which that opinion rested, and as such ought to have been communicated to the defenders. If this commandeering had been legal and effectual, or if it had changed the opinion on the subject held by the pursuers at the time of the sale, I should have held this contention correct. But the pursuers promptly made inquiries of Lieutenant Freeman's commanding officer, from whom any authority he might have in the matter must be derived, and learnt that his action was a gratuitous interference on his part wholly beyond any authority which he possessed, and therefore was a nullity. Moreover, they received information from his superior which was sufficient to convince them, and did convince them, that their original opinion was well founded. Under these circumstances no duty existed to communicate to the pursuers any of the matters which happened between the original interviews between the parties and the sale.

I hold therefore that the sale to the defenders was a good one, and that the property in the engine passed to them before the impressment, so that when the impressment took place it was an engine belonging to the defenders that was impressed. The loss due to such impressment must fall upon the defenders just as a loss by fire (if it had occurred) would have fallen on them. It constitutes no defence to the claim of the pursuers for the purchase-price.

As a last resort the defenders' counsel tried to contend that the pursuers had failed to give delivery and therefore had not fulfilled their obligations as vendors. This is based upon a complete misconception of the contract. So soon as the hammer fell the property passed, and it was for the buyer to remove the goods from the auctioneers' premises. Delivery so far as any was necessary to complete the contract of sale took place there and at that moment. If the auctioneers or their principals had refused to permit the purchaser to come on the ground to take away the goods they would have been liable to an action which in the English Courts is known as an action of detinue, or even under certain circumstances to an action of conversion. But these actions would have rested upon the hypothesis of the ownership being in the defenders and on a wrongful act having been done by the pursuers to their goods, and thus they would have implied that the purchase had been effected and therefore the purchase price had become due. No circumstances, however, exist in this case which would give any ground for any action of this type, and no such claim has been made before us.

I am of opinion therefore that this appeal should be allowed, with costs here and in the Courts below.

Their Lordships reversed, with expenses, the interlocutor appealed from and remitted to the Court of Session to pronounce a decree in terms of the conclusions of the summons.

Counsel for the Appellants — Moncrieff, K.C.—W. T. Watson. Agents—John E. Wilson & Foulis, Glasgow—Whigham & Macleod, S.S.C., Edinburgh—Ince, Colt, Ince, & Roscoe, London.

Counsel for the Respondents—J. Roberton Christie, K.C.—D. M. Wilson—Siney. Agents—Baucher & Vincent, Wigan—Turnbull & Findlay, Glasgow—Fraser, Davidson, & Whyte, W.S., Edinburgh—William A. Crump & Son, London.

Tuesday, May 11.

(Before Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Atkinson, and Lord Moulton.)

DOBBIE *v.* COLTNESS IRON COMPANY, LIMITED.

(In the Court of Session, December 21, 1918, 56 S.L.R. 144, and 1919 S.C. 257.)

Mines — Wages — Payment depending on Amount of Mineral Gotten—"Mineral Contracted to be Gotten"—Ascertainment of Deductions from Mineral Gotten—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 12 (1).

The Coal Mines Regulation Act 1887, section 12 (1), enacts:—"Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable: Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any checkweigher is stationed for this purpose as hereinafter mentioned) by such person and such checkweigher, or in case of difference by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a Court of Quarter Sessions within the jurisdiction of which any shaft of the mine is situate."

Miners in a coal mine agreed that

deductions from the "mineral gotten," *i.e.*, the total contents of the hutch, should be made by the weigher and checkweigher in accordance with the above-quoted section. The weigher proposed to deduct half a hundredweight a hutch, an amount ascertained by taking an average of a number of hutches crow-picked and from time to time checked in the same way. The checkweigher refused to agree to any deduction save what was ascertained by crow-picking each individual hutch, an impracticable method which would have stopped the working of the mine. He maintained that the weigher's proposal was a "special mode" only available by agreement between the owners and miners. The miners refused to call in an arbiter. The owners continued to pay the wages on the amount ascertained after deducting the half-hundredweight, a deduction which on the evidence was too little.

In an action by a miner to recover the additional sum he would have received had there been no deduction, *held* (*rev.* judgment of the Second Division), (1) that the miner was only entitled to wages on the mineral "contracted to be gotten;" (2) that in the absence of a "special mode" the weigher and checkweigher could adopt any mode; (3) that the miner had failed to prove anything to be due him, and consequently the action fell to be *dismissed*.

Bourne v. *Netherseal Colliery Company*, 1889, 14 A.C. 228, *distinguished*.

This case is reported *ante ut supra*.

The defenders, the Coltness Iron Company, Limited, appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY — This case raises an important question with reference to the ascertainment under section 12 of the Coal Mines Regulation Act 1887 of the amount on which the miner is entitled to be paid.

The respondent is a miner in the employment of the appellant company at their Blairhall Colliery in Fife. He was employed to win coal, his wages being dependent on the weight of mineral gotten by him, and he brought this action to recover £6, 17s. 2d. alleged to have been improperly deducted by the appellants. It is common ground that a term of his service was that deduction should be made from the gross weight of the mineral sent up the pit by the pursuer in respect of stones or substances other than the mineral contracted to be gotten, and that this deduction should be ascertained as provided by section 12 of the Act of 1887 (condescendence 3). No special mode of ascertaining the deductions had been agreed upon between the owners of the colliery and the miners. The checkweigher appointed on behalf of the men contended that the amount of deduction for "dirt" must be arrived at by actual weighing in the case of each hutch, and that failing ascertainment in this way the miner must be paid on the gross weight sent up, including stones and material other than coal. On the other hand the banksman or weigher as representing the company contended that the deduction should be ascertained by calculation of the average amount of "dirt." No agreement was arrived at and the action was brought to recover the balance which the company had refused to pay on the ground that it represented the "dirt" which had been brought up along with the coal.

The case must turn upon the interpretation to be put upon the provisions of section 12 (1) of the Act of 1887. This sub-section is still in force as it occurs in one of the sections exempted from the repeal of the rest of the Act of 1887 by the Coal Mines Act 1911 (1 and 2 Geo. V, chap. 50, sec. 126, and 4th sched.). Section 12 (1) is in the following terms: — ". . . *quotes* v. *supra in rubric*. . . ." It is to be observed that in virtue of the first paragraph of this subsection the miners are to be paid "according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them" is to be weighed at a place as near to the pit mouth as is reasonably practicable. The provision of the Act of 1872, section 17, had been that the miners were to be paid "according to the weight of the mineral gotten by them and such mineral shall be truly weighed accordingly," and then followed the proviso with regard to deduction of stones, etc., by agreement. The change from payment on "the weight of the mineral gotten by them" in the 1872 Act to payment on the "actual weight gotten by them of the mineral contracted to be gotten" is marked, and cannot have been accidental. It denotes that under the Act of 1887 payment is to be made on the amount of coal if that be the mineral contracted to be gotten, and for that purpose it is necessary that in some way the amount of coal as distinguished from stones and other material brought up with it should be ascertained. This seems to me to be clear on the words of the Act, and indeed it was admitted by counsel for the respondent that the mineral contracted to be gotten must denote coal apart from stones and other extraneous material.

On the other hand, the provision for the compulsory weighing is in different terms. What is to be weighed is "the mineral gotten by them," not "the weight gotten by them of the mineral contracted to be gotten." I agree with what was said by Lord Adam, differing on this point from the other Judges in *Atkinson* v. *Hastie*, 1894, 21 R. (J.) 62, 31 S.L.R. 892—"The Act takes a very sharp distinction between the minerals gotten by the miner and the minerals contracted to be gotten. The duty imposed upon the owner is to truly weigh the former, that is, the whole contents of the hutch, and not the latter, which is the coal." To weigh the coal would involve a separation from it of the stone and other extraneous material. Such separation would be a troublesome and lengthy process, and it is not disputed that if it were pursued the working of the colliery would be brought to a standstill. This accounts for the fact that in section 12 (1), while payment is to be on the mineral contracted to be gotten, what is to be weighed is the

mineral gotten, which will include stones, &c., as well as coal.

