On his reporting that it was within two miles the Sheriff-Substitute on 13th June 1899 granted interdict as craved.

The Co-operative Society appealed to the Court of Session.

Argued for the appellants—The action was an attempt to review the decision of the local authority. The Public Health Act provided that appeal should be made to the Local Government Board, and therefore the Sheriff had no jurisdiction. The local authority was a Court co-ordinate with that of the Sheriff, and the Sheriff had therefore no power to review its decision. As the proposed slaughterhouse was outside Wishaw, the Commissioners had no interest to object to it. They could prevent the butchers of Wishaw resorting to it—*Derrick* v. *Black*, December 10, 1889 17 R. J.C. 9.

Counsel for the respondents were not called upon.

LORD PRESIDENT—The Act of 1892 established, in favour of slaughterhouses erected under its provisions, a monopoly within two miles. The monopoly had been established by the section preventing the importation of slaughtered animals into a burgh, but the Act went on to say that it should not be lawful to erect a slaughterhouse within two miles of the burgh. It is perfectly clear that these provisions gave a right and a patrimonial interest to the owners of existing slaughterhouses to prevent the erection of others within that limit, and that that carries with it the right to apply to the Court in the ordinary way to enforce it. So that considering the question on the Act of 1892 and apart from the Act of 1897 I have no doubt.

What then does the Public Health Act of 1897 do? It does not make any change in the law prohibiting the erection of slaughterhouses; it leaves that where it was, but it provides that the local authority may grant licences to carry on that business of slaughtering. From the terms of the Act it is quite clear that the local authority or county council in so doing are exercising just the sort of authority which is exercised by the magistrates under the licensing statutes. Then the analogue to this case in the sphere of licensing law would be found if there were some previous Act of Parliament prohibiting the erection of public-houses within a certain area, and it is clear that in such a case parties interested might have recourse to the ordinary courts to enforce their monopoly. The licensing authority has no power to override or relax the statutory prohibition. They may assume, when asked to license anyone to carry on this business in a particular slaughterhouse, that the slaughterhouse has been legally erected. If it has not been legally erected, their licence has no effect to legalise it. These considerations apply equally to show that the local authority and the county council on appeal do not exercise any jurisdiction which can possibly oust the Sheriff from entertaining this interdict.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellants—H. Johnston, Q.C.—Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents — Sym. Agent—D. Hill Murray, S.S.C.

Friday, October 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

UNITED COLLIERIES *v.* GAVIN.

Process — Workmen's Compensation Act 1897—Sheriff—Duty of Sheriff as Arbitrator—Decree by Default—Reparation.

At a diet of proof fixed by a Sheriff as arbitrator in a claim under the Workmen's Compensation Act 1897, at which the only question at issue was the amount of the compensation to be found due, the pursuer was present with witnesses but no appearance was made for the defenders. The Sheriff, without taking evidence, gave decree for the pursuer in respect of no appearance for the defenders. Suspension of this decree *granted* (*rev.* judgment of Lord Kincairney, Ordinary), on the ground that the Act laid upon the Sheriff as arbitrator the duty of fixing compensation after such investigation as might be necessary in the circumstances of each case, and it was therefore incompetent for him to grant decree by default.

Brian Gavin, pitheadman, Baillieston, commenced proceedings in the Sheriff Court of Lanarkshire at Airdrie, to obtain compensation under the Workmen's Compensation Act 1897 for an accident suffered by him while in the employment of the United Collieries, Limited.

The defenders pleaded serious and wilful misconduct on the part of Gavin, but ultimately withdrew that plea, and the Sheriff-Substitute (MUIR) appointed a diet of proof for 22nd December 1898.

At the proof the agent for the pursuer was present, with four witnesses on his behalf, but no appearance was made for the defenders. The Sheriff-Substitute, without taking evidence, pronounced the following interlocutor:—"Finds, in terms of the prayer of the petition, that compensation is due to the pursuer by the defenders, and ordains the defenders to pay to the pursuer compensation at the rate of 14s. 6d. per week from and after the 10th day of August 1898, and to continue the said weekly payments until the further orders of Court, with the legal interest on each weekly payment from the time the same falls due till paid." With regard to their non-appearance the defenders made certain averments as to an alleged undertaking by the Sheriff to send

notice to them of the date of proof, the import of which is fully stated in the opinion of the Lord Ordinary.

A charge on the decree being threatened by Gavin, the United Collieries Company brought a suspension in which they pleaded—"(1) The said decree being unjust and oppressive in the circumstances ought to be suspended, with expenses. (2) The said decree having been pronounced in absence induced by the undertaking foresaid it ought to be suspended as oppressive. (3) The conduct of the said arbiter being *ultra vires*, illegal, and corrupt, the said award ought to be suspended. (4) The said arbiter having pronounced said award without having heard any evidence, and said award being based upon no proved facts, it ought to be suspended."

