Court (The LORD PRESIDENT and LORDS ADAM, M'LAREN, and KINNEAR) granted approval.

Counsel for the Petitioners—Hon. H. D. Gordon. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, May 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

RUTHVEN AND OTHERS *v.* RUTHVEN.

Process—Reclaiming Note—Competency—Interlocutor of Lord Ordinary Inoperative—Reclaiming Note with a View to Correct Interlocutor.

A pursuer reclaimed against an interlocutor pronounced by the Lord Ordinary on the pursuer's own motion, on the ground that the interlocutor as pronounced did not give effect to the pursuer's motion, and was unworkable. The Court *recalled* the interlocutor reclaimed against.

In November 1903 The Hon. Walter Patrick Ruthven, Master of Ruthven, and others, his trustees acting under an agreement entered into between the Right Hon. Walter James Hore Ruthven, Baron Ruthven, his father, as represented by his attorney George Auldjo Jamieson, C.A., with consents therein mentioned, of the first part, and himself the said Hon. Walter Patrick Ruthven, dated 30th March and 11th April, and registered in the Books of Council and Session 7th June 1892, raised an action against the said Lord Ruthven for implement of the obligations under said agreement, concluding, *inter alia*, for execution and delivery to the pursuers as trustees foresaid of a valid and sufficient conveyance of the estate of Harperstown, County Wexford, Ireland, in terms of the form produced.

On 27th March 1905 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor finding that the defender was bound, in implement of the agreement mentioned in the summons, to execute and deliver to the pursuers, as trustees acting under the said agreement, a valid and sufficient conveyance of the estate of Harperstown; and continued the cause that the terms of the said conveyance might be adjusted and approved of.

A conveyance was subsequently prepared for signature, and on 16th May 1905 the Lord Ordinary pronounced the following interlocutor on the pursuers' motion:—"The Lord Ordinary, in respect of the finding contained in the interlocutor of 27th March last, and of the letter No. 19 of process, decerns and ordains the defender to execute and deliver to the pursuers Charles James George Paterson and Archibald Robert Craufurd Pitman, as trustees under the agreement mentioned in the summons, the conveyance No. 6 of process, and that within fourteen days from this date."

The letter No. 19 of process, referred to in this interlocutor, was a letter written by the defender's agents to the pursuers' agents stating that the defender declined to sign any conveyance, and that they had no instructions to adjust the conveyance with the pursuers' agents.

On 19th May the Lord Ordinary granted leave to the pursuers to reclaim against the interlocutor of 16th May.

In the Single Bills counsel for the defender objected to the competency of the reclaiming note, and argued—The reclaiming note was incompetent in respect that the interlocutor reclaimed against had been pronounced on the motion of the reclaimers themselves—*Watson* v. *Russell*, January 30, 1894, 21 R. 433, *sub. nom. Watson* v. *Morrison and Others*, 31 S.L.R. 352. The present case was even stronger, since the defender was not represented by counsel when the interlocutor was pronounced.

Argued for the pursuers and reclaimers—The interlocutor as it stood was unworkable. Though pronounced on pursuers' motion the interlocutor was not in terms of the motion. The fourteen days within which the conveyance was ordained to be executed should have been made to run from the date of charge and not from the date of the interlocutor. Also expenses were not dealt with, for which the pursuers had moved. These were in effect clerical errors and should be corrected. Moreover, Irish procedure demanded the signing of a memorial corresponding to the Scots warrant for registration, and if this reclaiming note were sustained it was proposed to move for a decree ordaining the defender to sign this memorial.

The Court recalled the interlocutor reclaimed against and remitted the case to the Lord Ordinary.

Counsel for the Pursuers and Reclaimers—Fleming, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defender and Respondent—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, May 30.

FIRST DIVISION.

[Sheriff Court at Dundee.

COOPER & GREIG *v.* ADAM.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7, *sub-secs.* (1) *and* (2)—*Factory—Undertakers—Temporary Employment in Factory not Belonging to the Undertakers—Engineering Work.*

