before the said fall. The said blocks of stone, or at least those which failed, were soft or defective in quality, and quite unsuited, from their size, quality, and the manner in which they were cut and built in, for sustaining their superincumbent weight." Then in article 9 it is averred that the Refining Company, "by themselves or through their inspector of works, or others for whom they are responsible, failed properly to examine the quality of the material used in, and to superintend the character of the workmanship at, said building." The inspector of works is said in article 2 to have been appointed by them "to watch and superintend for them, and in their interest and on their behalf, the erection of said buildings." It is upon these averments that the pursuer seeks to make this company answerable for what happened; and it appears to me that upon principles of law clearly settled in this country no such liability arises. The defenders employed persons of proper character, engineers not said to be unqualified, and they entered into contracts with tradesmen for the execution of this work. On the authority of the case of M'Lean *v.* Russell, M'Nee & Co. and Others (12 D. 887), I have no difficulty in holding that persons in that position are not liable for such an occurrence as here happened. But then it is said they did not so far separate themselves from those whom they employed—that they had an inspector looking after their interests. That makes no difference. The inspector failed in no duty which he was bound as the defenders' representative to discharge to the deceased. He was not there to attend to the interests of the deceased, or to any duty of the defenders to the deceased. The company was not bound to have an inspector there, and it did not send him there to protect his interests. Anything he failed to do he was answerable for to the company, and to no one else. He might be liable personally, no doubt, for his own delinquency, but he could not bind the company. As regards Barclay, Blake, & Co., they were unquestionably charged with the control of this work. It does not exactly appear what was the nature of the contracts they made. We have not that at present; but, in the meantime, we have it alleged against them that the fault was theirs, and that the insufficient construction which caused the fall of the building went on under their eyes. I think, therefore, there is a relevant case stated against them.

The other Judges concurred; and the action as at the instance of the widow against the Refining Company, was therefore dismissed as irrelevant. The curator *ad litem* for the children was allowed time to consider whether, after the judgment now pronounced, he could amend the record so as to make a relevant case against the company.

The following issue was afterwards adjusted to try the question with the other defenders:—

"It being admitted that the pursuers are respectively the widow and children of the said John Braidwood; and it also being admitted that the said John Braidwood was killed by the fall of a sugar refinery at Bonnington on the 27th February 1865:

"Whether the defenders undertook to furnish the plans and specifications for the said building and to superintend the erection thereof; and whether the fall of the said building was caused by the insufficiency of the foundations, arising from a defect in the plans and specifications; or from the failure of the defenders duly to superintend the execution of the work—to the loss, injury, and damage of the pursuer?"

Damages laid at £1200 sterling.

Agent for Pursuers—David Forsyth, S.S.C.

Agents for Refining Company—Murdoch, Boyd, & Henderson, W.S.

Agents for Barclay, Blake, & Co.—Lindsay & Paterson, W.S.

Tuesday, June 26.

EVANS, ARNOTT, AND CO. *v.* DRYSDALE'S TRUSTEES.

Process—Trial before Lord Ordinary without Jury—Verdict—Reclaiming-Note—Competency. A reclaiming-note against a verdict of a Lord Ordinary refused as incompetent in respect none of its findings involved law. Opinions that when law is thought to be involved in a verdict, and is to be called in question, it should be brought under the notice of the Lord Ordinary in the note for re-hearing, and (diss. Lord Benholme) verdict should not be accompanied by a note.

Mrs Drysdale, widow of the deceased Alexander Drysdale, tailor and clothier in Sauchie, who died there on 8th September 1863, continued to carry on the business after her husband's decease, and became indebted to the pursuers, woollen manufacturers in Leeds. This action was raised against her husband's trustees, on the ground that through the widow they carried on the business for which the debts were contracted.

