by a decision in the tribunal appointed for varying or ending a payment fixed under the statute.

The complainers seek to prove facts in regard to the alleged subsequent agreements and the present condition of the charger. I am of opinion that the Lord Ordinary has rightly refused to allow such proof. The Act contemplates that such matters shall be disposed of in a summary manner by the statutory tribunal, and when an agreement has been recorded, variation of that agreement is not to be sought in a suspension in the Supreme Court, but in an application under the Act (Schedule II, section 8). If the complainers had grounds for rendering nugatory the power to charge on the recorded agreement, they should have taken the simple steps offered to them by the Act, by which if they were right on the facts they could have barred the charge of which they now complain. They were plainly the "party interested" in terms of that schedule.

I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD LOW—I have found the question raised in this unfortunate litigation to be attended with some difficulty, but in the end I have come to the conclusion that the judgment of the Lord Ordinary is right.

On 4th February 1904 the respondent while in the employment of the complainers sustained a fracture of the right ankle, and the compensation payable to him was fixed by agreement at 15s. 11d. per week, being the statutory maximum. A memorandum of the agreement was duly recorded in July 1905. In September 1905 the respondent had sufficiently recovered to be able to do light work. He appears to have been very willing to do any work which he was capable of performing, and the complainers seem to have been equally willing to give him work according to his capacity. The respondent was accordingly regularly employed by the complainers and earned considerable wages between 26th September and 9th December 1905. During that period the respondent agreed to accept and the complainers agreed to pay, and did pay to him, in name of compensation, one half of his net loss—that is to say one half of the difference between the amount which he was then earning and the amount which he was earning at the time of the accident. Calculated upon that basis the compensation paid to the respondent was 7s. 9d. per week from 26th September to 21st

October 1905, and 5s. per week from the latter date until 9th December 1905.

Towards the end of December a difference arose between the respondent (who was represented by his law-agent) and the complainers in regard to the amount of compensation to which the pursuer was entitled. The complainers at first proposed to reduce the amount to 4s. 7d. per week, but they ultimately offered to continue the amount which had been paid up to 9th December, namely, 5s. per week. The respondent, however, although he still intimated his willingness to accept one-half of his nett loss, refused these offers at first upon the ground that he was not able to work continuously even at light employment, and subsequently (in January 1906) upon the ground that the condition of his ankle had again totally incapacitated him. Both of these statements appear to have been supported by medical certificates which the respondent sent to the complainers.

In these circumstances, as the parties could not come to an agreement, the respondent, in March 1906, charged the complainer upon the registered agreement, to make payment to him of 15s. 11d. per week from 10th January 1906, that being the date at which he alleges that he again became totally incapacitated.

The complainers seek to have the charge suspended in the first place upon the ground that the original agreement—that which was registered—was superseded by the agreements under which the respondent agreed to accept, and did accept, compensation at a reduced rate between 26th September and 9th December 1905. I am of opinion that that ground of suspension cannot be sustained. It is true that during that period the respondent agreed to accept, and did accept, a reduced amount of compensation proportionate to the wages which he was then earning, but there is nothing in such an agreement to imply, nor is there anything in the correspondence to suggest, that the respondent ever agreed that in the event of his again becoming totally incapacitated or of his incapacity increasing he should not be entitled to full compensation, or to a larger amount than he had been receiving between September and December 1905, as the case might be.

The complainers further argued that as the respondent had only right to claim the maximum amount of compensation, if and so long as he was totally incapacitated, the suspension could not be disposed of without inquiry into the facts, seeing that they (the complainers) denied that the respondent had again become totally incapacitated. They also maintained that inquiry was competent, because the respondent having chosen to appeal to the common law by giving a charge upon the decree implied in the registered agreement, could not object to any defence which the complainers might have to his claim, whether under the statute or otherwise, being dealt with in a suspension—that being the appropriate common law remedy when a charge for payment is given. I am of opinion that that view cannot be sustained. The Act makes it plain that such questions as are raised in this case, namely, in regard to the amount or duration of compensation, must be settled by arbitration under the statute, and not by way of action in the courts of law. The complainers had a remedy open to them under the statute, because when in the end of 1905 or the beginning of 1906 it became apparent that the amount to be paid to the respondent could not be settled by agreement, they might have applied for review of the weekly payments. The complainers argued that it was for the respondent to make such an application if he was not satisfied with their offer to continue payment at the rate which he had accepted between the 21st of October and the 9th of December 1905. I think that it would have been quite competent for the respondent to institute proceedings under this Act, but I do not think that he was bound to do so. He was, in my opinion, entitled to take his stand upon the recorded agreement, which, for the reasons which I have given, I cannot regard as having been superseded.

No doubt the result of refusing the suspension will, I imagine, almost certainly be that the complainers will be compelled to pay to the respondent a great deal more than the amount which, if everything had been done in terms of the statute, he would have been entitled to demand. But that is a result which I am afraid the Court is powerless to prevent, because the question is not one of common law or of equity, but of statutory enactments. The statute has armed the respondent with a decree against the complainers for payment to him of a certain amount weekly, and the complainers have not adopted the statutory procedure by which their liability to pay that amount might have been ended or restricted. I therefore agree with your Lordship that the interlocutor of the Lord Ordinary must be affirmed.