The respondent pleaded—"(1) The present action being incompetent the note should be refused, with expenses. (2) No relevant case. (3) The decree sought to be suspended being in all respects legal and regular the note should be refused, with expenses. (4) The Sheriff-Substitute's actings in the matter libelled being competent, regular, and within his powers, the decree ought not to be suspended. (5) A diet of proof in the action referred to having been duly fixed and intimated by interlocutor of 1st December 1898, and defenders having, through their own fault or neglect, failed to appear at said diet, the Sheriff-Substitute was entitled to pronounce decree for the sum craved in the petition, and the present suspension should be refused, with expenses."

The Workmen's Compensation Act 1897 provides, sec. 1, sub-sec. 3—"If any question arise in any proceedings under this Act as to the liability to pay compensation under this Act, . . . the question, if not settled by agreement, shall . . . be settled by arbitration, in accordance with the second schedule to this Act."

By article 14 of schedule 2 it is provided —"In the application of this schedule to Scotland, . . . any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the 52nd section of the Sheriff Courts (Scotland) Act 1876."

Section 52 of the Sheriff Court Act 1876 provides as follows—"In every case of an application, whether by appeal or petition, made to the Sheriff under any Act of Parliament which provides, or according to any practice in the Sheriff Court which allows, that the same shall be disposed of in a summary manner in the Sheriff Court without record of the defences or evidence, and without the judgment being subject to review, but which does not more particularly provide in what form the same shall be heard, tried, and determined, . . . the Sheriff shall appoint the application to be served and the parties to be heard at a diet to be fixed by him, and at that diet, or an adjourned diet, summarily dispose of the matter after proof led, when necessary, and hearing parties or their procurators thereon, and shall give his judgment in writing."

On 13th July 1899 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor refusing the suspension.

Opinion.—"This is a note of suspension of a threatened charge on a decree pronounced in the Sheriff Court at Airdrie in an action under the Workmen's Compensation Act (60 and 61 Vict. cap. 37), concluding for compensation in consequence of injuries sustained by the pursuer (now respondent) when in the employment of the defenders, who are the complainers in this note of suspension. By the Sheriff's decree, dated 22nd December 1898, the complainers are ordained to pay the respondent compensation at the rate of 14s. 6d. per week from 20th August 1898, to continue until the further orders of Court, and the complainers are by the decree found liable in expenses. This decree bears to be pronounced 'on the motion of the agent for the pursuer' (present respondent), 'who was present with four witnesses, two of whom were medical gentlemen, and was prepared to go on with the proof, and in respect that there is no appearance on behalf of the defenders at the diet of proof fixed for to-day.'

"It seems to be clear that under the Workmen's Compensation Act the judgment or award of the Sheriff is not open to review on the merits, except on a case stated as provided by the 14th article of the 2nd schedule to the Act, and section 9 of the relative Act of Sederunt. I do not understand this to be disputed by the complainers, who profess not to ask for a review or recall of the Sheriff's judgment, but who seek to be relieved from it as wholly irregular and incompetent.

"Now a certified copy of the interlocutors pronounced in the Sheriff Court has been produced, and it does not disclose any irregularity of procedure. The complainers cannot say that the irregularity of which they complain can be detected by merely reading these interlocutors. By interlocutor of 1st December, the Sheriff fixed 22nd December as a diet for the trial of the cause, and granted diligence against witnesses and havers, and on that latter date he pronounced a judgment, which is in terms of the conclusions of the summons. Perhaps the interlocutor of 22nd December may not be quite accurately worded, but it is a decree on default, which, *prima facie*, the respondent was entitled to ask and the Sheriff was entitled, although, it may be, not bound to grant, and it may be regrettable in the circumstances that the respondent's agent asked it and that the Sheriff granted it. I would be somewhat anxious to suspend the threatened diligence until the complainers should bring an action of reduction if I could see that the complainers could succeed in such an action. But on the face of the interlocutor-sheet there seems no irregularity which could justify reduction or suspension of diligence. The suspension cannot be supported except on grounds which the interlocutors do not disclose.

"Suppose the complainers' absence had been purely accidental—as if, for example,

their attendance had been prevented by some irregularity of a railway train or some similar cause—yet if the Sheriff and the respondent knew no more than that they had failed to attend, it appears to me that a decree on default could not have been set aside as incompetent,—would have been to be regretted as possibly involving injustice, but it would, I fear, have been a misfortune for which, under the Workmen's Compensation Act, there would have been no complete, although there would have been a partial remedy.

