

ing note without hearing what the defenders' counsel had to say in explanation of the request which they made to supersede consideration of the pursuers' motion. The only explanation that was given was that as against the pursuers' liquid claim there might arise in an arbitration a counter claim for expenses in favour of the defenders. I never heard of a counter claim which might arise being dealt with as if it had already arisen. I think that the course which the Lord Ordinary has taken sins against the rule that compensation can only operate when you have two liquid claims. I think therefore that the Lord Ordinary's interlocutor should be recalled, and decree granted in name of the agents-disbursers.

LORD LOW—I think it was clearly recognised in the case of *Oliver* that extract of a decree for expenses may be superseded if another litigation is going on between the same parties in which a cross award of expenses may be made. If that be so when different actions are going on, I think it must also be so when an incidental award of expenses is made during the course of an action. What the Lord Ordinary has done is practically to supersede extract, on the ground that a counter claim for expenses may arise. I have no doubt that that was a competent course to follow, and as incidental expenses in the Outer House are very much in the discretion of the Lord Ordinary, I confess I should always be slow to interfere with what the Lord Ordinary has done. But the Lord Ordinary evidently recognised that this was a matter on which the parties were entitled to take the judgment of the Inner House, because he granted leave to reclaim, which he was not bound to do. That leaves us free to consider the case on its merits, and so, considering it, I think it is one in which there should be decree in name of the agents-disbursers.

LORD ARDWALL—The only cases cited to us in which a motion for decree in the name of the agents-disbursers for expenses which have been found due has been refused have been those in which there was a then existing right of set-off for expenses already found due to the other party, and the ground for refusing the motion was that that existing right would be injured if the motion were granted. But no case has been cited to us in which a motion for decree in the name of the agents-disbursers has been refused merely because there might possibly arise, either in the same or in another action, a claim for expenses on the other side. In the case of *Oliver v. Wilkie*, where two actions were in dependence between the same parties, the facts were that an interlocutor in each of the separate actions was pronounced on the same day, and in one of the actions the Court found that the pursuer's expenses were of a certain amount, but found that she was not entitled to obtain decree therefor in her agent's name in respect that the defender was entitled to set off the expenses due to him in the other action.

The whole question there dealt with, therefore, was as to two sets of expenses both presently due, and the observations in certain of the Judges' opinions as to supersession of extract were not strictly necessary for the decision of the case. What was said in these opinions was, that if two actions were running side by side, extract of the principal decree in one action might be superseded until decree should be pronounced in the other action. That, certainly, is a competent course for the Court to take. But it is only if it is clearly shown that one of the parties will be unjustly prejudiced that that course will be adopted, because when once a party has been found entitled to expenses he has a right to obtain extract of the decree, and it is only for very strong reasons that he will be deprived of that right. No such reasons have been shown in the present case, and, accordingly, I think the pursuer's motion should be granted.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary to decern for the taxed amount of expenses in name of the agents-disbursers.

Counsel for the Pursuer (Reclaimer)—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders (Respondents)—Cooper, K.C.—Crawford. Agents—Simpson & Marwick, W.S.

Friday, June 5.

SECOND DIVISION.

[Lord Guthrie, Ordinary.]

NATIONAL HOUSE PROPERTY INVESTMENT COMPANY, LIMITED v. WATSON.

Company—Contributory—Application for Shares—Calls Set off against Fees—Ultra vires—Directors.

A in applying for shares in a company paid in cash the amount due on application and entered into an agreement to pay the balance by allowing the fees to be earned by his firm as surveyors to the company to accumulate for that purpose.

The company having subsequently gone into liquidation, they and the liquidator sued A for the amount still unpaid on the shares for which he had applied.

Held that A was not a shareholder of the company, the agreement to set off calls against fees being *ultra vires* of the directors, and vitiating the whole contract.

Opinion that even had he been a shareholder, the pursuers would not have been entitled to obtain immediate payment of the calls, but only to

accumulate any fees which might be earned by A's firm.

Company—Contributory—Shares—Conditional Application—Condition Precedent or Condition Subsequent.

A applied for shares in a company, paying the amount due on application, and which entitled him to receive an immediate allotment. The application bore to be made "on the distinct understanding . . . that my firm is appointed surveyors to this company over an average radius of thirty miles from Edinburgh, the fees to be not less than those adopted by the English surveyors for the company, and that my firm is also appointed advisory surveyors to the advisory board for Scotland, at fees to be adjusted."

