stantially said that; at all events I intended to do so.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Pursuer — Darling — Graham Murray. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders—Strachan—Dickson. Agents—Morton, Neilson, & Smart, W.S.

Friday, June 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'DONAGH *v.* P. & W. MACLELLAN.

Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 7—*Notice.*

A workman sustained personal injuries on 7th May. He sent his employers notice of injury in time to be delivered in course of post on 19th June. *Held* that this notice was not served within six weeks from the occurrence of the accident within the meaning of the Employers Liability Act.

Reparation—Action—Receipt for Sum of Money in Compensation for Damages.

A workman who was making a claim against his master for reparation for an accident had intimated it through an agent, but afterwards met his master at the works and agreed to settle his claim for a small sum, and signed a receipt for the sum as full compensation. He subsequently raised an action of damages for the accident, stating that he understood that the amount given him was only part compensation. It was not proved, and he denied, that the receipt was read to him before signature, or that he intended to settle the whole case. *Held* that on repayment of the amount for which he granted the receipt he was entitled to be restored against it and to proceed with his action.

Process—Sheriff—Appeal—Plea.

A workman sued his master for damages for injury. The Sheriff found that the pursuer had discharged his claim, and the Court found on appeal that the discharge was no bar to the action. The pursuer then moved for leave to lodge issues for the trial. The Court *allowed* an issue to be lodged for trial by jury in the Court of Session, holding it unnecessary, as the whole case was before them, to remit to the Sheriff to proceed with it.

On 7th May 1885 John M'Donagh was injured in the left foot by the fall of a column in the raising of which for the support of the Forth Bridge he was employed by P. & W. Maclellan, engineers in Glasgow. The injury took place through the fault, as was alleged in this action, of his employers. A notice of injury under the Employers Liability Act 1880 was posted at Edinburgh by his agent on the afternoon of 18th June, addressed to the defenders at their office in Glasgow. It was posted in time to arrive at the Glasgow post-office on the evening of the 18th, but not so that it would be delivered that night in the ordinary course of post. The Act provides (sec. 4) that an action for recovery of compensation under it "shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury;" and further (sec. 7) that the notice "if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post." The period of forty-two days from 7th May, excluding in the reckoning the 7th May itself, expired on 18th May, that day being counted in the reckoning. The 19th, on which the notice would be delivered in ordinary course, was on this principle of computation forty-three days from the day of accident.

This action was subsequently raised. It was laid at common law, and alternatively under the Employers Liability Act, and was founded on averments that the accident arose from fault for which the defenders were responsible.

The defenders pleaded that the action could not be maintained under the Employers Liability Act in respect that the pursuer had failed to give notice in terms thereof. They also pleaded—"The pursuer having, in consideration of the sum of £8 paid him by the defenders, granted a discharge of all claims against them in respect of his injuries, is barred from insisting in his present claim, and the action should be dismissed with expenses. The pursuer not having been injured through any fault of the defenders, or of those for whom they are responsible, the defenders should be assoilzied." In support of the plea that pursuer had discharged his claim they produced this receipt—"Received from P. & W. Maclellan the sum of £8 as full compensation for any claim for damages on account of the accident to me in which my foot was injured whilst in their employment at the Forth Bridge Works, South Queensferry, in May last."

As to the alleged discharge the following facts appeared:—The pursuer had had several interviews with W. T. Maclellan, a partner in defenders' firm, and the question of settling the case had been discussed by them. The pursuer deponed that at one of these interviews he had asked for £50 and a promise of work, while the defenders deponed that while he at first asked £20, £8 was the sum agreed upon, and that they were to pay it out of charity. A day or two after the sum was discussed the parties met at the gate-house of the works, and the defenders laid before pursuer for signature the receipt above quoted. The pursuer signed it (the gatekeeper signing it as a witness) and received the £8, but deponed that he had not understood the true nature of the document, and imagined that it was part compensation. He swore that it was not read to him.

Mr Maclellan's evidence was that it was read over to the pursuer. The gatekeeper swore that he had not heard it read. The defenders also led evidence to show that they promised him work in watching.

The Sheriff-Substitute (GUTHRIE) pronounced this interlocutor—"Finds that the notice of action under the Employers Liability Act was not, in the meaning of the Act, served within

six weeks from the occurrence of the accident causing the injury condescended on: Finds therefore that this action is not maintainable under the Act, and to that extent and effect dismisses it: Finds, *separatim*, that by the document the pursuer, on October 12, 1885, discharged his claims against the defenders for compensation, whether under the said Act or at common law, for the said accident: Therefore assoilzies the defenders, and decerns.