By the trust-deed in question, the trustees were directed to pay the free yearly income thereof to the widow for the maintenance of herself and the children, and on the widow's death, if the children were then major, or if not, as soon as all the children should attain majority, the heritable properties were to be conveyed to them in certain proportions, and the personal estate distributed as specified. As to the stock-in-trade and business of the deceased, it was provided thus:—"Thirdly, My trustees shall have power, if they think it expedient to do so, to allow my widow to carry on my business of tailor and clothier and general dealer at Sauchie; and for that purpose to leave in her hands the whole stock-in-trade, outstanding debts, and other assets belonging to the business, with power to her to intromit therewith in the fullest manner; but my trustees shall have it in their power, at any time they may judge proper, to call upon my said widow to account for and pay over to them the value of the said stock-in-trade, debts, and assets, as the same stood at the time of my death; and to this extent my widow, should she be allowed to carry on the said business, shall be accounted debtor to the trust-estate; but my trustees shall not be obliged to compel her to pay the same, unless they shall consider it expedient to do so, in which matter I give them full discretionary powers."

The widow having applied to the trustees in terms of the foregoing clause to be allowed to carry on the business, the trustees executed a factory and commission, whereby they empowered and allowed her to carry on the business, and for that purpose left in her hands the whole stock-in-trade and other assets; authorised her to uplift the outstanding debts, and in their room and name empowered her to lift the rents of the heritable properties belonging to the trust.

The case was tried before Lord Kinloch with-

out a jury (the evidence of consent being taken down by a short-hand writer), under the following issue :—

"Whether the debts and bills set forth in the annexed schedule, or part thereof, were contracted and granted to the pursuers by Agnes Arnott or Drysdale, widow of the said deceased Alexander Drysdale, while carrying on business as tailor and clothier, and general dealer, at New Sauchie aforesaid, for and by authority of the defenders; and whether the defenders are indebted and resting-owing to the pursuers in said sums, with interest thereon, or any part thereof, under deduction of £15 paid to account on 16th December 1864."

On the 14th March 1866, the Lord Ordinary issued an interlocutor in which he "Finds it proved that the debts and bills stated in the schedule to the issue were contracted and granted to the pursuers by Mrs Agnes Drysdale, widow, &c., while carrying on business as tailor and clothier, and general dealer, at New Sauchie, and that the same are resting-owing to the pursuers. But finds it not proved that the said business was carried on for and by authority of the defenders. And finds on the issue for the defenders." His Lordship added a note, in which he explained that in his view nothing more was done than to carry out the trust according to its strict terms—the truster having contemplated that the widow herself, and not the trustees, should carry on the business.

Pursuer put in a note for re-hearing, in which his Lordship was simply asked to recal his findings, and in lieu thereof to find that the business was carried on for and by the authority of the defenders, and to find for the pursuers on the issue. The Lord Ordinary adhered to his former interlocutor, and the pursuers then reclaimed, and prayed the Court to recal the interlocutor, and in lieu thereof to find that Mrs Drysdale carried on business for and by authority of the defenders, and that in point of law the business so carried on was for the defenders, as trustees foresaid.

PATTISON and WATSON, for the pursuers, maintained that the Lord Ordinary had misread the trust-deed under which the trustees were entitled to appoint the widow as their agent in carrying on the business, and therefore his finding in fact that they had not done so was erroneous in law. The interlocutor might, therefore, be competently recalled, notwithstanding sections 46-7 of the Act of 1850.

GUTHRIE SMITH, for the defenders, was not called upon.

The Court refused the reclaiming-note as incompetent. Balfour *v.* Wordsworth, 9th July 1854, 16 D. 1028; Hood *v.* Williamsons, 8th Feb. 1861, 23 D. 496, were referred to.

