on the footing of equitably compensating the estate for the loss it had thereby suffered (*Gray's Trustee*, 1907 S.C. 54). In my opinion the other residuary legatees cannot be put in a worse position by Alfred Thomas Scott's executrix claiming the provision which had vested in him than they would be if the same provision had actually been paid to himself. This I think sufficiently appears from the language of the settlement. In the first place, I reject the argument that the claims of children under the marriage contract are to be included in the "just and lawful debts" etc., which fall to be deducted before the residue is ascertained. The children of the second marriage are under the contract, no doubt, as it has often been expressed, "creditors amongst heirs," but they are not creditors in the ordinary sense, and I think it may safely be inferred that a testator who gave his children by his settlement much larger provisions than they were entitled to under the marriage contract, did not contemplate that their possible claims under the marriage contract were to be provided for under the first purpose of his settlement. But further, the residue clause expressly provides that the lawful issue of a child who predeceases is to take his parent's place and share. Now the third party here would be getting more than his parent's share if his contention were well founded, because the parent himself could not claim his full share of the residue in addition to his share of the marriage-contract provision. On these grounds I am for answering the first alternative of the third question in the affirmative and the second in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

The Court answered the first alternative of the third question in the affirmative, and the second alternative of the third question in the negative.

Counsel for the First and Fourth Parties —Chree, K.C.—Hon. W. Watson. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—Clyde, K.C.—D. P. Fleming. Agents—M. J. Brown & Company, S.S.C.

Counsel for the Third Party—Morison, K.C.—R. C. Henderson. Agents—Davidson & Syme, W.S.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

MOORE & COMPANY *v.* PRYDE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Sched. II* (9)—*Application to Record Memorandum of Agreement—Terms of Memorandum Differing from Agreement Made.*

In an application by a workman to record a memorandum of an agreement to pay compensation under the Workmen's Compensation Act 1906, the employers objected to the genuineness of the memorandum on the ground that it omitted the words "during the period of total incapacity for work" contained in receipts signed by the workman or his representatives which formed the basis of the agreement. *Held* that as there was a difference, on the face of it not trivial, between the memorandum proposed to be recorded and the agreement entered into, the arbiter was bound to refuse a warrant to record.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *Sched. I* (3)—*Partial Incapacity—Amount of Compensation—Review of Weekly Payments—Discretion of Arbiter.*

In reviewing an award of compensation under the Workmen's Compensation Act 1906, on the ground of partial recovery of capacity, the arbiter must not proceed on any hard and fast rule that compensation is not to be altered unless the amount added to the workman's present earnings is equal to or exceeds his previous earnings, but must in all cases exercise his discretion with reference to the facts of the case.

Circumstances in which, where the arbiter had refused to diminish compensation, the Court remitted to him in respect that no facts appeared in the case to show that he had so exercised his discretion.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Sched. I (3)—"In fixing the amount of the weekly payment . . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

Schedule II (9)—"Where the amount of compensation under this Act has been ascertained, . . . either by a committee, or by an arbitrator, or by agreement, a memorandum thereof shall be sent . . . to the sheriff-clerk, who shall . . ., on being satisfied as to its genuineness, record such memorandum in a special register without fee. . . ."

The Act of Sederunt of June 26, 1907, sec. 12, enacts—"Where the genuineness of a memorandum under section 9 of the Second Schedule appended to the Act is disputed, . . . the person disputing the genuineness . . . shall lodge a minute stating clearly all the grounds for his action, and the memorandum shall thereupon be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the minute."

A. G. Moore & Company, coalmasters, St Vincent Street, Glasgow, *appellants*,

being dissatisfied with a determination of the Sheriff-Substitute (GUY) at Edinburgh, acting as arbiter under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in an arbitration between them and Thomas Pryde, labourer, Dalkeith, *respondent*, appealed by way of Stated Case.