"*Note.*—With regard to notice it is enough to refer to the words of the Act, section 7, providing that a notice, 'if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post,' and that it is not only obvious from the postal certificate, but is proved, that the notice could not have been so delivered within six weeks.

"Upon the other point it appears to be sufficiently proved that the document, the meaning of which is clear enough, was granted for valuable consideration by the pursuer to the defenders." . . .

The pursuer appealed, and argued — (1) The notice was in time. Even if it were held that the notice was not within the six weeks, the action was relevantly laid at common law, and he was entitled to issues. He had not understood the nature of the receipt which it was averred discharged the present claim. To set up such a discharge it was incumbent to show to the satisfaction of the Court that the pursuer had been made thoroughly and intelligently aware of what he was signing.

The defenders replied—(1) The notice was clearly not within the six weeks. (2) The discharge was effectual.

At advising—

LORD JUSTICE-CLERK—In this action, raised by a workman against his employers for injuries sustained by their alleged fault, there has been produced in process a discharge or receipt for the sum of £8 "in full compensation for any claim for damages on account of the accident." It turns out that two other questions were raised—first, as to whether there was any relevant action here at all; and second, whether at all events under the Employers Liability Act 1880 due notice of the action had been given within six weeks. Now, the notice was given by the pursuer through his law-agent. It came too late, but it certiorated that the pursuer was making a demand under the statute, and the defenders became aware by it that the pursuer had an agent acting for him. It seems that after several interviews Maclellan asked the pursuer what he would take to satisfy his demands for the accident. The pursuer says he asked for £50, and Maclellan says the sum was £8. A week after Maclellan saw him, having apparently gone to see him by arrangement, and he then had with him a receipt for £8 written out to be signed by the pursuer, acknowledging receipt of the sum as full compensation for his injuries. No doubt it was signed deliberately enough so far as the circumstances admitted. But I think it is always undesirable, especially where the parties are upon unequal terms as regards rank and condition of life and facilities for consideration of such a matter as this, that the party who is the least favoured in these respects should be induced to discharge such a claim when it is well known to the party who is inducing the discharge that he is at the time in the hands of a law-agent. Of course if it became clear that the man induced to do this, whether literate or illiterate, was perfectly aware of what he was doing, such a discharge may be sustained. Here, however, it is not proved that the pursuer understood when he signed the discharge that it was one in full compensation of his claim. I need go no further into the matter than to say that I think the parties were ill-advised when having each an agent with whom they could communicate with, they should have taken the risk of this private arrangement behind the agents' backs. I think, then, we cannot sustain the discharge to the effect of excluding the pursuer's claim if it is otherwise good.

As regards the other point, I am clearly of opinion that the notice was not given within the time required by the statute. There is, then, no claim under the statute. There may be one, however, at common law. I propose that we recal the judgment of the Sheriff dismissing the action, and find that the discharge is not available to exclude the pursuer's claim, find that the pursuer is not entitled to proceed under the statute, and allow the pursuer to lodge issues on condition of repaying the £8 which he received.

LORD YOUNG—The Sheriff has dismissed the action, and the whole case is competently here on appeal. The provision about appealing for jury trial when there has been an order for proof is another and totally independent matter. If there had been an order for proof there might have been an appeal without any judgment disposing of the merits. After discussion he concurred.

LORD CRAIGHILL—I am of the same opinion also. I think there is room for doubt whether the parties were at one with reference to the consideration for which the receipt was granted.

LORD RUTHERFURD CLARK—I also am of the same opinion. It is not proved that the parties were at one when they signed the discharge. I therefore cannot hold the pursuer bound by it if he chooses to repay the money to the defenders.

The pursuer then moved that although proof had not been allowed in the Sheriff Court he might be allowed to lodge an issue—*Gorman* v. *Morrison*, June 10, 1885, 12 R. 1073.

The defender pointed out that there being no order for proof the case could not be treated as an appeal for jury trial under section 40 of the Judicature Act, and maintained that the case ought to be sent back to the Sheriff for proof.

The Court pronounced this interlocutor:—

"Affirm the interlocutor of the Sheriff appealed against in so far as it is thereby found that the action cannot be maintained under the Employers Liability Act: *Quoad ultra* recal the said interlocutor: Find that it is not proved that when he signed the receipt mentioned in the record the pursuer understood that he thereby discharged his claim against the defenders in full, and that such claim is not thereby excluded: Find that he

is entitled to insist in his claim at common law on repaying to the defender the sum of £8 specified in said receipt, and repayment having been made at the bar, allow the pursuer within eight days to lodge issues for the trial of the cause; reserving all questions of expenses."

