As, however, the practice is different, and may possibly be more convenient, and it does not seem very material which way we decide the point, I concur with your Lordship.

LORD M'LAREN—The question might be of pecuniary importance in a case where a number of copies of the print were required and there were not enough remaining in the agent's office, in which case it might be necessary to reprint. Now, I assume that there is a question on the construction of section 77 of the Act of Sederunt of 1828, since it has been argued to us, but there is no better way of construing a procedure statute than by reference to practice, and there is certainly great convenience in following the practice of accepting a reference to a previous print instead of requiring a special application to the Court to dispense with printing. Appearance in such applications costs money in fees, and the matter may be overlooked. By adhering to the past practice the matter works automatically, because agents are accustomed to insert such marginal references in all cases where the print in question is already before the Court.

LORD KINNEAR—I agree that the objection is without substance, and should be repelled. If it had been necessary to decide the point for the first time, I should have preferred Lord Adam's view, because it seems to me that the procedure on appeals from the Sheriff Court to the Inner House must be regulated by the Act of 1868 and the Act of Sederunt, which was passed for carrying out its provisions, because it was that Act which for the first time allowed such appeals; and that it cannot be regulated by the Act of Sederunt following on the Judicature Act of 1825, when no appeal was allowed from the Sheriff to this Court, and the Sheriff's judgments were brought under review by advocations and suspensions brought in the Outer House. I should have been disposed to hold that the scope of the Act of Sederunt was limited by the procedure then in force, which it was intended to regulate, and that it would not apply to a process introduced by a much later statute. I have difficulty also in holding that the other construction is supported by practice. I think that all the practice shows is, that in two or three recent cases a very unsubstantial objection was not raised, because all the prints being before the Court nobody had any interest to raise it. But whichever be the right view, the result is the same, and I think that the objection should be repelled.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the pursuers and respondents' objection to the competency of the record, &c., in the second appeal, No. 63 of process, Repel said objection, and appoint the cause to be put to the roll: Find no expenses due to or by either party in respect of the discussion on the competency."

Counsel for Pursuer—Guy. Agents—Watt, Rankin, & Williamson, S.S.C.

Counsel for Defender—Sandeman. Agent—W. B. Rainnie, S.S.C.

Thursday, July 5.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

HENDERSON *v.* CORPORATION OF CITY OF GLASGOW.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (1) *and* (2) *—Factory and Workshops Act* 1878 (41 *and* 42 *Vict. c.* 16), *sec.* 93 (3) (*c*)—"*Factory*"—"*Manual Labour Exercised for Purposes of Gain*"—*Works Carried on by Corporation for Disposing of Town Refuse.*

The Corporation of Glasgow had works which were used by them for disposing of the town refuse. This refuse consisted of manure, street sweepings, and the contents of ashpits; the manure was sent out for sale to customers or for use on properties owned or leased by the Corporation, without being treated, and the other refuse was subjected to certain processes, in some of which steam was employed, after which portions of it were sold or used, and the rest of the material was destroyed. The amount realised by sales did not cover the expense of carrying on the works, the deficit being provided for by assessment.

Held that the works were a factory within the meaning of the Factory and Workshops Act 1878, and consequently within the meaning of the Workmen's Compensation Act 1897.

Caledonian Railway Co. v. *Paterson*, Nov. 17, 1898, 1 F. (Just. Cas.) 24, *distinguished.*

Process — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1, *sub-sec.* (1) — *Stated Case — Question of Fact — Accident Arising out of and in the Course of the Employment—Reparation.*

A workman was employed by a corporation in their cleansing department in carting manure to their refuse despatch works. He entered the works, and was proceeding to certain "tips" by which manure was discharged into railway trucks at a siding in the works. While waiting for his turn he sat down upon a protecting bar which was placed along certain tanks, and, the bar having broken, he fell into a tank and sustained injuries which resulted in his death. While standing at the bar he was near enough to his cart to have full control of the horse.

In an arbitration under the Workmen's Compensation Act the Sheriff found in fact that the accident to the

deceased workman was one "arising out of and in the course of his employment." In a case stated for appeal he was asked to state a question of law as to whether this decision was correct. *Held* that the Sheriff was right in refusing to state this question, in respect that it was a question, of fact and not of law.

Process — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1, *sub-sec.* (4)—*Procedure where Action Originally Raised Independently of the Act—Action Found to be Irrelevant.*

An action was raised in the Sheriff Court at common law and under the Employers Liability Act 1880 by the widow of a deceased workman against his employers for damages in respect of his death. The Sheriff found that the pursuer had not stated a relevant case in the action, but, as the pursuer had lodged a minute asking the Court to determine whether she was entitled to compensation under the Workmen's Compensation Act, before dismissing the action appointed a diet for hearing parties as to the pursuer's claim under that Act. Thereafter a diet was assigned as in an arbitration under the Workmen's Compensation Act, and proof having been led thereat, the Sheriff assoilzied the defenders. A case having been stated for appeal, the defenders objected to the competency of the procedure adopted by the Sheriff, and maintained that it was only competent to assess compensation under the Workmen's Compensation Act in an action brought independently of that Act where it is determined in such action that the employer would have been liable in such compensation, and that it is not competent to convert such an action into an arbitration under the Act for the purposes of ascertaining whether he is so liable. The Court *found* that the pre-ferable course for the Sheriff to have followed would have been to dismiss the action as laid, reserving it *quoad ultra* for the purpose of assessing under it any compensation which might be found to be due to the pursuer under the Workmen's Compensation Act, but that the procedure adopted was competent.

