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 liabilty 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 assoilzieing 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 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 ccurse 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

accident; (3) that there is now, however, a degree of nystagmus which prevents him resuming his former work underground, although it need not prevent his working above ground; (4) that no question was raised on record that the appellant at the time of the accident was suffering from nystagmus in the left eye, and that during the proof and in the course of the hearing on evidence no point was made that at the time of the accident the left eye was so affected by nystagmus as to impair its usefulness for his work, the sole question raised and debated being whether the nystagmus as at present existing was due to or was aggravated by the accident; (5) that it is proved that at the time of the accident nystagmus to a slight extent was present in the left eye; (6) that there is no proof that it then existed to such an extent as to prevent or even impede the appellant in his work as a miner; (7) that it is proved that the nystagmus was neither caused nor even aggravated by the accident; (8) that it is not proved whether nystagmus when it once exists has (like, *e.g.*, cataract) a tendency to increase, or whether (like, *e.g.*, inflammation) it may disappear and arise again independently; (9) that the appellant was paid compensation at the rate of 11s. 6d. per week from a fortnight after the date of the accident till and including 25th November 1907, when the respondents stopped payment; (10) that by that date he had recovered from the immediate effects of the accident to his right eye in so far as recovery (without an operation) is possible, and that if his left eye had not been affected by nystagmus to the extent to which it then was he might have resumed his former occupation; (11) that notwithstanding the present condition of his eyesight he is fit for work as a miner above ground but not under ground."

The Sheriff-Substitute further stated:—"Upon a consideration of the proof I found that the appellant had recovered as far as he ever would (without an operation) from the effects of the accident by 25th November 1907, and that after said date he was not, and that he is not now, prevented by or through the accident from resuming his former employment, and I dismissed the petition."

The question of law was—"Whether upon the facts as proved the appellant is entitled to have his compensation in respect of said accident under the Workmen's Compensation Act 1897 continued."

Argued for appellant—The appellant's incapacity resulted from the accident. He had lost his healthy eye (viz., the right) owing to the accident, and now had to use his bad eye. Prior to the accident he was able to work underground, and but for the injury to his right eye he would still be able to do so. That was clearly a case of partial incapacity resulting from the accident.

Argued for respondents—The Sheriff-Substitute was right. The appellant had now recovered from the injury to his right eye, and but for the diseased condition of his left eye might have resumed his former occupation. The condition of the appellant's left eye was due to natural causes and not to the accident. That being so, he was not entitled to compensation. There was evidence here on which the Sheriff-Substitute might properly find as he did, and in these circumstances the Court would not interfere with his decision—*Bist* v. *London and South-Western Railway*, [1907] A.C. 209.

At advising—

LORD MACKENZIE—This is an appeal in an arbitration under the Workmen's Compensation Act of 1897, in which the appellant asked that the respondents should be found liable to pay to him weekly compensation. The accident happened on 10th April 1907, and the appellant was paid compensation at the rate of 11s. 6d. per week from a fortnight after the date of the accident till and including 25th November 1907. The finding of the Sheriff-Substitute is to the effect that by the 25th November the appellant was not, and was not at the date when the case was before him, prevented by or through the accident from resuming his former employment. The question is whether that finding is correct or not.