A workman in the employment of a firm of boilermakers was sent by them to repair a boiler in a spinning-mill

belonging to a third person at a time when the work of the mill was suspended. In the course of executing the repairs the workman sustained an injury to one of his eyes. The work in which he was engaged when he met with the accident was the removal and renewal of the blow-off saddle of the boiler, and he was standing on the outside of the boiler holding a cutter by a handle of twisted wire against a rivet-head on the inside in order that it might be struck off by another workman using a heavy hammer inside the boiler. No steam, water, or other mechanical power was being used in the operation, although there was steam power on the premises, which might have been used. *Held* that the workman was not entitled to compensation from the firm of boilermakers under the Workmen's Compensation Act, 1897, in respect (1) that the spinning-mill was not the factory of the boilermakers, and therefore not a factory within section 7 (1) of the Act; and (2) that he was not engaged in "engineering work" in the sense of section 7, (1), (2), of the Act, as no machinery driven by steam, water, or other mechanical power was in fact used in the work in which he was engaged at the time of the accident.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) enacts, section 7, sub-section (1)—"This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work." . . . Sub-section (2) enacts—"In this Act . . . 'factory' has the same meaning as in the Factory and Workshop Acts 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895. . . . 'Engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used. 'Undertakers' in the case of a railway means the railway company; in the case of a factory, quarry, or laundry, means the occupier thereof within the meaning of the Factory and Workshop Acts 1878 to 1895; . . . and in the case of an engineering work means the person undertaking the construction, alteration, or repair." . . .

In an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court at Dundee, between John Adam, boilermaker, 88 Hawkhill, Dundee, claimant, and Cooper & Greig, engineers and boilermakers, Britannia Works, East Dock Street, Dundee, the Sheriff-Substitute (CAMPBELL SMITH) on 12th July 1904, after a proof, pronounced the following interlocutor:—"Finds that the pursuer is a boilermaker, and was, on 29th July 1902, while working in the employment of the defenders, so injured in the left eye as to be deprived of the sight of it: Finds that the work at which he was engaged was the removal and the renewal of the blow-off saddle of the Tayport Factory boiler, and that he was standing on the outside of it holding a cutter four inches long by a handle of twisted wire against a rivet-head on the inside in order that it might be struck off by a companion workman using a heavy hammer on the inside; that said companion struck the cutter so held that the rivet-head flew at the blow struck from the inside of the boiler, somewhere rebounded from the inside, flew through the manhole at which the pursuer was standing with the cutter in his grasp, hit him on the eye: Finds that the said Tayport Factory is in its regular business a spinning factory, but that the spinning business was, in respect of the week's annual holidays in the end of July, suspended for the week, and the factory was occupied by the defenders for engineering repairs, and in particular for the repair of this boiler, which, but for its weight and the difficulty of transport, could have been repaired as easily and as well, and by operations identical in every important respect, in the defenders' engineering establishment in Dundee: Finds that in carrying out the work they were employed to do the defenders were for the time being occupiers and tenants-at-will of this Tayport Factory as completely as if the said factory had been totally surrendered to them: Therefore repels the defences: Finds the pursuer entitled to compensation at the rate of 19s. a-week from the 12th August to 24th November 1902, also 12th April to 18th December 1903, also to 2d. a-week from latter date till the further orders of Court, and continues the cause: Finds the pursuer entitled to expenses," &c.

The Sheriff-Substitute having refused to state a case for appeal, the defenders presented a note to the First Division craving the Court to ordain him to do so. In their note the defenders averred—"During the last week of July 1902 the respondent, who was a boilermaker in the employment of the appellants, was sent by them along with two other men to repair a boiler at the factory of the Tayport Spinning Company at Tayport while the work of that factory was suspended for the week for the annual holiday. The work to be done was the removal and renewal of the blow-off saddle of the boiler, and no steam, water, or other mechanical power was employed by the appellants in the performance thereof or in connection therewith. On 29th July 1902 the respondent was standing on the outside of the boiler holding a cutter four inches long by a handle of twisted wire against a rivet-head on the inside in order that it might be struck off by a companion worker using a heavy hammer on the inside, when the head of the rivet flew off and struck the respondent on the left eye. As a result of the accident the respondent lost the sight of his left eye."

The pursuer lodged answers in which he averred—"The removal and renewal of the blow-off saddle is a composite process in the course of which machinery driven by

steam, water, or other mechanical power is used, and the applicant was employed in that process. That such machinery is used in the composite process is admitted by the witnesses for the defence."

On 29th November 1904 the First Division remitted to the Sheriff-Substitute to state a case setting forth the facts found by him to be admitted or proved relative to the following questions, viz. — "(*First*) Whether the respondent was injured on or in or about a 'factory' within the meaning of section 7 (1) (2) of the Workmen's Compensation Act 1897. (*Second*) Whether the appellants were 'undertakers' of that 'factory' within the meaning of section 7 (2) of said Act. (*Third*) Whether the work at which the respondent was injured was 'engineering work' within the meaning of section 7 (2) of said Act. (*Fourth*) Whether, if the foregoing are answered in the affirmative, the Sheriff-Substitute was right in awarding compensation for the period from 12th April to 18th December 1903, and recommend to the Sheriff-Substitute to include in such case any other question of law arising out of the facts found by him to be admitted or proved relative to the merits of the claim, and to give his judgment on the facts relative to these points."