On 2nd August 1899 Mrs Johanna Jack or Henderson, as an individual and as guardian and administrator-in-law of her two pupil children, brought an action at common law and under the Employers Liability Act 1880 against the Corporation of the City of Glasgow, in which she claimed damages for the death of her husband Walter Henderson, carter, Glasgow. After sundry procedure in that action, the pursuer on 17th November 1899 lodged a minute, in which she moved the Court, in the event of its being determined that the injuries sustained by her husband were injuries for which the defenders were not liable in the action, to determine whether or not she was entitled to compensation under the Workmen's Compensation Act 1897.

The Sheriff-Substitute (GUTHRIE) on 30th November 1899 pronounced the following interlocutor:—"Finds that the pursuer has not stated facts sufficient and relevant to support the prayer of the petition, but before dismissing the petition, on the pursuer's motion, appoints Tuesday, 5th December next, at 10·30 o'clock a.m., as a diet for hearing parties as to the pursuer's claim under the Workmen's Compensation Act in terms of section 1, sub-section 4 thereof."

On 14th December 1899 the Sheriff-Substitute pronounced this further interlocutor:—"Having considered the cause, assigns Tuesday 19th December current, at two o'clock p.m., as a diet under the Workmen's Compensation Act, and grants diligence against witnesses and havers for both parties for that and any succeeding diet."

Note.— . . . "It has now been determined in this action that the injury which the pursuer has sustained is one for which the employer is not liable in the action, but it has not yet been determined that the employers would have been liable to pay compensation under the provisions of the Workmen's Compensation Act. Thus the question arises whether it is competent to proceed to assess compensation under the Workmen's Compensation Act, and it is contended that before anything can competently be done under that Act that point must be determined—in short, that both conditions must be fulfilled before any proceedings for assessment of compensation can even be attempted.

"It cannot be determined that the employer is so liable without disposing of what would have been a preliminary objection in a petition originally brought under the Act, viz., that the defenders' works are not a factory in the sense of the Act. That is an objection which in most cases is decided after evidence has been taken on the whole cause. One cannot, apart from a strictly technical construction of the words of the section, see any reason why we should not now proceed, the pursuer having by minute restricted herself to a claim under the Act, to assess the compensation in the usual way, leaving the large question whether any compensation is due, including that whether the defenders' works are a factory, to be dealt with at the end of the case. It is quite arguable that this sub-section was meant to apply only where proof has been taken, and full materials for deciding the second of the two points exist in the ordinary action, and that it does not apply where the action falls to be dismissed on relevancy. In this remedial Act, however, that is not, I humbly think, a fair construction. Even if evidence had been adduced on the question of common law liability, it might have failed to touch the question whether these works are a factory, which was not raised. I do not think the collocation of the words of the Act precludes the inquiry from being made in the usual way as in a Workmen's Compensation petition, and the question whether the employer is bound to pay compensation

under this Act being determined at the close of the inquiry."

After a proof the Sheriff-Substitute assoilzied the defenders. Thereafter he stated a case for appeal under the Workmen's Compensation Act, which, after detailing the procedure above set forth, proceeded as follows:—"By minute of admissions the parties made certain admissions regarding the various operations carried on at said refuse destructor or despatch works aforesaid, viz.—The refuse consisted of three classes, as follows, viz.—(1) Long manure, that is, the manure from stables and byres; (2) street sweepings, which are subdivided into two classes, viz., wet and dry; (3) contents of ashpits.

"(1) *Long Manure.*—This, when brought to the works, is tipped direct from the carts in which it is conveyed down shoots into railway waggons underneath, and is then taken by rail to customers or to various tips on properties owned or leased by the Cleansing Department of the Corporation.

"(2) *Street Sweepings.*—In wet weather the sweepings from the street are tipped from the carts into large tanks, called slurry tanks. While in those tanks the water is allowed to drain off until the mixture is of such a consistency that it can be removed by manual labour into railway waggons along with the refuse from ashpits, and this is disposed of in the same manner as 'long' manure, by being sold to customers or sent to the Corporation tips.

"In dry weather the sweepings from the streets are tipped down shoots into a revolving screen driven by steam. This riddles the sweepings, a proportion of which falls on to a floor at a lower level, where it mixes with the riddlings of the refuse removed from ashpits. Such of the street sweepings as will not pass through the riddles are forced on to an endless carrier beside the screens, by which they are conveyed to furnaces and there cremated (? burned).

