Friday, October 19.

FIRST DIVISION

GOUDIE *v.* PAUL & SONS.

Process—Reparation—Action at Common Law and under Employers Liability Act —Issue.

G. raised an action of damages against his employers P. & Sons, on account of injuries sustained in their service. The action was laid both at common law and under the Employers Liability Act of 1880. The defenders having objected that in the schedule of damages appended to the issue the sum claimed alternatively under the Act was not specified, the Court (after consultation with the Judges of the Second Division) *held* that, where an action was laid both at common law and under the statute, the sums alternatively claimed should be separately stated in the schedule appended to the issue.

Counsel for Pursuer—A. S. D. Thomson. Agent—A. C. D. Vert, S.S.C.

Counsel for Defenders—Salvesen. Agents —Gill & Pringle, W.S.

Saturday, October 20.

SECOND DIVISION.

[Sheriff of Fife.

BURNS' *CURATOR BONIS v.* HOWARD, BAKER & COMPANY.

Judicial Factor—Curator Bonis—Title to Sue—Action Raised by Curator Bonis before he had Obtained Extract—Case of Emergency—Act of Sederunt, 14th January 1881, *sec.* 6.

By section 6 of the Act of Sederunt of 14th January 1881, for regulating the appointments of judicial factors in the Sheriff Courts of Scotland, it is provided that "no factor shall be entitled to act until he has obtained extract."

On 15th March 1894 a workman was seriously injured in the course of his employment. On 27th April he became insane, and by decree dated 13th September a *curator bonis* was appointed to him in the Sheriff Court. On 14th September the curator raised an action against his ward's employers for damages under the Employers Liability Act 1880. The period within which such action required in terms of the Act to be raised expired upon the 15th, and the curator did not obtain extract until the 22nd. The defenders pleaded "no title to sue."

The Court *held* that the Act of Sederunt did not preclude the *curator bonis* from doing an act necessary for the protection of his ward's estate before extract, and *repelled* the plea of "no title to sue."

On 15th March 1894 John Burns, an unskilled labourer in the employment of Howard, Baker & Company, contractors for the construction of a new railway, lost his eyesight and was otherwise seriously injured by reason of the explosion of a dynamite cartridge among debris being removed by him. On 27th April he became insane.

On 13th September 1894 Robert John Calver, S.S.C., Edinburgh, was appointed *curator bonis* to John Burns by the Sheriff-Substitute of the Lothians and Peebles.

On 14th September Mr Calver, as *curator bonis* to John Burns, raised an action in the Sheriff Court at Kirkcaldy against Howard, Baker & Company for payment of £1000 as damages and *solatium* at common law, or alternatively, for payment of £163, 16s. as compensation under the Employers Liability Act 1880.

The defenders lodged answers averring, *inter alia*, "The pursuer has neither found caution nor obtained an extract of his appointment, and he has no title to sue the present action."

They pleaded—"(1) No title to sue."

On 22nd September Mr Calver found caution for his intromissions as *curator bonis* and extracted his appointment.

By section 6 of the Act of Sederunt of 14th January 1881 for regulating the appointments of judicial factors in the Sheriff Courts of Scotland, it is provided, "No factor shall be entitled to act until he has obtained extract."

Section 4 of the Employers Liability Act 1880 (43 and 44 Vict. cap. 42) enacts — "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless . . . the action is commenced within six months from the occurrence of the accident causing the injury." . . .

On 11th October 1894 the Sheriff-Substitute (GILLESPIE) repelled the defenders first plea-in-law, and allowed a proof.

"*Note.*—The defenders' first plea is not of a kind which now finds much favour. The tendency of modern practice, contrary to the older and stricter rule, is to allow a title to be completed *pendente processu*. *Malcolm* v. *Dick*, 5 Macph. 18, cited by the defenders' agent, is not in point, for the action in that case was raised and decree obtained by a person suing as executor, who as next-of-kin had merely the possibility of being decerned executor. The position of the present pursuer, when he raised this action before he found caution and extracted his appointment, was much nearer that of an executor decerned but not confirmed."

The pursuer appealed for jury trial.

