would get nothing. The appellant's agent thereafter informed the appellant that he had an offer of £15 to settle the claim for compensation, and that if he were willing to receive that sum he would get it without any deduction except half a guinea to his doctor for his examination that day. On that statement the appellant authorised his agent "to accept the offer of £15 in full settlement of all claims at my instance for future compensation from" the respondents. The proposed memorandum of agreement simply records that on "28th January 1914 the parties agreed to redeem said weekly payments by payment of £15 sterling," and is silent as to the subsidiary arrangement which was made between the agents for the respective parties to the effect that the appellant's agent's claim for expenses should be settled by a payment of five guineas. But it must have been known to the appellant that expenses would be incurred, and he had the intimation of his agent that no deduction would be made in respect of these expenses from the money which he was to receive.

In these circumstances, and in view of the fact that no evidence was led in the Court below to show that five guineas was in excess of the expenses that the appellant's agent had reasonably incurred in the proceedings which he had taken on behalf of his client, I cannot hold that the settlement is vitiated by the mere fact that the amount of expenses which that agent was to receive from the respondents was not communicated to the appellant. There is nothing else that can be relied upon in support of the appellant's case, and his proposition is as broad as this, that no agreement of this nature can receive effect unless the exact sum of expenses which the appellant's agent is to receive from the respondents is communicated to the appellant. I do not think that is a ground for voiding the settlement.

It would have been a very different matter, as Lord Guthrie pointed out, if it had been alleged and proved that whereas the agent's account would not upon taxation have amounted to more than two guineas, he had taken three guineas additional from the respondents with a view to influencing the settlement by his client to the prejudice of that client. The Court would regard such a case with very great disfavour, because it might well be said that as the respondents were willing to pay £20, 5s. in settlement of the client's claim for compensation and the agent's claim for expenses, the client was being cheated by his agent out of a part of the sum which he was entitled to get from the respondents, and that the settlement was a fraud upon him. But no such case is suggested here. In the course of the debate the appellant's counsel stated that his client thought he was getting £15 in full settlement of his claim, but under liability to his agent to pay expenses —that is to say, that under this settlement he is getting more than he thought he was getting. I do not see what interest the appellant has to maintain the contention which he is now putting forward, and I think the arbitrator was justified in the conclusion at which he arrived.

LORD JUSTICE-CLERK—I am of the same opinion. We have had a very able argument from Mr Patrick, but he did not convince me that there was anything improper in the procedure in this case. The memorandum deals with the amount of compensation which is to be paid to the workman in respect of injury, and the expenses incurred in proceedings with reference to the compensation is no part of the compensation. As Lord Salvesen expressed it, the matter of expenses is subsidiary, and while it may form part of a compromise, it does not affect the compensation which is offered and accepted as full compensation.

If it was to be suggested that there was practically a bribe to the appellant's agent in the form of an offer of his expenses, then that would have to be specifically stated and specifically proved, but no suggestion of that kind was made to the Sheriff. We must take the facts as we have them, and so taking them I have no doubt about the result.

The two cases quoted to us do not seem to bear upon this matter at all. One was a case in which a bribe was offered to a veterinary surgeon to obtain an opinion about a horse. The other case was one in which it was held that when there is an agreement in writing the memorandum must be recorded precisely in the terms of the written agreement. Neither of these authorities appears to me to bear upon this case, and I entirely concur with your Lordships in the result at which you have arrived.

LORD DUNDAS was sitting in the Extra Division.

The Court answered the question of law in the affirmative.

Counsel for the Pursuers—Horne, K.C.—Gentles. Agents—R. & R. Denholm & Kerr, Solicitors.

Counsel for the Defender—Christie, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Thursday, November 5.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

BURT *v.* THE FIFE COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, rule* (3)*—Capacity—Partial Incapacity—Suitability of Employment—Loss of One Eye.*

A miner having lost the use of an eye claimed and received compensation for a certain period, after which the arbitrator terminated compensation in the meantime. The miner subsequently craved review and an award of partial compensation upon the ground that he was entitled to refuse to work at the face. The arbitrator awarded partial compensation in respect of the applicant's

diminished earning capacity as a mine at the face, but considered himself bound by the decision in *Law* v. *William Baird & Company, Limited*, 1914 S.C. 423, 51 S.L.R. 388, to find that work as a miner at the face was suitable employment for the applicant.