Now the first matter that strikes one in examining the grounds upon which that conclusion is reached is the finding of the Sheriff-Substitute under the 11th head, that the appellant is no longer fit for work under ground. It appears from a previous finding that before the accident he was fit for work under ground. Thus there is that difference in his capacity at the present time as compared with his capacity at the date of the accident. There is no doubt that partial incapacity does exist, and the question is whether, to use the words of the first schedule of the Act, that results from the injury that he sustained in consequence of the accident. The nature of the injury which he sustained was an injury to the right eye. This is the case of a man who at the time of the accident had one sound eye and one eye which was affected by an infirmity—nystagmus. He was, therefore, when the accident happened to him, incapacitated to the extent of having one eye that was not sound. In his 5th and 6th findings the Sheriff-Substitute holds it proved that at the time of the accident nystagmus to a slight extent was present in the left eye, but that there is no proof that it then existed to such an extent as to prevent or even impede the appellant in his work as a miner. So that the existing infirmity at the time of the accident did not incapacitate the man, as at that date he was fit to work below as well as above ground. Now he is not able to work under ground The finding which is important is the finding under head 1, because the Sheriff-Substitute finds that the injury to the right eye renders that eye of little use. That is the result of the accident. He then goes on to say in his 2nd and 3rd findings 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 the appellant working as before the accident, and that there is now, however, a degree of nystagmus which prevents him resuming his former work under ground, although it need not prevent his working above ground. If it had been the case that the right eye had recovered so as to be as good as it was before the accident, I think there would have been ground for drawing the inference that, if the appellant is now suffering from incapacity, the incapacity must be traceable to the infirmity in the left eye. But there is no finding by the Sheriff-Substitute that the infirmity in the left eye would have prevented the appellant from working below ground if the right eye had been sound. It is not, in my opinion, quite clear from the statement of the case whether the nystagmus in the left eye is to be regarded as having progressed, as having become distinctly worse, since the date of the accident, but in the view I take I do not think that is material. Whether the nystagmus was progressive or not, as I read the finding of the Sheriff-Substitute there was and is an injury to the right eye which renders that eye of little use, and that, coupled with the infirmity in the left eye, results in incapacity which unfits the appellant from working under ground.

It is the law that if a man who is already afflicted with an infirmity is injured by an accident and thereby incapacitated from carrying on the work which he was previously fit to do, then that is an injury which results from the accident, even though the accident would not have incapacitated him had he been otherwise sound. The case may be figured of an injury to a man who to begin with has only one eye. That renders him more liable to be disabled, but if an accident happens, and if there is injury to the sound eye, those responsible for the accident will be liable for the consequences, although if he had the other eye the result would not have been the same. In the same way, it is obvious that if a man with a lame leg receives an injury to the other leg the injury would have very much more serious consequences. Accordingly, I am unable to agree with the view of the learned Sheriff-Substitute upon the facts as stated in the case. It appears to me that this is the case of a man whose right eye has been rendered of little use in consequence of the accident, and that the result of that, coupled with his previous infirmity, is to render him partially incapacitated for work, and accordingly he is still in a state of partial incapacity in the sense of the statute, and that partial incapacity renders the employers liable to make compensation.

As regards the question of law put to us, I would suggest that in the circumstances of the case a direct answer should not be returned to it. The question put is—Whether upon the facts as proved the appellant is entitled to have his compensation in respect of said accident under the Workmen's Compensation Act 1897 continued? If a direct affirmative were returned to that question it might to a certain extent tie the hands of parties if they went back to the Sheriff-Substitute and desired a review of the amount. It appears to me that we should find that the appellant is still suffering from partial incapacity for work, which is the result of the injury caused him by the accident.

LORD M'LAREN—Long experience in judicial work makes one very tolerant of differences of opinion, and therefore I approach this case in the belief that things which appear clear and important to me must have seemed otherwise to the learned Sheriff-Substitute, although it is difficult to see how upon the facts as he has found them he arrived at the conclusion to which he has come.

The case stated shortly comes to this, that before the accident this miner had two serviceable eyes. One of them was slightly defective, because he had begun to have a disease known as nystagmus. That, as explained to us, is a trembling of the eyeball which interferes with distinct vision. The other eye was perfectly sound. The condition of the man now is that neither of his eyes is serviceable. The one that was formerly slightly affected by nystagmus is now so much affected by it that the man is unable to make any use of the eye at all. His other eye has also become unserviceable in consequence of the accident which happened to him in the pursuit of his employment. Natural causes connected with the nature of the work in which a miner is engaged may account for the disabled state of the left eye; but I see nothing in the facts to account for the disabled condition of the right eye except the accident. It is plainly found that the eye was injured by the accident, and that he is only so far recovered and is unable to work under ground.

