The accounts having been remitted to the Auditor for taxation, he disallowed the charges for the precognitions of seventeen witnesses taken upon 7th June, at which date no issue had been allowed and the record had not been closed.

The pursuer objected to the Auditor's report on the ground that he had disallowed these charges.

Argued for the pursuer—There had been a lower tender made which he had legitimately rejected, and in view of it he had been quite right in taking precognitions. An issue had ultimately been adjusted, and accordingly the date of taking the precognitions was immaterial. The interlocutor of the Court distinctly specified expenses "to 12th June," and this was an expense incurred prior to that date.

Argued for the defender—These precognitions had been taken before an order for proof or adjustment of issues, and were therefore not a good charge against the other side. It was the practice of the Auditor to disallow such charges—*Shirer* v. *Dixon*, May 28, 1885, 12 R. 1013, 22 S.L.R. 669; *Church* v. *Caledonian Railway Company*, December 22, 1883, 11 R. 398, 21 S.L.R. 268. The tender should have been accepted when no issue would have been necessary, and the pursuer ought not to profit by his wrongous procedure.

LORD ADAM—This is a case in which a tender for £51 was made on June 12th, and rejected by the pursuer, and the case went to trial. A verdict for £50 was given in the pursuer's favour, and the Court pronounced an interlocutor whereby they found the pursuer entitled to expenses up to 12th June 1901.

The charges which have been struck out by the Auditor are for the precognitions of seventeen witnesses taken upon the 7th June. The principle upon which the Auditor has proceeded is that the parties carrying on a litigation are not entitled to the expenses of any precognition taken before proof has been allowed or issues have been adjusted. These expenses were all incurred before issues were adjusted. Now, it appears to me that where a party tenders a sum of money, together with expenses up to date, that means the legitimate and proper expenses to which the pursuer would be entitled if he succeeded in the action. If that be so, it is clear that these charges cannot be allowed, because they were incurred before the allowance of proof or adjustment of issues, and that the the Auditor was right in disallowing them.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court repelled the objection to the Auditor's report.

Counsel for the Pursuer—J. C. Watt—Spens. Agents—Reid & Crow, Solicitors.

Counsel for the Defender—Watt, K.C.—Munro. Agents—Sim & Garden, S.S.C.

Friday, December 20.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED *v.* MOONEY.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—*Factory and Workshop Act* 1878 (41 *and* 42 *Vict. c.* 16), *sec.* 93 (3)—"*Factory*"—*Accident in Car-Shed Adjacent to Repairing Workshop of Tramway Company.*

A car-driver in the employment of a tramway company while oiling his car in the car-sheds, where the cars were kept while not in use, was injured by a travelling platform called a car-traverser, which was worked by a cable driven by a steam-engine in the immediate vicinity of the car-sheds. No other mechanical power was used in the car-sheds, but in the repairing workshop or machine-room, which was divided from the car-sheds by a wall, mechanical power was used for the purpose of repairing any parts of the cars which required repair, such parts being taken to the machine-room for that purpose and thereafter affixed to the cars in the sheds.

In a claim by the car-driver for compensation under the Workmen's Compensation Act 1897, *held* (*diss.* Lord Moncreiff) that the accident in question occurred on, in, or about a "factory" within the meaning of section 93 (3) (*b*) of the Factory and Workshop Act 1878, and section 7 of the Workmen's Compensation Act 1897, and that the Tramway Company were consequently liable in compensation.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, before the Sheriff-Substitute at Edinburgh (HENDERSON), between the Edinburgh and District Tramways Company, Limited, appellants, and James Mooney, car-driver, claimant and respondent.

The facts proved, as stated by the Sheriff-Substitute, were as follows:—"The respondent James Mooney was in the employment of the Edinburgh and District Tramways Company as a cable car-driver. At about 7 a.m. of 20th March 1901, while Mooney was engaged oiling his car preparatory to its being taken out for the day he was struck by a travelling platform called a car-traverser, and his right leg was so injured between the car-traverser and a side wall that it had eventually to be amputated below the knee, and in consequence he has suffered permanent disablement from his then employment. The place where this accident occurred was in the car-sheds of his employers at Shrubhill, Leith Walk, Edinburgh. These sheds consist of a covered-in building 550 feet long