A's firm was duly appointed surveyors to the Edinburgh district, but the company went into liquidation before an advisory board had been constituted for Scotland, and consequently before A's firm had been appointed advisory surveyors thereto.

Held that the condition that A's firm was to be appointed advisory surveyors was not a condition precedent to A's becoming a shareholder in the company.

The National House Property Investment Company, Limited, and James Mills Franklin, its liquidator, brought an action against John Watson, architect, Edinburgh, in which they claimed payment of £87, 10s., "being the amount of the call due by him as at 28th June 1906 on fifty preference shares of one pound each, and fifty ordinary shares of one pound each, held by him in the said The National House Property Investment Company, Limited."

The pursuers averred, *inter alia*—" (Cond. 1) At an extraordinary general meeting held at the company's offices on the 25th day of April 1906, a resolution was duly passed that the pursuers' company, The National House Property Investment Company, Limited, should be wound up voluntarily, and that the pursuer James Mills Franklin, a director of the company, should be appointed the liquidator for the purpose of such winding up. . . . (Cond. 2) On 16th February 1903 the defender made an application to the company for an allotment to him of fifty preference shares of £1 each and fifty ordinary shares of £1 each in the said company, conform to application of that date duly signed by him, herewith produced, and on that date he paid to the company the sum of 2s. 6d. per share due on such application, being £12, 10s. in all. The said fifty preference shares and fifty ordinary shares were thereafter duly allotted to the defender. Thereafter the defender was entered in the company's register as proprietor of the said shares. No payment beyond the said sum of £12, 10s. has been made by the defender in respect of the said shares. (Cond. 3) The pursuer James Mills Franklin, as liquidator of the said company, sent a notice to the defender intimating that a meeting would be held on 18th June 1906

to settle the list of contributories, and that his name had been included in the proposed list in respect of his said shares. No reply was made to the said notice, and the defender did not attend the said meeting. Accordingly, on said 18th June 1906, the defender's name was finally entered in the list of contributories in respect of the said fifty preference and fifty ordinary shares, with a liability thereon amounting to £87, 10s., being the unpaid call on the said shares."

The defender in a statement of facts stated, *inter alia*—" (Stat. 1) The pursuers' company was incorporated on 29th December 1902. Early in 1903 the defender's partner, Mr M'Arthy, received a call from W. M. Brooks, the managing director of the company, in connection with the formation of a Scottish board. Mr Brooks then pressed Mr M'Arthy to take shares in the company, but Mr M'Arthy refused to do so. Mr Brooks again called in February 1903, when he represented that business was to be pushed by the company in Scotland, and promised that the defender's firm would receive certain appointments in connection therewith, including the appointment of advisory surveyors to the advisory board for Scotland. On the footing that his firm received these appointments and that he was allowed to pay the balance of his shares by the fees to be earned, the defender agreed to apply for shares and sent to Mr Brooks the application referred to in the condescendence. (Stat. 2) The application contained *in gremio* the following conditions:—" This application is made on the distinct understanding, as arranged with Mr Brooks, that my firm is appointed surveyors to this company over an average radius of thirty miles from Edinburgh, the fees to be not less than those adopted by the English surveyors for the company, and that my firm is also appointed advisory surveyors to the advisory board for Scotland, at fees to be adjusted; also that I am to be at liberty, if I so desire it, to pay up the balance of my shares by allowing the fees to be earned by my firm to accumulate for this purpose." In terms of these conditions the directors and officials of the company were not entitled to allot shares to the defender or to enter him as a member of the company unless and until (a) they appointed the defender's firm surveyors for the company in the Edinburgh district; (b) they formed an advisory board for Scotland; and (c) they appointed the defender's firm advisory surveyors to the said board, and then only on the footing that the defender should be allowed to pay up the whole balance due on his shares, including the amount due on allotment, from fees to be earned by his firm. Of these conditions the most important, as the defender explained to Mr Brooks on his visit, were those relating to the formation of an advisory board in Scotland, because until that was done there was no guarantee that the company would do any business in Scotland, and the defender's sole object in applying for shares was with a view to