It is of course necessary that to ascertain the amount due to the miner the proper deduction should be ascertained. There is no compulsory provision for this purpose in the Act; it is left to agreement, but it is manifest that both parties have the strongest reason for agreeing for the making of such deduction. Until the deductions have been made the amount on which the miner is entitled to be paid has not been ascertained inasmuch as the section provides he is to be paid according to the coal he has gotten. The provision for ascertaining the deductions is in form permissive, but when its terms are rightly understood there appears to me to be no difficulty in its working.

This provision in the Act of 1887 takes the form of a proviso as in the Act of 1872, from which it has to a great extent been taken. The most material portion is in effect as follows—Provided that nothing in this section shall preclude the owner from agreeing with the persons employed in the mine that deductions shall be made in respect of stone or substances other than the mineral contracted to be gotten—sent out with the mineral contracted to be gotten. It was natural enough to put this in the form of a proviso in the Act of 1872, under which the miners were to be paid "according to the weight of the mineral gotten by them." It would not naturally be put in the form of a proviso in the Act of 1887 where the antecedent enactment was that the miners were to be paid "according to the weight gotten by them of the mineral contracted to be gotten," as this involves the necessity of ascertaining the net amount. The form adopted is really a survival from the Act of 1872, and it may have been some sense of its incongruity in the new Act which led the draughtsman to substitute the word "provided" simply for the words "provided always" in the 1872 Act. The proviso in the Act of 1887 is really a substantive enactment in a permissive form for determining the deductions which the terms of the earlier part of the section show must be made. After providing that agreement for deductions may be made, this proviso goes on to define the methods by which such deductions are determined. The first method is by agreement on some special mode, "such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mines on the one hand and the persons employed in the mine on the other." These words mean merely that the owners and the miners may agree on any particular method of determining the deductions, and that if such an agreement has been arrived at the method so agreed on shall be pursued so long as the agreement remains in force. The words do not mean, as has been supposed, that any methods which can be labelled as "special modes" can be adopted only if there has been an agreement for them between the owners and the miners. It is always open to those who under the latter part of the sub-section are entrusted with the determination to adopt any method whatever of ascertaining the true amount unless their hands are tied by the agreement of the owners and miners that a particular method must be pursued. Any special mode means merely any particular mode which the parties may have agreed on. No methods can be defined as special in themselves, and to read the clause as prohibiting the weigher and checkweigher from adopting on their own motion certain methods which may be considered special would be to render their task impossible. No one could say whether they had selected a method which was not open to the disqualification of being "special."

In the present case there was no agreement between owners and miners for any special mode. The matter was therefore left at large for the determination of the person appointed in that behalf by the owners (the banksman or weigher) together with the checkweigher who had been appointed by the men. The person so appointed by the owners proposed to determine the deductions by applying a system of averages based on the proportion of dirt which had been found in other cases. The checkweigher refused to be a party to any mode of determination except by actual weighing of each hutch, which would have involved the separation by crow-picking from the coal of the stones and other extraneous materials. It was admitted that this would have meant the stoppage of the mine owing to the time which the process would take and the constant accumulation of trucks. It appears to me that under these circumstances there was a "difference" within the meaning of the concluding part of the sub-section, and that the matter would fall to be determined by a third person to be agreed on by the parties. There was no mutual agreement on such third person, and according to the sub-section he was in that case to be appointed by a chairman of a Court of Quarter Sessions. The 76th section of the Act of 1887 provided that in Scotland such appointment should be made by the Sheriff instead of the chairman of Quarter Sessions. This section however has been repealed by the Act of 1911, so that there might be some difficulty in applying this provision in Scotland. It has been suggested that this difficulty might be met by invoking the *nobile officium* of the Court of Session, but for the purposes of the present case it is not necessary to determine this point.

As I have stated, the miner brought this action to recover the balance which would be due to him on the gross weight of the coal and other materials in the hutch. The case was sent to proof after there had been some debate on the amended record. The proof was taken before Lord Salvesen, and in his judgment there is given a summary of the facts. Omitting the 4th and 6th findings, to which the respondent's counsel took exception at the bar of your Lordships' House, this summary is as follows:—"The important facts are as follows—(1) That the attitude taken up by the checkweigher Tuke from the first was that he could agree to no deduction unless in the case of a par-

ticular hutch that was crow-picked. (2) That he was instructed to maintain, and did maintain, this attitude by the Miners' Union, of which he was an official. (3) That the cost of crow-picking every hutch in order to ascertain the amount of dirt in it is prohibitive, and such crow-picking is impracticable, as it would involve the stoppage of working in the seam in question. (4) . . . (5) That the defenders' deduction of half-a-hundredweight per hutch was on an average far below the amount of dirt immixed with the coal which the pursuer and his fellow miners sent to the surface. (6) . . . (7) That no method of estimating the dirt in the hutches of coal sent up from a particular seam has been suggested except by systematic crow-picking of sample hutches and collating the results. (8) That this method was in fact followed by the weigher, and that the checkweigher was invited to co-operate with him but refused to do so. And (9) that the checkweigher and those instructing him refused to agree to the appointment of an arbiter as provided for by the Act." The accuracy of the 9th finding was also challenged by the respondents' counsel, but the counsel for the appellants maintained that it was correct, and a reference to the letters and evidence cited by him appears to me to establish its substantial accuracy.

Lord Salvesen's summary of the facts as given above appears to contain substantially what is necessary for the decision of the case so far as facts are concerned. A great many authorities were referred to during the argument. The case of the *Netherseal Colliery* arose under the Act of 1872 (1887, 19 Q.B.D. 357, before the Divisional Court; 1888, 20 Q.B.D. 606, before the Court of Appeal; 1889, 14 A.C. 228, before the House of Lords). In that case the owners claimed to deduct the slack or small coal from the amount of coal on which they were to pay in pursuance of their contract with the miners to this effect. It was held that this deduction was illegal, as by the terms of the Act miners must be paid according to the weight of the mineral gotten, and as the slack was coal, though small coal, it was not by the statute permissible to contract for this deduction. None of the judgments throw much light upon the points in the Act of 1887, which now fall to be decided. In *Brace* v. *Abercarn Colliery Company* ([1891], 1 Q.B. 496) the decision in the *Netherseal* case was followed in a case arising under the 1887 Act. The decision of the Divisional Court was affirmed by the Court of Appeal, where it was held that the small coal was part of "the mineral contracted to be gotten" within the meaning of the Act of 1887, and that the variation in the wording as compared with that of the 1872 Act was for that purpose immaterial. In the case of *Kearney* v. *Whitehaven Colliery Company* ([1893], 1 Q.B. 700) the arrangement was that one tub out of twenty should be selected, and if it were found to contain more than a certain amount of dirt, the man who sent it up was to be paid nothing for the coal, while the other nineteen were paid in full on the total weight of the contents of each tub as if it contained coal only. It was held that such an arrangement was not a method of ascertaining the deduction within the terms of the Act. The correctness of this decision is not in question in the present case, but some of the dicta as to the meaning of particular words in the 1887 Act may be open to question.

This case falls really to be decided on the words of the statute, and previous decisions give little or no assistance.

The majority of the Second Division, the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie, concur in thinking that the pursuer was entitled to judgment for the £6, 18s. 10d. claimed. Lord Salvesen dissented.

