The defenders lodged a note of objections to the Auditor's report, and in the Single Bills argued—Looking to their pleas of waiver, *mora*, and suicide it was necessary for defenders to instruct counsel fully for the preparation of defences, and that could only be done by a memorial or by sending to them copies of the correspondence between the parties. The defence of suicide made it necessary to send to counsel the copies of precognitions taken. No charge had been made for the taking of them. The correspondence and precognitions were in fact only the equivalent of a memorial. The charges taxed off by the Auditor should therefore be allowed and the objections sustained.

Argued for the pursuers—The charge for copy of precognitions should not be allowed, as no proof necessitating them had been ordered—*Malcolm* v. *Moore*, December 18, 1901, 4 F. 369, 39 S.L.R. 259. The charge for copies of a correspondence, which was *ex parte* and entirely useless, had been rightly taxed off. There were two real points in the case—the interpretation of the policy and the question of suicide—and on these the copy correspondence sent to counsel had no bearing. The Auditor had applied his mind to the matter and his decision on it should not be set aside—*Dobell, Beckett, & Company* v. *Neilson*, February 25, 1905, 12 S.L.T. 747.

LORD M'LAREN—This matter is of small value as the sum involved is only £10, 0s. 3d. The objection is to the disallowance of a charge for copies of certain documents as material for the preparation of defences. It must be remembered that counsel in preparing defences have a duty to the Court only to state such as are necessary, and in doing so they must exercise discrimination. Consequently full information as to the facts of the case and the views of the parties should be submitted to them. It is settled practice that the cost of preparing a memorial to counsel to enable them to draw defences is a proper charge. Following that analogy, if instead of drawing a memorial an agent sends the original documents, leaving counsel to find the material facts for himself, or if he sends copies of them, and the cost of the copies does not exceed what might legitimately be charged for preparing a memorial, I think the cost of the copies sent should be allowed as coming in place of a memorial. As to the charge for copies of the precognitions, it may have been necessary to send such to enable counsel to exercise his discretion as to the advisability of drawing a special defence such as suicide. On the whole matter it seems to me that £10 is not an excessive sum for the preliminary information that is to be laid before counsel in preparing for a case of this nature. Even if it were slightly in excess of the possible cost of a memorial, as to which we are not in a position to make an exact estimate, I should not be inclined to cut down the charge. I am therefore for sustaining the objections.

LORD PEARSON and LORD JOHNSTON concurred.

The LORD PRESIDENT and LORD KINNEAR were absent.

The Court sustained the defenders' objections to the Auditor's report and allowed them the expenses of the discussion modified to two guineas.

Counsel for the Pursuers and Reclaimers—W. J. Robertson. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Respondents—Hon. W. Watson. Agents—Gill & Pringle, W.S.

Tuesday, October 23.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

SINCLAIR *v.* THE LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant—Process—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. II,* 8, *and* 14 (*c*)—*A. S. 3rd June* 1898, *sec.* 7 (*a*)—*Application to Sheriff for Warrant to Register Memorandum of Agreement—Sheriff Acting as Arbitrator or not—Appeal by Stated Case—Competency.*

A Sheriff-Substitute in granting or refusing a special warrant for the registration of a memorandum of an alleged agreement as to the payment of compensation under the Workmen's Compensation Act 1897, is not acting as arbitrator, and consequently an appeal from his decision by way of stated case under the Act is incompetent.

Binning v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312, and *Cochrane* v. *Traill & Sons*, November 1, 1900, 3 F. 27, 38 S.L.R. 18, *commented on* and *followed.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. 3, provides—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies) 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." Schedule II, sec. 8, as made applicable to Scotland by section 14(*a*), provides—"Where the amount of compensation under this Act shall have been ascertained or any weekly payment varied or any other matter decided under this Act either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by [Act of Sederunt] by the said committee or arbitrator or by any party

interested to the [sheriff clerk] for the district in which any person entitled to such compensation resides, who shall, subject to such [Act of Sederunt], on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a [Sheriff Court] judgment: Provided that the [Sheriff] may at any time rectify such register." And section 14 provides—"In the application of this schedule to Scotland . . . (*c*) Any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by Act of Sederunt to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session. . . ."

