THE

SCOTTISH LAW REPORTER.

WINTER SESSION, 1922–1923.

COURT OF SESSION.

Wednesday, October 25, 1922.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Hamilton.

JOHN WATSON LIMITED *v.* QUINN.

Workmen's Compensation — Review — Fall in Wages — Partial Incapacity — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (3).

A miner who had been injured by an accident which incapacitated him from following his vocation of miner obtained employment as a surface worker and was awarded compensation in respect of partial incapacity. His right to compensation was subsequently terminated in consequence of a general rise in the level of wages, which brought the amount he was able to earn above the pre-accident level. On the wages falling again below that level in consequence of economic causes he applied for a renewal of compensation. His physical incapacity remained the same as it was at the date of the original award. *Held* that the applicant having been incapacitated by the accident from working as a miner, the difference between his pre-accident wage and his present wage was due, not to economic causes but to that incapacity, and that the arbitrator was entitled to award him compensation.

Workmen's Compensation—Earning Capacity—Method of Assessment—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (3).

An arbitrator in an application for review assessed the earning capacity of the applicant on a period of time which covered three months prior to the award. His employers maintained that the arbitrator was bound to include an earlier period of eighteen months during which wages were abnormally high. *Held* that no reason had been shown for interfering with the method in which the arbitrator had exercised his discretion.

John Watson Limited, coalmasters, Hamilton, *appellants*, being dissatisfied with a decision of the Sheriff-Substitute at Hamilton (HAY SHENNAN) sitting as arbitrator in a case under the Workmen's Compensation Act 1906 between them and Michael Quinn, miner, Hamilton, *respondent*, appealed by way of Stated Case.

The Case stated, *inter alia*—"This is an arbitration in an application presented by the appellants on 29th November 1921 for review of an award dated 17th January 1917 by which the respondent was found entitled to compensation of 10s. 4d. per week in respect of partial incapacity. The appellants craved that the weekly payments of compensation to the respondent should be suspended as at 26th May 1920. The respondent opposed the application, but contended that in any event payment should be suspended only for the period between 26th May 1920 and 3rd October 1921.

"Proof was led before me on 31st January 1922 and 6th March 1922, when the following *facts* were admitted or proved:—1. On 20th May 1914 the respondent sustained injury to his back by accident arising out of and in the course of his employment as a miner with the appellants. Liability to pay compensation was admitted. His average weekly earnings prior to the accident were £2, 4s. Compensation in respect of total incapacity was paid down to 8th November 1915. Subsequently arbitration proceedings were raised, and under an award of 17th January 1917 the respondent was found entitled to compensation of 10s. 4d. per week in respect of partial incapacity. This is the award which is now brought under review. 2. Payment of compensation to the respondent at the rate of 10s. 4d. per week was made down to 25th May 1920. Thereafter owing to the rise in wages payment of compensation was

stopped because the respondent was earning more than his average weekly wage prior to the accident, and the respondent acquiesced in this. On 11th November 1921 the respondent requested that payment of compensation should be resumed, on the ground that owing to the fall in wages his earnings were much lower than they had been before the accident. The appellants refused this request, and the respondent charged them for payment under the subsisting award. The appellants at the same time raised the present proceedings for review. 3. The respondent has been employed at light labouring work on the surface and is at present working as a waggon painter. During the period between 25th May 1920 and 1st November 1921 he was able to earn an average wage considerably higher than his average weekly earnings prior to the accident. But during the same period he would but for his injury have been able to earn as a miner wages much higher than he was able to earn as a surface labourer. 4. From 1st November 1921 the respondent was able to earn about £1, 6s. weekly as a surface labourer. But for his accident he would have been able during this period to earn as a miner a wage substantially the same as his average weekly earnings prior to his accident. 5. His total earnings for the period between 25th May 1920 and 23rd January 1922, divided by the number of weeks wrought, show an average wage higher than his average weekly earnings prior to the accident. 6. It was agreed that the respondent's physical condition and fitness for work had not altered since 25th May 1920.

"On 16th March 1922 I issued my award. I declared the liability of the appellants to pay compensation to the respondent ended only for the limited period from 25th May 1920 to 31st October 1921, in respect that during that period he was able to earn wages in excess of his average weekly earnings prior to the accident, and I awarded him compensation in respect of partial incapacity of 9s. per week from and after 31st October 1921.