The LORD JUSTICE-CLERK—It appears to me that this is a very clear case. Difficulties have arisen and will arise upon the construction of the clauses of the Act of 1850, which provide for the trial of causes by a Lord Ordinary without a jury. The present case is not encumbered with any such. The interlocutor of the Lord Ordinary is, except as regards the last few words, a proper special verdict, and in the form contemplated by the 46th section of the Act. The Lord Ordinary had before him an issue which put to him the questions. [Reads issue]. Now his Lordship has found it proved. [Reads interlocutor down to last clause of it]. Now, stopping there, the interlocutor is entirely in conformity with the Act. I have some doubt about the last words of the interlocutor—"And finds on the issue for the defenders." That seems to me more like the verdict of a jury. The statute contemplates nothing but specific findings in fact, although these, as in the present case, conduct necessarily to a judgment of absolvitor. But passing by this (which, by the way, was also disapproved of in Hood and Others *v.* Williamson, 8th Feb. 1861, 23 D. 496), the interlocutor deals with nothing but pure fact, and in particular, in that finding which was objected to by the reclaimer, there is nothing but a finding in point of fact. The Lord Ordinary "finds it not proved that the said business was carried on for and by authority of the defenders." The reclaimers contend that this finding proceeds upon a misconstruction by the Lord Ordinary of the trust-deed of the late Mr Drysdale, and they think that had his Lordship not so misconstrued that deed his finding would have been different. I must say they have entirely failed to satisfy me upon this point. As the finding is put, it appears to me that whatever view the Lord Ordinary took of the trust-deed, his verdict would have been the same. Whatever the terms of the trust-deed, the question still remained the same, whether in point of fact the business was carried on for and by authority of the defenders. The parties construed the deed as not giving the trustees powers to carry on the business, and what they did was to carry out the purposes of the trust in conformity with that construction. But suppose that construction to have been utterly wrong, and that the Lord Ordinary had thought it was so, he would still, as it appears to me, have found as he did upon the evidence. I am of opinion that the reclaimers have failed to show that any question of law is involved in the findings of the Lord Ordinary. Even though I had had doubts as to this, I don't think the reclaimers have brought the matter competently before the Court. They had the Lord Ordinary's views as to the trust-deed before them in his Lordship's note; and yet, in applying under the statute for a re-hearing, they do not ask him to reconsider the law as it had been announced in his note. I am afraid they thereby lost their opportunity of bringing the matter up, even had there been anything in it upon the merits. I very much sympathise with the observations which have fallen from some of your Lordships as to notes being appended to interlocutors in such cases. They form no part of proper proceedings under the statute. In dealing with the Lord Ordinary's findings as the verdict of a jury, we are not entitled to go beyond the interlocutor itself, and I must say I think it would be better if Lords Ordinary did not add any note at all. I am for refusing this reclaiming-note as incompetent.

Lord COWAN—The question is, has any law been here competently raised? The Lord Ordinary's interlocutor does not contain any law, but merely findings in fact. I agree that the Lord Ordinary should just answer the issue by findings in fact without any note; and any point of law thought to be involved should be raised in the note for re-hearing. The case of Hood was considered with great deliberation, and is most important as an authority in such matters. I agree in the result arrived at by your Lordship.

Lord BENHOLME said—I concur in the result at which your Lordships have arrived, and will say no more than that I think it would be wrong in me to discourage Lords Ordinary from adding notes to their interlocutors in such cases. The main object of these is to show the parties on what grounds the verdict proceeded, and especially if questions of law be involved. I am not prepared to say that Lords Ordinary do not do well to explain the

views upon which they form their judgment, and this in view both of the re-hearing and of further proceedings under a reclaiming-note.

Lord NEAVES—The issue in this case has been very fairly dealt with by the Lord Ordinary. Although in point of form it put only one question, in point of fact it involved several. As I take it, the cases of Hood and others settle that the Lord Ordinary ought not to determine the case by a general verdict, but make, as the Lord Ordinary has done here, specific findings in fact. In this case, after the Lord Ordinary has done so, he "finds on the issue for the defenders," which I take to be a finding in law, meaning that the facts being so, the defenders are entitled to a verdict. The Lord Ordinary has added a note to his interlocutor. Now, it does not by any means follow that because he has done so, incidental remarks made therein are to be taken as formal findings. It is given for the information of parties. With regard to the law which it has been attempted to introduce into the interlocutors under review, the reclaimers had two opportunities of raising it before coming here—once in their speech upon the evidence, and again in their note for a re-hearing. Whether it is fatal to an after-attempt to raise it that it has been omitted in that note I do not say, but I think a party should raise it there, and say here is a question of law upon which I ask a finding. If it is essential to the case, and the Lord Ordinary gives no deliverance upon it, or an erroneous one, it might perhaps be dealt with here like a question of law raised upon a bill of exceptions. The Lord Ordinary has an opportunity, in pronouncing his second interlocutor, of giving a deliverance upon any point specially raised in the note for re-hearing, or of refusing to make any finding with regard to it. In this case, what reason is there to consider the right construction of the trust-deed the determining element in Lord Ordinary's mind? The question was what the parties meant to do and did, and not whether they proceeded upon a sound or unsound view of the clauses of the deed. The Lord Ordinary has obviously proceeded upon a view of the facts put in evidence. This is shown by the wording of the finding complained of. His Lordship finds that the pursuers have failed to prove that the business was carried on for, and by authority of, the defenders. The pursuers have not satisfied me that any of the findings of the Lord Ordinary proceeded on an erroneous view of law.