In these circumstances it seems to me quite clear that one of the results of the accident is that the man is no longer able to follow his pursuit as a miner. It is not proved that if he had been fortunate enough to escape the accident he would have been disabled from working under ground. He would have had one eye in perfect order, and, although the other one has through lapse of time become more and more affected with nystagmus, we do not know that, barring the accident, he would not have been able to get on quite well with a sound right eye. I think, therefore, that this is a case for compensation, but as it is found that the workman is able for lighter and perhaps less highly paid work above ground, the Sheriff-Substitute will take this into account in fixing the amount of compensation payable. I therefore agree with Lord Mackenzie that the case should be remitted to the Sheriff.

LORD KINNEAR—I agree. We must take the Sheriff-Substitute's findings in fact as he gives them. We cannot review his determination upon the facts at all. But taking these specific facts as he finds them we have to consider whether he is justified

in saying that they support the inference that this man's incapacity resulting from the accident has ceased, and that he is now capable of earning his former wages. I think it is quite clear upon the Sheriff's own statement that that is a finding that cannot be supported. The Sheriff begins by finding as matter of fact that the appellant received an injury to his right eye, which injury (at least until an operation is performed) renders that eye of little use. Therefore he starts by saying that the man who had a good eye before his injury has now an eye so affected that it is of little use. That is a finding in the present tense. Then he goes on to say that the accident did not affect the left eye, which, however, had previously been affected by the disease called nystagmus, and that before the accident the man was able to work as a miner under ground. If he had gone on to find that the right eye was now perfectly restored, and that the left eye had on the contrary become so far deteriorated in consequence of some other cause than the accident, that he could no longer work under ground in consequence, not of the condition of his right eye, but of the condition of the left eye alone, that might have raised the question which the Sheriff seems to have considered and decided as to whether the present incapacity of the man was really owing to the accident or was owing to the disease which had no connection with the accident. But then he finds nothing of that kind.

He finds that the left eye is quite healthy and in such a condition as would permit of the appellant working as before the accident except for the nystagmus. He does not distinctly state whether the nystagmus is now so much worse that the man could not have worked as before even if the right eye had not been injured; but he finds it proved that the nystagmus was not caused nor even aggravated by the accident. Then he gives the present position, repeats the finding with which he started, and says that by the 25th of November 1907, when the respondents stopped his allowance, he had recovered from the immediate effects of the accident to his right eye so far as recovery (without an operation) is possible, and that then he might have resumed his former occupation if his left eye had not been affected by nystagmus to the extent to which it then was. That is a finding that the man has not completely recovered. He has recovered only in so far as it is possible to recover without an operation. We are not told whether it is probable that the operation would result in his complete recovery, or whether it is wise to submit to an operation. All that we know is that the man has not yet completely recovered, and that, according to the Sheriff-Substitute, there may be a possibility that he would recover more completely as the result of an operation which has not been performed. That seems to me a finding in fact that the man's eye has been injured by an accident, and that it has not yet recovered. I cannot reconcile that with a finding that the man has been restored to the same condition, with the same power of work as before the accident. On the Sheriff's statement, therefore, I am of opinion, with your Lordships, that it is impossible to accept a general finding that the man is now in such a condition that we can say he is not prevented by or through the accident from resuming his former employment, which the Sheriff says he is now unfit for. With reference to the form of the answer, I agree with Lord Mackenzie that we ought to make no finding which should preclude the Sheriff from entertaining and disposing of the question of the exact amount of compensation which in the present circumstances should be allowed to the man. That must be left to him.

The LORD PRESIDENT gave no opinion, not having heard the case.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Find that the appellant is still prevented by the results of the injuries caused by the accident mentioned in the case from resuming his former employment: Recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit the cause to him to proceed as accords."

Counsel for the Pursuer (Appellant)—Scott Dickson, K.C.—Moncreiff. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Wednesday, June 10.

FIRST DIVISION.

(SINGLE BILLS.)

GEDDES *v.* A. & J. M'LELLAN.

Expenses—Modification—Jury Trial—Damages—Verdict in Court of Session Action for More than £5 and Less than £50—Act of Sederunt of 20th March 1907, *sec.* 8.

The Act of Sederunt of 20th March 1907, section 8, provides—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding two-third parts thereof."

Held (by the Judges of the First Division, after consultation with the Judges of the Second Division) that in a case originating in the Sheriff Court the limitation of expenses applied only to Court of Session expenses and not to the expenses in the Sheriff Court.