such business. (Stat. 3) Thereafter the defender received from Mr Brooks a letter dated 18th February, containing the following paragraph:—‘I have pleasure in sending herewith copy of resolution passed at the board meeting to-day. “It was proposed by Mr E. J. White and seconded by Mr N. A. Jones, that Messrs M’Arthy & Watson be appointed valuers for this company in the Edinburgh district and that their application for shares be accepted upon the terms contained on the back of said application.”’ (Stat. 4) Thereafter, on 8th April 1903, the defender received from the secretary of the company a request for payment of the 2s. 6d. per share due on allotment, to which the defender replied on 22nd April that in accordance with the conditions in his application he elected that any balance payable on the shares should be paid out of fees, but the demand being subsequently repeated on 3rd July 1903 the defender replied on 15th July 1903 in the following terms:—‘We would point out that we decided to apply for shares in your company after certain representations made to us by Mr Brooks and on specific conditions as stated in our application. As you are now unable to comply with these conditions we shall feel obliged by your returning our applications along with your cheque for the amount of our deposits plus the interest for the time you have had the money. In the event of your forming a Scottish board later on we are quite prepared to again consider the matter.’ (Stat. 5) The directors of the company never formed an advisory board for Scotland and never appointed the defender’s firm as advisory surveyors thereto. The defender from time to time made representations to the company with regard thereto, and was put off with promises that such a board would be speedily formed, which promises were never fulfilled. In respect of the company’s failure to comply with the conditions of the defender’s application, the defender repeatedly demanded the return of his deposit. In particular, he did so by letters dated 15th July 1903, 5th November 1904, 1st March 1905, and 3rd November 1905. With reference to the statement in answer, it is explained that the offer made by the defender was conditional on the company forming an advisory board for Scotland. If the company did not bind themselves to form such a board they entered into no contract with the defender at all. (Stat. 6) No notice of allotment was ever sent to the defender. No certificates for shares were ever sent to him; nor was any dividend ever paid to him although a dividend of five per cent. was declared at the annual general meeting held in December 1904.”

The defender pleaded, *inter alia*—“(2) The defender never became a member of the pursuers’ company and is not liable to pay calls—in respect (a) that no intimation of allotment was ever given to him; (b) that his application for shares was subject to conditions-precedent which have never been purified; and (c) that the alleged agreement to take shares was *ultra vires* of

the company and is not binding on the defender.”

On 26th August 1907 the Lord Ordinary (GUTHRIE) assailed the defender from the conclusions of the action, and decerned.

Opinion.—“The pursuing company and its liquidator seek to have the defender made liable as a member of the company now in liquidation.

“The defender denies the alleged membership on two grounds. He says, *first*, that *in gremio* of his application for shares was a condition-precedent which has not been fulfilled, and, *second*, that the alleged contract between him and the company contained a condition which was *ultra vires* of the company, and therefore that the condition was not enforceable by them.

“The pursuers reply to the first line of defence that the condition in question was collateral or subsequent, not precedent, and to the second line of defence that none of the conditions were *ultra vires*. I think that the defence is well founded on both points.

“(1) Was there a condition-precedent in the contract to take shares which was not fulfilled?

“It is admitted (1) that the conditions printed in statement two of the defender’s statement of facts, whether precedent or not, were duly made part of the contract; (2) that the first of these conditions, providing for the appointment of the defender’s firm of M’Arthy & Watson as Edinburgh and District surveyors or valuers, was duly fulfilled; and (3) that the third condition as to the method of paying up the balance of the shares was not a condition-precedent.

“The question then of condition-precedent arises only in regard to the second condition, which runs as follows:—‘That my firm is also appointed advisory surveyors to the advisory board for Scotland, at fees to be adjusted.’ Was that a condition-precedent or a condition subsequent? The nature of this question is precisely defined by Lord Cairns in *Elkington’s case*, L.R., 2 Ch. 511, 522 (1867). ‘The real point for determination in this case might be said to be this, Did Messrs Elkington intend and agree to become members and shareholders *in presenti* with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, Did Messrs Elkington agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders?’ There are no Scotch cases directly applicable; summing up the English cases the question may be expressed thus, does the second of the above conditions fall under the rule of condition-precedent given effect to in *Wood’s case*, 3 De Gex & Jones 85 (1858); *Pellatt’s case*, L.R., 2 Ch. 527 (1867); *Simpson’s case*, L.R., 4 Ch. 184 (1869); and *Roger’s case*, L.R., 3 Ch. 633 (1868), or under the rule of condition subsequent or collateral, that is, an agreement, apart from and collateral to a concluded agreement to become a member, given

effect to in *Elkington's case*, L.R., 2 Ch. 511 (1867); *Bridger's case* (1870), L.R., 5 Ch. 305; *Wheatcroft's case* (1873), 29 Law Times 324; and *Fisher's case* (1885), L.R., 31 Ch. Div. 120.