"The appellants argued that I should simply end compensation at at 25th May 1920 until further order. I held that they were only entitled to be freed from liability to pay compensation during the period when the respondent was able to earn more than his average weekly earnings prior to the accident. The respondent's disability had not ceased, and he was debarred from recovering compensation only because of the limits to the amount payable which the statute prescribes. During that period he was actually suffering loss through his incapacity, although the statute did not permit him to recover compensation therefor. The general fall in the rate of wages has affected injured workmen more than it affected uninjured workmen by bringing them down to a much lower subsistence level.

"As the case was competently before me I held that I was bound to assess compensation of new, and not merely to leave the award of 17th January 1917 standing. The appellants contended that in the event of respondent's compensation being ended until further order as at 25th May 1920, the onus was then upon the respondent to prove circumstances other than a mere general fall in wages to entitle him to compensation. This contention I negatived after full consideration of the authorities cited. In estimating what the respondent is able to earn at suitable employment I had regard mainly to the wages earned by him in November and December 1921 and January 1922. The appellants contended that in so estimating I should take as the basis the whole period from May 1920 to January 1922 in order to give them the benefit of the high payments made during most of that period. I refused to give effect to this claim. The wages of a weekly wage earner are presumed to be applied week by week to his subsistence, and the high wages during the period referred to were for the most part given to meet the increased cost of living. During that period the respondent was really being deprived (owing to the limits set by the statute) of compensation for loss which he was actually suffering, and his wage, although higher in terms of money than his average weekly earnings before the accident, was much lower when interpreted in terms of its purchasing power."

The *questions of law* for the opinion of the Court were—"1. On the foregoing facts were the appellants entitled to an award which simply ended payment of compensation as at 25th May 1920 until further order? 2. On the foregoing facts was I entitled to award the respondent compensation from and after 31st October 1921? 3. In ascertaining the respondent's present earning capacity for the purpose of assessing compensation should I have taken as the basis his average weekly earnings for the whole period from 25th May 1920 down to the date of the proof?"

The arbitrator appended the following *note* to his award—[*After dealing with the question of revival of compensation*]—"It might be held that the proper course was simply to revive the award of January 1917. But the case is competently before me under the employers' minute of review. They are entitled to be declared free from their liability to be charged in respect of the period during which payment of compensation was suspended. Accordingly it is competent and right to assess compensation of new suitable to existing circumstances.

"I have had regard mainly to the wages during November and December 1921 and January 1922. Quinn's first demand for resumption of payment was on 11th November 1921, and it would not be fair to award from an earlier date than 1st November. No doubt wages began to fall in October, but the serious drop came in November, and I think October may be fairly reckoned in with the preceding months of high wages. I was again urged to take the whole period since March 1920 as the basis on which I should estimate Quinn's average weekly earnings now. In the case of *Mullen* v. *William Baird & Company, Limited* (decided 25th February 1922) I gave my reasons for refusing to adopt this

course. I may add another reason. During the period of high wages, while the workman was earning more money according to its nominal value, he was really being deprived of all compensation for his actual incapacity. If Quinn had been uninjured he would probably have been earning £6 a-week during that period, while he actually earned something over £3. And the inflation of values made that £3 interpreted in terms of commodities a great deal less than the £2, 4s. of 1914 similarly interpreted."

Argued for the appellants—The Act provided compensation for injury received, not damages—*James Nimmo & Company* v. *Myles*, 1917 S.C. 522, 54 S.L.R. 465; *Dobly* v. *Wilson, Pease, & Company*, 1909, 2 B.W.C.C. 370. Loss caused by injury must be distinguished from loss caused by fall in wages—*Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009, *per* Fletcher Moulton, L.J., at p. 1017, and Buckley, L.J., at p. 1025. The state of the labour market was altogether outside the question of compensation—*Ball* v. *William Hunt & Sons, Limited*, [1912] A.C. 496, *per* Lord Shaw at p. 508, 49 S.L.R. 711; *Kean* v. *Shelton Iron, Steel, and Coal Company*, 1921, 14 B.W.C.C. 123, *per* Sterndale, M.R., at p. 125. A general rise or fall of wages did not necessarily affect compensation—*Malcolm* v. *Thomas Spowart & Company, Limited*, 1913 S.C. 1024, 50 S.L.R. 823; *Black* v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, 46 S.L.R. 812; *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905, 58 S.L.R. 588; *M'Neill* v. *Woodilee Coal and Coke Company*, 1918 S.C. (H.L.) 1, [1918] A.C. 43, 55 S.L.R. 15. It was only where differences had arisen in the physical condition of the man that review was justified. That being so, the employers were entitled to an award ending compensation till further order. The onus was on the workman to justify an award, and he had not discharged it. He was now fixed with the character of a surface worker—*Babcock & Wilcox, Limited* v. *Young*, 1911 S.C. 406, *per* Lord Justice-Clerk (Macdonald) at p. 408, 48 S.L.R. 298. The arbitrator should have taken into account all payments made by the employer during the period of incapacity.

