cedure having actually taken place in Edinburgh. I own that I have heard it with great surprise, but it seems to me that this procedure will not do. It is defective in the most elementary attributes which should belong to judicial proceedings even of the roughest and most summary kind. The parties are not heard, and an assessor takes on himself the function of an absent court, not on a matter of form but on this vital one whether the parties are to be heard or not. I regret that these proceedings should have taken place, but I do not dwell on them as the case seems to me so absolutely clear, and I do not want to cause any doubt on this fundamental doctrine, that parties must be heard on matters of this kind, and must be heard by the Court,—where it is a matter for the due exercise of the jurisdiction of the Court in determining whether changes proposed are sufficient or not. I therefore move that we recal the whole interlocutors after the 17th March, and send the case back to the Dean of Guild Court.

Lord Adam and Lord Kinnear concurred.

Lord M'Laren was absent.

The Court sustained the appeal, recalled the interlocutors appealed against as from 17th March onwards, remitted the case to the Dean of Guild Court, and found the appellants entitled to their expenses.

Counsel for Appellants—J. B. Balfour, Q.C.—Cook. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Cooper. Agent—Thomas Hunter, W.S.

Tuesday, July 11.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

THOMSON *v.* THOMSON & COMPANY.

(*Ante*, vol. xxxiv. p. 238, 24 R. 269.)

Contract—Sale or Lease—Assignation of Business in Consideration of Annuity—Loss by Fire.

By written agreement A assigned to B the business of engineer carried on by him in certain premises "and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to him." In respect of this assignation B on his part undertook, *inter alia*, to pay to A an annuity of £250 for life, which was declared to be "free of all burdens and deductions whatsoever." A at the date of the agreement was tenant of the premises, which he subsequently acquired as proprietor. B entered into possession of the premises where he continued to carry on the business, and duly fulfilled his obligations under the contract. A fire having occurred on the premises, in consequence of which the business was suspended for more than two months, B claimed that he was entitled to make a deduction from the annuity representing the rent during the period when he was deprived of the use of the premises, the loss of which fell upon A as the lessor of the premises.

Held that the agreement was not a lease, or subject to the ordinary incidents of a lease, and that by its terms the annuity was payable without deduction.

Thomson v. *Thomson & Co.* (Dec. 18th 1896, *supra*, vol. xxxiv. p. 238, 24 R. 269) *explained.*

On 22nd January 1894 Mr William Thomson, engineer, Glasgow, entered into an agreement with his two sons by his first marriage, William Thomson jun. and John Thomson, and his son-in-law Charles Davidson, in the following terms:—"Whereas the first party has for a number of years carried on the business of an engineer at 57 Smith Street, Kinning Park, Glasgow; and whereas the first party has resolved to hand over said business, and whole stock, funds, assets, rents, and goodwill thereof, and machinery and appliances used in connection therewith, to the second party, on the terms and conditions after specified: Therefore the parties have agreed, and do hereby agree as follows, *videlicet:—Clause First.*—The first party hereby assigns and transfers, as at the date hereof, to the second party, equally among them, the said Charles Davidson, as representing and for behoof of his said wife Marion Stark Thomson or Davidson, the business of engineer presently carried on by the first party at 57 Smith Street aforesaid, whether in his own name or under the style or firm of William Thomson & Company, and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in said premises, whether fixed or unfixed, belonging to the first party. *Clause Second.*—. . . . The first party shall, however, remain as consulting engineer in connection with the business, at such salary as may be agreed upon from time to time; and the second party shall be bound to take the advice of the first party on all points connected with the practical management and development of said business, as well as the ordering of all material and plant necessary for the carrying on of said business, and the engaging and dismissing of employees; but the first party shall not be responsible in any way for the advice so given, and he shall only give such time and attention to such points as he may think proper. *Clause Third.*—The second party bind and oblige themselves to pay the whole debts and obligations of the first party in connection with said business at the date hereof as the same mature, and to free and relieve and harmless and scatheless keep therefrom the said first party in all time coming. *Clause*