The Lord Justice-Clerk said that he did not think it necessary to consider the main enacting part of section 12. But it appears to me that it is vital to ascertain what is the true meaning of the words which define the right to payment. If they mean that the miner is to be paid according to the amount of coal gotten by him, it is impossible to sustain an interlocutor which gives to a miner who has been paid, according to the evidence, the value of all the coal that he got, an additional amount which must represent not coal but stones or other extraneous matter. The decision proceeds really on the view that if the deductions are not made in the manner prescribed by the statute, the miner is entitled to be paid on the gross weight of what he has got, including stone, &c., and as the clause provides that he is to be paid on the weight of the mineral contracted to be gotten, *i.e.*, the coal, such a decision must be erroneous.

Lord Dundas says that there had been no resort to any one of the three methods laid down in the section for determining the amount of deductions, that there had been no agreement between the owners and the miners as to any special mode, that as there was a checkweigher the weigher had no jurisdiction to decide except with his concurrence, that there had been no agreement between the weigher and the checkweigher, and that this made an end of the defenders' case. Lord Dundas added that a method based on averages could be validly adopted only by antecedent agreement between the owners and men as a special mode.

Lord Guthrie held that the mode of taking an average deduction and thus avoiding the necessity of individual weighing is a special mode, and was allowable only if the owners and men had so agreed.

Lord Salvesen differed, and he points out in his judgment that the effect of the conclusion reached by his colleagues is that the statute provides no means of adjusting differences as to the amount of deductions, and so makes the provisions of section 12 binding on the owners only.

The construction of section 12 adopted by the majority in the Court of Session would make it utterly unworkable. If the determination of deductions on the basis of averages is a special mode which can be adopted only with the consent of both owners and men, and the checkweigher will agree to no method but that of weighing the coal in each hutch separate from

the stones, no determination of deductions is possible. The result would be that the amount on which the miners are entitled to be paid cannot be ascertained except by a method which would stop the working of the colliery. In the interests of the men themselves the amount which they are entitled to be paid must be ascertained, and if it is not so ascertained they could not recover their wages. I can see no warrant for the view adopted in the Court below, that in such a case they are entitled to be paid on the whole contents of the hutch, including what is admittedly not coal.

In my opinion the interlocutor pronounced should be reversed, and the action dismissed, with costs here and below.

VISCOUNT CAVE—In this case the respondent, a miner employed at the Blairhall Colliery in the county of Fife, sued his employers, the present appellants, for a sum of £6, 18s. 10d. which he alleged to be due to him for wages earned between the 1st January 1915 and the 6th March 1916. The pursuer's case was that he was employed to win coal, his wages being dependent on the weight of mineral gotten by him, and that the defenders had during the period mentioned made illegal deductions from the weight of the mineral sent up by him from the mine, and had made corresponding deductions from the wages due to him; and the amount sued for was the aggregate amount of the deduction so made. The amount claimed is small, but this is a test case, and it is said that claims amounting to about £5000 depend upon the decision.

The decision must turn upon the construction and effect of the unrepealed sections of the Coal Mines Regulation Act 1887, and particularly of section 12, subsection 1, of that Act.

The first paragraph of section 12 (1) provides that where, as in this case, the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, "those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable." This enactment is compulsory, and takes effect notwithstanding any agreement to the contrary, and any contravention of it is punishable as an offence against the Act. Upon this paragraph an important question of construction arises. Each hutch or tub of mineral sent out of a coal mine contains with the coal a certain amount of foreign matter, such as stones and dirt, the quantity varying with the seam which is being worked, and the care exercised by the miner who fills the hutch. The question is whether the "mineral contracted to be gotten," upon the weight of which the miner is entitled under the section to be paid, means the gross contents of the hutch, or those contents less the foreign matter, that is to say, the clean coal. In my opinion the latter is the true meaning of the expression. It is plainly used in this sense in the second paragraph of the sub-section, where it is contrasted with the stones or other substances sent with it out of the mine, and there is no reason why a different construction should be put upon it in the first paragraph. Further, there is a significant difference between this section and the corresponding section (section 17) of the Coal Mines Regulation Act 1872, for whereas the earlier enactment prescribes payment according to the weight of the "mineral gotten," the later statute compels payment according to "the actual weight gotten by them of the mineral contracted to be gotten." It appears to me that the change of language is not due, as has been suggested in some cases, to a desire for uniformity on the part of the draftsman, but is intended to define and govern the meaning and effect of the section. In this respect I agree with the opinions expressed by Lord Wellwood in *Ronaldson* v. *Mowat* (1894, 21 R. (J.) 55, at p. 58, 31 S.L.R. 896) and *Atkinson* v. *Hastie* (1894, 21 R. (J.) 62, at p. 66, 31 S.L.R. 891).

It is obvious that if the first paragraph of section 12 (1) stood alone the difficulty of complying with it would be very great, and in some cases insuperable. In order to ascertain the actual weight of clean coal in any hutch, it would be necessary either to empty the hutch and crow-pick the contents, or to devise some other means of ascertaining the weight of stones and dirt mixed with the coal. The time and money expended in this process would be very great, disputes would be likely to arise, and the payment of the miners' wages would be proportionately delayed. Accordingly there is added to the subsection a second paragraph or proviso by which (if the parties choose to put it into operation) machinery is provided for ascertaining the actual weight of coal gotten. If this proviso is agreed to by employer and employee, then deductions are to be made from the matter "sent out of the mine" (that is to say, from the gross contents of the hutches) in respect of stones or substances other than coal; and these deductions are to be ascertained in one of three ways, *i.e.*, either (*a*) in such special mode as may be agreed upon between the employer or his agent or manager and the employee; or (*b*) by some person appointed in this behalf by the owner, agent, or manager, that is to say (speaking generally), by the weigher or banksman; or (*c*) if a checkweigher appointed by the employees is stationed for this purpose at the proper place, then by the weigher and checkweigher jointly, or in case of difference by a third person to be agreed on by the employer and employee, or in default of agreement to be appointed by the chairman of Quarter Sessions. In the present case it was agreed between the employers and employees that deductions should be made in accordance with the proviso, but no "special mode" was agreed upon for ascertaining such deductions. A checkweigher was appointed by the men, and I think it clear (though on this point a question was raised by the appellants) that he was duly "stationed for the purpose" of

ascertaining the deductions. It follows that in this case the deductions fell to be ascertained by the method marked (c) in the above statement—that is to say, by the weigher and checkweigher jointly, or in case of difference by a third person, to be chosen in the manner prescribed by the section.

Each of the hutches sent out of the Blairhall mine contained about half a ton of material; and it had for some time been the practice of the owners to deduct from the weight in each hutch sent out from the "five-foot" seam (where the pursuer was employed) a half-hundredweight in respect of stones and dirt, and to pay wages on the balance of the weight in the hutch. This figure of a half-hundredweight was arrived at by crow-picking a certain number of sample hutches and ascertaining the average amount of stones and dirt in the hutches so dealt with, the result so obtained being checked by periodical crow-picking and otherwise. It is not disputed that the amount so deducted, sometimes referred to as the "standard deduction," was well within the average weight of stones and dirt found in the hutches, though no doubt some hutches contained more and some less than the average amount. At or about the beginning of the year 1915 the checkweigher, acting on a resolution passed by a show of hands at a meeting of the employees, took objection to this standard deduction and claimed that every hutch should be separately crow-picked in order to ascertain the actual amount of clean coal which it contained. It is clear that at the Blairhall Colliery, where the hutches were sent up in rapid succession, sometimes (as your Lordships were told) at the rate of 3 or 4 in a minute—such a procedure could not be adopted without stopping the mine. The checkweigher, Charles Tuke, in his cross-examination stated as follows—"If every hutch had been crow-picked the colliery would have been stopped. One reason for this is that after the first batch of hutches came up there would be no hutches available for filling; they would block up the whole place. The labour required also would be prohibitive." In these circumstances the weigher not unnaturally objected to the checkweigher's proposal, and contended that the standard deduction should be continued. In so doing he was not, I think, proposing that this method should be agreed upon as a "special mode" of ascertaining the deductions within the meaning of the section. Such an agreement could, no doubt, have been made between the employers and employees, and indeed this was precisely the "special mode" which had been so agreed upon in the case of *Ronaldson* v. *Mowat*, 1894, 21 R. (J.) 55, 31 S.L.R. 896, and was there held to be lawful. But no such agreement could be made between the weigher and the checkweigher; and obviously what the weigher desired was, that having regard to the experiments made, a standard deduction of half a hundredweight per hutch should be recognised as a fair allowance in estimating the actual weight of coal in each hutch. The checkweigher, however, still acting on instructions, declined to give way, and no agreement was arrived at between the two men.