"(3) *Contents of Ashpits.*—The contents of ashpits when brought to the works are treated in a manner similar to the dry sweepings from the streets by being screened. Such of the refuse as will pass through the screens falls to a floor underneath them, and thereon mixes with the street sweepings which have passed through the screens. These are conveyed by manual labour to railway waggons, and disposed of in manner above stated, either by being sold to customers, or taken by rail to the tips.

"That the following was the amount of revenue and expenditure on these works for the year ending 31st May 1899, viz.—

Unsaleable refuse sent to tips, 7428 waggons (of 6¾ tons each), equal to 48,924 tons, 1s. 6½d. . . .	£3694	15	8
Saleable refuse sold, 3471 waggons (of 6¾ tons each), equal to 23,429 tons, at 1s. 7½d. .	1903	12	0
	£5598	7	8
Less revenue from saleable refuse, 3471 waggons at 5s.	867	15	0
	£4730	12	8

being a loss to the Department, which had to be provided for by the respondents out of an assessment for cleansing purposes.

"I thereafter held that the following facts had been admitted or proved:—

"(1) That the appellant's husband Walter Henderson was a carter in the employment of the respondents in their Cleansing Department.

"(2) That on the 15th May 1899 he was carting 'long manure,' viz., manure from stables and byres, to the City's Cleansing Department Kelvinhaugh Despatch Works, and when waiting in those works for his turn at a tip he fell into a tank and was injured, from the effects of which he died the following day.

"(3) That when the said accident happened the said Walter Henderson had with other carters entered the works and was proceeding to certain tips by which manure such as he was carting was discharged into railway trucks at a siding in said works, and that he had with them proceeded on the east side of the tanks, a route which was frequently used by carters in approaching the tips, though the route to the west side of these tanks was that prescribed by the regulations, or by the officials in authority at the works.

"(4) That the deceased was about two yards or less from his horse and cart, and having carelessly stepped backwards to sit upon or lean against a protecting bar which was placed along the tanks, it gave way when he touched it, in consequence of the stanchion by which it was supported being broken. The bar was about two-and-a-half feet above the level of the floor, as shown on plan No. 15 of process.

"(5) That the said Walter Henderson, while standing at said bar, was near enough his horse to have proper control over it.

"(6) That the accident to the said Walter Henderson was one arising out of and in the course of his employment, and that his average wages were 27s. a-week.

"(7) That the said works were carried on for the fulfilment of the powers and duties set forth in the 'Glasgow Police Act' 1866, section 344, and 'The Glasgow Police (Amendment) Act' 1890, section 34, and that the operations in said works are as set forth in said minute of admissions, and I found in law, following *Paterson* v. *Caledonian Railway Company*, that the said works were not a factory within the scope of 'The Workmen's Compensation Act' 1897."

The questions of law stated for the opinion of the Court were as follows:—"(1) Are the said refuse despatch works of the respondents at Kelvinhaugh, as described in the minute of admissions by the parties, a factory within the scope of the Workmen's Compensation Act 1897? (2) It having been held on 30th November 1899 that the appellant had not stated facts sufficient and relevant to support the prayer of the petition in the Ordinary Court, and it not having been ascertained at that date as a matter of fact that the respondents would have been liable to pay compensation under the provisions of said Workmen's Com-

pensation Act 1897, ought the said action to have been dismissed? Or ought the respondents to have appealed against the Sheriff-Substitute's interlocutors of 30th November or 14th December 1899, allowing the case to proceed under the Workmen's Compensation Act 1897?"

The Sheriff-Substitute further stated:—"On the request of the respondents, I certify that I refused the respondents' application to state the question, 'Whether the accident to the said Walter Henderson was one arising out of and in the course of his employment,' in respect that it is a question of fact and not of law. But in the event of the Court being of opinion that it is a question of law, I humbly submit the same as a third question in the case as stated."

Section 7 of the Workmen's Compensation Act 1897, and section 93 of the Factory and Workshop Act 1878, are (in so far as applicable here) quoted *ante*, p. 697.

Section 1, sub-section (4), of the Workmen's Compensation Act 1897 enacts that if within the time "hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action that the injury is one for which the employer is not liable in such action; but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action, instead of proceeding under this Act."