Fourth.—In respect of the assignation of said business, and stock, funds, assets, rents, and goodwill thereof, and machinery and appliances, the second party hereby bind and oblige themselves, jointly and severally, and their respective heirs, executors, and representatives whomsoever, to pay to the first party an annuity of £250 sterling per annum during all the days and years of his life, which annuity shall be strictly alimentary, and free of all burdens and deductions whatsoever, and shall not be arrestable or affectable by his debts or deeds, or by the diligence of his creditors . . . and so forth half-yearly and termly thereafter, during the lifetime of the first party. . . . *Clause Fifth.*—In the event of the said annuity remaining unpaid at any time for the period of six months, it shall be in the power and option of the first party, on giving one month's previous notice in writing by registered letter posted to the last known addresses of the second party, to enter into the possession and management of said business and stock. funds, assets, rents, and goodwill, and machinery and appliances, as if these presents had never been granted; and to call upon the second party, at their expense, to retransfer the same to him as received by them under these presents, conform to balance-sheet at present being made up, ordinary tear and wear and working requirements excepted, free of all debts and liabilities in connection therewith. But notwithstanding the first party exercising such option, he shall be entitled to call upon the second party to pay the arrears of annuity and all expenses incurred by him in connection with the recovery of the same, and entering into the possession and management of said business and others. *Clause Sixth.*—The second party shall not be at liberty to dispose, sell, or transfer said business, or any portion of the plant or stock and others, during the lifetime of the first party, nor shall it be in the power of the second party to assume a partner or partners without making provision to the satisfaction of the first party for payment of said annuity."

At the date of the agreement Mr Thomson held the premises under a lease from his wife, but thereafter she granted to him a formal conveyance of the premises. An action was raised by him against his sons and son-in-law concluding to have them ordained to flit and remove from the premises.

The defenders pleaded, *inter alia* — "(10) This action at the instance of William Thomson senior is against the good faith of the agreement between him and defenders and the actings of parties subsequent thereto."

The Lord Ordinary (STORMONTH DARLING), after a proof, on 14th July 1896 pronounced an interlocutor, whereby he sustained the tenth plea-in-law for the defenders, and in respect thereof assoilzied them from the conclusions of the summons.

The pursuer reclaimed, and the First Division, on December 18th 1896, varied the interlocutor reclaimed against by deleting the words "sustains the tenth plea-in-law for the defenders, and in respect thereof," and *quoad ultra* adhered and refused the reclaiming-note.

The defenders continued to occupy the premises and to pay the pursuer the annuity.

An action was raised by Mr Thomson in the Sheriff Court of Lanarkshire against the same defenders, concluding for payment of £106, 17s., being the balance of the half-year's annuity due on 15th May 1898.

The defenders averred—"Explained that on 19th March 1898 a serious fire occurred at the defenders' works, which stopped the business till 30th May 1898. Averred that defenders are not liable to pursuer for any annuity during the stoppage of the works through said fire. Pursuer, being proprietor, had insured or could have insured, against loss by fire the said buildings, including the amount of a year's rent to cover said annuity. In any event he is bound to give the defenders credit for the amount of rent recovered by him for loss by fire. The fire being *damnum fatale*, the principle of *res perit suo domino* applies, and the loss is thrown on the pursuer and defenders according to the *dominus* of interest. The time taken to restore the buildings was, through the fault or omission of the pursuer, the proprietor, unnecessarily long, as said buildings could have been restored within a month at most instead of the actual period."

They tendered the sum of £69, 10s. 5d., which they averred to be the amount due to the pursuer up to March 19th 1898, less the sum of £18, 3s., the amount of an account due by him to them.

The Sheriff-Substitute (BALFOUR) on 31st October 1898 pronounced the following interlocutor:—"Finds the defenders liable to the pursuer in the sum of £18, 3s. 3d., and decerns against them, jointly and severally, for payment of said sum: Finds no expenses due between the parties.

Note.—"This is a peculiar case, and it is a continuation of unfortunate differences which have subsisted between the pursuer and his sons. By an agreement dated 22nd February 1894 the pursuer made over his business to the defenders, and the subjects transferred were described as the business itself, along with the stock, funds, assets, rents, and goodwill thereof, and the whole machinery and appliances in the premises. In respect of the assignation the defenders undertook to pay to the pursuer an annuity of £250 during his lifetime, and they took over the whole debts and obligations of the business. The pursuer was not at the date of the agreement the proprietor of the premises, but he afterwards obtained a title to them.

"The pursuer in June 1895 instituted legal proceedings to have the defenders removed from the premises, and in these proceedings a judgment of the Court of Session was pronounced on 18th December 1896 (24 R. 269), the effect of which was that the agreement was held to import a lease of the premises during the pursuer's life, the rent,

though not specifically stated, being covered by the annuity, and the defenders were assoilzied.