"On this question I cannot distinguish between conditions one and two. It seems clear that the intention of parties was that there was to be no contract unless the defender's firm received the local appointment. Shares were applied for not for the ordinary purposes of investment or speculation but in connection with and for the promotion of the business of the defender's firm. But this consideration applies equally to the advisory surveyorship to the advisory board for Scotland. It may be that, if the defender's firm had accepted the local appointment without insisting on the obligation as to the advisory surveyorship being first fulfilled, the defender would be held to have waived his right to treat the latter as a condition-*precedent*. Equally, if the defender, as in *Elkington's case*, L.R. 2 Ch. 511 (1867), had accepted allotment and paid the money due on allotment, he could not thereafter have founded on the conditions being *precedent*. But he refused to pay the allotment money, and he insisted that both conditions must be treated as *conditions-precedent*. I think he was right in this. The company called itself by the ambiguous title 'National,' but its registered office was in England, and all the subscribers to the memorandum and all the original directors were resident in England. It was only if such a company established a regular Scottish business that the defender's firm of architects would have any reasonable interest to take shares.

"There was therefore, in my opinion, no such agreement to become a member as is necessary under the twenty-third section of the 1862 Act.

"(2) Was the condition *ultra vires*?

"I see no answer to this objection. It seems to me that all the considerations stated by Lord Cairns in *Pellatt's case*, L.R. 2 Ch. 527 (1867), apply in this case, with the result that the conditions being *ultra vires* vitiated the contract."

The pursuers reclaimed, and argued—
1. The agreement that the firm was to be appointed advisory surveyors was not a condition-*precedent* to and suspensive of the contract to take shares. It was a collateral agreement, the breach of which on the part of the pursuers would merely entitle the defender to raise an action of damages. The criterion to be applied was well stated by Lord Cairns in *Elkington's case*, L.R. 1867, 2 Ch. App. 511, at 522, viz., did the party applying for shares intend to become a member and shareholder *in presenti* with a collateral agreement as to what should be the effect of his so becoming a shareholder, or did he only intend to become a shareholder if and when a certain preliminary condition should be performed—*cf. Bridger's case*, 1870, L.R. 5 Ch. App. 305. That the former was the case here was clear from the facts that the defender actually applied for and paid the first call on the shares at a time when the advisory board had not been constituted.

The cases relied on by the defender were all distinguished from the present by the fact that in them it was apparent (apart from the question of the effect of the particular condition in each) that no contract had ever been completed between the parties (*e.g.*, no proper allotment; no proper acceptance), and therefore that there had been no proper *consensus in idem, e.g., Pellatt's case*, 1867, L.R. 2 Ch. App. 527; *Rogers' case*, 1868, L.R. 3 Ch. App. 633; *Wood's case*, 1858, 3 De G. and J. 85; *Simpson's case*, 1869, L.R. 4 Ch. App. 184. There was accordingly only a collateral agreement to appoint him advisory surveyor, should there ever be an advisory board, and of this there had been no breach, but even had there been a breach it was settled that it was not possible to set off a claim for breach of such an agreement against a liquidator's calls—*Black & Co.'s case*, 1872, L.R. 8 Ch. App. 254. 2. The agreement that the defender was to have the right to set off fees against calls was not *ultra vires* of the directors. The same or a similar agreement was to be found in almost all the cases cited. If it was an agreement to issue shares for a consideration other than cash, that was no longer illegal, section 25 of the Companies Act 1867 having been superseded by section 7 of the Companies Act 1900. The *dicta* in *Pellatt's case* as to *ultra vires* were *obiter*.

Argued for the defender (respondent)—
The Lord Ordinary was right upon both points. The first point depended wholly upon the construction of the agreement. Truly construed it was an agreement to take shares if and when his firm was appointed advisory surveyors. They had never been appointed—*ergo* he had never become a shareholder—*Pellatt's case, cit. sup.; Rogers' case, cit. sup.; Wood's case, cit. sup.; Simpson's case, cit. sup.* The cases in which persons had been held to be shareholders were all cases in which either the conditions were such as could only be fulfilled after the persons had become shareholders—*e.g., Fisher's case*, 31 Ch. Div. 120; *Bridger's case, cit. sup.*—or cases of waiver in which conditions originally conditions-*precedent* were treated by the parties as conditions-*subsequent*—*e.g., Elkington's case, cit. sup.* 2. In any event, the stipulation that calls should be set off against fees was *ultra vires* of the directors—*Pellatt's case, cit. sup.*, was a direct authority, there being no difference in principle between setting off calls against goods to be supplied and setting them off against fees for services to be rendered. *Pellatt's case* passed muster in *Black's case, cit. sup.*, and was regarded as authoritative by Buckley, Companies Acts, p. 78.