by a 160 feet wide. Down the centre of this erection there runs a well 33 feet wide and 27 inches lower in level than the flooring upon each side of it. In this well the travelling platforms or car-traversers are moved backwards and forwards by means of a cable driven by a steam-engine in the immediate vicinity of the car-sheds. The cars when brought to the sheds are pushed from the rails on which they have been brought in from the street on to the corresponding rails on the car-traversers, and the traverser is then moved to whatever position in the sheds the car is intended to be taken to, and the ends of the rails on the traverser having been placed directly opposite similar rails in the flooring of the shed, the car is then pushed into its desired place on either side of the well; when cars are taken out of the sheds a like process is gone through, the operation being reversed. It was while standing in the well above described at the end of his car that Mooney was injured. At intervals throughout the length of the sheds brick partitions exist on each side of the traverser well and at right angles thereto, which partitions form the basis from which the various portions of the roof of the sheds spring, the roof consisting of a series of angular glazed ridges, each partitioned off portion being covered by a separate ridge. At the west end of these sheds and at the north side thereof, and at a point where the traverser well ceases to be covered in by a roof and to be closed in from the open air, there is what is variously called a machine-room or workshop, which is divided from the sheds by a somewhat heavier brick wall than those which partition off the spaces in the sheds. This brick wall also is higher than the partition walls in the sheds, and the roof (which is similar to the roof of the sheds) springing from it is consequently higher than the shed roof, and therefore not a continuation of it. The flooring of this machine-room or workshop is also lower than that of the sheds, being on the level of the traverser well which passes along one side of it. The area of this machine-room is about 75 feet long and about 50 feet wide. Access to the machine-room is got by two large doors 7 feet wide, one in the wall dividing the machine-room from the sheds, and the other in the outside wall next the uncovered open part of the traverser well. These doors are kept closed by iron shutters from top to bottom, and entrance is obtained by means of small wickets in them. In the machine-room there are lathes, turning machinery, and boring machinery, which are used in connection with the repairs executed in the machine-room, which are put in motion by two electric motors. A foreman and eight or twelve men constitute the staff in this machine-room, and their duties are to repair the grippers, screws, and other parts of the cars, the pieces requiring repair being put right and mended in the machine-room and then affixed to the cars in the sheds. This is the sole purpose of the machine-room. No mechanical power is used in the sheds themselves apart from the power employed in moving the car-traverser. In addition to the affixing of the repaired portions above referred to as taking place there, the platforms, woodwork, and paint of the cars are also repaired in the sheds. From 90 to 100 cars are nightly housed in the sheds, and cars from almost all parts of the company's system are brought there for such repairs as have been described. Mooney was only a car-driver, and had nothing to do either with repairs or with the sheds or with the machine-room. The spot where Mooney was injured is 374 feet from the wall which divides the machine-room from the car-sheds."

On these facts the Sheriff-Substitute held in law—"(2) That the accident took place in or about a portion of the company's premises which formed a factory within the meaning of section 93, sub-section (3) (*b*), of the Factory and Workshop Act 1878, and therefore within section 7 of the Workmen's Compensation Act 1897, and that the claimant was entitled to succeed in his claim for compensation."

The question of law for the opinion of the Court was—"2. Did the accident in question occur on, in, or about a factory within the meaning of section 93, sub-section (3) (*b*), of the Factory and Workshop Act 1878?"

The Workmen's Compensation Act 1897, sec. 7, enacts—"(1) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about (*inter alia*) a factory." "(2) In this Act . . . 'factory' has the same meaning as in the Factory and Workshop Acts 1878 to 1891."

The Factory and Workshop Act 1878, sec. 93, enacts, *inter alia*—"The expression 'non-textile factory' in this Act means . . . (3) also 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—that is to say, (*a*) in or incidental to the making of any article or of part of any article, or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in or incidental to the adapting for sale of any article, and wherein or 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."

Argued for the appellants—1. The appellants' workshop was not a "factory." In order to bring it within the scope of sec. 93 (3), it must be shown that the process carried on was that of making articles for sale, or repairing articles for customers; and further, that it was carried on "by way of trade or for purposes of gain." Neither of these elements was present here. The appellants' business was that of running cars for hire, and the repairing of these was merely incidental to that business. Nor could such repairing be said to be for purposes of gain, although the appellants might effect a saving by doing their own repairs—*Caledonian Railway Company* v. *Paterson*, November 17 1898, 1 F. (J.C.) 24, 36 S.L.R. 60; *Henderson*

v. *Corporation of Glasgow*, July 5, 1900, 2 F. 1127, 37 S.L.R. 857; *Nash* v. *Hollinshead*, (1901) 1 K.B. 700. (2) But assuming that the workshop was a factory, the car-shed where the accident occurred was not part of the factory. The car-shed was a mere coach-house for the cars, and had no connection with the workshop—*Milner* v. *Great Northern Railway Company* (1900), 1 Q.B. 795; *Barclay, Curle, & Company* v. *M'Kinnon*, February 1, 1901, 3 F. 436, 38 S.L.R. 321. The appellants did not dispute that the accident arose out of and in the course of the respondent's employment.

