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