It appears to me that at this point a "difference" had arisen which was capable of being referred to a "third person" as arbitrator in accordance with the statute. It has been suggested that there was no such "difference," as the checkweigher was contending for a principle and did not apply his mind to the question of amount; but I think that the proper inference from this fact is, not that there was no difference, but that the difference was fundamental. At all events, the employers proceeded on the footing that a difference had arisen, for they proposed, both orally and in writing, that a third person should be agreed upon in accordance with the section; but the men refused to concur in any such appointment and the proposal dropped. No application for the appointment of a "third person" was made by either party to the Court. Possibly no such application could have been effectively made; for there is no chairman of Quarter Sessions in Scotland, and section 76 of the Act of 1887, by which it was provided that the expression "chairman of Quarter Sessions" when applied to Scotland should mean the Sheriff of the county, was repealed (doubtless by inadvertence) by the Coal Mines Act 1911. In any case no further step was taken for procuring the appointment of an arbiter, and accordingly the weight of clean coal gotten by the pursuer was never in fact ascertained in accordance with the proviso. The employers continued to deduct a half-hundredweight from the weight in each hutch, and to pay wages on that footing. The wages were accepted under protest, and this action was brought for the amount claimed as payable in respect of the amounts deducted, that is to say, for the difference between the wages actually paid and the wages calculated on the gross weight in the hutches.

What then is the legal position? It cannot be that the appellants, who were under contract to pay wages calculated on the weight of clean coal gotten by the respondent, and who have made every endeavour to get that weight ascertained in accordance with the Act, though without success, are now bound to pay on the gross weight in the hutches—that is to say, on stones and dirt as well as coal. I think the true view is that, the machinery provided by the Act for ascertaining the proper deduction having broken down, the parties were remitted to the position in which they would have stood if the proviso had not been inserted in the Act or had not been adopted. In other words, the employers were bound to pay on the actual weight of clean coal gotten by the respondent, and this amount had to be ascertained before the amount due for wages could be fixed. It was therefore for the respondent, if he disputed the wages offered to him, to prove what weight of clean coal was in fact gotten by him during the period in question. This involved no hardship upon him, for he might have concurred in the appointment

of an arbiter and thereby determined the dispute. In fact he has failed to prove that he got coal to an amount represented by the wages sued for in this action. On the contrary the evidence shows clearly that the deduction of a half hundredweight from each hutch filled by the respondent does not exceed the average weight of stones and dirt in the hutch, and accordingly that the respondent's claim in this action is for a wage calculated on the weight of stones and dirt and not on the weight of coal. If so, his claim must fail.

The above decision is entirely consistent with the decision in this House in *Netherseal Colliery Company* v. *Bourne* (1889, 14 A.C. 228), where the decision was that slack or small coal was coal, and must therefore (notwithstanding any agreement to the contrary) be taken into account in ascertaining the weight upon which the wages should be paid. It is also quite consistent with the decisions (apart from dicta) in *Brace* v. *Abercarn Colliery Company* ([1891] 1 Q.B. 496, 2 Q.B. 699) and *Kearney* v. *Whitehaven Colliery Company* ([1893] 1 Q.B. 700) as well as with the decisions of the Court of Justiciary above referred to.

For the above reasons I am of opinion that this appeal should be allowed and the action dismissed with costs here and below.

LORD DUNEDIN—[*Read by Lord Sumner*]—The coal in the Blairhall Colliery is in some of the seams so associated with foreign substances that it is impossible in the course of ordinary working to send up filled trucks or hutches in which there is not a certain admixture of foreign substances with the coal. The colliers being engaged at a certain rate of wage dependent on the amount of clean coal sent up by them, the matter was arranged prior to November 1914 by a fixed deduction being made from the gross weight of each hutch of coal weighed at the pit-head. This arrangement, if not the subject of actual agreement, was acquiesced in by the men, and no question can now be raised as regards it. Up to this time there was no checkweigher appointed at the colliery, but in November 1914 a check-weigher by the name of Tuke was appointed. Acting upon instructions received from the Union, he took exception to this method, and a correspondence ensued between him and the managers of the colliery. On the 4th March 1915 a meeting of the men was held, at which it was agreed "that deductions be made." This was communicated to the colliery owners by the following letter from Mr Macbeth, the law agent who was acting for the men:—"Dear Sir—Along with Mr Lee of the Miners' Union I had a meeting at Blairhall to-day with the men. After discussion the men agreed to adopt the provisional agreement which was entered into when Mr Adamson, Mr A. Robertson, and I met you, Mr France, and the Messrs Russell on the 25th ulto., the weigher and checkweigher to decide what deductions, if any, should be made for foreign material in the hutches in accordance with section 12 of the Coal Mines Regulation Act 1887, which is incorporated in the Coal Mines Act of 1911. Mr Russell senior, you will remember, said that he was willing that this method should be given a trial for a month, and we hope that the experience both of the men and of the company will be satisfactory under this arrangement. The men asked me to-day what proceedings I proposed to adopt for recovery of the deductions illegally made, and I shall be glad to know what suggestion you have to make for a settlement. Yours faithfully, JAMES CURRIE MACBETH." When, however, the weigher and the checkweigher came together it became apparent that a serious difference of view existed between them. The weigher, on behalf of the owners, proposed the old deduction of a half cwt. per head, based on the average obtained from actual weighing after crow-picking of sample hutches. The check-weigher on the other hand refused to consider any such method. He had been advised that inasmuch as this method had not been agreed to by the men as a special method, there was no legal mode left except to take actual weight, which could only be obtained by crow-picking each hutch. He therefore refused to do anything except co-operate in such an operation, and eventually as the owners would not consent to do this he relinquished his attendance at the pit. To crow-pick each hutch was a practical impossibility, as it would mean the stopping of the colliery, as the check-weigher was well aware, but he only followed his instructions. Nothing more was done in view of the attitude of the checkweigher. The owners in paying the men continued to make the half cwt. deduction. In view of the critical period of the war both parties had the patriotism and good sense to continue the work.

The present action was raised for the purpose of recovering from the owners the sum which was due on the assumption that payment had to be made for the total weight of the contents of the hutches. Originally it was laid for a random sum of £5, but the action being dismissed as irrelevant by the Sheriff-Substitute the pleadings were by the Sheriff allowed to be amended, and the conclusions were altered to the exact sum which on the above-mentioned hypothesis was due to the individual pursuer, a miner. The Second Division of the Court of Session, to whom the case was taken by appeal, affirmed the view of the Sheriff and allowed a proof. The proof was taken by one of themselves and reported, and judgment was then given for the pursuer by a majority, Lord Salvesen dissenting. Appeal has now been taken to your Lordships' House.

The determination of the case depends on the interpretation of section 12 of the Coal Mines Regulation Act 1887. The ruling Act of the moment is the Coal Mines Regulation Act 1911, but that Act while repealing generally the Act of 1887 especially saves some sections of which section 12 is one, and does not otherwise deal with this matter of the payment of miners by weight and the fixing of deductions. That section is as follows—" . . . *quotes, v. sup.* . . ."