The Case stated—"On or about 14th February 1912 the respondent lodged with the sheriff-clerk of the county of Edinburgh, to be recorded in terms of the Workmen's Compensation Act 1906, a memorandum of an agreement in the following terms:—'The claimant claimed compensation from the respondents in respect of injury to his left haunch caused by accident in the employment of the respondents at Dalkeith Colliery, Smeaton, on the 26th day of September 1911. On or about the 10th day of October 1911 the parties agreed as follows, viz.—That compensation be paid by the respondents to the claimant in terms of the said Act at the rate of ten shillings per week from said 26th day of September 1911. It is requested that this memorandum be recorded in the Special Register of the Sheriff Court of Lothians and Peebles at Edinburgh. R. Handyside, *Law Agent, Dalkeith, for Claimant.* 14th February 1912. *To the Sheriff-Clerk, Court-House, Edinburgh.*'

"Due intimation of this application having been given by the sheriff-clerk to the appellants, and they having objected to the recording of the said memorandum of agreement, the sheriff-clerk thereupon intimated to the respondent that the said memorandum had been objected to, and would not be recorded without a special warrant from the Sheriff. Accordingly, in terms of section 12 of the Act of Sederunt of 26th June 1907, the memorandum fell to be dealt with as if it were an application to the Sheriff for settlement by arbitration of the questions raised by the objections to the recording of the memorandum.

"Thereafter the appellants having lodged a minute objecting to the recording of said memorandum on the ground that it was not genuine in respect (1) that the period during which compensation at said rate was to be paid was limited by agreement to the period of the respondent's total incapacity for work, and that this was a material term of the agreement entered into between the parties; and (2) that the agreement sought to be recorded had been superseded by another, whereby on 30th December 1911 the respondent agreed to accept, and the appellants agreed to pay, partial compensation at the rate of 5s. 6d. per week—in said minute the appellants tendered payment of compensation at the said rate of 5s. 6d. per week; averred that the incapacity of the respondent for work in respect of which he had been paid compensation became greatly lessened on 25th December 1911, and that he was not entitled to full compensation as from that date, and craved the Court to diminish the claimant's compensation as at that date or at such subsequent date as the Court might think fit.

"To the said minute answers were lodged by the respondent, in which he admitted that on or about 20th December 1911 he started light work at the picking tables at the appellants' Dalkeith Colliery, and averred that the appellants then offered the respondent compensation of 5s. 6d. per week, which he agreed to accept on the condition that the wage to be paid him for light work and the partial compensation of 5s. 6d. per week would be equal to his wage of 20s. per week before the accident, and that owing to the respondent's condition as the result of his injuries his earning capacity did not warrant any reduction in his former compensation of 10s. per week as and from 25th December 1911.

"Thereafter a proof was allowed and led before me on 29th April 1912, when the following *facts* were admitted or proved:—1. That the respondent sustained personal injury to his left haunch by accident while in the employment of the appellants at Dalkeith Colliery, Smeaton, on 26th September 1911, whereby he was totally incapacitated for work. 2. That said accident arose out of and in the course of the respondent's said employment. 3. That the sum of 10s. per week was 50 per cent. of the respondent's average weekly earnings prior to the accident. 4. That on Saturday, 14th October 1911, the respondent asked his wife Mrs Elizabeth Jackson or Pryde to go to the appellants' office at Smeaton to get his compensation as he was unable to go himself; that she had no authority or express instructions from her husband to enter into any special agreement with the appellants; that she went to the appellants' office and saw their cashier Mr William Crooks, to whom she stated that she had come for her husband's compensation; that he told her that that was not the day for getting compensation and that Monday was the day, but that he would give it as she had come; that the said William Crooks informed Mrs Pryde that the compensation would be 10s. a-week; that at that rate the sum payable was 25s. for the two and a-half weeks which had elapsed since the accident; that he read over to her as a condition of payment of the compensation of 10s. per week the following words printed on the receipt sheet which was tendered by him to Mrs Pryde for her signature, viz.—'The undernoted sums are accepted under the Workmen's Compensation Act 1906 as the weekly compensation payable during the period of total incapacity for work as the result of the accident on the above date, my average weekly earnings having been 20s.'; that he asked her to sign the receipt sheet; that she stated to him that she could not write; that she at his direction signed the receipt sheet by a cross; that he wrote her name before the cross and signed as a witness; that thereupon Mrs Pryde requested the cashier to make future payments to James Black, a neighbour who was working at the pit, which the cashier agreed to do; that for six weeks thereafter the sum of 10s. per week was paid on the receipt of the said James Black; that for the next three weeks the sum of 10s. per