Argued for the respondent—A rise or fall in wages as affecting the amount which a man was able to earn could relevantly be considered either when originally fixing compensation or when circumstances made it necessary for the arbiter to review the award. The workman's ability to earn wages exceeding the maximum at which compensation could be awarded merely created a statutory bar of a temporary nature, and on earnings dropping below the maximum the right to compensation revived—*Bevan* v. *Energlyn Colliery Company*, 1912, 1 K.B. 63; *M'Neill* v. *Woodilee Coal and Coke Company* (*cit. sup.*); *Ball* v. *William Hunt & Son, Limited* (*cit. sup.*); Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule 2 (*a*). In assessing earning capacity the arbitrator had acted rightly with regard to the period of time considered.

LORD JUSTICE-CLERK—The respondent, who is a miner, was on 20th May 1914, while in the employment of the appellants, who are coalmasters, injured by an accident arising out of and in the course of his employment. His average weekly earnings before the accident were £2, 4s. The appellants admitted liability to pay compensation to the respondent on the footing of total incapacity, and did so till 8th November 1915. The respondent's condition having improved, arbitration proceedings were instituted, and the Sheriff-Substitute on 17th January 1917 awarded the respondent 10s. 4d. a-week in respect of partial incapacity. This sum was duly paid by the appellants down to 25th May 1920. It is common ground that the respondent's physical condition and fitness for work have not altered since that date. As at 25th May 1920, however, the respondent became barred from receiving further compensation, not because his earning capacity was restored, but because owing to a general rise in the level of wages the statute precluded any further payments to him. The respondent's right to compensation was accordingly with his assent suspended as from 25th May 1920. Wages having, however, fallen, and the statutory bar having thus been removed, the respondent on 11th November 1921 requested the appellants to resume payment of compensation to him. As they refused, he charged them on the award of 17th January 1917, and the appellants thereupon simultaneously sought review of that award. The arbitrator held that during the period from 25th May 1920 to 31st October 1921 the appellants were not liable to pay compensation to the respondent, as he was during that time able to earn wages in excess of his average weekly earnings before the accident. From and after 31st October 1921, however, the arbitrator awarded him compensation in respect of partial incapacity at the rate of 9s. a-week, and that award is the subject of this appeal. Two questions were argued by counsel for the parties — (1) Whether a general fall in wages is a change of circumstances which *per se* entitles a claimant to review of compensation? (2) Whether in assessing compensation in this case the arbitrator was bound to have regard to the whole period from 25th May 1920 to the date of the proof?

(1) The answer to the first question is manifestly in the negative. Principle and authority concur in furnishing this reply. Compensation is awarded because of loss of earning power due to an accident. Where that incapacity ceases, the right to compensation ceases. Neither the state of the labour market nor the level of wages is in itself a conclusive consideration either in an original application for compensation or in a process of review. In short, the operation of economic causes cannot by itself form the basis of compensation. The decided cases, with a detailed reference to which I think it is unnecessary to trouble your Lordships, yield the same result. But that does not conclude the matter. The position in this case is that for a time during

a period of high wages a statutory bar operated to prevent the respondent from receiving compensation. His compensation was accordingly suspended. But the statutory bar was removed by the fall in wages. Incapacity, however, remained. The respondent was still disabled by reason of his accident from earning the same wages as before that date. In these circumstances the arbitrator was, I think, well entitled to award him compensation.

