Friday, March 6.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

LAW v. WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, rule* (3)—*Wage-earning Capacity—Suitability of Employment—Loss of One Eye—Nova causa interveniens.*

A miner having lost the use of an eye his employers admitted liability and paid him compensation for a certain period, after which they terminated payment on the ground that he was able to resume his former occupation as a miner at the face. The miner applied for a review of the compensation, on the ground (*a*) that he was incapable of working at the face by reason of the loss of the sight of his eye, and (*b*) that in any event the risk to a one-eyed man involved in the work was such as to entitle him to refuse to resume it. The arbitrator dismissed the application. *Held* (*dub.* Lord Johnston) that the arbitrator had arrived at a correct decision.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I, (3), enacts — ". . . In the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

Henry Law, miner, Croy, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 from Messrs William Baird & Company, Limited, *respondents*, in respect of injuries which he alleged he had sustained on 24th April 1913 while at work in the respondents' employment.

On 27th November 1913 proof was led before the Sheriff-Substitute (MACDIARMID), who dismissed the application and found the appellant liable to the respondents in expenses. On 19th January 1914 he stated the following case for appeal:—"I found the following *facts* proved—(1) That when on 24th April 1913 the appellant, who is a miner, was working at the face in No. 1 Gartshore Pit, Gartshore, a chip of coal flying from the stroke of his pick struck him on the left eye injuring the same; and that said accident admittedly arose out of and in the course of his employment with the respondents. (2) That as a result of said accident the appellant had lost the sight of his left eye. (3) That the respondents paid him the compensation to which he was entitled under said Act from the date of said accident until 12th September 1913. (4) That at the latter date they ceased to pay him compensation on the ground that he was able to resume his former occupation as a miner at the face and to earn his former wage. (5) That the appellant maintained (*a*) that he was incapable of working at the face by reason of the loss of the sight of his left eye, and (*b*) that in any event the risk to a one-eyed man involved in the work was such as to entitle him to refuse to resume it. (6) That the risk disclosed by the evidence was that a chip flying from the pick might strike the eye with resulting injury, which might be, as in the present case, serious. (7) That while risk of serious injury was obviously appreciable, in point of fact a miner was often struck by a flying chip without such injury resulting. (8) That the said risk was incident to employment as a miner at the face. (9) That it was not increased by the fact that the miner had lost the sight of one eye. (10) That at 12th September 1913 the appellant was able to resume his occupation as a miner at the face and to earn his former wage. In these circumstances I *dismissed* the application and found the appellant liable to the respondents in expenses."

"The *question of law* for the opinion of the Court is—On the facts stated was I entitled to dismiss the appellant's application for compensation?"

Argued for appellant—The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) meant by "incapacity" incapacity to earn wages, not mere physical incapacity—*Eyre* v. *Houghton Main Colliery Company, Limited*, [1910] 1 K.B. 695, Fletcher Moulton, L. J., at 700. The Sheriff in his judgment had failed to take notice of the personal choice of the workman to decline the work offered as not suitable in his present condition. Suitability was a mixed question of fact and law—*Eyre* (*supra*), Buckley, L.J., at 701. Under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) a workman might exercise his judgment as to the suitability of the work offered—*Fraser* v. *Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, Lord President (Balfour) at 912, 38 S.L.R. 653; *Ellis* v. *Knott*, 2 Butterworth 116 (old series). The question of suitability of employment involved consideration of risk of consequences. His prospect of getting work in the open market was a further consideration. The cases of *Howards* v. *Wharton*, 6 Butterworth 614; *Elliot* v. *Curry & Dodd*, 5 Butterworth 584; and *Hargreave* v. *Haughhead Coal Company, Limited*, 1912 S.C. (H.L.) 70, 49 S.L.R. 474, all involved considerations which were not here present.

Argued for respondents — It had been held that the loss of an eye was no reason for continuing compensation — *Hargreave* (*supra*). If as a result of a second accident the sight of the other eye was lost, there was no causal connection between the two accidents — *Howards* (*supra*) and *Elliot* (*supra*). It was purely a matter of fact for the Sheriff whether there was greater risk involved in the employment of a one-eyed man—*Eyre* (*supra*). The general principle

was that wage-earning capacity meant physical capacity. Of this there were only two qualifications—(1) when the full results of an injury were not known; (2) when physical fitness had been restored but market value had depreciated. In both cases a suspensory award was appropriate, but such was not the case here. *Eyre* (*supra*) was in marked contrast to the present case, because there the man was still partially incapable. The Court ought not to consider the possibility of another accident occurring—*Cox* v. *Braithwaite & Kirk*, 5 Butterworth 77; *O'Neill* v. *John Brown & Company, Limited*, 1913 S.C. 653, 50 S.L.R. 450.