week was paid to the respondent himself, the last of these payments being made on 18th December 1911; that the words above quoted were not read over to the said James Black or to the respondent himself at any time. 5. That on 20th December 1911 the respondent had partially recovered capacity for work, and was employed by the appellants at light work and paid wages at the rate of 1s. 6d. per shift, with eleven shifts in the fortnight, equivalent to 8s. 3d. per week. 6. That said sum of 8s. 3d. per week represented at that date and still represents the respondent's earning capacity, and said sum added to 10s. per week as compensation leaves the respondent with 1s. 9d. per week less than his average weekly earnings prior to the accident. 7. That the appellants from said 20th December 1911, in addition to paying the respondent wages at said rate, paid him for compensation as follows:—On 25th December, for the week ending 22nd December, 9s. 6d., and for each of the three following weeks 5s. 6d. These payments were made to him along with the wages he was receiving for the light work that he was doing. The respondent accepted the payments under protest, and claimed that he was entitled for his work and as compensation to as much as his average weekly earnings before the accident had been. 8. That when on 30th December the respondent was for the first time paid compensation at the rate of 5s. 6d. per week the cashier explained to him that that was all that he was authorised to pay him as compensation, but the respondent did not then or at any subsequent time agree to accept said sum as the compensation to which he was entitled. The appellants' said cashier had no authority to enter into any agreement with the respondent as to his compensation or to bind the appellants thereanent in any way and he did not do so. When taking receipts from the respondent for said sums of 5s. 6d. he took same on the original form bearing that they were sums accepted as the weekly compensation payable during the period of total incapacity for work. The method by which the appellants calculated the said sum of 5s. 6d. was by treating the respondent as capable of earning 1s. 6d. per shift or 9s. per week, and then taking 50 per cent. of the difference between said sum of 9s. and 20s., his average weekly earnings prior to the accident.

"On these facts I found that the appellants had admitted liability to pay compensation to the respondent under the Workmen's Compensation Act 1906 in respect of said accident and injury, and had agreed to pay him the sum of 10s. per week in name of compensation from said 26th September 1911, which the respondent agreed to accept; that the memorandum of agreement now sought to be recorded by the respondent is genuine; that the parties did not agree upon said sum of 5s. 6d. per week as the amount of compensation payable to the respondent, and entered into no agreement with one another modifying their first agreement before referred to; and that the appellants had failed to prove that the earning capacity of the respondent was sufficient to entitle them as a matter of right to have the respondent's compensation diminished, and I accordingly granted warrant to the sheriff-clerk of the county of Edinburgh to record the foresaid memorandum of agreement sought to be recorded by the respondent in the special register kept by him for the purpose, and in the circumstances of the case refused to diminish the compensation payable to the respondent, and found the appellants liable to the respondent in expenses."

The *questions of law* were, *inter alia*—"1. Upon the facts stated, is the memorandum of agreement lodged for the respondent genuine within the meaning of the Workmen's Compensation Act 1906? 3. Upon the facts set forth above, was I entitled to grant warrant to record the memorandum of agreement lodged by the respondent? 4. On the facts stated (*a*) were the appellants entitled, as a matter of right, to have the respondent's compensation diminished? or (*b*) was I entitled in the circumstances of the case to refuse to diminish the respondent's compensation?"

Argued for the appellants—There was no verbal agreement here, nor was there any that could be inferred from the circumstances. Therefore any agreement was qualified by the words "during the period of total incapacity," and if these were not accepted there was no agreement at all—*Shotts Iron Company* v. *Barr*, July 5, 1912, not reported; *Phillips* v. *Vickers, Son, & Maxim*, [1912] 1 K.B. 16; *Hartshorne* v. *Coppice Colliery Company*, 1912, 5 B.W.C.C. 358. The Sheriff's duty was confined to finding out what was the agreement between the parties and to recording that—*M'Lean* v. *Allan Line Steamship Company, Limited*, 1912 S.C. 256, 49 S.L.R. 207. In any event the arbiter was not entitled to lay down a rule as he had done here that unless there was a reason to the contrary he should award the full amount. The presumption, on the contrary, was that compensation should be reduced as soon as the employer established that total incapacity had ceased—*Carlin* v. *Stephen & Sons, Limited*, 1911 S.C. 901, *per* Lord Salvesen, p. 907, foot, 48 S.L.R. 862. In certain cases no doubt full compensation had been given though the incapacity was only partial, but that was in special circumstances such as did not exist here—*Geary* v. *William Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; *Parker* v. *William Dixon, Limited*, July 19, 1902, 4 F. 1147, 39 S.L.R. 663; *Webster* v. *Sharp & Company, Limited*, [1904] 1 K.B. 218. In such cases the Sheriff must exercise his discretion and must state the special circumstances in which he exercised it. In the case of *Bryson* v. *Dunn & Stephen, Limited*, December 14, 1905, 8 F. 226, 43 S.L.R. 236, founded on by respondents, there were facts stated on which the Sheriff had exercised his discretion.