LORD ARDWALL—The complainers in this case ask that a charge following upon a memorandum duly registered in the Sheriff Court at Dunfermline under the provisions of sec. 8 of the Second Schedule of the Workmen's Compensation Act 1897 should be suspended. Such a memorandum is declared by the same section, taken along with the interpretation clause 14 (*a*) of the same schedule, to be enforceable as a Sheriff Court decree. There is nothing incompetent in raising such a suspension, and a suspension of a charge on a registered memorandum was granted in the case of *Nimmo & Company* v. *Fisher*, 1907, S.C. 890. But such a suspension ought not readily to be entertained, and to justify its being granted it ought to be shown that without such suspension the complainer would suffer some manifest injustice, and further that the end to be attained by such suspension could not be attained by proceedings under the said Act.

The facts in the present case are as follows:—On 4th February 1904 the respondent, while in the course of his employ-

ment, met with an accident and claimed compensation. The parties agreed that the amount should be 15s. 11d. a-week, which was the statutory maximum, and that amount was paid from 18th February 1904 till 26th September 1905. A memorandum of this agreement was recorded in terms of the Act in the special register of the Sheriff Court of Fife at Dunfermline. The complainers aver that the respondent having partially recovered and returned to work, the parties on 23rd October 1905, by agreement, varied the weekly payment to 7s. 9d. per week, as from 26th September 1905, and that this agreement superseded the recorded agreement, and was acted on by the parties for the period between 26th September 1905 and 21st October. They further say that another agreement to vary was entered into on 6th November 1905, whereby the compensation was fixed at 5s. a-week as from 21st October, and that this latest agreement was acted on for the period between 21st October and 9th December 1905. At that date the complainers proposed to reduce the compensation to 4s. 7d. a-week, but the respondent declined to agree to this, and on 10th January 1906 he left their employment and intimated that he was totally incapacitated for any work whatever.

The complainers admit liability to pay compensation at the rate of 5s. a-week from the 21st October 1905 till that rate shall be varied by agreement or review, in terms of the Act. The respondent has charged them for payment at the rate of 15s. 11d. a-week, from and after 10th January 1906, in terms of the only registered agreement. The respondent took no steps of any kind between the cessation of payments on 9th December 1905 and the date of the charge on 8th March 1906. Accordingly the complainers had plenty of time if they so desired either to record their alleged new agreement or to apply to the Sheriff for a variation of the rate of compensation set forth in the only recorded agreement. It cannot therefore be said that this suspension is rendered necessary by reason of any hurried action on the part of the respondent. The two grounds on which suspension is asked are—*First*, that the respondent had entered into an agreement in November 1905 to accept 5s. a week of compensation, and, *second*, that on 10th January 1906 he was not suffering from such incapacity as to entitle him to receive 15s. 11d. a week, being the amount fixed by the registered memorandum of agreement. The complainers' counsel asks for a proof on these two grounds. I entirely agree with what the Lord Ordinary says in his opinion, "that to allow a proof in this Court upon either of these heads would be to run plainly counter to the policy of the Workmen's Compensation Act 1897, which aims at providing summary and inexpensive methods of inquiry where parties do not agree on matters of fact." This being so, the next question is whether the complainers might have had the inquiries made and the remedies they seek granted by taking steps under the said Act. I have no doubt that they could.

In the first place, in respect that they alleged that there was a new agreement they might have applied to have the memorandnm of that agreement registered, and if that had been done it would then have lain upon the respondent if he wished an increase of weekly compensation to have applied to the Sheriff. If, on the other hand, the respondent had succeeded in convincing the Sheriff Clerk or Sheriff that there was really no such agreement, or if the Sheriff Clerk or Sheriff took the course suggested by Lord Salvesen in the case of *Hughes*, 1907, S.C., 607, and declined to order the memorandum to be recorded in respect that there was a *bona fide* dispute between the parties, then the course would have been clearly open to the complainers to apply for a diminution of the weekly payments under section 12 of Schedule 1 of the Act, which the Sheriff would have then heard and would have decided the question in terms of the Act. At one point in the course of the argument for the complainers the crux of the case seemed to be this, which of the two parties—the respondent or the complainers—ought to have applied to the Sheriff in the circumstances which existed at January 10th 1906? It seems to me that the complainers were the proper parties to apply, because if the respondent had taken up the position (which he has now taken up) that he had entered into no new agreement in October or November 1905, the way was open to them at once to apply to the Sheriff for review of the compensation payable under the only recorded agreement.

I accordingly arrive at the conclusion that there was no good reason for the complainers adopting the method they have done to have the rate of compensation settled, and I think it would be intolerable in the administration of the Workmen's Compensation Act if it were to be held competent by merely raising a suspension to have such questions determined in the Court of Session instead of by the proceedings prescribed by the Act.