"If that be so, then the only question is whether the reason which the complainers give for their absence at the diet of proof is such as will entitle them to have the decree suspended or set aside, and I think it is not. It is a very singular reason. They say that their agent was absent because he did not know of the diet, and the reason for that they aver to be, that at the previous diet the Sheriff had intimated that he would consider whether he should allow a proof or remit to a medical referee, and had promised and undertaken—such is the complainers' averment—that intimation would be given to the complainers' procurator by post of the next diet, especially if a proof were allowed, that 'in breach or disregard or forgetfulness of the understanding of parties' no intimation of the diet was made to him by the Sheriff or Sheriff-Clerk, and that the agent, being resident in Edinburgh, was therefore not aware of it.

"At this stage of the cause I am bound to assume the truth of the complainers' averments, however improbable. But if I do so, I do not think they make a relevant case. Such a promise by the Sheriff was not a judicial act. It can be regarded as nothing but the promise of a private individual, and I cannot think that the other party, pursuer of that action, could be deprived of what would otherwise have been his right because the Sheriff in his private capacity made a promise which he forgot to keep. As my assumption that the Sheriff made this promise and did not keep it is insufficient for the complainers' case, I prefer not to make the assumption, but to suppose—what is no doubt the case—that the complainers' agent misunderstood the Sheriff and supposed that he had made this irregular promise when in truth he did not. It is easy to imagine how this might happen.

"The complainers say that their agent wrote Mr Bradley, the respondent's agent, inquiring whether any order had been pronounced by the Sheriff (an inquiry which, by the way, suggests that he was not relying on the Sheriff's promise), and that Mr Bradley gave him no answer. If this be so, I would not think Mr Bradley's conduct to be wholly commendable, but it is impossible to say that he was under any legal obligation to answer, or that his mere silence misled the complainers or their agent.

"Whether the complainers' agent misunderstood the Sheriff or not, it would appear that he was not aware of the diet of proof, and that his absence was due to some misunderstanding or mistake not involving much fault on his part. It seems hard that his clients should lose their right on account of that accident, and I would be anxious to give a remedy if I could, but I am unable to see that there is any complete remedy under the statute. There seems to be a somewhat incomplete remedy under the 12th article of the first schedule, which authorises revisals of awards of compensation at any time. So that, if the complainers think that the amount awarded is too high, they can still have a remedy for that. But I think that this suspension must, in the circumstances averred, be refused."

The United Collieries Company reclaimed, and argued—The duty of the Sheriff as an arbitrator was to apply his mind to the case brought before him. Here he had not done so, but had given effect to the motion of one party. The whole scope of the Workmen's Compensation Act pointed to a friendly arbitration, not to a litigation; and on an arbitration a decree by default was out of place. An arbitrator must take evidence, unless the circumstances were within his own knowledge—*Sharp* v. *Bickerdyke*, Feb. 24, 1815, 3 Dow 102; *Macdonald* v. *Macdonald*, Dec. 8, 1843, 6 D. 186; *Mowbray* v. *Dixon*, June 2, 1848, 10 D. 1102. It was true that section 14 of Schedule 2 referred to section 52 of the Sheriff Court Act 1876 (quoted *supra*), but there was nothing in that section to make it competent, far less obligatory, on the Sheriff to grant decree by default. Section 20 of the Sheriff Court Act 1876 was not applicable, because the word "action" there meant ordinary action, not summary action. The power to grant decree by default proceeded on the presumption that the non-appearing party was confessed, but an arbiter had no power to make such an assumption. Such decrees were only granted in exceptional cases in the Court of Session—Ersk. iv. 2, 17—and were incompetent in the Sheriff Court except under the express provisions of statute—[The LORD PRESIDENT cited *Duff* v. *Stewart*, Jan. 17, 1882, 9 R. 423, *per* Lord President Inglis at p. 425]. The Sheriff might have the power in ordinary actions, where the party against whom the decree was given might be reponed, not in a case where, as here, the decree was final. The remedy suggested under section 12 of Schedule 1 of the Workmen's Compensation Act (which gives power to the arbitrator to review the weekly payment) was probably not applicable here, where it would require the Sheriff to go back on his previous proceedings and take a proof. There was nothing unreasonable or contrary to the spirit of the Act of 1897 in an employer preferring to trust the case to the discretion of the Sheriff.