LORD LOW—I confess that I have difficulty in adopting the view of the Lord Ordinary that the second condition upon which the defender applied for shares in the pursuers' company (namely, that his firm should be appointed advisory surveyors to the advisory board for Scotland) was a condition-*precedent*.

The first condition—that the defender's

firm should be appointed surveyors to the pursuers in the Edinburgh district—was one which could be fulfilled at once, but the constitution of an advisory board for Scotland was a matter which necessarily required time, and there was nothing to be gained by appointing an advisory surveyor to the advisory board until that board came into existence. That was the view which was taken by the pursuers, because by the resolution which the directors passed the defender's firm was then appointed valuers for the company in the Edinburgh district, and the other conditions for which he had stipulated were simply accepted. That obviously meant that the directors agreed to appoint the defender's firm advisory surveyors to the Scotch advisory board when that body was formed. I think that that was all that the defender could ask, because I cannot read his application as meaning that the allotment of shares to him should be postponed for an indefinite time until an advisory board should actually be formed. In the first place, the application itself was for an immediate allotment of shares, and the amount due on application, and requisite to entitle the applicant to an immediate allotment, was paid. Further, it is to be remembered that apparently there was nothing to prevent the pursuers doing business in the Edinburgh district, if occasion offered, even before an advisory board was constituted; and by applying for an immediate allotment of shares, and obtaining an immediate appointment as local surveyor, the defender was in a position to obtain the benefit of any business which might be done. Accordingly, I read the application as being an application for an immediate allotment of shares if the pursuers agreed to the conditions annexed.

For the reasons which I have given I think the pursuers did agree to these conditions. They certainly intended to do so; and (what is more important) it is evident that the defender was satisfied with the resolution passed by the directors as being an acceptance of the conditions. I say so because, in answering a letter from the pursuers' secretary asking for payment of the amount due on allotment, the defender did not suggest that the conditions upon which he had agreed to become a shareholder had not yet been fulfilled. He merely intimated that he would avail himself of the third condition, which was that he should be entitled to pay off the balance due upon his shares by allowing fees to be earned by his firm to be accumulated.

If, therefore, the only defence to the action had been that the formation of an advisory board for Scotland and the appointment of the defender's firm as surveyors to that board was a preliminary condition which must be performed before the defender would become a shareholder in the company, I should have thought that the defence had not been established. I think, however, that a complete defence is furnished by the third condition to which I have referred. It is expressed in these terms—"I am to be at liberty, if I so desire

it, to pay up the balance of my shares by allowing the fees to be earned by my firm to accumulate for this purpose."

The defender paid to the pursuers the sum of £12, 10s., being the amount of 2s. 6d. per share due on application for an allotment of shares, but when he was asked to pay the additional sum of 2s. 6d. per share upon the shares allotted to him he intimated that he elected to "allow our fees to accumulate to meet the balance payable on our shares."

The pursuers argued that the condition in regard to fees amounted to no more than this—that if the defender's firm should be employed and should actually earn fees, the defender should be entitled, instead of demanding payment of the fees, to allow the pursuers to retain them and to attribute them to account of, or, so far as necessary, in payment of calls. If that was all that was meant I hardly think that any special agreement was necessary, because if at the time when a call was made the pursuers were due to the defender in fees a sum equal to the amount of the call, I think that he would be entitled, without any special agreement, to set the amount due by the pursuers to him against the amount due by him to them, unless, it may be, the company was in liquidation. It is to be remembered that when the application for shares was made the pursuers had never done any business in Scotland, and notwithstanding their utmost endeavours might not be able to establish a business there. In these circumstances the object of the conditions with which the defender qualified his application for shares was, on the one hand, to secure employment for his firm in the event of the pursuers doing business in Scotland, and on the other hand to protect himself against loss in the event of business not being done; and he attained the latter object (as I read the conditions) by stipulating that he should not be bound to pay calls in cash, but that the pursuers should be entitled to retain and accumulate any fees which might become due to him until the calls were in that way extinguished.

