the Court in this matter. After the judgment in that case it is no longer possible to follow the old practice by which, in cases where the Court thought that the amount of the damages found due by the jury was excessive but that the verdict was otherwise justified, the Court were in the habit, without consulting the defender, of giving the pursuer the alternative of accepting the amount which they thought reasonable or of facing a new trial. The case of *Watt* seems to have laid down that the consent of the pursuer only is not enough, and that a verdict for a new amount can be pronounced by the Court only with the consent of both parties. Accordingly, in the present case we should not have done as we have done to-day had we not previously obtained the consent of both parties.

I may add that, speaking as the Judge who presided at the trial, it is my opinion that, had a new trial been granted, the pursuer would again have secured a verdict, for although I do not think that any *malus animus* was proved on the part of the writer of the article, still I think that the article associated the pursuer with a somewhat doubtful transaction with which he had nothing to do, and that this had been taken advantage of to injure the pursuer in his profession. At the same time, the damages found due by the jury were excessive—more than double the whole earnings of the pursuer for the year. Looking to the fact that his character has been completely cleared, we think that the sum which we have awarded is sufficient compensation.

LORD M'LAREN—I am of the same opinion. The judgment of the House of Lords in the case of *Watt*, [1905] A.C. 115, is of course subject to the observation that it was pronounced in a case in England where the conditions and rules relating to jury practice have been largely innovated by statute, while we have kept to the practice as it existed in the time of George III, when juries in civil cases were introduced into this country. But in this case I cannot think that the differences between English and Scottish practice can prevent a decision of the House of Lords being binding on us in the Courts of Scotland. There may be cases where the defender might have good reason for refusing to consent to the assessment of damages by the Court. It might be that the verdict of the jury, in addition to being excessive in the amount of the damages awarded, was also unreasonable in the view taken of the evidence, though not so unreasonable as to warrant its being set aside as contrary to the evidence. In such a case the defender might be justified in saying, "The verdict is so absurd that I prefer to have a new trial." I may say that, if the point were open, my individual opinion would be in agreement with the judgment in the case of *Watt*.

LORD KINNEAR—I entirely agree with your Lordship. I am satisfied that the judgment of the House of Lords is binding upon us, because it proceeds upon principles which apply as much in this country as in England. I cannot doubt, after your Lordship's explanations, that the defenders in this case have exercised a wise discretion in agreeing to leave the assessment of damages to the Court, but I quite agree that we could not have compelled them to do so.

LORD PEARSON was not present.

The Court discharged the rule and refused to grant a new trial; on the motion to apply the verdict, of consent restricted the amount of damages assessed to £125, and decerned for that sum, finding the pursuer entitled to expenses, save the expenses of the motion for a new trial, to which neither party was found entitled.

Counsel for the Pursuer—Crabb Watt, K.C.—T. Trotter. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders—Morison, K.C.—Findlay. Agent—E. Rolland M'Nab, S.S.C.

Friday, March 6.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

LAWRIE *v.* JAMES BROWN & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (2) (*b*), *Schedule II*, 8, 14—*Agreement—Registration of Memorandum—Ordinary Action of Damages for Breach of Part of Agreement—Competency.*

An agreement between an injured workman and his employers set forth the amount of compensation to which he was entitled under the Workmen's Compensation Act 1897, and then stated that the employers agreed "in lieu of such compensation" to give the workman "regular employment" at specified work and to pay him the fixed weekly wage of 23s., and also, on the date of the agreement, the sum of £90 sterling, "and these in full of all his claims for compensation under the said Act." A memorandum of the agreement was duly recorded in terms of Schedule II (8) of the Act. The employers paid the £90, and after keeping the workman for nearly three years in their employment, and paying him the stipulated wages, dismissed him as the result of a dispute.

The workman brought an ordinary action of damages against the employers founded on breach of the contract of employment. *Held* (Lord Ardwall indicating an opinion *contra*) that the action was incompetent, inasmuch as the agreement being one and indivisible, and having become by

registration equivalent to a decree of court, the pursuer could only follow out his remedy under that decree.

Master and Servant—Contract of Employment—Contract to Give "Regular Employment"—Dismissal after nearly Three Years—Action of Damages—Relevancy.