Argued for the respondents—There was

an agreement here which was construed out of the actings of the parties for ten weeks. The words "during the period of total incapacity" did not limit the agreement, but were imported from the statute and did not qualify the acknowledgment of liability thereunder. In the case of the *Shotts Iron Company* v. *Barr* (*cit. sup.*) the receipt was quite different, because under it the employers did not acknowledge liability beyond the week for which they were making payment. In *Hartshorne* v. *Coppice Colliery Company* (*cit. sup.*) the gloss was very different from the present (end, diminish, or increase), and in *M'Lean* v. *Allan Line Steamship Company, Limited* (*cit. sup.*) the receipt was stamped, and constituted *per se* a written agreement. The receipt in the present case did not restrict the statutory right of the workman. In *Shotts Iron Company* v. *Barr* (*cit. sup.*), on the other hand, it did so. The authorities simply showed that if the agreement contained a non-statutory term you could not have the benefit of recording the memorandum. There was no hardship in granting record in such cases as the present, because it was decided in *M'Ewan* v. *William Baird & Company, Limited*, 1910 S.C. 436, 47 S.L.R. 430, that the employer could ask review of the compensation *unico contextu* with the application for registration. *Esto*, however, that respondent was wrong in this, still under proceedings at the instance of the employer the Sheriff-Substitute had made an award and that award was final. The Sheriff-Substitute had an absolute discretion as to the amount he should award within the statutory limits. There was no case in which the Court had overturned the discretion of the Sheriff-Substitute on this point. The Sheriff-Substitute in awarding compensation for total incapacity was applying a different standard from what he applied in awarding compensation for partial incapacity, and there was no reason why the amount awarded in the one case should be exactly proportionate to the amount awarded in the other—Lord M'Laren in *Bryson* v. *Dunn & Stephen, Limited* (*cit. sup.*). In that case the circumstances were similar and the Sheriff was held to have exercised his discretion sufficiently. The cases of *Geary* v. *William Dixon, Limited* (*cit. sup.*) and *Parker* v. *William Dixon, Limited* (*cit. sup.*) supported respondent's argument. What was given was not compensation for injury, but for loss of wage-earning capacity. In these cases there was no word as to the circumstances except as to the nature of the injury to justify the discretion. In all these cases the employer must show two things—(1) recovery of partial capacity; (2) that the old award more than compensated the workman. Here the appellant only showed (1).

At advising—

LORD GUTHRIE—In this Stated Case the appellants maintain, first, that the arbiter was wrong in holding the memorandum of agreement (relating to the compensation payable by them to the respondent Thomas Pryde in respect of an injury to his left hand caused by accident in the appellants' employment at Dalkeith Colliery, Smeaton, on 26th September 1911) genuine within the meaning of the Workmen's Compensation Act 1906; and second, that he was wrong in refusing their crave to have the compensation paid to him at the rate of 10s. from 26th September 1911 reduced as at and from 25th December 1911.

The first of these questions is raised in the first and third questions of law, and the second in the fourth question of law, subsection (*b*). The appellants did not insist on the point to which the second question of law relates.

1. Was the memorandum genuine, and therefore capable of being recorded? It was suggested by the respondent that the agreement was verbal, and was either arrived at antecedent to Saturday, 14th October 1911, the date founded on by the appellants, or that on that date there was a verbal agreement for a weekly payment of a sum of money, namely, 10s., which must be taken as the agreement of parties, irrespective of any conditions which might be annexed in the written receipt to the payment of that sum. I cannot agree with either view. The case does not suggest any communings between the parties prior to 14th October, and the facts stated make it clear that the agreement, if there was any agreement, embodied in the receipt of that date, must be taken as a whole.