Argued for the appellant—These works fell under the definition of factory, because while it could not be maintained that they existed primarily for the sake of trade or gain, they certainly were used for these purposes. The Corporation used them for trading in a marketable commodity and though the amount realised by sales did not cover the expenses of the works, it reduced the loss to the Corporation in the disposal of their refuse and thus was a gain to them. They exercised a special power under a private Act to render the refuse adaptable for sale and thus reduce their expenditure. It might be that in the future there would be an actual profit over the whole working. The case of *Caledonian Railway Company* v. *Paterson*, November 17, 1898, 1 F. (Just. Ca.) 24, on which the judgment of the Sheriff-Substitute was founded, was not applicable. In that case the laundry existed already for the purposes of the hotel and was only incidentally used for guests. Here the works were erected for this specific purpose. The other requirements of the definition were satisfied, there being steam power employed. The point raised by the respondents as to the accident having occurred in a part of the works not used for manufacturing purposes was not in the case, and could not therefore be taken. The procedure followed by the Sheriff-Substitute had been in accordance with the statutory provisions—*Edwards* v. *Godfrey* [1899], 2 Q.B. 333. But in any event it was the duty of the defenders to have appealed at the time when the new phase of the case was entered into, and they were barred from doing so at this stage—*North British Railway Company* v. *Gledden*, June 26, 1872, 10 Macph. 870. 3. The Sheriff-Substitute was right in holding that the question whether the accident was in the course of the workman's employment was purely one of fact.

Argued for the respondents—(1) The appellant must show that the destructor was a commercial concern, set up and carried on for private profit. It was in point of fact not set up voluntarily but under compulsion. The true test was the motive with which it was set up, and clearly it was not for the sake of gain, but to get rid of the town refuse. Though a certain amount was made out of the saleable refuse, that did not really cover working expenses. The case was even stronger than that of *Caledonian Railway Co.* v. *Paterson, supra*. But even assuming the destructor to be a factory, the place where the accident occurred was in a part used for another purpose than manufacture, and accordingly the definition in section 93 of the Factory and Workshop Act of 1878 did not apply to this particular part of the works. Though this point had not been raised before the Sheriff, there was sufficient material before the Court to enable them to dispose of it. (2) There had been laxity on the part of the Sheriff-Substitute in the procedure in converting the original action into this arbitration. To satisfy the statutory requirements two elements must be present—it must be determined in the action that the employer was not liable under the action, and that he was liable under the Workmen's Compensation Act, and then the Court might proceed to assess compensation. Here it could not be determined in the action that the employer would have been liable under the Workmen's Compensation Act, and a proof was required to show that he was. (3) What the Sheriff-Substitute had declared to be a question only of fact might well be one of law, because it would involve the interpretation of the statute—*Durham* v. *Brown Brothers & Co.*, Dec. 13, 1890, 1 F. 279, at p. 286.

LORD PRESIDENT — The first question which we have to answer is—"Are the said refuse despatch works of the respondents at Kelvinhaugh, as described in the minute of admissions by the parties, a factory within the scope of the Workmen's Compensation Act 1897?" That question is quite correctly put as relating to the character of the place. We have had a good deal of argument as to what was being done in the place, and it was suggested that when Walter Henderson received the injuries, from the effects of which he died, he was not engaged in manual labour exercised by way of trade or for purposes of gain, but if the place in which he was

working was a factory in the statutory sense the Corporation might be liable, and accordingly the Sheriff has very properly not put a question as to what Henderson was doing, but as to whether the place in which he was working was a "factory." The word "factory" is introduced into the Act of 1897 in section 7, which declares that it shall apply only to employment by undertakers in or about, amongst other places, a factory. Then the definition of a "factory" is that it has the same meaning as in the Factory and Workshops Acts 1878 to 1891, and also includes certain other places to which I need not now refer. Then on turning to the Act of 1878 we find very careful definitions in section 93. After dealing with a "textile factory," with which we are not now concerned, the Act defines "non-textile factory." Under heads 1 and 2 it refers to certain specified and enumerated classes of non-textile factories. The first of them, apparently, embracing what are often called dangerous trades, and the second less dangerous trades, but still trades in which it is notorious that there is considerable danger to the workman. The third head of this clause enacts—I select the words that seem material—"Any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes or any of them,"—I only pause for one moment to say here that I could not accept an argument which was stated for the appellant to the effect that it was enough to bring the case within this section that the man was working for wages, and in this sense for purposes of gain. That, I think, would not be a reasonable meaning. I take it that the meaning of the section is, that it applies where manual labour is being exercised by way of trade or for purposes of gain by the persons who are conducting the so-called factory. Then the detailed definition follows—"In or incidental to the making of any article, or in or incidental to the altering, repairing, ornamenting, or finishing of any article, or in or incidental to the adapting for sale of any article." I pass over the first two of these alternatives, and point out that the words "adapting for sale of any article" seem to cover any case where the thing that is being done is the adapting of any article for sale. And accordingly if it shall appear that in this place in question something was adapted for sale, and that for purposes of gain, then so far the place would satisfy the definition. But that does not exhaust the definition, because the place must further be one within the close or curtilage or precincts of which "steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." That provision is for the very obvious purpose of making it clear that any place where the previously enumerated things are done is not necessarily a factory, but that it requires to make it a factory that steam, water, or other mechanical power is used in aid of the process, the obvious reason being that wherever you have steam, water, or other mechanical power used in aid of the process, you introduce a class of danger which does not exist if you have simply manual labour exercised for the purposes of gain, for the object, *inter alia*, of adapting an article for sale. In this case there is no question that steam was used in the place, and therefore one element of the statutory definition is satisfied. It is, however, necessary to observe the particular mode in which the street sweepings and the contents of ashpits, which are superfluous bye-products to be got rid of as nuisances, are dealt with. The Corporation very properly desire to get rid of these as inexpensively as they can, and if by exercising ingenuity they can make a little profit out of their disposal they are quite right to do so. That seems to me to be one of the things that are done in their despatch works. According to the statement before us, they treat the long manure in one way; they appear to send it, or most of it, straight away to customers. That so far does not seem to me to be treating a material for sale, because it is ready for sale; and therefore if the case had gone no further I think the place would not have fallen under the statutory definition of a factory. But other things are done. "In wet weather the sweepings from the streets are tipped from the carts into large tanks. While in these tanks the water is allowed to drain off," and the residuum with the contents of ashpits are disposed of by being sold to customers or sent to the Corporation tips. Again, as to the street sweepings, it is said that in dry weather they "are tipped down a revolving screen driven by steam. This riddles the sweepings, a proportion of which falls on to a floor at a lower level where it mixes with the riddlings of refuse removed from ashpits. Such of the street sweepings as will not pass through the riddles are forced on to an endless carrier beside the screens by which they are conveyed to furnaces and there burned." The last mentioned they can make nothing of, but as to a considerable part of the materials, although the processes are simple, there is a certain degree of separating, mixing, and handling, all with the object of adapting them for sale, to use the words of the statute. These are adapted for sale and are sold. So far, therefore, it seems to me that the requirements of the statutory definitions are satisfied as to them.