Now the view of the majority of the learned Judges comes to this. The mineral they say was weighed. An agreement was come to that deductions should be made, but the deductions could only be made in the way provided for by the statute. No agreement had been made by the men for deductions by way of the special mode of making an average deduction. The weigher could not make the deductions at his own hands because of the existence of a check-weigher. The checkweigher and the weigher together had never made a deduction because the checkweigher would not agree to the proposition of the weigher, and the weigher did not act in accordance with the proposition of the checkweigher; consequently no deductions had been made according to statute. The result was that the owners were bound to pay on the total weight taken.

It is this last step which is in my opinion fatal to the judgment. I have little doubt as to how the learned Judges came to this conclusion. I think they proceeded upon what they considered had been the opinion of the House in the *Netherseal* case. In that case the deduction made from the total weight was such coal as by the passage through a sieve came to be denominated as "slack." The judgment was that the only deduction allowable was for foreign matter, but the slack being coal which was the mineral according to the weight of which the wage was to be paid, it could not form the subject of a legal deduction. This does not touch the point; but undoubtedly in his opinion Lord Halsbury pointed out that the weight to be taken was the weight of all that filled the tub, and that that weight must be paid for with deduction only of such amounts as were lawfully arrived at in the methods allowed by the Act. I cannot help thinking that sufficient attention was not paid to the fact that the *Netherseal* case was decided upon the Act of 1872, which is materially different in its terms from the Act of 1887. In the earlier Act the statutory injunction as to payment is that the work is to be paid according to the weight of the mineral gotten. In the Act of 1887 the payment is to be made, not of the mineral gotten, but of the mineral contracted to be gotten. Now here the mineral contracted to be gotten was clean coal. There was no obligation to pay except for clean coal. Accordingly the inference which the learned Judges drew, viz., that if deduction was not lawfully made, payment must be made according to the full contents of the hutch, is an inference which could be made under the Act of 1872, but could not be made under the Act of 1887 if it is admitted, as it is, that the full contents of the hutch contained matter other than mineral contracted to be gotten.

This consideration is sufficient to dispose of this appeal. As the judgment stands it is a decree for payment for something which the statute says is not to be paid for, viz., something which is not mineral contracted to be gotten; but the case has been brought as a test case, and we have had full arguments as to the effects of the statute, and I think, therefore, it is only right that I should say more as to the statute in general.

The leading enactment is that contained in section 12 (sub-section 1), that where the bargain is for payment by results of mineral extracted, the miners shall be paid by the weight of the mineral contracted to be gotten. And then follows the instruction that the mineral shall be duly weighed. Not, observe, the mineral contracted to be gotten but the mineral. Now in some seams no trouble would arise, for in such seams it would be possible to send up clean coal; but there are other seams where a certain admixture of blaes or stones is a necessary concomitant of the coal. The proviso which follows is put in to meet such cases, though doubtless it would have been better expressed if not put in the form of a proviso; the proviso form being appropriate indeed to the scheme of the Act of 1872, but not to the scheme of the Act of 1887. The proviso meets the practical difficulty and provides for an agreement between owners and men to make a deduction from the only weight to be weighed, to wit, the gross weight. An agreement being come to that deduction should be made, the deductions then are only to be made in certain statutory ways. First an agreement as to any special mode arrived at between owners and men. This, if made, would bind all men in the colliery and no individual could quarrel with it. Undoubtedly an average deduction would fall within the terms "special mode." Failing this agreement then the deduction was to be settled first by a person appointed by the owners if there is no checkweigher in existence, or second, if there is a checkweigher in existence, then by agreement between the two, with an arbiter called in if they cannot agree. Now on this there is a remark to be made. It seems to have been thought, and the law agent's advice in the present case, contrary to his own individual opinion, but due to his interpretation of the Home Office letter, was to the effect that a deduction per average was such a special mode as to be available only to an agreement by the men as a whole, and not available to be fixed by the owners' representative and the checkweigher, and failing agreement by the arbiter. I need not inquire whether the Home Office letter, which is a little obscure, really meant this. If it did not, it does not matter; if it did, it is wrong. I am clearly of opinion that any method of deduction, including deduction per average, is open to the determination of the owners' representative and the checkweigher if they agree, or to the arbiter if they do not. The erroneous belief as to this is the seat of the whole trouble. It is quite clear that the checkweigher in this case, instructed by his union on the supposed legal point, thought that he could force the owners to pay for dirt by the simple process of getting the men to agree to a deduction per average as a special mode, and then refusing upon the plea of illegality to concur in fixing any mode except weighing each hutch—a practical impossibility, as he frankly admitted in the witness-box. I refer to the evidence of

Tuke where he said—"If every hutch had been crow-picked the colliery would have been stopped." If this were right then the Act would have been made to contradict itself, for the men, as here, would only have to refuse to adopt a special mode in order to compel the owners to pay for what the statute particularly says they shall not pay, viz., the whole contents sent up as opposed to the mineral contracted to be gotten.

Sir John Simon, for the owners, strenuously argued that in this case the checkweigher having renounced his functions there was no checkweigher, and accordingly the owners' representative at his own hand was entitled to make the deduction of the half cwt. per hutch. I do not think so. I think that as soon as the weigher said he proposed to take a half cwt. as a fair deduction, and the checkweigher said he proposed that each hutch should be weighed, there arose a difference between them, and that if either side wished a binding decision they ought to have called in the arbiter. It has been pointed out to us that the arbiter is a person appointed by the chairman of the Court of Quarter Sessions—a term inapplicable to Scotland; and that the interpretation clause of the Act of 1887, which provides that in application to Scotland this should mean the Sheriff of the county, has been, no doubt *per incuriam*, repealed by the Act of 1911. This is a case where the *nobile officium* of the Court of Session may by petition be invoked to get out of the difficulty. Let me again point out that whereas a settlement of average as a special mode arrived at by arrangement with the men would bind all, the determination of the weigher and checkweigher, and on difference by the arbiter, would only bind the individual. Such a judgment would doubtless be repeated, and further, it is clear that the whole question of whether a sufficiency of test had been taken to strike a true average would be a question for discussion and, failing agreement, for arbitration.

The result is that the Act standing as it is there is in a dirty seam only one practical way of working it out, viz., to agree, as has been done, to make deduction, and then to allow the deduction to be fixed in any way that the owners' representative and the checkweigher may fix, and failing their doing so by arbitration. As the case stands, the owners, it is true, have not fixed the deduction, but the man has not proved his case, and the judgment of the House, in my opinion, ought to be to reverse the interlocutor appealed against, and to remit the case to the Court of Session with instruction to dismiss the action with expenses to the defenders.

LORD ATKINSON — I concur. As has already been stated, the pursuer was a miner in the employment of the defenders at their Blairhall Colliery in the county of Fife. It is stated in the third condescendence of the respondent that when he entered the service of the defenders it was understood and agreed between them that deductions should be made from the gross weight of the mineral sent up the pit by the pursuer in respect of stones or substances other than the minerals contracted to be gotten. From the 1st January 1895 to the 6th March 1915 deductions were in fact made from the minerals so sent up at the rate of a half cwt. from each hutch full, a rate which, according to the evidence of James Horne, a deputy of Tuke, the checkweigher, was not unfair to the miners; and the pursuer was paid his wages on the assumption that all material which remained in the hutch after this deduction was coal. He now sues and has obtained judgment for £6, 17s. 2d., the difference between the amount of wages he on this assumption received, and what he would have been entitled to receive had no deductions been made. This demand necessarily involves a claim to be paid for all he sends up as if it were coal, no matter how much or how little coal may in fact be contained in each hutch.