(2) The appellants essay to establish that the arbitrator was *bound*—not, be it noted, *entitled*—in assessing compensation to take into account the whole period from 25th May 1920, which included within it a period of inflated wages. This it appears to me is a hopeless contention. Earning capacity is a question of fact; and I cannot find any statutory or other warrant compelling an arbitrator to take any particular period into account in reaching a sound conclusion in the matter. The First Schedule in the Act leaves it to his good sense to work out the average for which he seeks in the manner in which he thinks proper. In this case the arbitrator had in point of fact regard to the wages earned by the respondent over a period of three months, No reason has in my judgment been shown for interfering with the exercise of his discretion.

On both these questions then the contention of the appellants fails, and the appeal falls to be dismissed.

LORD HUNTER—I quite agree. The questions argued to us by the appellants appear to me to be simple and susceptible of easy answer in terms of the statute itself, without reference to any antecedent authorities, although I quite realise that that is, perhaps, a rash statement to make with reference to any controversy under a statute so fruitful of litigation as the Workmen's Compensation Act. The policy of that Act is to give to a workman injured in any of the employments referred to under the Act compensation during the period of his incapacity. Now in the present case the incapacity from which the respondent suffered has not disappeared. He was a miner, and in consequence of the accident he can no longer work as a miner. He cannot now earn the wages which he was earning at the time of the accident. The only criterion that the statute sets up in order to determine the capacity of a man at any particular time relatively to his capacity at the time of the accident is the amount of money he can earn in the shape of wages. The result is that if a man is able to take up a different kind of employment from the employment in which he was at the time of the accident, he may, owing to exceptional economic causes, be able to earn in money a greater wage than he was earning at the time of the accident, although his incapacity has not disappeared. But when the temporary causes which have enabled him to earn exceptional wages have disappeared he remains incapacitated as compared with his state at the time of the accident. That is what has occurred here. The respondent was able for a substantial period of time to earn higher wages as a surface workman than he had formerly earned as a miner, but his incapacity had not disappeared. Now when the temporary causes which enabled him to earn such wages have ceased to operate, he is earning a wage that is 18s. a-week less than the wage he was earning as a miner. The arbiter has awarded him 9s.; he might have awarded him anything up to 18s. He has considered the whole circumstances in exercising the discretion that is conferred upon him, and came to the conclusion that the respondent ought to get 9s. a-week of compensation. In reaching that conclusion I do not see that the learned arbitrator has in any way erred.

The appellants make the extraordinary suggestion that the man ought now to be treated as though he had always been a surface workman and not a miner. To give effect to the appellants' contention we would require to hold that for all purposes a man who can now earn 18s. a-week less than he was earning at the time of his accident, and who cannot now engage in the same sort of employment as he was engaged in at the time of his accident, is not incapacitated. A result such as that appears to me to be on the face of it absurd. If the arbitrator had reached the conclusion that the appellants contend for, and had been bound to do so under the statute, I think there is no doubt that the statute would require alteration, but fortunately the statute is, in my opinion, clear enough to prevent a result so contrary to common sense as that being reached.

As regards the second and subordinate question that was raised, it appears to me that it is clearly impossible to give effect to the contention of the appellants. They say that in order to determine what the man's present earning power is you have to take into account all the inflated wages that he had earned during the time that as a surface workman he was receiving a greater wage than he had as a miner. Under the statute there is no possible justification for such a contention. The only provision of the statute that was relied on in that connection is First Schedule (3), where it is said that in fixing the amount of weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of incapacity. That does not refer to a case like the present. It refers to a case where the arbitrator is fixing the allowance that a workman should receive; and if the workman has, during the period of incapacity in respect of which the arbitrator is making his award, received any gratuity from the employer, the arbitrator is to take that into account in determining the amount that the workman is to receive. But where the question before the arbitrator is to determine the man's present capacity with reference to his capacity previous to the accident, it seems to me that there is no obligation whatever upon the arbitrator to consider the state of matters which he has found—and I have no doubt perfectly rightly found — was merely temporary.

The arbitrator in determining what the man's present wage-earning capacity is has to take into account such circumstances as he thinks relevant. I have read the opinion of the arbitrator here, and I think he has proceeded upon lines which are not open in any way to exception.

I entirely agree with your Lordship that this appeal ought to be refused, and the questions put to us answered adversely to the contentions of the appellants.

LORD ANDERSON—I think I can most compendiously state the conclusions I have arrived at by referring to the three questions of law which are proponed in the case of Quinn.