The Act of Sederunt to regulate procedure under the Workmen's Compensation Act 1897, of 3rd June 1898, in sec. 7 (*a*), *inter alia*, provides, after making provision for the form of a memorandum of agreement and for the sheriff clerk registering it if it is signed or if its genuineness is not disputed—". . . But if the genuineness is disputed he shall send a notification of the fact to the party from whom he received the memorandum along with an intimation that the memorandum will not be recorded without a special warrant from the Sheriff." Section 7 (*b*)—"A judgment of a Sheriff disposing of an application made to him under the Act, or a certified copy thereof, shall be dealt with by the sheriff clerk as if it were a memorandum as to a matter decided by an arbitrator agreed on by the parties duly signed by the arbitrator. . . ."

This was an application by the appellants, the Lochgelly Iron and Coal Company, Limited, carrying on business at 40 St Vincent Place, Glasgow, and at Lochgelly in the county of Fife, for an order on the respondent Daniel Sinclair, miner, 5 North Square, Wellwood, Dunfermline, to show cause why the Sheriff-Substitute (SHENNAN) at Dunfermline should not state a case in the following circumstances as set forth in their note:—"Upon 12th October 1904 the respondent while in the employment of the appellants met with an accident by which he sustained a compound fracture of the nose and injury to his teeth, which injuries at the time totally incapacitated him for work. His average weekly wages for the twelve months prior to 12th October 1904 were £1, 13s. 6d., and the appellants and respondent agreed that the amount of compensation payable by the appellants to the respondent under the said Act during the respondent's total incapacity for work was 16s. 9d. per week, and compensation at this rate was paid down to 25th January 1905, at which date the respondent's total incapacity had ceased.

"Thereafter the respondent denied the existence of an agreement between the parties for payment of compensation under the said Act and raised an action in the Court of Session at common law for recovery of £350 as damages in respect of his said injuries. The summons in said action was signeted on 27th April 1905, and after a proof therein the Lord Ordinary (Lord Dundas) upon 8th July 1905 assoilzied the defenders (the present appellants) from the conclusions of the action and found the present respondent liable in expenses upon the ground that the action was excluded by the respondent having elected to take and having taken compensation under the Workmen's Compensation Act.

"Thereafter the respondent lodged for registration a memorandum of the foresaid agreement between him and the appellants for payment of compensation at the rate of 16s. 9d. per week. Intimation of this memorandum having been given to the appellants they intimated to the sheriff clerk that they objected to the recording of the memorandum on the ground of its not being genuine, whereupon on 27th March 1906 the respondent lodged a petition for a special warrant to record the foresaid memorandum.

"In the proceedings following upon said petition the appellants averred that the agreement under which the payments were made by them to the respondent for the period prior to 25th January 1905 expired on that date, and maintained that the action was incompetent in respect that a question as to the amount and duration of the respondent's continued compensation had arisen between the parties, which fell to be settled by arbitration in terms of section 1 (3) of the Workmen's Compensation Act, and that the memorandum was not genuine.

"The Sheriff-Substitute having heard the agents for the parties upon 18th May 1906, pronounced the following interlocutor:—*Dunfermline 18th May* 1906.—The Sheriff-Substitute having heard parties grants warrant to record the memorandum of agreement, and decerns: Finds the pursuer entitled to expenses on the lower scale: Allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and to report.

HAY SHENNAN.

"Thereafter the appellants applied to the Sheriff-Substitute by minute in common form, craving him to state a case for decision of the Court of Session in terms of paragraph 14 (*c*) of the Second Schedule of the said Act, and proposed the following questions of law to be submitted for the opinion of the Court, viz.—(1) Is the pursuer entitled without proof to obtain a warrant to record a memorandum of agreement which the defenders allege no longer subsists. (2) A question having arisen (prior to the presentation of said memorandum for registration) as to the duration of payment of pursuer's compensation, and same not having been settled by agreement, does said question fall to be settled by arbitration under section 1 (3) of said

Act. (3) In the circumstances set forth was the pursuer entitled to obtain the special warrant craved.'

"The Sheriff-Substitute, however, refused to state a case, and the appellants now pray for an order on the respondent, the said Daniel Sinclair, to show cause why a case should not be stated by the Sheriff-Substitute for the following reasons:—(1) Because the appellants contend that the agreement sought to be recorded ceased on the expiry of the period of the respondent's total incapacity. (2) Because the appellants contend that the amount of compensation to be paid now to the respondent falls to be decided by arbitration in terms of section 1, sub-section 3, of the Workmen's Compensation Act. (3) Because the appellants are entitled to have a case stated for the purpose of determining the legal rights of parties in regard to the questions raised."