Held that the arbitrator was not so bound.

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."

Robert Burt, miner, Kelty, *appellant*, claimed and received compensation for a certain period under the Workmen's Compensation Act 1906 from the Fife Coal Company, Limited, *respondents*, in respect of injuries which he had sustained while at work in the respondents' employment. The Sheriff-Substitute (UMPHERSTON) having by interlocutor dated 20th May 1913 ended the appellant's right to compensation in the meantime, the appellant subsequently presented this application to the Sheriff-Substitute craving review of the said interlocutor, and to award him partial compensation on the basis of the difference between his average weekly earnings before the accident as a miner at the face and his average weekly earnings as a repairer or roadsman since he resumed work.

On 26th February 1914 proof was led before the Sheriff-Substitute, who awarded partial compensation in respect of the appellant's diminished earning capacity as a miner at the face and found the respondents liable to the appellant in expenses.

On 13th July 1914 he stated the following Case for appeal—"I found the following *facts* admitted or proved:—1. That the injury in respect of which the appellant had been paid and again claimed compensation resulted in such loss of vision in the left eye as to render him practically a one-eyed worker underground. 2. That in June 1913 the appellant, who at the date of the injury above-mentioned was a miner working at the face, accepted work as a repairer, and since then had continued to work in that capacity or as a roadsman. 3. That in August 1913 he applied for work at the face. This he did, not because he wanted to return to the face, but solely in order to test his earning capacity at the work in which he was engaged at the time of the accident. The appellant had then been working at the Glasses or Lockie seam, which is a hard coal, at which eye injuries from bursts of coal or sparks from the pick are more liable to occur than at a softer coal. 4. That the under manager offered Burt a place at the main seam, which is a much softer and thicker seam than the Lockie, and I was satisfied he did this out of consideration for Burt, recognising the very serious effect to him if he received a similar injury to his right eye. This, however, was not explained to the appellant, who refused to go to the face unless he got the same work as that at which he was injured. 5. That as the appellant's purpose in going to the face was to test his earning capacity at his old work, his refusal to go to the main seam was not unreasonable. 6. That the appellant is now unwilling to return to the face, that he is fifty-eight years of age, that he has been able to adjust himself fairly well to his altered conditions and to do the work at which he is engaged, but that he finds difficulty in judging distances, particularly in low places, and has not the same confidence in moving about or the same readiness in his work as formerly; that he is not so observant as formerly of the many things about a pit, such as bars on the roof and wire ropes along the roads which may, and often do, cause injury if not noticed in time. 7. That in consequence of this he has received a good many knocks which he might otherwise have escaped—two in particular which kept him from work for one and three days respectively. 8. That his main reason for declining to return to the face is that injuries to the eye are more liable to occur there than at his present work, which is the case, and if he received an injury to his right eye such as he sustained to his left, he would be practically blind for life. 9. That injuries to the eyes, more or less severe, are peculiarly characteristic incidents of work at the face, and are of more frequent occurrence there than in other employments. 10. That the appellant is able to work as a miner at the face, but on account of his injury his earning capacity there is about 1s. 6d. per shift less than before he was injured, and that he is able to earn £1, 11s. 4d. per week as a miner at the face.

"Considering myself bound by the decision in *Law* v. *William Baird & Company, Limited*, 1914, S.C. 423, 51 S.L.R. 388, to find that work as a miner at the face was suitable employment for the appellant, I awarded compensation at the rate of 3s. 9d. per week, being 50 per cent. of the difference between his former earnings (£1, 18s. 10d.), and what I held he is now able to earn (£1, 11s. 4d.) as a miner at the face, and found the respondents liable to the appellant in expenses."

The *question of law* for the opinion of the Court was:—"Was I bound to hold that employment as a miner at the face is suitable employment for the appellant?"

Argued for appellant—The question of law should be answered in the negative. By the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I (3), where there is partial incapacity the arbitrator must inquire whether the employment offered is suitable. He had not done so here. The case of *Law* v. *William Baird & Company, Limited*, 1914 S.C. 423, 51 S.L.R. 388, was different from the present case, for in the former the arbitrator found as a fact that there was full capacity. Findings (6) and (7) in this case were the

very opposite of finding (9) in *Law's* case. The question of suitability of employment was one of fact, or at least of mixed fact and law—*Eyre* v. *Houghton Main Colliery Company, Limited*, [1910] 1 K.B. 695; Buckley, L.J., at p. 701; *Law* (*supra*), Lord Johnston at p. 429 — and the arbitrator must come to a conclusion upon it.