By an agreement between a workman and his employers fixing the compensation payable to the former in respect of accidental injuries, the latter (in lieu of compensation under the Workmen's Compensation Act 1897), besides making an immediate pecuniary payment, undertook to give the workman "regular employment" as foreman at a specified weekly wage. The employers retained him in their service and paid him the stipulated wages for nearly three years, and then dismissed him. The workman brought an action of damages against the employers for breach of contract, averring that he still was able and willing to perform his duties, and had done nothing which justified his dismissal. *Held* that the action was irrelevant, the agreement having fixed no term of endurance of the employment.

Thomas Lawrie, while in the employment of James Brown & Company, Limited, was injured in circumstances entitling him to compensation under the Workmen's Compensation Act 1897.

The following memorandum of agreement between the parties was duly recorded in terms of Schedule II (8) of the Workmen's Compensation Act 1897—"The said parties agree that the maximum compensation to which the applicant is entitled under the Act is 17s. 6d. per week, being one-half of his average weekly earnings, consisting of 30s. of regular wages and an average sum of 5s. of extra work of overtime wages, but subject to deduction in terms of the second paragraph of the first schedule of the said Act of the average amount which he is now able to earn as regular and extra wages, and the respondents agree in lieu of such compensation to give the applicant regular employment as foreman over the workers at the settling ponds in connection with their works at Esk Mills, and to pay him the fixed weekly wage of 23s., with the usual additional pay for extra work, and also to pay him on the date hereof the sum of £90 sterling, and these in full of all his claims for compensation under the said Act in respect of the said injury."

James Brown & Company paid Lawrie the £90 and kept him in their employment at a weekly wage of 23s. for nearly three years, when they dismissed him as the result of a dispute.

Lawrie thereafter raised an action against James Brown & Company in which he sued for £300 damages for breach of contract.

His averments were in substance that he had always performed his duties satisfactorily, that he still was able and willing to continue so to perform them, and that he never had done anything which justified his dismissal by the defenders.

He pleaded, *inter alia*—"(1) The defenders never having implemented the obligation incumbent upon them to provide the pursuer with regular employment as foreman over the workers at the settling ponds, and having by dismissing the pursuer from their service caused him much loss, injury, and damage, they are liable in reparation. (2) The defenders having wrongfully dismissed the pursuer from their service are liable in reparation."

The defenders pleaded, *inter alia*—"(1) The action is incompetent as laid, in respect, *inter alia*, that although the claim arises out of an agreement under the Workmen's Compensation Act 1897, it seeks to add a remedy which the Act does not give. (2) The averments for the pursuer are not relevant or sufficient to support the conclusions of the summons, and the action should therefore be dismissed with expenses."

On 15th June 1907 the Lord Ordinary (GUTHRIE) assoilzied the defenders from the conclusions of the action, and decerned.

Opinion.—"The defenders plead incompetency and irrelevancy.

"They say that the action is incompetent because the only claim stated by the pursuer against them arises out of an agreement under the Workmen's Compensation Act 1897. That agreement, they admit, can be enforced in all its terms under the Act, but according to them no part of it can be made the ground for a claim for damages at common law, such as is made in this action. The pursuer has foreseen the difficulty, and has endeavoured to avoid it by representing the statutory agreement as one contract and the agreement for regular employment, which is the basis of his present claim, as another and distinct contract. But this is not so either in fact or in law. The whole stipulations are contained in one agreement. It is headed 'In the matter of an agreement under the Workmen's Compensation Act 1897,' &c., and after detailing the terms of the agreement, including the undertaking by the defenders to give the pursuer 'regular employment as foreman over the workers at the settling ponds,' ends with these words—'and these in full of his claims for compensation under the said Act in respect of the said injury.' In these circumstances it is unsound to maintain, as the pursuer does, that the case is the same as if the stipulation as to regular employment was in a separate document containing no reference to the Act. If the contract founded on by the pursuer is part of an agreement under the Act, as I hold it is, it is not disputed that it cannot be enforced in this action.

"I also sustain the plea to the relevancy. It is not necessary to consider the pursuer's averments as to the defenders' breach of a verbal contract to employ his children, and to afford him extra work, because it was explained that these are not matter of substantive claim. Nor is any case made of want of reasonable notice, if the pursuer was truly employed by the defenders, as alleged by them, at will. The pursuer's

complaint is that, while the defenders undertook to give him 'regular employment,' they only did so for nearly three years and then dismissed him. I see no breach of contract by the defenders in thus acting, unless there be read into the agreement an obligation on them to give the pursuer regular employment for life, or at least, as the pursuer contended, so long as he is able and willing to serve them and does his work properly. I see no warrant for reading any such terms into the agreement, and I therefore hold the pursuer's averments of breach of contract irrelevant."