But we have heard an argument to the effect that the definition is not satisfied unless the enterprise or the business is carried on with a view to sale. That, of course, is not so here as to the main enterprise, because the materials dealt with are nuisances, and the object is to get rid of them. But there may be in the process of getting rid of them a certain amount of gain. We know that in the industrial development of this country the products which were nuisances turn out to be sources of profit, and to a limited extent this seems to be the case with respect to the things dealt with at the despatch works. They have become great

sources of profit. They put them into a saleable condition; they sell them; and it seems to me vain to say that this is not adapting for sale of an article within the meaning of the statute. That is done by, amongst other things, manual labour, and in some of the processes steam-power is used. So that all these separate requirements of the section are fulfilled. If this be so, I do not think it is an answer to say that this is only done incidentally to the larger process which is not carried on for purposes of sale, viz., the disposal of street sweepings. Mr Shaw in the course of his speech frankly admitted that a good deal of this stuff, if it was not adapted for sale, would have had to be removed like the non-saleable parts, and that this would infer the cost of providing a place of deposit as well as the cost of carting and handling it.

It thus appears that the process described not only results in a gain from what is paid by the purchaser who buys the material, but also indirectly by preventing it from becoming a cause of expenditure. I do not say that the mere fact of the material being prevented from becoming a cause of expenditure to the municipality would bring the case within the statutory definition, but it is not immaterial in considering the general question, because the process undoubtedly includes the adapting of an article for sale. For these reasons it seems to me that the first question, whether the despatch works are a factory within the meaning of the Act of 1897, should be answered in the affirmative.

Much reliance was placed by the respondents' counsel upon the decision in *Paterson* v. *Caledonian Railway Company*. That case related to the laundry of the Central Hotel in Glasgow. It was said that the laundry was kept for purposes of gain—first, because it was attached to the hotel, which was kept with a view to profit, and secondly, because a separate profit was derived from it, because washing was done at it for guests living in the hotel. The view that the Court took was, that it was purely incidental to and part of the larger enterprise, which was the hotel; that as to the washing of the linen of the hotel, and of the servants, no separate gain was contemplated; it was merely a way of economically conducting the business of the hotel, and the argument came, I think, very much in the end to depend on whether the saving of the wages was gain. And the view which the Court took was that a thing of that kind forming part of a larger enterprise did not make it a place to which the Act founded on in the complaint applied. It seems to me that there is nothing in that decision contrary to what we propose to decide here. It is not necessary to go into the question whether the same canons of construction should be applied here as were applied in the Central Station Hotel case. That was a proceeding of a quasi-criminal nature; and in such a case a statute might be more strictly construed than a beneficial Act such as that of 1897 would be. I merely desire to point out that it does not seem to me that there is anything in that case at all contrary to what I now submit would be a right decision in this case.