"Another dispute has now arisen between the parties on account of a fire which occurred in the premises on 19th March 1898, and which is said to have stopped the business till 30th May 1898, and in answer to the present claim for the pursuer's half-yearly annuity, which fell due at 15th May 1898, the defenders maintain that they are not liable for the annuity during the stoppage of the works, and that as fire is a *damnum fatale* the loss must fall upon the pursuer, and that they are entitled to an abatement from the rent.

"There would be no difficulty in entertaining the defenders' claim if this were an ordinary case of a lease with a definite rent fixed, in which case the defenders would be entitled to an abatement during the temporary stoppage of the works from fire. But a difficulty presents itself in dealing with the agreement in question as an ordinary lease, and also in defining what the pursuer's interest is in the subjects as landlord. The agreement is a compound one, and not only gives the defenders a right to occupy the works, but it transfers to them the stock and goodwill of the business and the machinery and appliances in the premises, whether fixed or unfixed; and it follows that a considerable part of the annuity represents not the rent of the heritable subjects, but the price payable for the stock and goodwill of the business, &c. The difficulty which the Court of Session encountered in deciding the case was that no rent was fixed in the agreement, but they got over the difficulty by holding that the agreement imported a lease of the premises, and as in a question with the pursuer the rent formed part of the sum agreed to be paid by way of annuity. Lord Adam (who gave the leading judgment) stated that if it had not been intended that the business and premises should be inseparable during the currency of the agreement there would have been a separate sum stipulated for as the rent of the premises.

"It was stated by the defenders' agent in this case that the rent of the premises in the valuation roll is £115, and the difficulty which I have had to encounter is, whether under the peculiar circumstances I should fix any rent in respect of which the defenders should receive an abatement. It would hardly be fair to the defenders to find that, as the rent is not specified, and as the arrangement is of an inseparable character, they were not entitled to any abatement whatever. The fairer thing to do is to take a reasonable sum as rent, and to allow them a corresponding abatement. It would not be satisfactory to have a proof on the subject of rent, because the value of the plant and stock, &c., as at January 1894 would be so difficult of ascertainment that the proportions of the annuity respectively applicable to the plant &c., and to the rent could not be easily got at. The most satisfactory mode of solving the difficulty is to take the rent in the valuation roll and allow the defenders a proportion of the £115 from 19th March to 15th May 1898. The figures would then stand as follows:—

Proportion of annuity from 11th November 1897 to 19th March 1898 - - -	£87	13	5
Less account against pursuer	18	3	5
Interim decree for -	£69	10	5
Proportion of annuity from 19th March 1898 to Whitsunday 1898 - - - -	£37	6	7
Less proportion of rent for same period at £115 per annum - - - - -	19	3	4
	£18	3	3

"The pursuer has received payment of the sum of £69, 10s. 5d., and I have given decree for the proportion of the annuity from 19th March, less the proportion of rent, leaving the foresaid balance of £18, 3s. 3d.

"It is not of any importance that the pursuer has conveyed the subjects to his daughter. It is not only difficult to treat her as a singular successor, but the fact remains that the annuity is payable to the pursuer, and that rent must be held to be included in the annuity, and if an abatement is made for fire it must be from the pursuer.

"The defenders further maintained that they were not the absolute proprietors of the subjects assigned, and that the loss by fire, *quoad* even the moveable subjects, should fall on the pursuer, and in support of this argument they founded upon the sixth clause of the agreement. The effect of that clause clearly is to prevent them selling the business or plant or stock without making provision to the pursuer's satisfaction for payment of his annuity.

"The averments with regard to the pursuer's insuring the building and to his obstructing the restoration of them appear to me to be irrelevant."

The pursuer appealed to the Court of Session, and argued—The terms of the agreement showed conclusively that the rights of the parties were not those of landlord and tenant. The Court had not decided in the former case that there was a lease, and had not sustained the defenders' plea to that effect. They had merely assoilzied the defenders, holding that the pursuer had no power to remove them. The agreement was lacking in all the characteristics of a lease; there was no clause of warrandice, nothing against singular successors, no fixed rent, and no obligation on the defenders to remain on the premises. The agreement must be read as a whole, and it showed that the defenders were bound to pay the whole annuity without taking into account the occurrence of risks such as fire, which were incidental to their business.