The pursuer reclaimed, and argued—(1) The action was competent. Although at first sight the agreement was an agreement under the Act, and accordingly only enforceable by the methods prescribed by the Act, closer examination showed that it was not one but two agreements, viz., first, an agreement under the Act for pecuniary compensation, admittedly only enforceable by the methods prescribed by the Act—*Cochrane* v. *Traill & Sons*, March 16, 1900, 2 F. 794, 37 S.L.R. 662; second, an agreement as to employment outwith the scope of the Act, and accordingly enforceable, if it was enforceable, only by an action at common law. That the two agreements happened to be contained in one document was obviously immaterial, as was also the fact that incidentally the latter agreement happened to have been recorded under the Act, since no amount of recording could affect the nature of the agreement itself, or change a common law agreement into an agreement under the Act. The question then came to be, Was it enforceable? As soon as the fallacious idea that it was an agreement under the Act was exploded no reason could be stated why it should not be enforced just like any other agreement, viz., by an ordinary action at common law. The defenders' contention involved this anomalous result, that the pursuer was left without any means of enforcing the most important item of a perfectly reasonable and perfectly legal contract which violated no known rule of common or statutory law. It was noticeable in this connection that section I, 2 (*b*) of the Act expressly safeguarded a workman's common law remedies. In *Robertson* v. *S. Henderson & Sons, Limited*, June 2, 1904, 6 F. 770, 41 S.L.R. 597, it was held that a common law reduction of an agreement under the Act was competent. (2) The action was relevant. It was obvious that in the contemplation of the parties who made the agreement regular employment meant permanent and continuous employment so long as the workman behaved himself and was able and willing to perform his duties.

Argued for the respondents — (1) The action was incompetent. There was only one agreement here. It was impossible to split it into two parts. It expressly bore to be an agreement under the Act, and had been recorded as such, and had thereby become for all practical purposes equivalent to a decree of Court—Schedule II, 8, 14. The only method of enforcement was by a charge, an action concluding for the enforcement of what was virtually a decree of Court, or for damages, being obviously absurd and incompetent. It might perhaps be that part of the agreement could not actually be enforced, but none the less the probability that it would be carried out formed a valuable consideration in the contract—see *Robertson* v. *S. Henderson & Sons, Limited*, June 16, 1905, 7 F. 776, 42 S.L.R. 632. It was a fundamental part of the Act that a workman could not proceed both under the Act and independently of it—sec. I, 2 (*b*). All that the case of *Robertson* in 6 F. and 41 S.L.R. decided was that an unrighteous or illegal agreement which purported to have been made under the Act could be reduced by an action at common law. (2) The action was irrelevant. "Regular" employment did not mean "permanent" employment, but only employment which was not casual or intermittent. The agreement contained no stipulation as to the length of time during which regular employment was to be given.

LORD STORMONTH DARLING — I agree with the Lord Ordinary upon both points. He has decided the case by finding that the action is bad both as being incompetent and irrelevant. Now nothing is better settled than that you cannot proceed both under the Workmen's Compensation Act and also independently of it, and the Workmen's Compensation Act provides for workmen a short and simple remedy, where there has been an agreement between the parties, for working out that agreement, first, by registering the agreement, and then by making it enforceable as a Sheriff Court decree to all effects. The agreement here was signed by both parties, and from the first it seems to have been determined that it should be registered under the Act. Now when that is so I think that all other remedy is excluded. I quite agree that the judgment in the case of *Robertson* v. *S. Henderson & Sons, Limited*, 6 F. 770, settles that in certain circumstances there may be an action at common law. There, an agreement had been made between a minor and his employers, and it was held that it was reducible by the workman on the ground of minority and lesion, but the ground of that decision on the competency was stated by Lord Kinnear in these words—"The Act of Parliament gives compensation in certain circumstances, and allows it to be fixed either by agreement or by arbitration. But when it allows the compensation to be fixed by agreement it assumes that the agreement is valid and binding according to law." Now of course an agreement under the head of minority and lesion can only be reduced by an action at common law. Now what is the agreement here, and what are the circumstances of this case? The agreement was a mixed one. In the first place it provided what the compensation to which the applicant was entitled under the Act would have been, and as to that the parties are