Argued for respondents — On the facts found the arbitrator, applying the principles laid down in *Law* (*supra*), was entitled and bound to come to the conclusion to which he had come. The arbitrator had considered here all the factors which determined the question of suitability of employment. Findings (6) and (7) in the present case were not the opposite of finding (9) in *Law* (*supra*). Under (6) and (7) the arbitrator failed to find that at work on the face there would have been an increased chance of accident referable to the appellant's condition. The fact that because of the appellant's condition the consequences of an accident incident to a certain employment might be more serious was not a ground for holding that the employment was unsuitable—*Eyre* (*supra*), Buckley, L.J., at p. 701; *Law* (*supra*), the Lord President at p. 427.

LORD PRESIDENT—I have no doubt that we ought to answer the question put to us here in the negative. The learned arbitrator seems to have considered that in consequence of a judgment of this Court in the case of *Law* v. *William Baird & Company, Limited*, he was precluded from considering the question, which was in my judgment a question of fact, whether or no employment at the working face was suitable employment for this miner who had been injured by accident arising out of and in the course of his employment.

Now the arbitrator finds certain facts proved under his sixth and seventh findings which might—I put it no higher—which might have led him to the conclusion that employment at the working face was unsuitable employment for this workman. If he had so found, I have not the slightest doubt that no Court of Appeal would have or could have disturbed his conclusion; but then, misreading, as I think, the judgment in the case of *Law* v. *Baird & Company*, the arbitrator shrank from finding yea or nay upon the question of suitability, and considered apparently that he was bound to pronounce yea upon the authority of the judgment in the case I have mentioned.

Now that case lays down no general rule of any kind Indeed it stands in marked contradistinction to the present case in this vital particular, that there the arbitrator found that the workman was able to resume his occupation as a miner at the face and to earn his former wages, and in these circumstances he dismissed the application. Accordingly the arbitrator in *Law's* case never had to consider the questions which are very relevant and proper to be considered when partial incapacity still remains and the arbitrator has to decide the amount of compensation. He must then face the third section of Schedule I, and consider what is the difference between the earning capacity of the man prior to the accident and the wage which he will be able to earn now, in some suitable employment, as a damaged man. The arbitrator in the case before us is entitled to consider that question quite untrammelled by any legal decision, and I think we ought to remit to him to consider the question—a question, as I believe and as I understand, of fact—whether employment at the working face was suitable employment for this man, or whether work as a repairer was not the suitable employment for him and therefore afforded the standard by which the compensation ought to be determined.

LORD JOHNSTON—There is no doubt that the appellant's present work of repairer is a suitable employment; but the question is, whether it was not merely a suitable employment but the most remunerative suitable employment which the trade of mining offers to this man,

There are in findings 4, 5 and 6 circumcumstances disclosed which import some difficulty into the case. The man refuses to go to the face unless he gets the same work as he had before he was injured. He does that under a misapprehension, and I do not think that in finding 5 the arbitrator was justified in saying that the refusal was not unreasonable. It was not a question of reasonableness or unreasonableness; it was a question of misapprehension. There is no blame attaching to the man's action, but it does not follow that it was reasonable. I have therefore difficulty in apprehending what the arbitrator means by saying, in finding 6, "That the appellant is now unwilling to return to the face, that he is fifty-eight years of age," and I agree with your Lordship that the real question is whether as a one-eyed man this employment of mining, which may perfectly well be conducted, not necessarily at the exact face and in the exact seam in which he was working before, but in any seam which the company may offer him—whether that employment is suitable employment for a man with one eye,

On that subject I venture to refer to what I said in the case of *Law*, which represents my view of the question which is here raised.

LORD SKERRINGTON—It is impossible to read this case without seeing that the arbitrator has refrained from performing his statutory duty of deciding a question of fact, and that he did so because he was misled by the decision of this Court in the case of *Law* v. *Baird*. An examination of that case shows that the judgment did not turn upon the meaning of the expression "suitable employment" as used in the third section of the First Schedule. In any case a decision upon one set of facts can never be a binding precedent where the facts are different. Accordingly I have no doubt that the question must be answered in the negative.