If that be a sound view, then the pursuers would not be entitled to decree for immediate payment of the sums sued for, even although the defender had become a shareholder, but would only be entitled to accumulate any fees which might be earned by the defender's firm to meet his liability upon the shares. I think, however, that the defender is entitled to absolver, because, in my opinion, the agreement in regard to fees was *ultra vires* of the directors. I think that the present case is, in principle, indistinguishable from *Pellatt's case* (*in re Richmond Hill Hotel Company*, L.R. 2 Ch. 527). In that case, *Pellatt*, who was a glass and china merchant, agreed to take fifty shares in the hotel company, paying 70s. on application and 30s. on allotment, while the hotel company agreed to purchase the glass and china goods required by them from *Pellatt*, and that all calls on the shares after allotment should be placed to his credit to account of goods to be

supplied by him. Pellatt refused to carry out the agreement, and the company having gone into liquidation the question arose whether he was liable to be placed on the list of contributories. It was held that he was not, because it was *ultra vires* of the directors to agree that calls should be set off against goods to be supplied.

In giving judgment Lord Cairns said—“Without laying down any general rule, but looking only to the particular circumstances of this case, I entertain a strong opinion that the contract was *ultra vires*. The intention of the Act is, that shares shall be held as shares wholly or in part paid up, or not paid up at all, and that so far as they are not paid up the ordinary liability to pay up the remainder in cash, when required, should attach on the holder of them; and it is required to be entered in the register how much is paid up on them. If some consideration is given it may be quite right for the directors to state on the register that they are to be treated as part paid up, though no money has passed; but I do not think it within their power to contract that the calls in respect of what remains to be paid up shall be set off against goods to be supplied by the shareholder, and shall not be paid in money. The inconvenience arising from such a contract might be almost incalculable. Goods might not be supplied at all, or they might be supplied of such a quality that they ought to be rejected, and the remedies against the shareholder might be unavailable, while the other shareholders had all along been paying in cash.”

I think that these considerations are directly applicable here. I see no difference in principle between setting off calls against goods to be supplied, and setting them off against fees for services to be rendered, and accordingly I am opinion that it was *ultra vires* of the directors to agree to the stipulation in question. But if that be so, then the whole contract is vitiated and cannot be enforced either by or against the company.

I am therefore of opinion that the Lord Ordinary was right in assailing the defender.

The LORD JUSTICE-CLERK, LORD STORMONTH DARLING, and LORD ARDWALL concurred.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Cullen, K.C.—Sandeman. Agents—Thomas White & Park, W.S.

Counsel for the Defender (Respondent)—Graham Stewart, K.C.—Jameson. Agents—T. F. Weir & Robertson, S.S.C.

Saturday, June 6.

FIRST DIVISION.

[Sheriff Court at Hamilton.

LEE v. WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule, sec. (1) (b)—Incapacity Resulting from Injury—Workman also Affected by Disease—Question whether Incapacity Due to Injury or to Disease.

A miner received an injury to his right eye by accident arising out of and in the course of his employment. Having recovered from this injury so far as recovery was possible without an operation, although that eye was of little use he could have worked at his former work, had it not been that his left eye, which had been affected by disease at the time of the accident (there was no proof of the affection was then such as to impede his work), was so affected by the disease, which had not been caused or aggravated by the accident, as to render his working underground impossible.

Held that, as it was not proved that the miner could not have worked underground if his right eye had not been injured, his partial incapacity was incapacity resulting from the injury entitling him to compensation under the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), which by section 1 gives to workmen for personal injury by accident arising out of and in the course of the employment compensation as scheduled to the Act, in section (1) of First Schedule, enacts—“The amount of compensation under this Act shall be— . . . (b) Where total or partial incapacity for work results from the injury a weekly payment during the incapacity after the second week not exceeding”

George Lee, miner, Alva Place, Blantyre, claimed compensation under the Workmen's Compensation Act 1897, from William Baird & Company, Limited, coalmasters, Priory Colliery, Blantyre, in respect of injuries sustained by him while in their employment. The matter was referred to the arbitration of the Sheriff-Substitute at Hamilton (THOMSON), who dismissed the application, and at the pursuer's request stated a case.

The facts proved as stated by the Sheriff-Substitute were:—“(1) The appellant on 10th April 1907, in the course of his employment as a miner in the Priory Pit No. 4, Blantyre, belonging to the respondents, received an injury to his right eye, which injury (at least until an operation is performed) renders that eye of little use; (2) that the left eye was not affected by the accident, and is (save for nystagmus) quite healthy and in such a condition as would permit of appellant working as before the