The second question is one of a different kind. It is a question of procedure which I do not think that we have had occasion to consider before. It is, shortly stated, whether in view of an interlocutor which the Sheriff-Substitute had pronounced on 30th November 1899, finding that the appellant had not stated facts sufficient and relevant to support the prayer of the petition in the Ordinary Court, and it not having been ascertained at that date as a matter of fact that the appellants would have been liable to pay compensation under the Act of 1897, the proper course would not have been to have dismissed the action; or should the decision of the Sheriff-Substitute to allow the case to proceed under the Workmen's Compensation Act have been appealed against? That depends very much upon the construction of subsection 4 of section 1 of the Act of 1897, which provides, that "If within the time hereinafter limited an action is brought to recover damages independently of this Act, for an injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed, but the Court shall, if they choose, assess compensation under this Act." That provision is evidently intended to save multiplicity of procedure by providing that an ordinary action may in a certain event be utilised as a proceeding under the Act of 1897 instead of requiring that a separate proceeding should be instituted under that Act. It seems to me that the Sheriff has followed a course which is quite competent. It might perhaps have been better when the Sheriff formed the opinion that this was not a case to which the common law or the ordinary Employers Liability Act applies that he should have dismissed the action in so far as it is founded on common law or under the Employers Liability Act, and to have reserved it as a proceeding for assessing compensation under the Act of 1897. But what he has done is the same in effect.

The only remaining question put is whether the accident was one arising out of and in the course of his employment, which the Sheriff declined to state, because it was one of fact and not one of law. It seems to me that the Sheriff was quite right in so declining. It is a question of fact, generally at all events, whether or not an accident occurred in the course of the workman's employment. There might conceivably be a legal question raised for such a point, but here there was no such legal question. What happened apparently was, that Henderson, who was a carter, thought that he would take a rest while they were emptying his cart, and he was proceeding either to lean or to sit upon a small fence, which then gave way, and he fell back into one of the tanks, receiving injuries from

the effects of which he died. It is stated in the case that he was only a short distance from his horse, so that he retained control over it. He was here in the course of his employment waiting till his cart was emptied, ready to take it away, on his employers' ground. Under these circumstances it seems to me that while he made an unfortunate mistake, he was, nevertheless, in the course of his employment. It looks very like as if there were contributory negligence, but that is not a question in the case, as the Act of 1897 requires something very different to constitute a defence to a proceeding under it. Only serious and wilful misconduct will avail; and it was not serious and wilful misconduct to rest while a cart was being unloaded. Serious and wilful misconduct is not pleaded, and it could not be seriously maintained that what occurred was serious and wilful misconduct.

LORD M'LAREN—I concur with all your Lordship's observations. This is a very proper case to be brought here by the Corporation of Glasgow, because it raises an important question of principle as to what is called municipal trading, where the motive of the trade—I use the word provisionally—is not profit or gain, but the more convenient supply of the community who are carrying on the trade, or it may be for enabling the community to obtain certain benefits at a less cost than the cost of obtaining them under private competition. In this case there is no question that the injured workman was engaged within the area in which certain works were carried on by steam-power, which would satisfy one of the definitions of a factory under the Factories Acts, and would *prima facie* give rise to a claim under the Workmen's Compensation Act. The main defence was that this could not be regarded as coming within the scope of the Acts of Parliament, because this was not a work instituted for the purpose of making a profit, but was incidental to the discharge of the powers and duties of the Corporation of Glasgow as a municipal body, which include the disposal of the refuse collected from the streets and thoroughfares of the city. No doubt the collection of refuse and its disposal in such a manner as to be innocuous to health is a municipal purpose, yet it is perfectly possible that this municipal purpose may in its turn give rise to what is a proper trading purpose in order to enable the Corporation to dispose the more economically of this refuse matter. The Sheriff stated as one of the results of the inquiry which he held the amount of expenditure and the proceeds of sale of this material which is prepared for sale in what is called the refuse despatch works. It appears that the saleable portion of the manurial refuse costs in the handling and disposing of it £1900, and the proceeds of sale were between £800 and £900, but then by comparing that head with the head of the cost of handling and disposing of the unsaleable matter we find that the costs are substantially the same in the two cases. Now, supposing that the city had been accumulating all this refuse, saleable and unsaleable, for years, and some-one had pointed out that there was a large portion of the heap which at a very moderate cost might be made of saleable value, and the Corporation had proceeded to make it saleable, and to turn it into money, then if the question be whether the Corporation had made a profit or gain, I think it must be answered in the affirmative, because the question of profit or gain arises at the point where the material has been collected and is unproductive, the alternative being either leaving it in that condition or making a profit out of it by means of sale. It is admitted by counsel for the City that the result of the operations carried on at the refuse despatch works is to effect a saving to the Corporation, because they get a small return from what would otherwise be waste, and has to be got out of the way. In the Factory Acts one of the definitions of a factory is that it is to be a work in which steam-power is used and where manual labour is exercised in trade or for the purposes of gain. Whether these two things—trade and gain—are one and the same, or whether they mean different things, appears to me to be of very little consequence, because if we are satisfied that this is a trade, then it is of no consequence whether it results in gain. I think it has the ordinary marks or incidents of a trade, because there is a commodity bought and sold, and with the result that the seller is left in a better condition financially than he would have been if this had never been made the subject of a sale. My opinion is that the refuse despatch work is a factory in the sense of the Factory Acts, and therefore also in the sense of the Workmen's Compensation Act, and that this claim has been rightly brought under that Act.