There was argued to us a question of some general importance, namely, whether in considering whether work is suitable, an

arbitrator is entitled to take into account the fact that owing to the workman having only one eye the consequences of an accident to that eye would be very much more serious than if he had two eyes. That question does not arise. Personally I should have had no doubt that that was a relevant circumstance which the arbitrator might take into account and attach such weight to as in the particular circumstances he thought right. If necessary a decision could be obtained by an arbitrator finding that employment at the face is unsuitable for a particular one-eyed man, and then stating the question whether he was entitled in coming to that decision to take into account the specially serious consequences of an accident to the remaining eye, or whether that was a circumstance to which he ought to have attached no weight. I agree with your Lordship in the result.

LORD MACKENZIE was absent from the hearing.

The Court answered the question of law in the negative, recalled the determination of the arbitrator, and remitted to him of new to decide whether employment at the face was suitable employment for the appellant.

Counsel for the Appellant—Lord Advocate (Munro, K.C.)—T. Graham Robertson. Agent—D. R. Tullo, S.S.C.

Counsel for Respondent—Horne, K.C.—Russell. Agents—Wallace & Begg, W.S.

Friday, November 6.

FIRST DIVISION.

[Sheriff Court at Glasgow.

ORENSTEIN & KOPPEL—ARTHUR KOPPEL (A.G.) *v.* EGYPTIAN PHOSPHATE COMPANY, LIMITED.

Process — Foreign — Sist — Enemy Corporation — "Branch Locally Situated in British Territory" — "Transaction" — Trading with the Enemy Proclamation, No. 2, dated September 9, 1914 (Statutory Rules and Orders, 1914, No. 1376), 5 (1) and 6.

The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914, declares, *inter alia*—"5. From and after the date of this Proclamation the following prohibitions shall have effect, . . . and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—(1) not to pay any sum of money to or for the benefit of an enemy"; and "6. Provided always that where an enemy has a branch situated in British . . . territory . . . transactions by or with such branch shall not be treated as transactions by or with an enemy."

A company, registered in Germany and manufacturing there, which had an office but no manufactory in Britain, and in respect of that office was registered under the Companies (Consolidation) Act 1908, sec. 274, brought an action in the Sheriff Court against a British company for payment under a contract. After a proof the Sheriff pronounced an interlocutor. Pending an appeal, the cause having been put to the short roll, war was declared against the German Empire. The pursuers presented a note to the Lord President craving an order that the cause should be put out for hearing in its proper order upon the short roll. The Court *refused* the note, and *hoc statu sisted* the process.

Held that the pursuers' office in Britain was not a "branch" within the meaning of declaration 6 of the said Proclamation, so that according to declaration 5 (1) thereof the Court were precluded from giving an effective decree.

Held (*per* the Lord President and Lord Johnston) that a payment to the pursuers under the said contract was not a "transaction" within the meaning of declaration 6 aforesaid.

The Trading with the Enemy Proclamation, No. 2, dated September 9, 1914 (Statutory Rules and Orders 1914, No. 1376), declares, *inter alia*—"3. The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country. . . . 5. (*cited supra*). . . . (1) (*cited supra*). . . . 6. (*cited supra*). . . . 7. Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident carrying on business or being in Our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted."

In the Sheriff Court at Glasgow, Orenstein & Koppel—Arthur Koppel, Alstein Gesellschaft (trading as Orenstein & Koppel—Arthur Koppel (Amalgamated)), railway material and rolling stock manufacturers, Berlin, registered under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) as a foreign company trading in this country, and having their registered address in this country at 27 St Clement's Lane, Lombard Street, London, *pursuers*, brought an action against the Egyptian Phosphate Company, Limited, 188 St Vincent Street, Glasgow, *defenders*, for payment of sums which the pursuers averred to be due and resting-owing to them under a contract between the parties for the supply of certain iron-work.

After sundry procedure had been taken in the action and a proof had been led the Sheriff-Substitute (CRAIGIE) on 5th November 1913 pronounced an interlocutor against which the pursuers appealed. The cause was appointed to be put to the short roll. Pending the appeal war was declared against the German Empire.