Argued for respondents—The agreement had already been construed by the Court, and the appellants' contention was an attempt to review the judgment. The import of that judgment was that the

agreement constituted a lease *quoad* the premises, the rent being covered by the annuity, and accordingly the respondents were entitled to make this deduction. The fact that it was not stipulated in so many words what part of the annuity was to be considered as rent in no way detracted from the plain import of the agreement.

LORD M'LAREN—This case is a sequel to one which has already been considered and decided by the Court, in which we were called upon to construe an agreement between the present parties. The pursuer was an engineer and had founded the business in question, but after reaching a certain time of life he entered into an agreement with his sons by which he assigned his whole rights in the business in consideration of an annuity to be paid to him for life. It is unnecessary to say much as to the circumstances of the claim in the former action; the question raised was as to the right of possession of the premises, the pursuer maintaining that the contract under which he had given up the business did not entitle the defenders to the use of the premises, and attempting to interdict them from the further occupation thereof. In that case your Lordships came to be of opinion that the contract between the parties included such right to the premises as the pursuer was able to give the defenders. He gave no absolute warrandice, for at the date of the agreement he held the premises as tenant from his wife, though they were subsequently conveyed to him by her. Your Lordships held that so long as the pursuer had any power over the property the defenders could not be removed therefrom. It was unnecessary for the purposes of that case to inquire more particularly into the nature of the contract.

Here, however, the question raised is whether the defenders occupy the premises as tenant, so that a part of the consideration in the agreement is to be treated as rent, in which case the defenders would be entitled to an abatement of rent in respect of the fire. The Sheriff held that while it was true that there was no statement that so much of the annuity was given as the price of the machinery and so much as the rent of the heritage, yet that the contract was one of sale and location, and he appropriately followed up that part of his judgment by allowing an abatement from the rent. I am anxious not to express any views which may be supposed to conflict with our judgment in the former case. We are bound to give effect to it so far as it fixes the rights of parties, to which extent it constitutes *res judicata*. But I am unable to see that we found that there was in the agreement a contract of location of the heritage. In my own opinion it is not so put, but is an agreement for the sale of a going business including such rights to the heritage as the seller could give. In Lord Adam's opinion I think the word "lease" was used as an illustration rather than as fixing the nature of the contract. The result of my consideration of the agreement in the present case is, that there was no contract of location, but only a sale of a going business, including the machinery and the use of the premises occupied for the purposes of the going business at a fixed price. The contract did not create the relation of landlord and tenant between the parties. The fact that the consideration was in the form of an annuity was only for the convenience of the parties, since it was easier for the defenders to make payment in this way than to pay a capital sum down, while the pursuer having retired from business preferred to receive the price of the business in the shape of a fixed annual sum on which he could live. On this short ground I am of opinion that the sons are not entitled to an abatement from the annual payment which they have undertaken to make to their father. The true meaning of the contract is, that the purchasers should take all risks pertaining to the business, the risk of fire being one of these though perhaps a small one. The words used in describing the annuity in the 4th clause of the agreement are inconsistent with the notion that this is a mixed contract of sale and lease, and in an ordinary lease the landlord would pay the burdens effeiring to him as owner, while the tenant would be assessed for his interest, while here the pursuer's annuity is free of all burdens whatever. I think, therefore, the defenders are not tenants, but that they merely enjoy a usufruct of the premises as part of the subject of sale.

LORD KINNEAR—I am of the same opinion. We had occasion to consider this agreement in the previous action, and I see no reason to doubt the construction at which we arrived. The material point, as Lord Adam there pointed out, is that the father transferred to his sons a going business with a considerable amount of machinery which could not be removed except at great expense and loss of time, and that the business had been carried on in the same premises for twenty years, so as to acquire a goodwill inseparable from these premises. The father proposed to turn out his sons, and the Court held he was not entitled to do so, because under the agreement they had an implied right to the use and occupancy of the premises for their father's lifetime. If that be equivalent to a lease—and I daresay it may be so considered—it is nevertheless a lease embodied in a larger contract containing other and different rights besides the temporary occupation of the premises. The question appears to me to be not whether the technical term lease is applicable to the right in the premises conveyed by the pursuer to his sons, but whether this right, however it may be technically styled, is subject to all the conditions and incidents of an ordinary lease. The annuity may be supposed to include whatever return might be thought proper for the occupation of the premises, but it is not a return for that alone; and it is impossible to apportion it and say that one part is rent for the premises and another part is payment for