In compliance with the remit the Sheriff-Substitute, on 17th March 1905, stated a case in which he referred to his interlocutor of 12th July 1904 as to the facts found proved. The case contained, *inter alia*, the following additional statements:—"The Sheriff-Substitute wrote his interlocutor and note in the undoubting belief that the three questions set forth in the interlocutor of the Court of Appeal all fell to be answered in the affirmative in point of fact. . . . The defenders have an extensive engineering business in Dundee and district, and are not known to carry on, or profess to carry on, any other business. An important part of their said business is to construct the boilers, engines, and other motive machinery for the spinning factories, and a regular part of it is to execute repairs, renewals, and extensions during the July holiday week, when the ordinary factory workers are turned out to go idle in the name of holiday, and the engineers are more busy than they are during any other week of the year, taking advantage of the machinery being at rest for the opportunity of repairs and alterations that have been postponed for it, and for the long light that gives facility for extra hours. At the time of the accident there was a contiguous and substitute boiler generating steam and driving the machinery in the adjoining mechanic's shop, and that machinery and steam-propelled tools were at the service of the defenders had they required to use them to facilitate any part of their work. . . . The Sheriff-Substitute was satisfied that the liability for compensation under the Workmen's Compensation Act depends upon the question of employment and its nature, and not upon the question as to whether the undertakers' title to the *locus* where the injury befell the servant was permanent or temporary, if it was a lawful and sufficient title at the time of the accident for the master taking the man to work 'in or about' a place defined by statute to be a factory, to do work essential to the trade and business-existence of the factory as a steam-driven spinning factory. The question that the Sheriff-Substitute understood he was called upon to decide, and did decide, was that the defenders, being engineers, and admittedly and professedly doing 'engineering work,' in the course of which the pursuer and respondent lost the sight of his eye, are exempt from liability under the Workmen's Compensation Act, in respect that the engineering work was done in a spinning factory of which the defenders and appellants were not for the time being the occupiers or undertakers, and which was not in the line of the proper and special business of a spinning factory. The Sheriff-Substitute decided against the defenders on being satisfied in point of fact that the work was engineering work in the sense of the statute."

The questions of law were—"(1) Whether in respect of the facts admitted and proved, as above set forth, the Sheriff-Substitute was wrong in law in holding the pursuer entitled to compensation under the 'Workmen's Compensation Act 1897.' (2) Whether when a workman who has partially recovered from an injury, and has for a time obtained employment but has not recovered his full working powers, and has been again thrown idle because of the want of them, retains the right to obtain from his master one-half of the loss of wages, or at least part of his loss by way of compensation under said Workmen's Compensation Act, and whether the right to compensation once existent and established can be put an absolute end to without the decree of a competent Court."

Argued for the appellants—Employment by the "undertakers" on or in or about a factory in section 7, sub-section (1), of the Workmen's Compensation Act, meant employment by the "undertakers" on or in or about their own factory. The appellants were not the "occupiers" of the factory where the accident happened within the meaning of the Act.—*Francis* v. *Turner Brothers*, December 16, 1899 [1900], 1 Q.B. 478; *Wrigley* v. *Whittaker & Sons*, April 29, 1902 [1902], A.C. 299; *Malcolm* v. *M'Millan*, January 30, 1900, 2 F. 525, 37 S.L.R. 383; *Purves* v. *Sterne & Company, Limited*, May 22, 1900, 2 F. 887, 37 S.L.R. 696. The operation in which the workman was engaged was not an "engineering work" in the sense of the Act, as no steam, water, or other mechanical power was being used. The appellants were therefore exempt from liability.

Argued for the respondent—The place where the accident happened was in fact a factory. The appellants were for the time being the "occupiers" of this factory, and were therefore the "undertakers." The work in question was an "engineering work" in the sense of the Act. It was part of a composite process, and that being so it was sufficient to bring it within the

definition of engineering work if in any part of the process mechanical power was used. In the present case steam-power had been used in cutting out the new blow-off saddle which was to replace the one being removed. The "undertakers" of an "engineering" work meant "the persons undertaking the construction, alteration, or repair" thereof. The appellants were therefore the "undertakers" of an "engineering work" in the sense of the Act.—*Middlemass* v. *Berwickshire District Committee*, January 17, 1900, 2 F. 392, 37 S.L.R. 297; *Reid* v. *Fleming & Company*, June 25, 1901, 3 F. 1000, 38 S.L.R. 720; *Atkinson* v. *Lamb*, April 21, 1903, 19 T.L.R. 412.