Argued for the respondent—This was not an ordinary arbitration, but a proceeding to be carried on in the form provided by section 52 of the Sheriff Court Act 1876. It was therefore a litigation, and the Sheriff had power to grant decree by default—Dove Wilson's Sheriff Court Procedure, p. 280. That was not necessarily final, because

there was a power to alter the amount awarded (Schedule I, sec. 12). Section 20 of the Sheriff Court Act 1876, which declares that the Sheriff shall grant decree in a contested action when one of the parties fails to appear, applied to actions under section 52 of that Act, and therefore to arbitrations under the Workmen's Compensation Act.

LORD PRESIDENT—I am prepared to deal with this case on the assumption that the non-compearing party was to blame for not appearing at the diet of proof. And I agree in the view taken by the Lord Ordinary as to the extremely small value in point of relevancy of the averments as to what the Sheriff is said to have promised to do. I dismiss that point, and proceed to consider the case on the footing that the defenders were in fault in not appearing.

Now, this is a proof appointed to be taken in a statutory arbitration under the Workmen's Compensation Act. It is important to observe that while in Scotland the Sheriff is a statutory arbitrator, yet at the same time he is an arbitrator, and his duties are to award compensation under the conditions and in the terms prescribed by the Workmen's Compensation Act and by its schedules. Now, both a general and a detailed view of that Act show that in conferring upon the employer liability to pay compensation the Legislature provided this safeguard, that it should be compensation as determined by arbitration, and by arbitration according to certain principles which are laid down in the Act. When the Act and its schedules treat of the duties of the arbitrator, the words used are "fix compensation," "settle compensation," "determine compensation," and in other cases "settle the matter." All these words point plainly not to a litigation but to an arbitration; and accordingly it is natural to expect that we shall find that the duty of examining the subject from the point of view of a friendly arbitrator is to continue throughout the procedure which is to follow. Now, it is true that the Act says that any application to the Sheriff as arbitrator shall be tried and determined by the Sheriff summarily in the manner provided by the 52nd section of the Sheriff Court Act 1876, and for my part if it had been demonstrated that the procedure prescribed by section 52 contained as a statutory part or ingredient a duty on the Sheriff to grant decree by default in all cases in which there was non-compearance at the proof, then I should have reluctantly yielded to the conclusion that the anticipation formed that the matter should be looked into by the Sheriff had been defeated, and that the litigious element prevailed over the spirit of arbitration. But then it seems to me that the holders of this judgment have conspicuously failed in establishing that, under the summary procedure pointed to in section 52, it was the duty of the Sheriff to grant decree by default in this proceeding. He has first maintained that section 20 of the Sheriff Court Act 1876 applies, and that the Sheriff was therefore bound to grant decree, but when we turn to the interpretation clause we find that the word "action" in section 20 means an ordinary action, and therefore there is no warrant for extending the provisions of section 20 to the peculiar class of summary cases dealt with in section 52. Therefore the Sheriff was not compelled to grant decree in this case, and if he was not so compelled, then the gates are open to the flood of argument drawn from the principal Act as to the duties which he has to perform. He is to bear in mind that, if untrammelled by the provisions of section 20, he is to do the several things prescribed by the principal Act—that is, he is to "fix," "determine," "settle" the compensation, and that in certain cases he can only do on a consideration of circumstances only ascertainable by investigation. I am supported in this view by the fact that it is quite in the spirit of the Workmen's Compensation Act that one of the parties should place such confidence in the good sense and knowledge of the Sheriff that he should take no part in the proceedings, but leave the Sheriff to ascertain the facts for himself, they being (in the case supposed) of a comparatively simple kind, and very likely the amount at stake of comparatively small dimensions. It will be a wholesome rule which we shall lay down if the result of our judgment is to allow the parties to cases of this kind to be less anxious in litigating, and more ready to trust to the discretion of the Sheriff.

Now, if I am right in holding that it was the duty of the Sheriff, although one of the parties was absent, not to give decree by default, but to ascertain the amount of compensation, it is plain that the extent of his investigation must depend upon the subject-matter before him, and in a case where one party was absent, the Sheriff would naturally apply due and judicial criticism to test the evidence placed before him, while at the same time he would not conjure up objections which the absence of the contradictor made it pretty certain did not exist. The conclusion I have come to is that this judgment cannot stand. It is not a case where the Sheriff, in the exercise of a discretion which all arbitrators are entitled to exercise has held that he was sufficiently informed by personal knowledge and the statement of parties to enable him to dispense with a proof. That is not what is recorded in this interlocutor. What is recorded is that the Sheriff gave decree in consequence of the absence of the party, and if your Lordship shall hold that the judgment cannot stand, it does not follow that in all cases it is the duty of the Sheriff to examine witnesses for himself. That would depend on the nature of the case presented to him. In the present case it is plain that the Sheriff could not know the facts on which he had to decide, and he does not propose to base his judgment on any such knowledge. Accordingly, I am for recalling his judgment and suspending the charge.