The defender moved the Court to hold the action incompetent, and argued—The pursuer had no title to sue at the date when the action was commenced, as he had neither found caution nor extracted his decree—Pupils Protection Act 1849 (12 and 13 Vict. cap. 51), sec. 2; Judicial Factors

Act 1880 (43 and 44 Vict. cap. 4), sec. 4, sub-sec. 4; Act of Sederunt, 14th January 1881, sec. 6. This authority was conferred by the extracted decree, and his warrant took effect only from the date of extract—Bell's Prin. 2116. He required to have an active title prior to the date of compearance—Stair, iv. 38, 18. An action raised by a factor before he found caution fell to be dismissed *de quod non satisdedit*— *Tutor of Congilton* v. *The Lady*, 1550, M. 16,222. Parties paying money to a factor who had not extracted his decree of appointment were liable in a second payment if the money was lost—*Donaldson* v. *Kennedy*, June 18, 1833, 11 S. 740. A *curator bonis* who had not found caution was in a very different position from an executor-dative who had been decerned but not confirmed. The appointment of a *curator bonis* was a purely statutory appointment, and must be governed absolutely by the terms of the statute.

Argued for pursuer—He had a title to sue. He had a decree of appointment when the action was brought, and this decree had been extracted in due course. No objection could be taken to his title except under section 6 of the Act of Sederunt. This was not a statutory provision, but a rule laid down by the Court, and which the Court in exceptional circumstances could set aside. It would be a very hard thing if a provision in an Act of Sederunt was to deprive the ward of his remedy. The result of dismissing the present action would be this, that the insane ward would be deprived of all right of compensation under the Employers Liability Act, because the six months within which an action under that statute must be raised had expired on 15th September. The Court had a discretion as to whether they would enforce the penal provisions of an Act of Sederunt, and the equity of this case was against their doing so—*Boyd, Gilmour, & Company* v. *South-Western Railway Company*, November 16, 1888, 16 R, 104, opinion of Lord Young, p. 109.

At advising—

LORD JUSTICE-CLERK—The case that we are dealing with arises from the fact that owing to the misfortune of the man himself who should have otherwise been the pursuer of this action, it was necessary that his affairs should be placed in the hands of an official to act for him. This official was appointed under Act of Parliament, and his duties are regulated and controlled by Act of Parliament and Act of Sederunt. The question turns upon whether the direction in one of the clauses of the Act of Sederunt, that "no factor shall be entitled to act until he has obtained extract," is to have the effect of rendering absolutely nugatory every act which the factor may have performed between the date of his appointment and that of his finding caution and obtaining extract. If an Act of Parliament, or even an Act of Sederunt, expresses in direct words that the acts of an official are null and void till something is done, it would be impossible for the Court to hold as valid an act of that official performed before he complied with the direction of the Act. It does not appear to me, however, that this is the effect of the present Act of Sederunt. The purpose of the Act is to prevent factors taking possession of the effects of their wards till they have found caution. But that does not preclude them from doing any act for the protection of the interests of their wards, if in emergency such should be necessary. The direction in the Act of Sederunt is a direction forbidding the factor to touch or administer the property of his ward before he has found caution, but it does not prevent him from doing something to protect the interests of his ward.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I have come to be of the same opinion also.

LORD TRAYNER — I have considerable difficulty on the point. I think there is a good deal to be said in favour of the defenders' objection, looking to the terms of the Act of Sederunt. But, taking the provision as a direction which subjects the factor to a penalty if he disobeys its orders, I am not prepared in the circumstances of this case to hold that the action is excluded.

The Court repelled the defenders' first plea-in-law and ordered issues to be lodged.

Counsel for Pursuer—A. G. Young—J. Wilson. Agent—William Hamilton, S.S.C.

Counsel for Defender—C. S. Dickson—Clyde. Agent—James Ayton, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, October 22.

(Before the Lord Justice-Clerk, Lord Young, and Lord Adam.)

CLARKSON *v.* STUART.

Justiciary Cases — Intimidation — Complaint—Relevancy—Specification—Qualifying Words—Conspiracy and Protection of Property Act 1875 (38 *and* 39 *Vict. cap.* 86), *sec.* 7—*Criminal Procedure Act* 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 8.

Section 7 of the Conspiracy and Protection of Property Act 1875 imposes a penalty upon "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do, or abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person," or does certain other acts specified in the following sub-sections.

A complaint set forth that the accused, with a view to compel certain persons to abstain from their usual and