The receipt bore these words—"The undernoted sums are accepted under the Workmen's Compensation Act 1906 as the weekly compensation payable during the period of total incapacity for work as the result of the accident on the above date (26th September 1911), my average weekly earnings having been 20 shillings." On a receipt in these terms, signed for the first payment by the respondent's wife (by mark) and for subsequent payments by James Black, a friend of the respondent, and then latterly by the respondent himself, payments were regularly made at the rate of 10s. down to the week ending 15th December 1911.

If the respondent had been willing to record a memorandum of an agreement in the terms of the receipt, including the words "during the period of total incapacity for work," there would have been no question between the parties. But the respondent insisted on a memorandum of agreement in the following terms—"That compensation be paid by the respondents to the claimant in terms of the said Act at the rate of 10s. per week from said 26th day of September 1911." The appellants insisted on the insertion of the words "during the period of total incapacity for work." Hence the present dispute.

A preliminary question was mooted, rather than argued, namely, whether, in view of the fact stated in the case that the respondent's wife, with whom the appellants allege an agreement, had no authority to enter into any special agreement with the appellants, there was any agreement

at all which could be recorded. But this question is not raised by any of the questions, and it must therefore be assumed that, if otherwise unobjectionable, the agreement contained in the receipt might have been recorded. The question is, Could the agreement embodied in the memorandum of agreement, not containing the words "during the period of total incapacity for work," be recorded as genuine?

A similar question was considered in Scotland in the case of *Maclean* (1912 S.C. 256) and in England in the case of *Phillips* ([1912] 1 K.B. 16). These cases decided that, if there be a variation, not trivial, between the memorandum of agreement proposed to be recorded and the agreement actually entered into, it is not for the arbiter to decide whether the difference is so substantial as to prevent the agreement in the memorandum being considered genuine. It is sufficient that there is a difference, on the face of it not trivial, and which is objected to on the ground that it is material.

In this case the appellants maintain that the insertion of the words founded on by them would put them in a more advantageous position in relation to the duration and termination of the payments to an injured workman than if the words were omitted. If the views expressed in the cases above cited be well founded, it is not for the arbiter to decide whether the appellants would or would not obtain any such advantage. It is significant that, although the respondent maintained that the words in question, even if introduced, would in no way alter the rights of parties, he has always refused, and still refuses, to record a memorandum which includes these words.

I therefore think that the first question should be answered in the negative, and if it be necessary to answer the third question, that it also should be answered in the negative.

2. Ought the arbiter to have refused to diminish the respondent's compensation? There is no question that the original sum of compensation, 10s. a-week, being 50 per cent. of the respondent's average weekly earnings prior to the accident, was properly fixed for the period of total incapacity. But it appears from the case that on and after 20th December 1911 he had partially recovered capacity for work, and was employed by the appellants at light work, and was paid by them 8s. 3d. a-week. This sum added to the respondent's compensation amounted to 18s. 3d., being 1s. 9d. per week less than his average weekly earnings prior to the accident.

The question turns on the interpretation of Schedule 1 (3) of the 1906 Act, which runs as follows—"(3) In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

This section may be compared with the corresponding section of the Act of 1897—"(2) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

The cases of *Geary* (4 F. 1143), *Parker* (4 F. 1147), and *Bryson* (8 F. 226), arose under the previous Act of 1897, and the case of *Carlin* (1911 S.C. 901) was decided under the existing Act of 1906. The result of these cases is that circumstances like the present raise a *prima facie* case for reduction, but that it is open to the workman to prove circumstances which will warrant the arbiter (he being the judge of their sufficiency) to refuse to diminish the compensation. Both in *Parker's* case and *Geary's* case there were permanent injuries; in the first case the workman's hands were burned so as to produce permanent injury, and in the other case the man had lost an eye. In both cases his value in the labour market was permanently lessened.

Now the Stated Case does not disclose any special circumstances relevant to displace the *prima facie* case made by the employers. The only circumstance stated by the arbiter is that the compensation money, *plus* the respondent's earnings, did not equal his average weekly earnings before the accident. So far as the case shows, this was the only ground on which the respondent claimed that his compensation should not be reduced. Holding as I do that this circumstance by itself cannot justify a refusal to diminish, I am of opinion that if it had been necessary to determine this question now, the proper course would have been to answer the fourth question in its second branch in the negative. But in view of the way in which the case is stated, it might not be fair, without a remit, to assume the absence of the relevant circumstances. If we answer the first and third questions in the negative, it seems unnecessary to answer the other questions.