I think it right to say that I have not been able to convince myself that the employers had a remedy against a decree by default under section 12 of Schedule I. of the Work-

men's Compensation Act. I doubt whether the Sheriff could at a later stage order a proof for the purpose of fixing the amount of compensation due merely on the ground that the party now moving had neglected to attend. But on that point it is unnecessary to pronounce any opinion.

LORD ADAM—There can be no doubt that the Workmen's Compensation Act 1897 puts upon an arbiter the duty of settling the amount of compensation. In this case it is the Sheriff who is appointed arbiter. As arbiter, accordingly, he sits and adjudicates, and it is so acting as arbiter that he has to settle the amount due. The claim made here was for certain weekly payments. Now, it is perfectly obvious that such a claim requires a proof, because the Sheriff cannot possibly of his own knowledge be aware of the proper amount, and accordingly in such a case the Act says, First Schedule (2), that in fixing the amount of the weekly payment regard shall be had to the difference between the average weekly earnings of the workman before the accident, and the average amount he is able to earn after the accident, and to any payment not being wages which he might receive from his employer during the period of his incapacity. Accordingly it was the Sheriff's duty, it appears to me, in proceeding to fix the amount of the weekly payment to which the workman was entitled under the Act, to hold an inquiry and inform himself as far as he could. If that be the sound construction of the Act, there is no room either for a decree in absence or, as in a case of this kind, for decree by default. For in pronouncing such decree the Sheriff would not be keeping in view the provisions of the Act, and would not, in fixing the amount of compensation, "have regard," &c. That consideration is to my mind conclusive of the question, for whatever may be the powers of a Sheriff in a summary proceeding in the ordinary course of pronouncing either a decree in absence or a decree by default, unless there is a statutory duty on him to pronounce such a decree, the provisions of the particular Act—here the Workmen's Compensation Act—must override the general practice, and therefore, without throwing any doubts on the power of the Sheriff to pronounce either a decree in absence or a decree by default in a proper case, I am satisfied that this is not a case in which he can do so.

LORD M'LAREN—On reading the judgment of the Lord Ordinary it appeared to me that his Lordship's attention was not called to the circumstance that the Sheriff's interlocutor was not pronounced in the ordinary course of judicial procedure in which a decree by default would be perfectly competent, but in a statutory process of arbitration. This appeared to me to be the crux of the case, and I ventured to ask counsel whether any precedent could be found for such a procedure—for an arbiter pronouncing a decree by default. No authority was cited, and it seems to me that for an arbiter to make a penal award "in respect of no appearance" is going outside the confines of the question submitted to him. The view I suggested was met by the argument, that though as to certain incidents the proceedings before the Sheriff are of the nature of arbitration, yet the procedure is so far assimilated to that of a Sheriff Court action that reference is made to the 52nd section of the Sheriff Court Act 1876 for purposes of procedure. But when the Sheriff Court Act is examined, the 52nd section is found to be altogether an insular section having no relation to ordinary procedure, but intended to furnish a short code to be applied to cases under existing or future Acts of Parliament which allow these cases to be disposed of under the provisions of this clause. If the question is confined to the terms of sec. 52, I am unable to find in it any warrant for the Sheriff pronouncing a decree by default, or doing anything which is inconsistent with the principle and basis of the proceeding, which is, that it is an arbitration. Turning to the principal Act, it seems to me that on a fair reading of its main provisions it was not supposed that the proceedings under it would be usually or necessarily litigious, but only that if the parties are unable to agree as to the compensation due, the Sheriff should, by the methods prescribed by the Act, settle the amount of compensation. The parties do not need to bring witnesses unless they think it necessary; they are entitled, if they think fit, to leave the determination of the sum to the Sheriff on a consideration of the admitted facts of the case. I refrain from elaborating these points, because your Lordship has fully expressed my view upon them. I would only add, that it seems to me that it would be in the interest of both parties that the decree we are to pronounce should be in such a form that the parties should be able to take up the case at the point where it stood when proof was allowed.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Recal the interlocutor: Suspend the decree pronounced in the Sheriff Court, dated 22nd December 1898: Continue the sist, and decern: Find the reclaimers entitled to expenses."

Counsel for the Reclaimers—W. Campbell, Q.C.—J. C. Watt. Agents—Anderson & Chisholm, Solicitors.

Counsel for the Respondent—G. Watt—Orr. Agents—Patrick & James, S.S.C.