On the first question no argument was submitted. It seems to me, however, to be quite plain that the arbitrator, on the facts established in the process of review, would not have been justified in issuing the award suggested. During the period between May 1920 and the autumn of 1921 there was a temporary inflation of wages of such degree as enabled the workman to earn an average wage considerably higher than his average weekly earnings prior to the accident. During this period the workman, by reason of the provisions of section (3) of the First Schedule to the Act of 1906, was debarred from claiming the compensation payable under the subsisting award or any part thereof, and no compensation during said period of inflation was either demanded or paid. After October 1921 wages became deflated, and began to approximate to the pre-war scale. When the arbitrator came to issue his award in March 1922 the position was that the workman had for five months or thereby been earning an average wage considerably less than his average weekly earnings prior to the accident. *Prima facie*, therefore, the workman was entitled in March 1922 to an award of compensation, and a suspensory award would have been quite inappropriate.

The second question of law is concerned with the main contention which was urged on behalf of the appellants. The respondent's present rate of wages it was said is due to economic causes, and not to impaired earning capacity caused by the accident. If this proposition were sound in fact, then it is well settled in law that the *status quo* as to compensation could not be disturbed—*Black*, 1909 S.C. 1150, and *Quilter*, 1921 S.C. 905. The appellants' argument was presented in this way—from the time that the respondent was able to resume work he was employed at light surface labour; he thus entered a new grade of employment, and his claim to compensation must now be determined on the footing that he had always been in that grade; he is now able, despite the results of his injury, to earn as high wages as any other workman in that grade; his present rate of wages is thus due to economic causes. True it is that he has been incapacitated from following his former avocation of a miner, in which higher wages can be earned, but that is a circumstance which it is urged the arbitrator was not entitled to take into account. The respondent's counsel on the other hand maintained that it was a material circumstance which the arbitrator had to consider that the respondent had been incapacitated by reason of the accident from pursuing his original vocation of a miner. It seems to me that the arbitrator was bound to take this circumstance into account. He was justified in holding that as the respondent had been incapacitated by the accident from working as a miner, and so earning higher wages, he was entitled to compensation. In other words, the arbitrator rightly held that the difference between the present earnings of the respondent and his earnings prior to the accident was due, not to economic causes but to his incapacity to work as a miner. In *Black* and *Quilter* the workmen were able to follow their former avocations, and their reduced earnings were found to be *solely* due to economic causes. They were therefore held to be disentitled to demand increased compensation because of a general fall in the rate of wages. The present case is clearly distinguishable from these decisions. The point seems to be determined in favour of the respondent's contention by the observations made by Lord Macnaghten in the case of *Ball*, 1912 S.C. (H.L.) 77, footnote at p. 78, [1912] A.C. 496. "It seems to me," says the learned Judge, "that the injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages *in the employment in which the injured workman was engaged at the time of the accident*. At that time this man was earning 20s. a-week as an edge tool moulder. That is what he was worth then. What is he worth now? As he is now no one will take him on at that work." These observations may be exactly applied to the present case. No one will take the respondent on at his former avocation of mining. He can only get a job as a surface labourer, and as such he can only earn £1, 6s. a week. If he could work at his former craft he would be able to earn £2, 4s. a-week. He is thus entitled to an award of compensation from the date at which his wages fell to the former figure, to wit, 31st October 1921.

The third question of law is concerned with what the appellants' counsel described as the minor point of the method adopted by the arbitrator in assessing the compensation now payable. It was conceded that, as the query is expressed, it does not raise any question of law, and that in order to do so it should have been expressed imperatively—was the arbitrator *bound* to have taken as the basis of assessment the period of time suggested? I am of opinion that the arbitrator was not so bound. In a process of review the arbitrator's duty, as prescribed by section 16 of the First Schedule to the Act, is to end, diminish, or increase the weekly payment of compensation. In order to determine the proper award the arbitrator must ascertain as a question of fact what is the present earning capacity of the workman in order to contrast that with his earning capacity prior to the accident.