LORD HUNTER—The first question raised in this Stated Case is whether on the facts stated a memorandum of agreement lodged for the respondent was genuine within the meaning of the Workmen's Compensation Act 1906. The memorandum of agreement bears, *inter alia*, an unqualified statement that compensation was agreed to be paid by the appellants to the respondent at the rate of 10s. per week from 26th September 1911.

From the facts stated by the Sheriff-Substitute it appears that the respondent's wife on 14th October 1911 received 25s., being compensation for two and a-half weeks, and granted a receipt which bore, as was explained to her, that the undernoted sums are accepted under the Workmen's Compensation Act 1906 as the weekly compensation payable "during the period of total incapacity for work, as the result of the accident." Subsequent payments were made to a friend of the respondent and to the respondent himself on receipts which were similarly qualified. It is said that these receipts were not read over or explained either to the respondent's friend or to himself. I do not think this is of any importance, as there was no evidence, except in terms of the receipt, of the appellants having agreed to any payment.

On 12th February 1912 the respondent, who had partially recovered, and had for three or four weeks received less than the full compensation from the appellants, lodged a memorandum of an agreement with the sheriff-clerk, to the genuineness of which the appellants objected, and the question came to be dealt with by the Sheriff as if it were an application for settlement by arbitration of the questions raised by the objections to the recording of the memorandum. The principal objection was that the memorandum was not genuine, as it did not contain any qualification to the effect that compensation at the agreed rate was limited by agreement to the period of the respondent's total incapacity for work. The Sheriff-Substitute repelled the objection, and we were asked to sustain his view, upon the ground that the memorandum of agreement was in statutory terms, and that the qualifying words "during total incapacity" which it was proposed to insert were an implied statutory qualification of payment of the maximum weekly compensation under the Act. It appears to me, however, to be quite clearly decided by the cases to which we were referred—*Phillips*, [1912] 1 K.B. 16; *M'Lean*, 1912 S.C. 256; and *Hartshorne*, 5 B.C.C. 350—that the Sheriff-Substitute took a wrong course. In *M'Lean's* case the Lord President, speaking of an agreement which was evidenced by a receipt signed by the workman, said "that where an agreement which has been come to between the parties is admittedly in writing, the Sheriff must record that agreement as it stands, and nothing else." Lord Kinnear added in the same case—"Either party is quite entitled to say that in so far as it departs from the express terms of this document, the agreement proposed is not what he has consented to." The recent case of *Hartshorne* raised exactly the same point as is raised in the present case, because there, as here, what the employers sought was to prevent a memorandum of agreement being recorded that did not contain the same qualifying words that the appellants maintained should be introduced in this case.

Another question was argued to us. It arises from the following circumstances:—At the time when the respondent presented his application to the sheriff-clerk to have the memorandum of agreement recorded he was earning 8s. 3d. a-week, and the Sheriff finds that that figure represents his present earning capacity. The 8s. 3d. added to 10s. as compensation leaves the respondent with 1s. 9d. less than his average weekly earnings prior to the accident. The appellants maintained that the respondent was only entitled to 5s. 6d. The Sheriff-Substitute found "the appellants had failed to prove that the earning capacity of the respondent was sufficient to entitle them as a matter of right to have the respondent's compensation diminished." I do not think that is a correct way of considering the question which arises upon an application to reduce compensation where there has been partial recovery of earning capacity by a disabled workman. The provision under the Act of 1906 is somewhat different from the provision under the Act of 1897, which was considered by the Court of Session in the three cases of *Geary* (4 F. 1143), *Parker* (4 F. 1147), and *Bryson* (8 F. 226). It is now provided (6 Edw. VII, cap. 58, Schedule I (3)—"In fixing the amount of the weekly payment . . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

The last words quoted were not used in the Act of 1897. They appear to me to make it clear that the Sheriff-Substitute must not proceed upon any hard and fast rule that compensation is not to be altered unless the amount added to his present earnings is equal to or exceeds the former earnings of the workman. I do not say, although his findings rather suggest it, that the Sheriff-Substitute took this view; but there is nothing to show that he exercised his discretion with reference to the facts of the case, which I think he was bound to do. The fourth question is not, however, so framed that either branch of it could be answered either in the affirmative or the negative without a remit being made to the Sheriff-Substitute. But if the first and third questions are answered in the negative, I do not think that it is necessary to answer the other questions put.