other advantages. The substance of the agreement is that the pursuer makes over a going business with certain property and machinery, and stipulates in return for a fixed annuity payable in all events. The undertaking of the sons to take over the business was in the nature of a speculation, and they bound themselves to meet the risks inevitable to the prosecution of the business and to their occupation of the business premises. I see no reason why we should separate the occupation of the premises from the rest of the contract and treat it as though it were a separate lease of house property in Glasgow, subject to all the usual incidents and conditions. If we look at the contract alone there can be no doubt that it was intended that the annuity to be paid by the defenders to the pursuer was to be paid in all circumstances and without any deductions.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute dated 31st October 1898: Find the defenders liable to the pursuer in the sum of £37, 6s. 7d. sterling, and decern for that sum: Find the pursuer, appellant, entitled to expenses both in this and in the Sheriff Court, and remit," &c.

Counsel for Pursuer—C. K. Mackenzie—T. B. Morison. Agents—Sibbald & Mackenzie, W.S.

Counsel for Defenders—A. Jameson, Q.C.—Orr. Agent—George Inglis Orr, S.S.C.

Tuesday, July 11.

FIRST DIVISION.

[Sheriff Court of Dundee.

BARRETT AND ANOTHER *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Title to Sue — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2) *b, and First Schedule—Joint Action by Father and Mother of Deceased Workman—"Dependants."*

The father and mother of a deceased workman jointly sued his employers under the Workmen's Compensation Act 1897 for compensation in respect of his death. The Sheriff found on the facts that the pursuers were "in part dependent" upon their son at the time of his death, and found the pursuers entitled, jointly and severally, to a sum by way of compensation. The Court (following the case of *Whitehead* v. *Blaik*, 20 R. 1045) *held* that the father alone was the proper person to sue; but *approved* the sum awarded by the Sheriff in respect that it appeared from the facts that the father, as representing the family, was partly dependent on his deceased son, and there was nothing to show that the Sheriff had awarded a larger sum in consequence of having decerned in favour of father and mother jointly.

This was an appeal by the North British Railway Company from the award of the Sheriff-Substitute of Forfarshire (CAMPBELL SMITH) in an arbitration under the Workmen's Compensation Act 1897, at the instance of Mr and Mrs John Barrett and their children against the appellants, to ascertain and fix compensation due in respect of the death of Joseph Barrett, railway painter. By interlocutor dated 18th February 1899 the Sheriff sustained the title of the father and mother only to sue, and allowed a proof.

The following facts were set forth by the Sheriff-Substitute as having been established in the proof:—"(1) That Joseph Barrett, a son of the pursuers, on 6th July 1898, when going home along the Tay Bridge, on which he had that day and for some days previously been working as a painter of said bridge, in the employment of the defenders, was run down and killed by one of their trains. (2) That the deceased was aged 19 8/12 years, and had been for the previous four years for the most part employed on board ship as a common sailor and as a fireman. (3) That for three seasons when he was at the Greenland whale-fishing his mother drew his half-pay, conform to Nos. 8 to 13 of process inclusive, and that he regularly gave up to his mother his whole wages to spend upon herself and the family as she chose, he receiving back from her 2s. or 3s. a week of pocket-money when he asked it, as also money to pay for such clothes as he and she thought to be necessary for him. (4) That as a son he was dutiful, affectionate, steady, industrious, and unusually free from selfishness in his relations to his parents, spending little upon himself. (5) That his father is a carter earning 23s. a week, except when losing time through wet weather; that when the mother was able she worked in a mill, and earned about 9s. a week, until the deceased desired her to stop working outside of her home, and gave her his half-pay, which, at the date of this request and acquiescence in it, amounted to 30s. a month, upon the condition that she should stay at home; that this pair had produced eleven children, of whom only five are now living, and that in the family there has been a great deal of bad health; that the circumstances of the family were such that the contributions made by the deceased, which practically amounted to the whole of his earnings that he could possibly spare, were necessary to keep the large delicate family provided with the plain common necessaries of life, and in a state of comfort and decency not much above penury, and not at all above the level of families of working men who regularly earn 20s. a-week. (6) That to attain to this desirable level of plain living necessary for comfort and health the pursuers were dependent upon the contributions made by the deceased to his mother,