The method whereby the workman's present earning capacity is ascertainable is left to the discretion of the arbitrator, with this qualification, that section 3 of the schedule, which appears to apply to a process of review as well as to an initial assessment of compensation, prescribes that the arbitrator shall take an average. The period of time chosen by the arbitrator for striking his average was the three months preceding the issue of his award. The appellants contend that the period chosen ought to have included the months from May 1920 to November 1921, during which wages were abnormally large. I am unable to hold that the method adopted by the arbitrator was so obviously unjust as to warrant this Court in reversing his decision on this matter of fact. On the contrary, I think I should have followed the same method of ascertaining the present earning capacity of the respondent as was chosen by the arbitrator.

I therefore agree that the case should be disposed of as suggested by your Lordship.

LORD ORMIDALE did not hear the case.

The Court answered the second question in the affirmative and the third question in the negative.

Counsel for the Appellants — Graham Robertson, K.C. — Marshall. Agents — W. & J. Burness, W.S.

Counsel for the Respondent—Lord Advocate (Murray, K.C.)—Fenton. Agents—Simpson & Marwick, W.S.

Thursday, October 26.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

NEWTON *v.* NEWTON.

Trust—Donation—Proof—Writ or Oath—Disposition of Heritage — Delivery — Disposition by Prospective Husband to Fiancée in Contemplation of Marriage —Supervening Marriage—Act 1696, *cap.* 25.

A man in contemplation of marriage bought a house and directed that the titles should be taken in his prospective wife's name. An *ex facie* absolute title was duly recorded in the Register of Sasines and the titles handed to her. After the marriage the husband brought an action against his wife for declarator that the property was really held in trust for him, and that the defender should be ordained to grant a valid disposition of the subjects in his favour. The defender averred that she had received the property as a gift. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) that notwithstanding the defender's averments of donation the onus of proof was on the pursuer, and that the proof fell to be restricted to the defender's writ or oath.

Observations of Lord President Dunedin in *Brownlee's Executrix* v. *Brownlee* (1908 S.C. 232, at p. 240, 45 S.L.R. 184) *commented on.*

James Martin Newton, grocer, Paisley, *pursuer*, brought an action against Mrs Agnes Money or Newton, his wife, *defender*, for declarator that certain subjects in Paisley, which she held on an *ex facie* absolute conveyance registered in the Register of Sasines, were truly held by her under that disposition for the pursuer and his heirs and assignees, and that the defender should be ordained to grant and deliver to the pursuer a valid disposition thereof. The pursuer purchased the subjects from a Miss Cumming at a time when he was engaged to the defender as a home for them after their marriage. He averred that for certain reasons which he gave he got the title taken in his fiancée's name, and handed the title-deeds to her "to be kept by her for him" in the house. The defender averred that she got the subjects by way of gift.

The pursuer pleaded, *inter alia*—"1. The title to the said heritable subjects having been taken by the pursuer's instructions in favour of the defender, in exercise of a disclosed intention that the defender should hold the subjects on behalf of the pursuer and his heirs and assignees, and without any intention of making a donation, decree of declarator should be pronounced as concluded for. 2. The said subjects described in the summons and known as 'Argyll' being held by the defender for the pursuer and his heirs and assignees as condescended on, decree should be granted in terms of the declaratory conclusion of the summons."

The defender pleaded, *inter alia*—"2. The defender being the absolute proprietrix of the subjects described in the summons, should be assoilzied. 3. The defender never having undertaken any trust for behoof of the pursuer in respect of said subjects, should be assoilzied. 4. Any such alleged trust in the defender being only provable by her writ or oath, proof should be so limited. 5. The pursuer having conveyed said subjects to the defender absolutely and irrevocably as a gift to her in view of his approaching marriage with her, the defender should be assoilzied. 6. The defender having been in no relationship to the pursuer, either of contract, trust, or otherwise, which could give rise to a claim of damages, the pursuer's fourth plea-in-law should be repelled and the action dismissed *quoad* its third conclusion."

On 7th July 1922 the Lord Ordinary (BLACKBURN) before answer allowed parties a proof of their averments.

Opinion. — "The pursuer James Martin Newton was married to the defender on 20th April 1920. Before marriage, but while the parties were engaged, he on 22nd February 1918 purchased a house for their home after marriage, and directed that the titles should be taken in the defender's name. This was done and the titles were handed to the defender. The marriage was not a success, and in this action the pursuer asks declarator that 'the subjects are truly held by the defender under the said disposition for the pursuer and his heirs and assignees.' He asks further that the defen-