LORD PRESIDENT—The stated case before your Lordships is not satisfactory in form, but still there are in it and the note for appellants and answers sufficient materials to enable your Lordships to dispose of the case. It is not in satisfactory form because it would have been more convenient, in view of the interlocutor pronounced by your Lordships on 29th November 1904, if the Sheriff-Substitute had kept to the questions then asked instead of substituting two new questions of his own. The reason for his doing so appears from the stated case where he says "the Sheriff-Substitute wrote his interlocutor and note in the undoubting belief that the three questions set forth in the interlocutor of the Court of Appeal all fell to be answered in the affirmative in point of fact." When I turn to your Lordship's interlocutor I find it was a remit to state the facts relative to the following questions, viz.—(1) Whether the respondent was injured in or about a "factory" within the meaning of section 7 (1) (2) of the Workmen's Compensation Act 1897; (2) Whether the appellants were "undertakers" of that "factory" within the meaning of section 7 (2) of said Act; (3) Whether the work at which the respondent was injured was "engineering work" within the meaning of section 7 (2) of said Act. These are not questions of fact. They may be questions of composite fact and law, and if so they are questions of law. The Sheriff-Substitute treats them as questions of fact and states new questions for himself. But sufficient material is given in the findings in the Sheriff-Substitute's interlocutor, which is incorporated by him with the stated case. [*His Lordship quoted the interlocutor.*]

Now on these findings it is clear that the Sheriff-Substitute's judgment proceeded on one of two grounds, either (1) that the place where the accident occurred was a "factory" and the appellants were "undertakers" thereof; or (2) that the place was an "engineering work." (1) This point is entirely concluded by authority. It is clear from the case of *Wrigley* v. *Whittaker*, L.R. 1902, A.C. 299, that the "factory" referred to in section 7 (1) means the "factory" that belongs to the undertakers. This disposes of the first point, as the Tayport factory was not the factory of the defenders. (2) This point is not directly dealt with by decision. It is that these Tayport premises—for now the word "factory" is of no importance—became for the nonce the "engineering work" of the defenders. The Sheriff-Substitute says the defenders were "tenants at will of the premises." The phrase seems to me quite inapplicable. Any tradesman coming to do work in a house is, on that principle, a "tenant at will" of the house while engaged on the work. It does not seem to me that there is any ground for such an idea. The view of the statute is that the work should be the work of the "undertakers," and "engineering work" is defined in section 7 (2). [*His Lordship quoted the definition of "engineering work" from the statute.*] Here it is clear that neither steam, water, or other mechanical power was used. It is not to the point that there was steam on the premises that might have been used; and consequently the fact falls short of the definition of "engineering work" in the statute. The case fails therefore in the second point also, so that there is here no ground of liability at all.

In my opinion the first question should be answered in the affirmative, and if this is done the second question need not be answered.

LORD ADAM—[*After stating the facts*]—The question is, whether, on these facts the claimant is entitled to compensation under the Workmen's Compensation Act 1897. The claim was put upon two grounds—(1) It was said that when he was injured he was engaged on or in or about a factory. No doubt he was injured in a factory. But it has been held, and I think rightly, that in order to give a claim under the Act the factory must be the factory of the employer, and the factory in which this accident occurred was not the employer's factory. (2) It was said he was employed on or in or about an "engineering work." Now, when we go to the definition of "engineering work" in sub-section (2) we find that it means "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer." The work of the claimant here did not fall under any of these categories. We find also that "engineering work" includes "any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." If the workman is engaged on or about a railway or the other kinds of works mentioned in the earlier part of the definition it is unnecessary that mechanical power should be employed. But in the case of the work mentioned in the latter part of the definition, it is essential that machinery driven by mechanical power is used. In the work at which the claimant was engaged at the time of the accident no mechanical power was used. The work was all done by hand. That is the distinction between the present case and the case of *Reid* v. *P. R. Fleming & Company*, 3 F. 1000. In that case mechanical power was used, and that fact made the employers liable. But in this case the work was not an engineering work in the sense of the Act.

LORD M'LAREN and LORD KINNEAR concurred.