At advising—

LORD PRESIDENT—On the 24th April 1913 an accident befell the appellant in the course of and arising out of his employment as a miner. The result of the injury which he then suffered was to deprive him of the use of his left eye. His employers admitted liability and paid him compensation down to 12th September 1913, when they ceased payment, contending that the appellant was able to resume his former occupation as a miner at the face and to earn his former wage.

Now the arbitrator found that this contention was well founded, for the 10th finding runs thus—"That at 12th September 1913 the appellant was able to resume his occupation as a miner at the face and to earn his former wage." He found further that the loss of his left eye did not render the man more liable in the future to the chance of a similar accident befalling him, and it is clearly found that his incapacity due to the injury he suffered on the 24th April 1913 had absolutely ceased, and that his wage-earning capacity was unimpaired, for it was not contended to us that a miner who had lost the sight of his left eye was handicapped in the labour market. That was not maintained before us, and we were not asked to allow any inquiry upon that subject.

But the miner says, that although his incapacity due to the result of the injuries he received upon the 24th April 1913 has ceased, and although his wage-earning capacity is unimpaired, still if a similar accident befalls him in the future the consequence will be the total loss of his eyesight, and accordingly that the employment of a miner working at the face is no longer a suitable employment for him. Accordingly he maintains that the arbitrator did wrong when he dismissed his application for a review of the compensation.

I am of opinion that the arbitrator was right, and upon this short and simple ground, that the appellant's incapacity due to the injury resulting from the accident he suffered had ceased, and that his wage-earning capacity was wholly unimpaired. And I cannot see, having regard to the terms of the 3rd section of the First Schedule of the Act, that the arbitrator could have pronounced any other finding than he did. That section runs as follows:—". . . [*quotes, v. sup.*] . . ." It is to be observed, therefore, that the arbitrator is not to approach the consideration of the difference between the man's wage-earning capacity before and after the accident until partial incapacity due to the accident can be postulated. Now partial incapacity cannot be postulated in this case. The condition, therefore, is never fulfilled, and the arbitrator cannot approach the consideration of the question which is formulated in the 3rd section.

I think, therefore, that Mr Horne was quite right in his contention to us when he maintained that partial incapacity having ceased, and capacity to earn his former wage and to work at his former employment having returned, the one and only suitable employment for the man was the employment in which he had been formerly engaged.

If the chance of a chip flying from the pick and injuring the man's eye is not increased in the future by the result of the injuries which he sustained on the 24th April 1913, then the certainty that if such an accident occur the results will be serious —the total loss of sight—does not render the employment unsuitable. To say otherwise would be equivalent to asserting that for a one-eyed man employment at the working face as a miner was always an unsuitable employment; at all events there is no finding to that effect here. To take into account now the chance that in the future an accident may befall him with all its attendant consequences would be in effect to find that his present employers are liable to pay compensation to him for an accident which may never take place, and for the consequences of which, if it does take place, somebody else will require to pay full compensation. In short, if an accident does occur in the future, the consequences of which are total blindness to this man, then it will be a *nova causa interveniens*. The consequence of total blindness will be attributable directly to the second accident, and there will be no causal relation between this consequence and the first accident which took place. In short, the train of causation will be entirely broken, and the serious consequences which it is figured may occur if the man is unfortunately the victim of a second accident will be attributable to that accident and to that accident alone. It will not be the result, direct or indirect, remote, improbable, unnatural even, of the first accident which occurred. It will be the result of a *nova causa* which may never emerge.