The claim is entirely inconsistent with the agreement set forth in condescendence No. 3. It would appear to me to be unjust in fact, because it is proved by the witness Horne, who has worked for many years in these mines, that "he could not fill a hutch with perfectly clean coal — that there is always necessary a quantity of dirt in every hutch as it goes up from the bottom of the pit." At common law if a workman be employed to do a certain piece of work at so much per yard or per ton or per any other unit of measurement, he must, *prima facie*, before he is entitled to be paid at the stipulated rate per unit, prove the number of units of the particular work he has executed. The burden is on him.

In this case that principle would seem to have been reversed, and the compound of coal and dirt sent up in each hutch was to be assumed to be all coal, unless and until the employer proves what precise proportion of the compound is coal and what dirt. In condescendence 3 it is further stated that it was part of the agreement there set out that the deductions which it was agreed should be made from the gross weight of mineral sent up should be ascertained as provided by section 12 of the Coal Mines (Regulation) Act of 1887. This statute received the royal assent on the 16th September 1887. It was preceded by an earlier statute, the Coal Mines (Regulation) Act 1872, which it repeals.

Section 17 of the Act of 1872 is, with the exception of the pregnant addition hereinafter mentioned, practically identical with section 12 of the Act of 1887. The two last lines of the first paragraph of this section 17 run, "to be paid according to the weight of the minerals gotten, and such minerals shall be truly weighed accordingly," whereas the last four lines of the first paragraph of section 12 of the Act of 1887 run, "be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near the pit's mouth as is reasonably practicable."

By this addition it is, in my view, made perfectly clear that by this first paragraph of section 12 all obscurity is removed. "The mineral gotten" is treated as the whole, of which the mineral "contracted to be gotten" is but a part. The proviso to each of the sections 17 and 12 respectively shows that what it was desired to get at for the purpose of payment was "the mineral contracted to be gotten." The deductions about which the owner, agent, or manager and the persons employed in the mine were free to agree were the deductions which should be made in respect of stones or material "other than the mineral contracted to be gotten."

In section 12 the above-mentioned addition is introduced to make the object of the proviso all the more clear. Before deductions can be made it is but natural that the weight of the whole from which they are to be made should be ascertained. This is secured by the provision that the mineral gotten (which may include shale or ironstone minerals) should be weighed. There is no obligation whatever imposed upon the owner to weigh that portion of it described as the "mineral contracted to be gotten." The words introduced into the Act of 1887 naming the place where the weighing is to take place would seem to indicate this, viz., the words "at a place as near to the pit's mouth as is reasonably practicable" are not found in the Act of 1872. The case of *Bourne* v. *Netherseal Colliery Company*, much relied upon on behalf of the respondent, was decided on the Act of 1872 in the Queen's Bench Division on the 13th of July 1887. The plaintiff there claimed to recover a sum of £20, 8s. wages earned by him in getting coal for the defendant. He claimed the same amounts also as having been illegally and improperly deducted from his wages without the assent of the checkweigher at the colliery, and against the provisions of the Act of 1872.

The plaintiffs were there employed under an agreement whereby they agreed to serve the defendant company from the date of the agreement, and to obey the general and special rules and regulations of the colliery, and also that the mineral contracted to be gotten referred to in the Coal Mines Regulation Act of 1872 should in all cases mean and include only such pieces of coal as could not fairly be passed through an ordinary loading rake, the clear spaces between the prongs of which are two and a half inches wide. After a strike the men returned to work on the terms that coal should be paid for at 16d. per ton, with a premium of 2d. per ton in certain cases, and further that no slack whatever should be paid for except that sent out as heading slack, all other kinds of slack being deducted from the different hutches in proportion to their loading. The practice was that the tubs or hutches containing the material won were raised and weighed by a weigher and checkweigher and the weights taken down. The coal was then moved in trucks to a place where it was sorted into classes, and after being sorted was taken to a place 40 yards away and shot down six feet on to a screen, part of a machine called Billy Fairplay, and a boy who was in the employ of the company noted from a dial the weight of the slack that had gone through the screen. The men were paid upon the weights handed in by the checkweighers.

The case came before the County Court Judge, who gave judgment in favour of the defendant company. The plaintiffs appealed to the Queen's Bench Division, when Justices Stephen and Wills decided in favour of the plaintiffs solely on the ground that the deductions for slack were not determined by the persons named in section 17 of the Act, namely, the "banksman or weigher and checkweigher (if there should be one)," but by a boy who managed a machine called Billy Fairplay. The defendants appealed to the Court of Appeal. The case is reported 20 Q.B.D. 606—when it was held by Lord Esher, R.M., and Lopes, L.J., Fry, L.J., dissenting, that the mineral contracted to be gotten was, within the meaning of the statute, coal, and that slack, being a part of such coal, deductions in respect of it were unauthorised, that so much of the contract as related to it was therefore void, and that the plaintiff was entitled to recover.

On appeal to this House, 14 A.C. 228, the decision of the Court of Appeal was affirmed by Lords Halsbury, Herschell, and Macnaghten on the ground, according to the head-note, that by the contract the amount of the wages paid depended on the amount of mineral gotten within the meaning of section 17, but the miners were not paid according to the weight of the mineral gotten, nor was such mineral truly weighed accordingly, within the meaning of the section, for the mineral contracted to be gotten was coal, including slack, and slack was not material other than mineral contracted to be gotten, and was therefore not one of the things allowed by that section to be deducted.

Though the special agreement entered into in that case differs from that entered into in the present case, the decision supports the case of the defendants rather than that of the plaintiff, inasmuch as it establishes that where the matters deducted are such as cannot be legally deducted, the miner is entitled to be paid for the full amount of that which the statute fixes as the measure of his wages. In the Statute of 1872 the measure is "the weight of the mineral gotten." In the Act of 1887 the measure is different; it is the actual weight gotten of the "mineral contracted to be gotten," which is coal. I have dealt with this case at some length because I think it has been misapplied in argument on behalf of the respondent. In my view it lends no support to the contention that if no deductions be legally made the employer is bound to pay for a mixture of coal and dirt sent up from the pit as if it were all coal.

The whole object and design of the proviso to the 12th section of the Act of 1887 is to set up machinery by which the amount of the mineral contracted to be gotten can, by the deduction of stones and substance other than this mineral, be ascertained.

The practice adopted in the colliery for ascertaining the amount of coal won was by

taking at random some of the hutches sent up as fair specimens of all the others, having those crow-picked, ascertaining thus the weight of the average amounts of dirt (other than that removeable by washing) contained in them, and deducting that average weight from all the other hutches. The proprietors show pretty clearly that the amount deducted under this system was in fact insufficient. No case is made out that it was unfair to the men as a body. By the 12th section of the Act of 1887 it is enacted that the deductions to be made may be determined by three different modes or methods. (1) By such a "special mode" as may be agreed upon between the owner, agent, or manager of the mine on the one hand and the persons employed in the mine on the other. This obviously means a mode which is to be decisive according to its terms and to be applied as long as the agreement in reference to it remains in force. (2) By some person employed by the owner, agent, or manager. And (3) If any checkweigher is stationed for such purpose as thereinafter mentioned, by such person and such checkweigher. It was suggested that Charles Tuke, who was appointed checkweigher by the men, was not appointed for the purpose of determining the deductions to be made. I think the evidence establishes the contrary. It is obvious that if this last mode or method is to work, provision must be made for the case where the two persons thus selected are unable to agree; and accordingly it is provided in section 12 that in case of a difference between them the deductions to be made should be determined by a third person to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or, in default of agreement, the person appointed by a chairman of Quarter Sessions within the jurisdiction of which any shaft of the mine is situate. By the 76th section of this same statute the chairman of Quarter Sessions is, in the application of the Act to Scotland, defined to mean the Sheriff of the county. But this section of the Act of 1887 is, together with all the others save those numbered 1, 3, 12, and 13, repealed by section 126 and Schedule 4 of the Coal Mines Act of 1911. So that this last provision of section 12 of the Act of 1887 cannot be taken advantage of. It is still open, however, to the persons employed in the mine to withdraw their checkweigher or to retain him and give him and the representative of the owners an opportunity of agreeing to a third person to be brought in as an umpire.