agreed. It said that the average weekly earnings were 30s., and that the maximum compensation would therefore have been 17s. 6d., being the half thereof and an added sum for average overtime. And then it went on to agree that in lieu of such compensation the respondents were to give the applicant regular employment as a foreman over the workers at the settling ponds in connection with their works at Esk Mills, and to pay him the fixed weekly wage of 23s. with the usual additional pay for extra work, and also to pay him on the date hereof the sum of £90 sterling, and in full of all his claims for compensation under the said Act in respect of the said injury.

Well now, the compensation which is here referred to covers all the stipulations in his favour—that is to say, those stipulations which the respondents agreed to pay in lieu of compensation are, the £90 down and the undertaking to give regular employment as foreman over the workers at the settling ponds in connection with their works at Esk Mill at a weekly wage, with a certain additional pay for extra work. It was these things which he agreed to accept as compensation under the Act, and that agreement was, as I have said, duly signed and recorded. It seems to me that the Lord Ordinary is quite right in saying that you cannot split an agreement of that kind into two. The compensation for the accident was a composite thing, part of which, I quite agree, would not have been enforceable at all, and so the Lord Ordinary held on the question of relevancy. But still I do not see how it was competent to split it into two as the workman proposes to do. He says, I have got my £90—and that is all that was, strictly speaking, money compensation for the injury I received—but I propose to treat that separately altogether from the obligation to give regular employment in a certain capacity which I see is not enforceable under the agreement, because it was open to a number of objections, and I can only enforce it at common law. Now, I think that is an illegitimate way of dealing with the agreement, and it was so held, as I read the agreement, in the subsequent case of *Robertson* v. *Henderson & Sons*, namely, a report in 7 F. 776, because there the Court undoubtedly viewed the compensation as consisting partly of the promise or undertaking by the employers to give employment, although they admitted it was not enforceable at all.

Well then, here the workman agreed to that, and it was a term of the agreement which he made under the Act, and the Lord Ordinary has held that you cannot split it into two parts and treat the one part as compensation and the other not. I think it was all compensation, and the workman took it for what it was worth, and was bound to proceed as the Act directed, namely, by registering the agreement, which he did, and by charging upon it as a Sheriff Court decree. I agree with Mr Lees that it is impossible to treat a Sheriff Court decree as a thing which is to be split into its parts and treated differently according as one part was and the other was not, strictly speaking, enforceable.

That concludes the Lord Ordinary's mode of dealing with the plea of incompetency, and then he goes on to deal with the relevancy, and there again he holds that the pursuer's averments are objectionable as being not relevant, because his complaint is merely that the employers failed to give him regular employment as he considers it. Now, what is the fact? They took him on as foreman over the workers at the settling ponds and kept him there for two years and a-half. However, there arose a dispute between them owing to his failure to obey the orders of the foreman over the whole workers, which undoubtedly he was bound to obey. It is not said that he was not put as foreman over the workers at the settling ponds, but it cannot be contended that he was not bound to obey the foreman over the whole workers. There also I think the Lord Ordinary was perfectly right, and therefore what I propose to your Lordships is to adhere to the interlocutor which the Lord Ordinary has pronounced in both branches.

LORD LOW—I concur. I think that when the parties recorded the agreement under section 8 of the second schedule of the Act, they elected to abide by the Act, because the effect of recording the agreement was that, as it is put in the eighth section, they obtained what was equivalent to a County Court judgment in terms of the agreement; or if we take the words of sub-section (*b*) of the 14th section of the schedule, what was equivalent to a recorded decree arbitral in terms of the agreement. The pursuer having therefore chosen to take a decree which he can enforce, it seems to me that he must abide by the remedy which he has chosen, and cannot throw over the registration and appeal to this Court on the ground that this is a contract having nothing to do with the Workmen's Compensation Act at all.

But even if that view were not maintainable, I agree with the Lord Ordinary that the action falls to be thrown out on the ground that no relevant averment has been made. Under the agreement no doubt the employers bound themselves to give the workman regular employment as foreman over the workers at the settling pond, but no term of endurance of the employment is fixed. It was argued that the use of the word "regular" implied a term of endurance, but I do not think that is so, because I think that the word "regular" is used as distinguished from "occasional" or "intermittent," regular employment being employment which will enable the workman to earn wages regularly week by week. But as no term of endurance is fixed I take it that the employment was necessarily employment at pleasure, and that is a contract which in my judgment cannot be enforced, because I do not think that the Court will ordain that to be done which may immediately be undone.