If the learned Lords Justices in the case of *Eyre* v. *Houghton Main Colliery Company, Limited*, [1910] 1 K.B. 695, were considering a question exactly similar to that which we have now actually before us, then I have no hesitation in saying that I prefer the opinion of Lord Justice Buckley to the opinion of Lord Justice Fletcher Moulton for the reasons I have just given. It appears to me that to give effect to the view expressed by Lord Justice Fletcher Moulton would be to run counter to the principle which was laid down as far back as the year 1902 by the Master of the Rolls (Collins) in the case of *Dunham* v. *Clare*,

[1902] 2 K.B. 292, and would be entirely antagonistic to the decision recently pronounced in the Scottish appeal in the House of Lords—*Hargreave* v. *Haughhead Coal Company, Limited*, 1912 S.C. (H.L.) 70, where the reasoning on which the judgment rested seems to me to apply directly to the case we have before us. Lord Atkinson in that case said—"The compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and that alone, that the workman is entitled to receive compensation. The function of the schedule"—to which I have referred—"is to supply a measure of damages for that compensation"—compensation for that accident which has actually happened—"but the man is not entitled to compensation for an injury not inflicted upon him by the accident with which he meets. If the argument of the appellant were well founded, if a man loses one eye, inasmuch as if anything happens to the other eye he would become totally blind, the award must be for ever kept open in order to see whether that misfortune will ever befall him."

Now that reasoning appears to me to be applicable in terms to the present case, and I think if we were to reverse the judgment of the arbitrator here we would be in effect keeping open indefinitely the award of compensation in order to see whether an accident might subsequently befall the man. It would be quite otherwise if the arbitrator had found that the risk of another accident had been increased by the former accident. But he has found exactly the contrary. He has found that it is not increased by the fact that the miner has lost the sight of one eye, and therefore I am clearly of opinion that—inasmuch as the consequence which it is figured to us might result if another accident did take place cannot be attributable, directly or indirectly, to the accident which befell this man on 24th April 1913—the arbitrator has come to a right conclusion, and I am for answering the question put to us therefore in the affirmative.

LORD JOHNSTON—The workman in this case, who was a miner, lost his left eye by a chip of coal striking him when working at the face. He has recovered from the injury, but is now blind of his left eye. He is physically able to return to work at the face. But he has declined to do so on the ground that though every miner working at the face is exposed to the risk of losing an eye through a flying chip of coal striking it, and though he would be so exposed only equally with others, yet the result of such accident would be to him so abnormally serious, viz., total blindness, that he ought not to be required to face it.

This in effect is the question, not raised for the first time, though not yet solved, whether mining at the face is or is not a suitable employment, in the sense of the third section of the First Schedule of the Act of 1906. Upon the answer it depends whether the Sheriff here was or was not justified in refusing compensation. I say refusing, because though the Sheriff does not tell us in what form the case came before him, I take it that compensation had been voluntarily paid and then stopped, and that the workman did not commence the proceedings by application to record a memorandum of agreement, but by demand for arbitration.

The Sheriff has found (1) that the risk of being struck in the eye by a flying chip of coal is incident to the employment of a miner at the face; (2) that the risk is no greater to a one-eyed man than to a man with both eyes; (3) that the workman was at 12th September 1913 able to resume work at the face at his former wage; and he therefore dismissed his application. The workman has appealed.

I may first deal with two initial points, viz., (1st) I take it that when the Sheriff says that the risk is no greater to a one-eyed man than to a two-eyed man, he means simply the risk or chance of the accident occurring, and not the risk in the sense in which the word is used in the case of insurance, or the measure of the result of the accident; and (2nd) that no question is raised as to the disadvantage to the appellant in the labour market of being a one-eyed man. The case was pleaded solely on the question of the suitability of the employment.

The question was raised in *Eyre* v. *Houghton Main Colliery Company*, [1910] 1 K.B. 695, in identical circumstances. But the case is distinguishable, in that the County Court Judge, differing from the Sheriff here, thought—and in this I think most men would agree with him—that a one-eyed man did, as compared with a two-eyed man, run an appreciably increased risk of injury to his remaining eye in working at the face, and taking into consideration that fact along with the absolute incapacity which might result from a second injury, he held the employment unsuitable, and awarded compensation. Cozens Hardy, M.R., held that what is suitable employment in each case is a question of fact for the arbitrator, and that there was evidence which justified the conclusion of the County Court Judge, which therefore could not be disturbed. Between Fletcher Moulton, L.J., and Buckley, L.J., there was a difference of opinion closely touching the present case.

Fletcher Moulton, L.J., while holding that increased risk was certainly an element to be considered, added—"Similarly the fact that the consequence of the risk, which is a special one in the case of mining, that is to say, injury to the other eye, would be so much more serious after the past accident, is also a consideration which the County Court Judge is justified in having regard to."

Buckley, L.J., considered the question as one of mixed law and fact, and he held that the consideration that having lost an eye, the loss of the second would be of greater import to the man in question than to any two-eyed man, was not relevant upon the question of suitability. But as the County Court Judge had also found that there was

increased risk in working at the face with only one eye, he agreed that the award could not be disturbed.