The Court answered the first question of law in the affirmative.

Counsel for the Pursuer and Respondent—Garson. Agents—Douglas & Miller, W.S.

Counsel for the Defenders and Appellants—Campbell, K.C.—Lord Kinross. Agents—Anderson & Chisholm, S.S.C.

Wednesday, May 31.

FIRST DIVISION.

PROCTOR'S TRUSTEES *v.* PROCTOR.

Succession—Marriage-Contract—Satisfaction of Marriage-Contract Obligation—Clause of Discharge in Settlement—Testamentary Provisions to be Accepted "in Lieu and in Full Satisfaction of All Claims Competent upon my Estate through my Death."

By antenuptial contract of marriage A assigned to trustees two policies of insurance and his household furniture, with power to the trustees to demand in lieu of the furniture a sum of £200. He also bound himself to pay his widow a sum of £20 for mournings. The contract provided that in the event, which happened, of the dissolution of the marriage by the predecease of A, the estate was to be conveyed to his widow. The trustees never entered into office, and the policies of insurance lapsed.

By a trust-settlement subsequent in date A conveyed his whole estate to trustees for, *inter alia*, payment of certain legacies to his children and an annuity of £70 to his widow, declaring that these provisions "in favour of my wife and children are made and shall be accepted by them as in lieu and in full satisfaction of all claims competent to them upon my estate through my death."

On A's death his widow elected to take the annuity of £70 provided to her by the settlement, but contended that she was entitled in addition thereto to the marriage-contract provisions of £200 and £20. She agreed to abandon all her other claims under the marriage-contract.

Held that the widow's claims for the sums of £200 and £20 under the marriage-contract were "claims competent . . . on my estate through my death," and accordingly were excluded by the clause of discharge in A's settlement.

By antenuptial contract of marriage entered into between the late Alexander Forbes Proctor, M.B., 9 Golden Square, Aberdeen, and Mrs Elizabeth Roger or Proctor, dated 2nd September 1864, Dr Proctor conveyed to the trustees (*first*) two policies of assurance, and (*second*) his whole household furniture and other plenishings then belonging or which should belong to him at the dissolution of the marriage, with power to the trustees to demand from him and his heirs and successors the sum of £200 "in lieu and place of the said furniture and others." He also bound himself in the event of his predecease to pay to his widow, *inter alia*, the sum of £20 for mournings.

The marriage-contract provided—in the event which happened, viz., the dissolution of the marriage by the predecease of the husband—as follows:—"(*Second*) If the said intended marriage shall be dissolved by the predecease of the said Alexander Forbes Proctor, whether there shall be issue thereof alive or not, the said whole estate and effects shall belong to the said Elizabeth Roger for her own absolute use and behoof, and the trustees shall be bound to denude in her favour accordingly, and to account with her for any interests which may have accrued on any of the said trust property, and generally for their disposal thereof."

Dr Proctor, who died on 25th June 1903, left a trust-settlement dated 30th July 1902, and registered in the Books of Council and Session 29th June 1903. At the time of his death Dr Proctor was living apart from his wife under a contract of voluntary separation dated 8th December 1896, which provided for the payment to her by him of an annuity of £70. The said annuity was paid down to September 1903.

By the fourth purpose of the trust-settlement it was provided as follows:—"(*Fourth*) My trustees shall continue to pay my wife during the said next three years, if she survive so long, the annuity of £70 per annum she at present receives from me." . . . (*Sixth*) As soon as may be after the expiry of the said three years after my death my trustees shall denude and make over equally share and share alike to my said four daughters or the survivors or survivor, the legal issue of any predeceasing daughter coming in their mother's place, *per stirpes*, the residue of my said whole means and estate then remaining in their hands, but that under burden of the continuance, should my wife be then alive, of an annuity to her of £70 per annum which I hereby leave her; Declaring that the foregoing provisions in favour of my wife and children are made and shall be accepted by them as in lieu and in full satisfaction of all claims competent to them upon my estate through my death." . . .

Mrs Proctor having claimed payment of the marriage-contract provision in addition to the annuity of £70 provided to her by the trust-settlement, an agreement, dated 22nd December 1903, was entered into between her and Dr Proctor's trustees by which she elected to take the provisions in her favour in the settlement, and agreed to abandon her claims under the marriage-contract, except her claim for the sum of £200 in lieu of furniture and the sum of £20 for mournings. As regards her right to demand payment of these two sums in addition to the provision in her favour in the settlement, a Special Case was presented, of which the said agreement was