I shall not occupy time in speaking to the other two points in the case except to say that I agree with the Lord President that it might perhaps be a more convenient course, where an ordinary action has been converted into a compensation claim, that the action should be dismissed as laid, reserving for further consideration a claim under the Workmen's Compensation Act. But in this case no prejudice has resulted from delaying the judgment of absolvitor which is eventually pronounced. Nothing has been done in the Sheriff Court proceedings which would bar the parties from obtaining their rights under the Workmen's Compensation Act.

LORD KINNEAR—I agree with your Lordships. The learned Sheriff-Substitute founds his judgment exclusively upon the decision in the Court of Justiciary in the case of *Paterson* v. *The Caledonian Railway Co.*, and it does not appear from anything that he has said what conclusion he would have arrived at if he had not felt himself bound by that decision. I shall only say upon that, that I think that case is quite distinguishable from the present, and that we are not absolved by that decision from the duty of

construing the statute for ourselves with reference to the particular question put before us, which is a totally different question from that which the Court of Justiciary had to consider. The question really is, whether the deceased man was or was not employed in or about a factory in the sense of the Workmen's Compensation Act 1897 at the time that he met his death, and the statement of fact upon which that arises is that on 15th May 1899 he was carting manure from stables and byres for the City of Glasgow Cleansing Department to their refuse despatch works, and that when waiting in those works for his turn he fell into a tank and was injured, from the effects of which he died on the following day. On that statement of facts the Sheriff says—and it is quite clear upon the whole statement that he is quite correct in saying—that the question of law is, whether the city refuse despatch works are a factory within the scope of the Act of 1897? In order to determine that he describes what they are, and it appears from his description that these are works to which manure, street sweepings, and refuse in Glasgow are brought, and that when it is brought there the material is treated in, I think, three different ways—some of it is destroyed by being burned, some of it seems to be deposited for a time and afterwards removed elsewhere, and some of it is subjected to a treatment which enables it to be sold, and it is sold accordingly to customers. The expenditure, we are told, which is involved in bringing all this mass of refuse together into the works is enormous, and one can easily believe that no amount of profit on any sale would make up for that expenditure. But then when the Corporation finds itself in possession of all this stuff, which it must get rid off, it has discovered a method of treating a part of it which enables it to be sold for money. Now, the statute says that a factory, among other things, shall include any premises wherein any manual labour is exercised by way of trade, or for purposes of gain, in or incidental, among other things, to the purpose of adapting for sale any article. I am quite unable to doubt that the premises in question are premises in which manual labour is exercised for a purpose which is incidental to the preparing of part of this manure for sale. If that be so, I cannot doubt that the labour so exercised is exercised by way of trade or for purposes of gain, because after the stuff has been so adapted for sale it is in fact sold for money, and I do not know any definition of trade or gain which would not include such a sale. I therefore must agree with your Lordships that the first question must be decided in the way your Lordship proposes.

It was said in the course of the argument, which was, as your Lordship observed, exceedingly fair for the magistrates, that this man was never in fact near that part of the works where the refuse is treated in order to adapt it for sale. That might have raised a very fair question if the fact so alleged had appeared on the face of the stated case. But it does not so appear, and I think Mr Shaw admitted—and at all events it is clear—that we must take the facts stated as correct and sufficient for the determination of the question of law. I think the same observation applies to some other points which were taken in the argument, and which may be very interesting when they are raised, but which do not appear to me to be within the scope of this stated case. The first question therefore must in my opinion be answered in the affirmative.

As to the second question, I quite agree with the view indicated by your Lordship that Mr Shaw's criticism of the procedure is quite fair, and that it would perhaps have been more regular if the Sheriff, instead of dealing with the common law action alone, had dismissed it as an action at common law, reserving right to the parties to make such use of it as might be necessary for the purpose of raising or stating a claim under the Workmen's Compensation Act. But, as your Lordship has pointed out, there has no prejudice arisen to the parties from the Sheriff having taken a procedure which in substance and effect is perfectly just, although it might have been put in more regular form.