The Court, therefore, refused the prayer of the reclaiming-note as incompetent, and found the pursuers liable in expenses since the date of the last of the interlocutors of the Lord Ordinary.

Agent for Pursuers—James Somerville, S.S.C.
Agent for Defenders—Alex. Morison, S.S.C.

Wednesday, June 27.

FIRST DIVISION.

STEVEN *v.* M'DOWALL'S TRUSTEES.

Process—Conjoined Actions—Application of Verdict. A person having raised an action of count and reckoning against the representatives of his deceased partner, was met by a defence founded on the fact that a balance-sheet had been made out and signed by the partners. He then alleged that his signature had been obtained by fraud, and raised an action to reduce it. The actions were conjoined and an issue adjusted to try the question of fraud. The jury found for the defenders. Held that in applying the verdict the defenders were entitled to absolvitor from both actions.

Prior to 1st January 1850, the now deceased John M'Dowall was proprietor of the Milton Iron Works, Corn Street, Glasgow, and carried on the business of an ironfounder there. About that date he assumed his nephew, the present pursuer, as a partner. This arrangement subsisted till 1st January 1861, at which date the partnership was dissolved; and by contract of copartnery, dated the 21st and 22d August 1861, a new firm was established under the name of M'Dowall, Steven, & Co., the partners of which were Mr M'Dowall, the pursuer Thomas Steven, and his brothers Hugh Steven and James Steven. This contract provided, *inter alia*, that the capital stock of the new company should consist of the Milton Iron Works, and the machinery and other effects therein, together with "the whole outstanding debts and whole other assets of the late company, but subject to and burdened with the whole liabilities of that company, which works and assets were valued at the nett sum of £42,000 sterling." In connection with this contract a balance-sheet of the affairs of the old company of M'Dowall & Co., as at 1st January 1861, was made out, and a docquet in the following terms appended thereto:—

"The foregoing is the balance-sheet of the firm of M'Dowall and Co., at the 1st day of January last, the valuations and assets and liabilities of which are adopted by the new firm of M'Dowall, Steven, & Company, and the capital taken to be the sum of Forty-two thousand pounds, as per the contract of copartnership executed by us, the partners thereof.

(Signed) JOHN M'DOWALL. JAMES STEVEN.
THOMAS STEVEN. HUGH STEVEN.

Glasgow, 22d August 1861."

Mr M'Dowall died on 9th September 1861, and the defenders were confirmed as his executors. On 16th May 1863 the pursuers brought an action of count and reckoning against them as trustees and executors of Mr M'Dowall, concluding for an accounting in regard to the whole intromissions of the deceased Mr M'Dowall with the funds of the old firm of M'Dowall & Co., betwixt 1st January 1850 and 1st January 1861, and for payment to to the pursuer of the sum of £15,000 as his share in the funds of the said firm, on the ground that the late Mr M'Dowall had appropriated a large amount of the company's funds to his own private purposes. To this action the defenders pleaded that the pursuer and the late Mr M'Dowall, having adjusted their respective interests in the firm of M'Dowall & Company by the signed balance-sheet and the contract of copartnery of August 1861, the whole conclusions of this action were thereby excluded. The pursuer accordingly, on the 7th June 1864, raised an action of reduction of these documents, on the grounds (1) that he signed the said balance-sheet and contract under essential error; and (2) that his signature thereto was obtained by fraud on the part of the said John M'Dowall. On the 2d February 1865 these actions were conjoined, and issues ordered. The pursuer proposed two issues, one on the head of error, and another on that of fraud. The former was subsequently withdrawn, and the case went to trial upon the latter. The trial took place before Lord Mure in April last (*ante*, vol. i. p. 260), and resulted in a verdict for the defenders. The case now came before the Court on a motion by the