LORD GUTHRIE intimated that the LORD JUSTICE-CLERK, who was absent at the advising, had considered the opinions and concurred in the result indicated.

LORD DUNDAS and LORD SALVESEN, who were present at the advising, gave no opinions, not having heard the case.

The Court answered the first and third questions in the negative, recalled the determination of the arbitrator, and remitted to him to proceed.

Counsel for the Appellants—Horne, K.C. —Lippe. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Dykes. Agents—Gray & Handyside, S.S.C.

Tuesday, January 7, 1913.

SECOND DIVISION.

(BILL CHAMBER.)

CUMMING *v.* HENDRY.

Process—Reclaiming Note—Competency—Suspension—Caution—Effect of Offer to Find Caution—Personal Bar.

In a note of suspension a complainer contended that she was entitled to have the note passed without caution, but offered to find it if so appointed. The Lord Ordinary on the Bills passed the note on caution as offered.

Held that the complainer was not barred by her offer from reclaiming.

Mrs Annie Corner Tait or Cumming, Portobello, *complainer*, brought a note of suspension in the Bill Chamber against John Mitchell Hendry and Andrew Hendry junior, solicitors, Dundee, *respondents*, of a charge at their instance for the sum of £226, with interest, upon an extract registered bond and disposition in security.

In the note the complainer stated "that the complainer considers that in the whole circumstances of the case she is entitled to have this note passed without caution or consignation."

At the hearing in the Bill Chamber the complainer amended the note by adding after the word "complainer" in the statement, *supra*, the words "is prepared, if your Lordships shall so appoint, to find caution, but she."

On 18th December 1912 the Lord Ordinary on the Bills (HUNTER) pronounced this interlocutor—"Allows the note to be amended to the effect of offering caution, and this having been done, on caution as offered passes the note."

On the case appearing in the Single Bills of the Second Division the respondents objected to the competency of the reclaiming note, and argued—By amending the note at the hearing in the Bill Chamber to the effect of offering to find caution the complainer had virtually abandoned her objection to finding caution, and she was therefore barred from now reopening the question.

Argued for the respondents—The complainer did not abandon her contention that caution was unnecessary by offering to find it if so required, and therefore she was entitled to reclaim against the interlocutor appointing her to find it—Mackay's Manual of Practice, 429.

LORD JUSTICE-CLERK—I think that this reclaiming note cannot be held incompetent. Although the complainer amended her note of suspension to the effect of offering caution, she did not give up her contention that the note should be passed without caution, so as to preclude her from bringing that question before this Court by a reclaiming note.

LORD DUNDAS—I concur.

LORD SALVESEN—I am of the same opinion. The complainer's offer of caution was a conditional one. She maintained before the Lord Ordinary on the Bills that she was entitled to have the note passed without caution, and nothing took place in the course of the proceedings in the Bill Chamber, so far as was explained to us at the Bar, to prevent her from now insisting in that contention before this Court.

LORD GUTHRIE—I concur.

The Court appointed the cause to be put to the Summar Roll.

Counsel for the Complainers and Reclaimers—J. R. Christie. Agents—Galbraith, Stewart, & Reid, S.S.C.

Counsel for the Respondents—Lippe. Agents—Cowan & Stewart, W.S.

Saturday, January 11.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

BARCLAY *v.* T. S. SMITH & COMPANY.

Process—Sheriff—Remit for Jury Trial—Proof or Jury Trial—Trifling Character of Cause—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

In an action of damages at common law, in the Sheriff Court, for £100 for personal injury, the pursuer required the cause to be remitted to the Court of Session for jury trial. The Court *refused* the application and remitted the cause back to the Sheriff on the ground that *ex facie* of the record the injury averred by the pursuer was not serious, and the case was therefore unsuitable for jury trial in the Court of Session.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, enacts—"In cases originating in the Sheriff Court, . . . where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof, . . . it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the