The weigher appointed on behalf of the owners of the mine was of opinion that the established practice of crow-picking the contents of some of the hutches selected at random, finding thereby the average weight of dirt found in them, and deducting this average in all cases, was fair and ought to be adhered to. Mr Tuke, the checkweigher, insisted that every hutch should be crow-picked and the weight of dirt found deducted from the weight of the full hutch. It is not disputed that such a method as this is absolutely impracticable. The letters of Charles Tuke, dated 16th and 17th March 1915 respectively, the first addressed to Messrs Macbeth, Bain, and Currie, and the second to Peter Warden the weigher, show the nature of the demand made by the writer, its genesis and object; while the letter written on the 16th March 1915 on behalf of the company shows, I think, that they were ready to act reasonably; Mr Tuke states in both his letters that he was willing to agree that the actual amount of dirt found in any tub should be deducted from that tub only, and Mr Robert Russell, writing on behalf of the company, states that at a meeting to which he refers both parties agreed that crowing each hutch was impracticable. But I am quite unable to see how it can be said that when two persons are appointed to do a certain thing, and one insists on doing it in one way, which is practical and proved to be reasonable and fair, and the other insists upon doing it in another and a different way, which happens to be impracticable, there is not a difference between them within the meaning of this proviso to section 12 of the Act of 1887. The difference referred to is not confined to a difference as to the mode of applying, or the result of applying an agreed test, or an agreed mode of measurement. It, in my view, clearly extends to a difference as to the nature of the test or mode of measurement itself which is to be applied for the purpose named. It is also, in my view, perfectly clear that there is nothing whatever to prevent the weigher and checkweigher agreeing to a mode in which the deductions may be determined. That is not the "special mode" referred to in the first part of the proviso. And indeed it is difficult to see how, where no special mode, properly so called, has been agreed upon, they could ever arrive at any result unless they did so agree.

In my opinion, therefore, the pursuer has wholly failed to show that he is entitled to recover the sum for which he has obtained judgment. I think the decision appealed was erroneous and should be reversed, and this appeal be allowed with costs.

LORD MOULTON—The present appeal is from an interlocutor decreeing payment to the pursuer of the sum of £6, 17s. 2d. with interest. The amount to which our decision relates, therefore, is in itself trifling, but the case is one of great importance, not only because it is a test case governing many others, but also because it involves the interpretation of clause 12 of the Coal Mines Regulation Act 1887, which governs the payment of wages to all coal miners who are paid according to the coal they raise.

The claim is for wages unpaid. The pursuer, who is a miner in the employ of the defenders, avers that he has raised some eighty odd tons of coal in excess of that for which the defendants have paid him. The Courts below have found that he is entitled to his full claim. There is no dispute as to the rate of payment, so that the interlocutor is equivalent to a finding that the pursuer has proved that he has in fact

raised the whole of the coal for which he claims.

The peculiarity of the case is that everyone concerned — pursuer, defenders, and judges—knows that such a finding is contrary to the facts of the case. There can be no dispute as to this, for the claim is based upon the gross weight of mineral sent up by the pursuer during the period in question, and it is common ground that such mineral did not consist entirely of coal but contained substantial amounts of stones, rubbish, and dirt. Nay, further, I do not think that it is seriously contested on the evidence as it stands that the total amount of such extraneous material was at a fair estimate at least equal to the weight claimed for by the pursuer in this action.

The dispute between the parties turns, therefore, rather upon a question of the respective rights of the pursuer and defenders under the relevant clause of the statute regulating the payment due to the pursuer than upon any genuine difference of opinion between the parties as to the facts of the case. I shall therefore proceed at once to examine section 12 of the Coal Mines Regulation Act 1887, which is the clause in question.

The enacting portion of this clause reads as follows:—" . . . *quotes, v. sup.* . . ."

The drafting of this clause is, in my opinion, very careful and accurate, and shows that in the mind of the draftsman there was a clear perception of the subject-matter to which it relates and of the legislative provisions which were to be made respecting it. A clear distinction is drawn throughout between "mineral gotten" and "mineral contracted to be gotten." By "mineral contracted to be gotten" is meant (in the case of a coal mine) the coal itself. By "mineral gotten" is meant the total mineral sent up by the miner, which includes stones and substances other than coal which come up in the hutch together with the coal. If there could be any doubt about this construction of the two phrases it would be set at rest by reference to the proviso which speaks of deduction—"In respect of stones or substances other than the mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten."

The enacting part of the clause therefore provides that where wages depend on results the miners shall be paid — not upon the total weight of the mineral gotten by them —but upon the amount of coal contained in it. This is a fair basis of payment, because it is the coal that measures the value of the work done by the miner. The stones and rubbish are not only useless when brought to the surface, but they are much better left in the pit where they serve to lessen the volume of the excavation and *pro tanto* diminish the consequent subsidence of the surface.

But there is a further provision in the enacting part of the clause. No doubt it is primarily for the protection of the miner, but it is truly in the interests of both parties that an accurate record should be taken of the only relevant matter that can be definitely and accurately ascertained at the moment without hindrance to the working of the pit, *i.e.*, the weight of the total contents of the hutch. The Legislature throws upon the employer the duty of ascertaining this. But it is only the weight of the total mineral that can thus be ascertained, and the words of the clause make it clear that this is realised and intended by the Legislature. The words used in this connection are "mineral gotten" not "mineral contracted to be gotten." The actual provision relating to it reads thus — "The mineral gotten by them shall be truly weighed at a place as near to the pit-mouth as is reasonably practicable."

The Legislature provides, therefore, that the miner shall be paid according to the actual weight of the coal gotten by him. But it does not, and for practical reasons could not, provide how that weight should be ascertained in each particular case. All that it could do was to provide that the total weight of mineral gotten should be truly and promptly ascertained. There was left unsolved the mode of ascertaining how much of that mineral was actually coal—in other words, what deduction should be made for stones, rubbish, &c. This is a matter which must depend on the circumstances of each particular case and could not be legislatively provided for.

But the Act did all that it was possible to do to prevent the continual friction that might so easily arise between the parties in connection with the determination of this question of fact. It put in a proviso giving to the parties the widest powers of agreement that the necessary deductions from the gross weight of the mineral should be made, and of determining what those deductions should be. From the nature of the case these matters must rest ultimately on agreement. But the proviso goes so far in its efforts to bring about and facilitate an agreed method of arriving at the desired result, that upon its true construction I am of opinion that if the parties have agreed that deductions should be made their representatives have the widest powers of agreeing as to the mode to be adopted in calculating them.

In the argument before us great importance has been attached to the words "special mode" in the proviso. It is not a phrase of limitation but simply means the method agreed upon, whatever that may be, of settling these deductions while the work goes on. It will be noticed that when the parties have agreed that deductions shall be made the mode of making them is a matter that may be agreed on by the checkweigher on behalf of the men, and some person appointed for the purpose on behalf of the employer, with power in case of difference to call in an umpire whose method of appointment is specified. There is no need to go back to the principals themselves to fix the mode of determining the deductions. In practical working this is doubtless of great importance, since it is to the true interest of all parties that the actual amount of coal raised should be promptly and accurately ascertained. But

in theory it amounts to but little, because any arrangements so made can be put an end to by terminating the fundamental agreement that deductions shall be made under the terms of the proviso.