The respondent averred that his total incapacity continued till April 1905, and that the agreement had not expired on 25th January 1905, but still subsisted.

On 29th May 1906 the Sheriff issued a certificate of refusal as follows:—"I hereby certify that I have refused defenders' application that I should state a case for the decision of the Court of Session in the above proceedings in terms of paragraph 14 (*c*) of the Second Schedule of the Workmen's Compensation Act 1897, and Act of Sederunt of 3rd June 1898; and the ground of my refusal is that the present proceedings are not an arbitration under the said Act, but arise on an application for warrant to register a memorandum of agreement, and that therefore I have no power to state a case as requested. (See *Binning* v. *Easton*, 18th January 1906, 43 S.L.R. 312.)"

Argued for the appellants—The Sheriff-Substitute in refusing to state a case had proceeded on the view that he was foreclosed from doing so by the case of *Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, 43 S.L.R. 312. All that was there decided, however, was that a judgment of a Sheriff-Substitute with regard to the registration of a memorandum of agreement presented to him under the Workmen's Compensation Act was not pronounced in the exercise of his ordinary common law jurisdiction. This decision was no authority for the proposition that an appeal was incompetent by way of stated case under the Act. Indeed sub-section (*b*) of section 7 of the Act of Sederunt 3rd June 1898 provided in terms that a Sheriff's judgment disposing of an application made to him under the Act "shall be dealt with as if it were a memorandum as to a matter decided by an arbitrator," and all judgments of arbitrators under the Act were appealable by stated case. Further, the opinion of Lord Kyllachy in *Binning* v. *Easton & Sons*, *ut supra*, laid it down that there was an appeal by stated case from the Sheriff's decision where the question was as to the existence of an agreement, which was the case here. If the Sheriff's judgment was not open to review, the employer might be subject to great hardship, since the decision in the cases of *Steel* v. *Oakbank Oil Company, Limited*, December 16, 1902, 5 F. 244, 40 S.L.R. 205, and the *Pumpherston Oil Company, Limited*, v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, had this effect, that upon the memorandum of agreement being recorded the workman was entitled to compensation from the date of the accident until the amount of compensation should be reviewed in terms of Schedule I, section 12. Surely it was a question of law, and so subject to review by stated case, whether the pursuer should record an agreement without proof. The case of *Colville & Sons, Limited* v. *Tigue*, December 6, 1905, 8 F. 179, 43 S.L.R. 129, was also referred to.

Argued for the respondent—The Sheriff here was not acting as arbitrator in granting special warrant for registration. The case of *Binning* v. *Easton & Sons*, *ut supra*, had decided that such Acts were ministerial, and was conclusive.

At advising—

LORD KINNEAR—This is an application for an order upon the Sheriff of Fife to state a case under the Workmen's Compensation Act in order that the petitioners may be enabled to raise a question of law for the decision of the Court on appeal from the Sheriff. The petitioners, who are the employers, allege that the respondent, their workman, met with an accident in October 1904; that he and they agreed that the amount of compensation payable by them should be during the respondent's total incapacity for work 16s. 9d. a-week, and that compensation at that rate was paid down to January 1905. There is therefore an admission at the outset by the petitioners that they did make an agreement with the respondent. But they aver that the respondent during the existence of the agreement brought an action in the Court of Session in which he denied that there was an agreement, and maintained that he was entitled to recover damages at common law. The result of that action was a decision in favour of the employers on the ground that the workman had elected to take compensation under the Workmen's Compensation Act. Therefore he was entitled to fall back on the agreement for compensation if there was an agreement still in force. They then say that after the decision of the action he lodged a memorandum of the foresaid agreement; and they go on to say that he and they are at variance as to what the terms of that agreement really were. They say it was to pay compensation during the respondent's total incapacity, that his total incapacity had ceased on 25th January 1905, and that therefore, if he is to have compensation now, it must be on a new agreement or arbitration fixing the amount of compensation to which he is entitled under the existing circumstances. The respondent does not dispute that his total incapacity has ceased. He says his total incapacity lasted till February 1905, and that he is still partially incapacitated. But then he maintains that he is nevertheless entitled to have the admitted agreement put into the form of a memorandum and

registered in terms of the Act, and the Sheriff so decided.