Now had the County Court Judge held with the Sheriff here that there was no increased risk, Fletcher Moulton, L.J., would have sustained, Buckley, L.J., would have upset, the award on the ground of misdirection.

I have considered very anxiously this judgment, and while I agree with Buckley, L.J., that the question is a mixed question of fact and law, I should, had I been sitting alone, have respectfully agreed with Fletcher Moulton, L.J., that the risk, in what I have called the insurance sense or the possible result of a second accident to a man who has already lost an eye, is a relevant subject for consideration by the arbitrator, and I should have decided that the Sheriff in the present case had misdirected himself, or rather that his direction was defective, in that he had not taken that matter into consideration.

The Irish case of ***Elliot***, (1912) 5 Butterworth 584, is of value for the adhesion of Lord Chancellor Barry to Fletcher Moulton, L.J.'s doctrine. *Hargreave's* case, 1912 S.C. (H.L.) 70, though in other circumstances it might have done so, did not in fact raise the present question. Your Lordship has referred to it, and in particular to Lord Atkinson's judgment. To understand the bearing of that case upon the present I think that it is necessary to keep in mind that the question of the right of the injured employee arises here in this form, viz., he being able to resume work, is he bound to accept the work offered him, whether his former work or some other, because it is suitable? Whereas in other cases it takes this form, viz., though he is able to resume work, is he, in the circumstances, entitled to have his right to compensation kept open by what in England is termed a declaration of liability? In *Hargreave's* case the question partook of the latter characteristic. In the present case it falls entirely within the former category. But there is another element in this class of case which has to be also kept in mind. A man who has lost an eye and re-enters the world as a one-eyed man is exposed to the loss of the other, possibly in endeavouring to carry on his former employment, possibly in a hundred other ways which have no relation to employment. *Hargreave's* case was in its circumstances quite different from the present. The workman had lost an eye. The other was threatened by a cause which was held in fact to have no relation either to employment or to the original accident. What was in question was his right to continued compensation, or at least to have the matter kept open, till it be seen whether he was to lose the other eye. To that *species facti* Lord Macnaghten's ground of judgment, and also Lord Atkinson's, are directly applicable. As where the latter says—"Compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and of that alone, that the workman is entitled to receive compensation." But that unquestionable proposition does not solve the question as it is raised in the present case, which is not, as in ***Hargreave's*** case, whether the matter of compensation is to be kept open, but whether compensation is to be continued ***pro tanto***, because by reason of the injury caused by the accident the workman cannot obtain his former living in a suitable employment. That question is not solved either by Lord Macnaghten or by Lord Atkinson, for their minds and their words were not directed to it.

As I have said, had I been sitting alone, I should have adopted and applied the view presented by Fletcher Moulton, L.J., in *Eyre's* case, [1910] 1 K.B. 695. But your Lordship, with whom I am aware Lord Guthrie agrees, has advanced cogent reasons for an opposite conclusion, and I do not feel sufficient confidence in my own opinion, notwithstanding the support to which I have referred, to justify my dissenting from the judgment which your Lordship proposes.

Lord Guthrie—I am unable to discover in the findings of the arbitrator grounds for disturbing the result at which he has arrived. I go further, and think he has reached the right result.

In his findings the arbitrator has not referred to the fact, which is of course obvious, that if the appellant at any time in future, whether by disease or accident, loses the sight of his remaining eye, he will be incapable of any seeing employment. We were told that in the argument before him the arbitrator was asked to take this fact into consideration, and on account of the special risk of an accident to the remaining eye connected with this employment (see finding 8) to find that the appellant's former employment was not "suitable employment" in the sense of Schedule I, rule 3, and to hold that the respondents were not entitled, as they had done, to cease to pay him compensation on the ground that he was able to resume his former occupation as a miner at the face and to earn his former wage.

In his argument the appellant assumed that he fell within the scope of Schedule I, rule 3, and that the only question was whether the consequences of a possible accident in the future to his remaining eye, arising in this particular employment, was one of the elements that could be taken into account in the question of what is suitable employment in the sense of the statute.