Counsel for Appellant—Rhind—Watt. Agent—D. Howard Smith, Solicitor.

Counsel for Respondents—Pearson—Napier. Agents—Drummond & Reid, W.S.

Friday, June 18.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

RUSSELL'S TRUSTEES *v.* RUSSELL AND OTHERS.

Husband and Wife—Jus relictæ—*Succession—Provision to Widow—Election—Equitable Compensation.*

A testator bequeathed an annuity and the liferent of his town-house to his widow, and bequeathed the residue of his estate (after certain provisions had been satisfied) to his daughters in liferent and their children in fee, directing that the provisions for widow and children should be accepted in full of their legal rights. The widow having taken her *jus relictæ, held* that the case was one of election not forfeiture, that the doctrine of equitable compensation therefore applied, and that both the daughters and their children as liferenters and fiars having suffered loss the testamentary provisions made for the widow should be applied so as to compensate them for their respective interests as liferenters and fiars.

Where a widow or child rejects the provisions given in lieu of legal rights, such case is not one of proper forfeiture, and therefore the provision is not to be treated as simply a lapsed interest.

William Russell of Ardpeaton died on 29th August 1884 leaving a trust-disposition and settlement, dated 29th August 1879, by which he left his whole estate, heritable and moveable, to trustees for the purposes therein mentioned. He was survived by his wife, by one son, John James Russell, and by three daughters—Mrs Gardiner, Mrs Murray, and Mrs Howat. He *inter alia* directed his trustees to pay his widow, in addition to her marriage-contract provisions, a free liferent annuity of £900 per annum, and to allow her the free alimentary use of his house in Kew Terrace, Glasgow, with a provision that if she married again the annuity was to be reduced to the sum of £400 per annum. He directed £14,000 to be paid to his son on his attaining twenty-one, while the residue, including the capital fund and estate set aside to secure the provision to his widow, was to be held by the trustees for behoof of his daughters, equally among them in liferent, for their liferent only and their children in fee, and these provisions were "to be accepted" by the widow and children in full of their legal rights. Mrs Russell decided to take her legal rights. The *jus relictæ* was about £27,000.

The present action of multiplepoinding was raised by Colin Campbell and others (Mr Russell's trustees) for the purpose of settling how the annuity of £900 per annum, left by Mr Russell to his wife, along with the liferent of the house in Kew Terrace, were to be disposed of in the altered state of circumstances. The trustees claimed that they were bound to uplift the amount of the £900 annuity, and the rent of the house, and apply them, Mrs Russell having rejected them, in the equitable compensation of the beneficiaries who had been injured by Mrs Russell's election—that is, in making payments to the three daughters as liferenters of the residue, and in making additions to the capital of the residue which was destined to the children, and that in proportion to the loss actually sustained by the fiars and liferenters respectively. They proposed to uplift these sums at each term, and apply them in making payments at each term in proportion to the loss actually sustained by the liferenters and fiars.

The daughters maintained that in consequence of their mother having taken her legal rights the effect on the fund *in medio* was the same as her death would have been, and the amount necessary to secure the annuity to her, and the value of the house in Kew Terrace, fell into residue, and to be divided immediately among them in liferent and their children in fee.

On 19th December 1885 the Lord Ordinary pronounced this interlocutor—"Finds that in consequence of the election of Mrs Russell to claim her *jus relictæ* in place of the testamentary provisions contained in the trust-settlement of the deceased William Russell, her husband, the annuity of £900 therein provided to her, and the liferent of the house at Kew Terrace, and moveable effects also therein provided, have vested in the trustees of Mr Russell's estate in trust for the purpose of being applied under such equitable scheme of distribution as may be approved of by the Court towards the compensation of the objects of the residuary destination for the loss which they will sustain through the exercise of Mrs Russell's right of election: Finds that under the said residuary destination the testator's daughters are respectively entitled to one-third of the income of residue during their respective lives, and that in the executing of the said resulting trust it is necessary that the amount of the prospective loss of income to each daughter should be separately ascertained according to the present value thereof; and finds that each annual instalment of £900, with the liferent of said house and moveable effects, should be apportioned between the testator's three daughters (as liferenters) and the trustees as custodiers for the contingent fiars in the proportion of the losses respectively sustained by such liferenters and fiars according to a scheme to be approved by the Court after such inquiry and report as may be hereafter directed; and appoints the case to be enrolled with a view to further procedure."

Mrs Gardiner and Mrs Murray having obtained leave, reclaimed, and argued—This was really a case of forfeiture, and being so there was no room for the doctrine of equitable compensation; if the conventional provisions were not taken advantage of, then there was no room for the doctrine of equitable compensation.