Now, upon that state of matters it is clear enough that there were questions which required consideration. In the first place, the employers were entitled to maintain—whether they could maintain it successfully or not is another matter, but it was a reasonable position for them to maintain—that the agreement embodied in the memorandum presented in March 1906 for registration was not in the circumstances registrable at all, because it was a verbal agreement, as to the terms of which the two parties were in controversy. In the second place, they were in a position to maintain that it ought not to be registered, because it had become by force of circumstances totally inapplicable to the condition in which the workman now was, in respect that the amount of compensation was fixed by the agreement when the man was totally incapacitated from work. They maintain that the agreement ought not to be registered so as to make a foundation for diligence to recover compensation on the footing of total incapacity during a period of more than a year, when the workman according to his own admission was not totally incapacitated.

I think these are questions well worthy of consideration. But then the Sheriff considered them, and in so doing he had to determine whether he should decide them on their merits before ordering registration, or whether the memorandum should be registered irrespective of the petitioners' objections and without deciding whether they were good or bad. I do not know which view he took; all I know is that, these points being brought before him, he decided that the memorandum presented to him ought to be recorded, and he granted warrant accordingly. Now, the petitioners desire to present an appeal against that decision. I am of opinion that the competency of such an appeal is clearly decided against the petitioners by the case of *Binning* v. *Easton & Sons* (8 F. 407). That was a decision of Seven Judges finding that there is no appeal against the ground of the decision, or against the decision of a Sheriff granting or refusing to grant a warrant to register a memorandum, and that it was incompetent to bring the question before this Court at all.

Now, that decision is directly in point. I am unable to see any distinction between the present case and the case of *Binning*, except that in the present case the form of appeal to which the employers desire to resort is a stated case to raise a question of law under the Workmen's Compensation Act, whereas the case of *Binning* was an appeal at common law bringing up the whole decision of the Sheriff on all its grounds. I think that is a distinction which makes no difference in the application of the decision. It is true that in the course of their opinions the majority of the judges in *Binning's* case observe that if any injustice were done by the registration of a memorandum, which ought not to have effect as a continuing agreement, there may be a remedy open to the party aggrieved. What that remedy may be is a different matter; but it is quite clear to my mind that whatever the remedy is it is not an appeal under the Workmen's Compensation Act, because the appeal provided in that statute is an appeal only against the decision of the Sheriff as arbitrator in determining matters which under the Act are to be settled by arbitration. It begins by setting out that certain provisions should apply for settling any matter under this Act by arbitration, and after providing for the arbitration procedure it provides—"That it shall be competent to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, which may hear and determine the same finally." Now, that is a special provision for appeal against the decision of an arbitrator, and has no relation whatever to a proceeding for obtaining the registration of a completed award by an arbitrator or a completed agreement which would exclude the necessity for arbitration. The true distinction between the two proceedings was stated by Lord M'Laren in the case of *Binning*, where his Lordship says—"It is quite clear that in granting the warrant for registration the Sheriff does not act as arbitrator, because arbitration and agreement are alternative methods and the provisions as to registration presuppose a completed arbitration or a completed agreement." Lord M'Laren was in that case in the minority as regards the actual decision pronounced, but none of the judges in the majority expressed any dissent whatever from that perfectly clear statement of the law, and I, for my own part, entirely concur in it. I think that is the principle which determines the decision of this question, and if we cannot entertain an appeal in ordinary form we cannot entertain an appeal from the Sheriff Court under the Act.

I only add that if the decision of the Sheriff were appealable at all, I can see no justification for the argument that there is a distinction between an appeal in law and an appeal in fact. If an order to register is not final, then the party aggrieved by it must be entitled to appeal on any ground, whether of law or of fact, and if on the other hand it is final it cannot be appealed against on law any more than on fact. I think the distinction between the two cases which was argued does not exist.

I only add that I express no opinion on the effect of registration, because that is not before us. It was argued to us that the remedy pointed out by the Lord President in the case of *Binning* v. *Easton & Sons*, viz., that the employer could apply for revision of the compensation under the statute in case he is aggrieved by an order for registration, is not open to the petitioners in the present case, for what they complain of is the enforcement of the alleged agreement for a period which is already past and which will not be covered by a revision. I express no opinion as to the consequence of registration, but if the

petitioner's apprehensions are well founded their remedy cannot be an appeal under the second schedule on a case stated by the Sheriff.