As to the last point, whether the accident arose out of and in the course of his employment, I think the Sheriff is quite right in saying that it is only a question of fact, if he has treated it as a question of fact. It has occurred in several cases which have come before us that questions of law have been stated in terms of fact, and in those cases if we had looked at nothing but the exact words of the question of law we might have been obliged to say, "There is nothing for us to consider." But then it sometimes appears that the Sheriff or arbiter has come to his conclusion of fact upon a ground of law, because he has considered himself constrained by a construction of the statute, or by some rule which he supposed to be a rule of law, to a certain construction of the facts, and in a case of this kind it is quite right and necessary that this Court should entertain an appeal. It has been sometimes said that the question in that kind of case is raised in very much the same way as if we were asked to consider a hypothetical charge given by the Sheriff as judge to himself as a jury, and to find that he had given himself a wrong direction. But then that kind of question never can arise when the Sheriff says in so many words—"I think this is a question of fact, and I decide it upon the facts; I have not proceeded upon law at all;" and that is what the Sheriff says in this case. And therefore I agree with your Lordship on that point also.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"The Lords having considered the stated case on appeal under the Workmen's Compensation Act 1897 at the instance of Johanna Jack or Henderson, and heard counsel for the

parties, in answer to the questions of law submitted for the opinion of the Court, say (1) that the said refuse despatch works at Kelvinhaugh, as described in the minute of admissions for the parties, are a factory within the meaning of the Workmen's Compensation Act 1897; (2) that the preferable course would have been to dismiss the action so far as founded on common law and on the Employers Liability Act 1880, reserving it *quoad ultra* for the purpose of assessing under it any compensation which might be found to be due to the appellant under the Workmen's Compensation Act 1897, but that the course followed did not preclude the appellant from maintaining her pleas under the said Act, or prevent her from having compensation assessed under it; (3) that the Sheriff was right in refusing the respondent's application to state the question "whether the accident to the said Walter Henderson was one arising out of or in the course of his employment," in respect that that was a question of fact and not of law: Recal the interlocutor of 2nd January 1900 in so far as it finds that the said works are not a factory within the scope of the Workmen's Compensation Act 1897, and assoilzies the defenders, and in so far as it finds the pursuer liable in expenses, and allows an account to be given in, and remits to the Auditor to tax and to report; and meanwhile continue the cause."

Counsel for the Appellant—M'Lennan—Craigie. Agents—Miller & Murray, S.S.C.

Counsel for the Respondents—Shaw, Q.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Saturday, July 7.

SECOND DIVISION.

[Lord Pearson, Ordinary.

GALBRAITH *v.* PROVIDENT BANK OF SCOTLAND, LIMITED.

Husband and Wife—Wife's Capacity to Contract—Personal Obligation of Married Woman—Promissory-Note Granted by Married Woman—Cautionary Obligation — Knowledge and Consent of Husband — Separate Estate — In rem versum—Married Woman Carrying on Business in Maiden Name — Married Woman Holding Herself out as Single — Innocent Misrepresentation — Promissory-Note Signed by Married Woman in Maiden Name.

A, a married woman, carried on the business of a dressmaker under her maiden name, with the knowledge and consent of her husband. The marriage was not secret or latent. In matters connected with her business A was in the habit of signing her maiden name. In other matters she signed her married name. B, a friend of A and her husband, applied to a bank for a loan, to be used by him for the purposes of his own business, which had no connection with that of A, and on their asking for additional security he submitted the maiden name of A, describing her as a dressmaker, at her business address. The bank, who had no knowledge of A, wrote to her in her maiden name, asking if B had her authority in giving her name as security for the advance desired. Before A had replied to this letter B called on A with a promissory-note for the amount, and A signed it in her maiden name. B then presented the promissory-note to the bank, and they, taking A's signature as a favourable reply to their letter, advanced him the money. This advance having been partially repaid, B obtained a further advance from the bank upon a second promissory-note, which was also signed by A in her maiden name. The bank had no further communications with, and made no further inquiries regarding A before making this second advance. B having thereafter suspended payment, the bank demanded payment of the second promissory-note from A, which she refused on the ground that she was a married woman.

Held (*aff.* judgment of Lord Pearson) that as (1) there had been no fraudulent misrepresentation made by A to the effect that she was unmarried, and her marriage was not latent or concealed, and (2) the transaction was not *in rem versum* of her, and was not connected with her business, A was not bound by her personal obligation, even assuming it to be the case that she had signed the promissory-note with the consent of her husband—*diss.* Lord Moncreiff, who was of opinion that, although there was no evidence of fraud in the ordinary sense, A by her actings had held herself out as an unmarried woman, and had thereby induced the bank to give the advance, and that this was sufficient to make this case an exception to the general rule that the personal obligation of a married woman is not binding upon her.

Mrs Agnes Jack or Galbraith, wife of and residing with John Sands Galbraith, 304 Bath Street, Glasgow, with consent and concurrence of her husband as her curator and administrator in law, presented a note of suspension of a threatened charge at the instance of the respondents the Provident Bank of Scotland, Limited, 2 West Regent Street, Glasgow, proceeding upon an extract registered protest, dated 2nd June 1899, and warrant of the Lords of Council and Session thereon, dated 17th June 1899, the said protest being at the instance of the respondents against J. & A. Yuill, 4 Robertson Lane, Glasgow, Alfred Yuill, Ralston, Barrhead, Hugh Campbell, Haymount, Cambuslang, and the complainer, to make payment to the respondents of the sum of £22 sterling contained in a promissory-note, dated 18th January 1899, and