But there is a prejudicial question. The matter of what is suitable employment can only arise when there is partial incapacity. But the arbitrator has found on the facts, and I think has found rightly, that the appellant is not partially incapacitated. Take the case of a one-eyed man seeking employment at an occupation not requiring two eyes. He could not be refused employment on the ground that he was partially incapacitated for such work; he will do the work as well as if he had both eyes. Incapacity and unsuitability are different things. Whether or not his former work is, on an all-round consideration of the whole circumstances,

suitable for the appellant, the arbitrator's finding (No. 10) is conclusive as to the appellant's partial incapacity to do his former work having ceased. I therefore think that the appellant is not in a position to raise any question under Schedule I, rule 3. I do not decide what the appellant's position would have been had he raised the question considered in the case of *Dempsey*, 51 S.L.R. 16, as to the direct effect of his injury on his wage-earning capacity in times of dull trade. Had he done so, I am inclined to think that the point I am now dealing with would not arise.

Suppose I am wrong in thinking the appellant excluded from raising any question under Schedule I, rule 3, it is necessary to consider whether, on account of the special conditions of his employment, the consequences of a future accident to the appellant's remaining eye, the effect of which would be to render him totally blind, can be taken into account by the arbitrator in considering the suitability of an employment. Such a consideration might occur to a prudent man, but I doubt whether it would in practice prevent any ordinary workman returning to his former employment. In any case I am of opinion that it is not an element which can enter into the question of what is suitable employment under the statute.

Under the Workmen's Compensation Act 1906 each accident is dealt with by itself, and full statutory compensation is given for each accident. So far as the workman's wage-earning capacity is affected by an accident, full statutory compensation is given for that accident, whether the loss of the wage-earning capacity arises from physical or from other causes. If another accident arises the same process will be repeated. If this appellant should unfortunately in the future lose the sight of his remaining eye by another accident and become in that case totally incapacitated for life, he will receive full statutory compensation on the basis of total incapacity, and his then employer will not be entitled to plead that but for the earlier accident his liability would have been for partial incapacity only. But if the appellant's contention were to be sustained he would now be obtaining an advantage on account of an injury which may never occur, and for which, if it does ever occur, he will receive full statutory compensation.

The appellant limits his argument to a case like the present, where the particular employment involves a special risk to the remaining eye. I confess I do not see how the contention can be so limited. It seems to me that the logical result of the appellant's position would be to unfit him for any future employment of any kind, because every employment open to the appellant involves some risk of accident to the remaining eye, with the result of total blindness if an accident happens.

Therefore (assuming that the question can be considered, in view of the finding of the arbiter that partial incapacity has ceased) I am of opinion that the view expressed by Lord Justice Buckley in the case of *Eyre*, [1910] 1 K.B. 695, is right. I venture to think that the illustration given by Lord Justice Moulton, who took the opposite view in that case, is not applicable to the question now under consideration. He took the case of a man so damaged by the results of an accident that exposure to cold would kill him in circumstances which but for the accident would have been harmless. That seems to me to be a case in which an employment might be unsuitable from a risk directly due to the accident. The man would be physically incapacitated by the accident from encountering a risk of an ordinary incident in every out-of-door occupation. On the other hand, what we are now considering is not a risk directly and certainly arising out of the accident, but a question of remote and hypothetical consequences which may never occur, and for which, if they do occur, a remedy will be available.

The Court dismissed the appeal.

Counsel for Appellant—Moncrieff, K.C.—Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondents—Horne, K.C.—Russell. Agents—W. & J. Burness, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, March 7.

(Before the Lord Justice-General, Lord Ormidale, and Lord Anderson.)

HILSON *v.* EASSON.

Justiciary Cases—Procedure—Pleas in Bar of Trial—Tholed Assize—Person Charged in England with Obtaining Goods by False Pretences, admitting before Sentence Guilt of Similar Offence for which Warrant of Arrest Issued in Scotland—English Sentence Pleaded in Bar of Trial in Scotland.

A person was convicted in a Court of Quarter Sessions in England of obtaining goods by false pretences, and was allowed, in accordance with English practice, to plead guilty to a further offence of the same nature for which a warrant was out for his arrest in Scotland, but in which no complaint had yet been served upon him. The English Court, in passing sentence, declared that they had taken into consideration the offence committed by the accused in Scotland. Subsequently he was charged in a Sheriff Court in Scotland with the further offence above mentioned, and the relevancy of the complaint was objected to on the ground that he had already tholed an assize.

Held that the proceedings in England could not be regarded as a trial of the accused for the offence charged in the complaint, that he had consequently not tholed an assize, and that the complaint was relevant.

Observed that if the accused were convicted, the question whether he had already been adequately punished in England for the offence charged in the