I am quite clearly of opinion that this is an incompetent appeal, and I am therefore for dismissing the application.

LORD PEARSON—I agree that the Sheriff was right in refusing to state a case. But his reference to the case of *Binning* v. *Easton* as his authority for so refusing perhaps requires some explanation, for, as Lord Kinnear has pointed out, the thing that was negatived in *Binning's* case was the alleged right of appeal from the Sheriff Court to this Court under the common law jurisdiction. The authority which, I think, really excludes the present application is the previous case of *Cochrane* v. *Traill & Sons*, November 1, 1900, 3 F. 27, 38 S.L.R. 18, in this Division, where the Court (as here) was asked to entertain an appeal by stated case in an application to the Sheriff for a special warrant to record a memorandum of agreement the genuineness of which was disputed. The Court dismissed the case stated on appeal as incompetent on the ground that the procedure by way of stated case has no application except where the Sheriff is acting as arbritrator, and that he is not acting as arbitrator in a proceeding to register an agreement. So far as I know, that decision has never been challenged, and it furnishes the true ground for throwing out the present application. What has been challenged is the suggestion then made by the Court that an application to the Sheriff to register a memorandum was an application to him in the exercise of his ordinary common law jurisdiction. That is what was negatived in the case of *Binning* v. *Easton*, which laid down that in such a case the Sheriff was acting neither as arbitrator nor as judge but ministerially.

The appellants point out the hardship in which they are involved if the memorandum of agreement is now recorded. Both parties are now at one as to there having been originally an agreement for compensation under the Act. But after the appellants had paid the full statutory compensation for upwards of three months, the respondent attempted to throw over the agreement, and raised an action at common law for £350 damages. This was thrown out in July 1905 on the ground that the respondent had elected the statutory remedy, and the appellants were found entitled to expenses. They say they are now in this position, that if the agreement is recorded they will be liable in full compensation until the amount is modified or payment is stopped in terms of the statute, and, moreover, that they will not be entitled to set off the sum due to them for expenses in the action. I do not know whether these apprehensions are well founded or not. But I am afraid these considerations cannot affect the judgment; and besides I think the appellants might have been in a stronger position, at least on the first point, if they had themselves stood by the agreement and tendered a memorandum of it for registration as soon as the common law action was threatened. As soon as that action was over the Sheriff could have dealt with the compensation as the appellants desired, and the dispute might have ended more than a year ago.

LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court refused the application.

Counsel for the Pursuer and Respondent—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, W.S.

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

Friday, October 26.

SECOND DIVISION.

[Lord Pearson, Ordinary.

THE LICENSES INSURANCE CORPORATION AND GUARANTEE FUND, LIMITED *v.* SHEARER AND OTHERS.

Arbitration — Contractual Arbitration — Interdict against Proceeding with — Arbitration ex facie Regular—Refusal.

A note of suspension and interdict to stop proceedings in a contractual arbitration which was *ex facie* regular and in which the arbiter was *ex facie* well-appointed *refused*, it not having been made plain to the Court that the arbiter was not possessed of the power which he was called upon to exercise.

Dumbarton Water Commissioners v. *Lord Blantyre*, November 12, 1884, 12 R. 115, 22 S.L.R. 80; *Glasgow, Yoker, and Clydebank Railway Company* v. *Lidgerwood*, November 27, 1895, 23 R. 195, 33 S.L.R. 146, *followed*.

In November 1901 The Licenses Insurance Corporation and Guarantee Fund, Limited, issued a policy of insurance in favour of James Wilson, a license-holder at 69 Vennel, Greenock, for a maximum sum of £3000, insuring him against any loss he might sustain in the event of the license held by him not being renewed by the licensing authority owing to any reason beyond his own control. The policy contained, *inter alia*, the following conditions:—"(4) No person other than the insured, and in case of death his executors, representatives, or disponees, and an assignee of the premises to whom the licensing authority shall have granted a transfer of the certificate of license, shall benefit under this policy . . . (13) If any difference of any kind whatsoever shall arise between the insured or any claimant under this policy and the Corporation in respect of this policy or any claim hereunder, every such difference when and as the same arises shall be referred to the