I may add that it appears to me from the correspondence which is produced and printed by the complainers, and which may be read along with the record, that there was not at any time an agreement in the proper sense of the word for a reduction of the compensation from 15s. 11d. What happened was, that the complainers provided work in the way of wood-cutting for the respondent, whose true occupation was that of a miner, that he worked at cutting wood, and in fact did everything he could to earn his wages, and that the arrangement was come to between the respondent and the complainers that as his wages rose his compensation should diminish to the effect of giving him 50 per cent. of the difference between the wage he was receiving from time to time and the amount of his former wages. The whole matter

was accordingly left in a state of uncertainty varying from time to time according as the respondent might be able for more or less work and earn more or less wages. This case differs entirely from the cases of *Beath*, 1903, 6 F. 168, and *Nimmo* v. *Fisher*, 1907, S.C. 890, in both of which the workman endeavoured to go back over a past period and to obtain more compensation than he could possibly be entitled to on a sound construction of the Act had the ordinary proceedings under the Act been adopted. In the present case all that the respondent gave a charge for was compensation at the rate fixed by the agreement from the time when the parties fell out, and if that was in the circumstances too high it was a very simple matter for the complainers to have gone before the Sheriff, as I have already explained, and got the rate varied, but this they failed to do.

On these grounds I think the note ought to be refused.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Complainers (Reclaimers)—Hunter, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—George Watt, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Tuesday, January 14.

FIRST DIVISION.

[Lord Johnston, Ordinary.

PAXTON AND OTHERS *v.* BROWN.

Process—Summons—Competency—Several Pursuers — Community of Interest — Amendment.

An action was brought against a defender by (1) her former tutors and curators, who claimed repayment of sums which they alleged they had paid her in excess of her income prior to her majority, and (2) her factor, who claimed repayment of sums he alleged he had paid her in excess of her income after she attained majority.

Held (1) that the action was incompetent, inasmuch as the pursuers were independent pursuers suing in the same action on separate and independent grounds of debt; but (2) that the action might be competently amended.

By his settlement the late James Brown of Tweedhill, Berwickshire, who died on 3rd November 1893, appointed John Paxton, physician and surgeon, Norham-on-Tweed, and William Crawford, Sheriff-Clerk of Berwickshire, to be tutors and curators to his daughter. Dr Paxton and Mr Crawford accepted office, and appointed James Herriot, solicitor, Duns, to be their factor. Miss Brown attained majority on 19th May 1904.

On 23rd May 1907 Paxton and Crawford, as "the tutors and curators nominated by and lately acting under" the said settlement, "with consent and concurrence of James Herriot, solicitor, Duns, for any interest he may have," and Herriot "as an individual," raised an action against Miss Brown in which they sued (1) for "payment to the pursuers, the said John Paxton and William Crawford," of £245, 15s., and (2) for "payment to the pursuer the said James Herriot" of £204, 4s. 7d. Both claims were in respect of advances which the pursuers alleged they had made to Miss Brown.

The defender, who denied that the sums sued for were due, pleaded, *inter alia*—"(1) The action is incompetent, in respect that it is laid at the instance of separate and unconnected pursuers upon separate and independent claims of debt."

On 4th December 1907 the Lord Ordinary (JOHNSTON) repelled the defenders' first plea-in-law and ordained her to lodge objections to certain accounts produced.

Opinion.—". . [*After dealing with the provisions of the settlement*] . . . Dr Paxton and Mr Crawford accepted office and appointed James Herriot, solicitor, Duns, their factor.

"The history of the administration of the provision for Miss Brown is to be found in a series of accounts of charge and discharge, at first between the curators of Miss Brown and Mr Herriot, their factor, and afterwards between Miss Brown herself and Mr Herriot as her law agent. But though there is this distinction made in the heading of the accounts, owing to the young lady having attained majority at 19th May 1904, the accounts are really consecutive, and carry on the balance due by Miss Brown on the curatorial account into the personal account. There were over-advances made to or on behalf of Miss Brown, both during the later period of the curatory and afterwards. These advances were out of the pocket of Mr Herriot during both periods. The curators and Mr Herriot want now to recover these advances from Miss Brown, and as their accounts and actings are disputed, it has become necessary to clear up matters in Court. Had the alleged balance been the other way, the young lady would have sued her curators and Mr Herriot for accounting and payment of the balance due to her; but in the circumstances as they stand the curators and Mr Herriot can only sue for the amount of the advances they allege, and the accounting arises on Miss Brown's counter claim. But the action is none the less in substance, though not in form, an action of accounting. I lay stress upon this, because it appears to me materially to affect the question with which I have at present to deal.

"The curators and Mr Herriot sue as joint pursuers in the same action. The instance is as follows:—Dr Paxton and Mr Crawford, as tutors and curators nominated by the settlement of the late James Brown of Tweedhill to his daughter Isabella Annie Brown, 'with consent and concurrence of James Herriot, solicitor Duns,