Argued for the respondent—The Sheriff was right. The manufacturing process spoken of in sub-section 3 (*c*) must be read in connection with sub-section 3 (*b*), which expressly mentioned repairing as included in that expression. It was not essential that the process should be a manufacturing process in the strict sense—*Weir* v. *Petrie*, June 19, 1900, 2 F. 1041, 37 S.L.R. 795. Further, the work carried on was by way of trade or for purposes of gain. Clearly it would be so if the repairing were done by a person not the owner of the cars. The result should be the same where the company did their own repairs. It was sufficient if the operation resulted in a saving to the company—*Henderson, cit. supra, per* Lord President at p. 1134; *George* v. *Macdonald*, November 23, 1901, 39 S.L.R. 136. (2) If the workshop was a factory, the whole premises—workshop and car-sheds—must be regarded as *unum quid*. In any view the sheds were in the precincts of or about the factory.

At advising—

LORD JUSTICE-CLERK — There are two points to be dealt with under this appeal. The first is whether the works of the Tramway Company described in the case fall within the definition of the Workmen's Compensation Act, in which the Factory Act of 1878 is referred to for the data by which it may be ascertained whether a particular work is a factory falling within the Acts. The second is whether on the assumption that this was a factory, the place at which the accident happened was part of the factory.

The Sheriff-Substitute has given a most clear and comprehensive series of findings in fact, describing with great fulness the place and the work carried on in it. Upon these facts I agree with the decision at which he has arrived that the defenders had at their works a factory in the sense of the Factories Act. I am unable to agree with the argument which was addressed to the Court by which it was sought to establish that this case was similar to that of the Caledonian Railway Laundry in Glasgow, in which it was attempted to have the company condemned in a penalty because they had not complied with the requirements of the statute in posting rules, &c. That case was decided on the ground that it was not established that this part of the hotel establishment was carried on for gain or profit, but only for the convenience of the general business of the hotel, and that therefore it was not a public laundry falling under the statute. I do not think that that case is at all analogous to the present, where engineering works such as are described were established by the defenders.

Upon the second point I am also satisfied that the Sheriff's decision is right. This machine shop was so placed that when cars were brought in and taken out they passed through the space occupied by the machine shop. The mechanical power generated in the machine shop was carried to the carriage shed to haul the cars opposite the sidings in which they were to lie and to haul them out again. The mechanics took any parts requiring repair to the machine shop and brought them back to refix them. It is true that the car at which the accident happened was 374 feet from the wall of the machine shop, but this was an accidental circumstance. It might have been close to it. The very large number of cars requiring to be housed in the shed was the only reason why some cars had to be placed at some distance from the machine shop, a large number of lyes being necessary, but the shed itself was in direct contiguity with the machine shop, and the work of the machine shop was in direct relation to the cars, whatever might be the particular position of each car in the shed.

I am of opinion that the question of law should be answered in the affirmative.

LORD YOUNG—I concur.

LORD TRAYNER—On the facts stated by the Sheriff-Substitute I think he has reached a sound conclusion.

LORD MONCREIFF — 1. If the appellants' machine-room or workshop is held to be a non-textile factory in the sense of section 93 (3) of the Factory and Workshop Act 1878, it may reasonably be held that the shed in which the accident to the respondent occurred is "within the precincts" of the factory. Even this is not so clear, because the machine-room or workshop is simply a comparatively small adjunct—70 feet long by 50 feet wide—of the enormous sheds 550 feet long by 60 feet wide, the chief use of which is to serve as a covered siding for the tramway cars when not in use. But on the other hand it is found as a fact that when a car requires to be repaired, the repairs are put on it in the sheds.

2. But on the other point I have more doubt. The material words are "premises wherein manual labour is exercised in making, repairing, or adapting for sale of any article by way of trade or for purposes of gain wherein steam, water, or other mechanical power is used," &c., "in aid of the manufacturing process," &c.