But I do not think it is necessary to go as

far as that, because, assuming that the employers were bound at all events to give the workman employment for some time, they have done so. They have given him the stipulated employment and paid him regularly the stipulated wages for two and a-half years, and it is perfectly plain that the reason why they dismissed him in the end was that there was a dispute about the kind of work he was to perform. In these circumstances I think that it is plain that the claim of damages for breach of contract is untenable. On both branches of the case, therefore, I agree with your Lordship in the chair and with the Lord Ordinary.

LORD ARDWALL—I agree with the result at which your Lordships have arrived, that we should affirm the judgment of the Lord Ordinary, but I do so only on the question of relevancy, and that for the reasons stated by my brother Lord Low.

There was no duration here, and where this is so in a contract of service it is well settled that the duration of such contracts is what is customary in the employment. In the case of gamekeepers and gardeners, &c., it is usually held that the engagement is for six months or a year according to the custom of the country. With regard to workmen in a work of this kind, they usually are employed for the term of a single pay, which is generally a fortnight. I think, therefore, it is absurd to say that after the pursuer has been three years or so in the defenders' service and, the parties having fallen out about the nature of the employment, the defenders have dismissed the pursuer, there is any relevant averment entitling him to damages, and accordingly on that ground I think the action is irrelevant, and that the defenders must be assoilzied.

But I must say that I am not, without much further consideration, prepared to agree in holding that this action is incompetent. I am not convinced that it is illegal to insert an undertaking to give employment as part of a contract for compensation under the Workmen's Compensation Act. If it is not illegal to do so the question comes to be, How is such an agreement to be enforced? It is said—"Just register your memorandum, and go on and charge upon it." Now that is all very well, but a contract of service, as is pretty well settled, is not a contract of which a court of law will decern specific implement. But the service has come to an end, and the man has been discharged. What, then, does the pursuer's claim resolve into? If a relevant case had been stated it would resolve into a claim of damages; but there is no procedure prescribed by the Workmen's Compensation Act for enforcing such a claim, and therefore I must say I am disposed to think, if there had been a relevant case here, it was not incompetent to ask in an ordinary Court of law a remedy which could not be worked out under the Workmen's Compensation Act. We, however, have not a relevant action here, and accordingly I refrain from expressing a definite opinion on the question of competency.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C.—Gillon. Agents—Kirk Mackie & Elliot, S.S.C.

Counsel for the Defenders (Respondents)—Lees, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S.

Tuesday, February 25.

SECOND DIVISION.

PENNY'S TRUSTEES *v.* PENNYS AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance — Conditional Institution of Issue.

A testator, whose estate consisted almost entirely of heritage, left his widow, whom he appointed his sole trustee, a liferent of his whole estate, "the same to be realised and divided equally on her death among my children share and share alike, the issue of predeceasing children taking among them the share which would have fallen to their parents if in life." He had provided for advances being made if necessary to any child, "all payments made to children being reckoned as part of their ultimate share when the same falls to be divided."

Held (1) that the estate vested in the testator's children *a morte testatoris*, but subject to defeasance in the event of their predeceasing the liferentrix leaving issue who should take, and (2) that an advance formed a burden upon a share whether eventually falling to a child or those in his right.

Cairns' Trustees v. *Cairns*, 1907, S.C. 117, 44 S.L.R. 96, *followed*.

Question as to the effect of the issue also of a predeceasing child failing to survive the liferentrix.

James Penny of Park, in the counties of Aberdeen and Kincardine, died on the 22nd day of January 1902 possessed of estate of the net value of about £20,000, of which about £19,500 was heritage, and leaving a general settlement dated 10th September 1901, and subsequently registered 27th January 1902.

The testator's settlement was:—"I, James Penny of Park, seeing that I intend to make a will for regulating the division after my death of my means and estate, do hereby, in order to settle the same meantime until I have fully and ripely considered the terms thereof, appoint my wife to be my sole trustee and executrix, with power to her as trustee and executrix foresaid to borrow money on the security of my estate either for the purpose of setting up any of