I do not say that read in one way these words will not bear the meaning your Lordships put upon them, but as far as I know they have not hitherto been so interpreted. If they had been so interpreted, this and similar workshops would have been dealt with and inspected as factories. I have hitherto understood that the pre-

mises referred to in sub-section (3) were premises in which the trade carried on was that of making articles for sale or repairing them for customers, and that the sub-section did not apply to premises in which the work of making or repairing articles was merely incidental to a trade or business which did not consist in selling or giving out the goods in question. Now, the work which is carried on in the appellants' machine-room and workshop and partly in the sheds is not in itself a trade carried on for the sale of articles made or repaired in the machine-room. The trade or business of the appellants is that of carriers and not that of the makers or repairers of tramway cars, and therefore the operations which go on in the machine-room and workshop are simply incidental to that trade or business, although indirectly they may be necessary to earning gains in the appellants' business. The work done is simply necessary repairs on the cars.

That is the footing on which I understood that the case of the *Caledonian Railway Company* v. *Paterson*, 1 F. (J.C.) 24 (in which I concurred) was decided. The Factory and Workshop Act of 1895, section 22, sub-section 1, enacts that with respect to any laundry "carried on by way of trade or for purposes of gain" certain provisions of the Factory Acts, including powers of inspectors and fines, should apply. The laundry in question was attached to one of the Railway Company's hotels, and a complaint was lodged to the effect that in this laundry the Railway Company had failed in terms of the Acts to affix an abstract of the Factory and Workshop Acts, and therefore became liable in a fine. It was held that the laundry was not in the sense of the statute carried on by way of trade or for purposes of gain. The work done in it was (1) washing of hotel linen, (2) washing of the clothing of the hotel staff, and (3) washing of the clothing of visitors to the hotel. The first purpose is the one most applicable to this case. In order to carry on the trade or business of hotelkeepers the company required to have their hotel linen washed (no doubt at considerable expense), just as they required to keep the furniture of the hotel in a good state of repair. That is exactly what the appellants in this case are doing. They do not sell or hire out tramway cars, but they require to keep their rolling-stock in good repair, and they do this with the assistance of their own workmen in their own workshop. I therefore cannot see any solid distinction between the two cases.

Your Lordships, however, are prepared to give a more liberal interpretation to the Factory and Workshop Act, and I cannot say that I regret it, because for the purposes of the Workmen's Compensation Act work carried on in such an establishment is just as dangerous and likely to cause injury to the workmen employed in or about it as work in premises in which the trade carried on is making or repairing articles for sale.

But as your Lordship's judgment finding these premises to be a factory will be attended with not unimportant consequences, such as inspection, I have felt bound to express my dissent.

The Court answered the question of law in the affirmative and affirmed the award of the arbitrator.

Counsel for the Appellants—Campbell, K.C. — Spens. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Claimant and Respondent —M'Lennan—Munro. Agents—Cumming & Duff, S.S.C.

Friday, December 20.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

ALLAN *v.* JONES & COMPANY'S TRUSTEE.

Right in Security—Transaction in Form of Sale but Intended to Operate by way of Security—Security over Moveables Retenta possessione—Bankruptcy Act 1696, *cap.* 5—*Sale—Sale of Moveables—Sale of Goods Act* 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 61, *sub-sec.* 4.

In 1899 a borrower, who was a bicycle agent, obtained a loan of £40, and in consideration thereof gave to the lender a promissory-note for that sum, and also as one of the conditions of receiving the loan gave to the lender a receipted invoice for certain bicycles priced at £72, 12s. No price was in fact paid, and the bicycles remained in the possession of the borrower. The borrower having granted a trust-deed for behoof of his creditors on 13th August 1900, and left his business in the hands of a manager, the lender thereafter claimed five of the bicycles invoiced, and at his request the manager sold three of them and paid the proceeds to the lender, and also removed the two remaining bicycles to the lender's house. These two bicycles were subsequently sold by the manager and the proceeds were paid to the lender. On 7th September 1900 the estates of the borrower were sequestrated. In an action at the instance of the borrower's trustee in bankruptcy against the lender for payment of the proceeds of these bicycles, *held* (*diss.* Lord Young) that the receipted invoice was an attempt to create a security over moveables left in the possession of the debtor, that no security was thereby created, that the realisation by the borrower within sixty days of bankruptcy of five of the bicycles specified in the invoice on behalf of the lender was in contravention of the Act 1696, cap. 5, that the payment of the proceeds thereof made to the lender was not in whole or in part a cash payment in ordinary course of business; and that