It is, however, unnecessary to examine the proviso further, because it is clear that in the present case the pursuer, together with the rest of the miners, refused to act under it. They were of course entitled so to refuse. The form that their refusal took was that of refusing to agree to any deduction from the gross weight of mineral in any hutch unless that particular hutch had been "crow-picked," *i.e.*, the contents emptied out and the coal separated from the stones and rubbish and the latter separately weighed. They would not allow the experience thus gained as to the amount of extraneous material coming up with the coal to be applied generally or to any other hutches. The pursuer has not even allowed so much as this, for in cases where a hutch was actually crow-picked and the amount of stone and rubbish in it ascertained directly he has claimed for the gross weight without any deduction.

It is evident that the defenders could not be expected to consent to such a method of ascertaining the amount of coal raised by the miners. To do it in this way would make it necessary to crow-pick every hutch, and all parties are agreed that it would be impracticable so to do, as it would necessarily stop the working of the colliery. I am afraid that it is clear that this was what the pursuer relied upon. Someone had led the miners to believe that if they did not agree to any practicable method of arriving at the deductions, no rectification of the weights as ascertained by weighing at the pit's mouth could be made, and they would be entitled to be paid on the gross weight of the mineral raised by them whether it was coal or not.

In this they were wholly wrong. Their behaviour in this respect could not alter the contract that they should be paid on the actual weight of the "mineral contracted to be gotten," or in other words, that their employers should pay them on the amount of coal raised and on that alone. Agreeing or not agreeing to deductions does not alter the rights of the parties under the contract; it only affects the mode of proof by which the result of those rights in the shape of money is ascertained. If there is an agreed deduction it is binding on both parties, and decides absolutely as between the parties what is the weight of coal which the miner is to be taken to have raised and for which he is entitled to be paid. But if there is no such binding admission as to the weight of coal raised, it must be decided, by whatever tribunal has to decide it, by the same machinery by which all other issues of fact are decided, viz., by evidence. The issue is, of course, on the pursuer. He has to prove that he won the coal for which he is claiming payment, and he does not discharge this *onus* by producing evidence as to the sum of the gross weights of the mineral in the hutches he has sent up, for it is not denied that this was not all coal. The Court must do the best it can upon the evidence before it to decide how much coal there was in that mineral, and if it cannot arrive at any conclusion on the point the pursuer has failed to support his case.

This emphasises the desirability of the parties behaving reasonably in agreeing to some system of arriving at the net weight of the coal in the hutches which can be applied during the course of the working, so that differences can be settled as and when they arise. The terms of the proviso show that the Legislature contemplated this being done. It assumed that people would try to avoid disputes by behaving reasonably, and I greatly regret that in this case there was a refusal on the part of the miners to adopt any reasonable arrangement to settle the matter by agreement as indicated by the proviso. Such a course of action cannot benefit the party adopting it, for while the proviso does not in any way alter the contract or compel the parties to act under it, the tribunal which has to decide the question of fact can hardly abstain from giving the benefit of any doubt which may arise upon the evidence to that one of the parties that has done its best to prevent the dispute arising by its willingness to act reasonably in the matter of agreeing to the proper deductions from the gross weight as indicated by the proviso.

In the present case, however, the sole evidence adduced by the pursuer in support of his claim is the list of gross weights. The defenders adduced evidence which makes it clear that a substantial part of this gross weight was not coal, and in addition gives to the Court evidence on which they can reasonably arrive at an estimate of its amount. Accepting that evidence (which is practically uncontradicted) there is nothing due to the pursuer, because he has been paid upon the weights for which he claims with the deduction of such amounts of extraneous matter.

The pursuer has therefore failed to prove his case, and the judgment of this House ought in my opinion to be that the interlocutor appealed against should be reversed, and that the case should be remitted to the Court of Session with instructions to dismiss the action.

Their Lordships, with expenses, reversed the interlocutors appealed from, and remitted to the Court of Session to dismiss the action.

Counsel for the Appellants — Sir John Simon, K.C. — Moncrieff, K.C. — W. T. Watson. Agents — Ross & Connell, W.S., Dunfermline — Wallace & Begg, W.S., Edinburgh—Walter H. Guthrie, London.

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COURT OF SESSION.

Tuesday, March 2.

SECOND DIVISION.

[Lord Anderson, Ordinary.

ALEXANDER *v.* ALEXANDER.

Husband and Wife—Marriage—Nullity—Fraud—Pregnancy at Date of Marriage Due to Another Man—Adoption of Marriage—Presumption of Marital Intercourse.

A husband brought an action against his wife for declarator of nullity of marriage on the ground that at the time of the marriage the defender had attributed her pregnancy to her intercourse with him, whereas as he had discovered it was due to intercourse with another man. It was proved that after the child was born the pursuer in full knowledge of all the facts had registered the child as his own, giving it his mother's names, and had slept for some weeks with the defender. The Court dismissed the action, *holding* that even if the marriage were voidable the pursuer had adopted it.

Stein v. *Stein*, 1914 S.C. 903, 51 S.L.R. 774, *distinguished.*

Opinions that the occupying of the same bed by a husband and wife is sufficient proof, without direct evidence, of marital intercourse to establish condonation.

Robert Alexander, clerk, Glasgow, *pursuer*, brought an action against Mrs Ruth Crawford or Alexander and against Isabella Beveridge Alexander, a child of the said Mrs Ruth Crawford or Alexander, *defenders*, for declarator "that the first named defender was at the time of the pretended marriage between her and the pursuer pregnant of a child of which the pursuer is not the father, and that this fact was unknown to the pursuer at the time of the marriage and was concealed from him . . . that the said pretended marriage betwixt the pursuer and the defender was from the beginning, is now, and in all time coming shall be, null and void and of no avail, force, and effect; and that the pursuer is free to marry any free person; and . . . that the pursuer is not the father of the second defender, being the female child born to the first defender on 21st November 1917, and registered under the name of Isabella Beveridge Alexander."

The pursuer *pleaded*—"1. The marriage between the pursuer and the defender Ruth Crawford or Alexander being null and void, decree of declarator of nullity should be granted as concluded for. 2. The defender Isabella Beveridge Alexander not being the child of the pursuer, declarator should be granted to that effect."

The defenders pleaded—"1. The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. 2. The averments of the pursuer so far as material being unfounded in fact, this defender is entitled to be assoilzied from the conclusions of the summons. 3. In any event the pursuer is barred *personali exceptione* from insisting in the present action."

The *facts* are given *infra* in the Lord Ordinary's opinion.

On 15th January 1919, after proof led, the Lord Ordinary (ANDERSON) found and declared in terms of the declaratory conclusions of the summons.

Opinion.—"This is an action of declarator of nullity of marriage at the instance of Robert Alexander, 30 Willowbank Street, Glasgow. The defenders are Ruth Crawford, whom he purported to marry on 2nd November 1917, and a child born of the said Ruth Crawford on 21st November of that year. The legal basis of the action is that which was formulated in the case *Stein*, 1914 S.C. 903, namely, this, that the pursuer had been deceived into entering into the contract of marriage with the defender, a material fact having been fraudulently concealed from him by her, to wit, that at the date of the marriage she was pregnant as the result of intercourse with a man other than the pursuer. The case of *Stein* decided that if those facts be substantiated the pursuer is entitled to have the alleged marriage declared null and void.

"The history of those young people prior to the present litigation is this—I call them young people, because even now the pursuer is 23 and the defender 22—that the parties six years ago or thereby, being then aged 17 and 16 respectively, became acquainted. They were both resident in the city of Glasgow, the pursuer living with his parents and being then an apprentice plumber, and the defender living with a Mr and Mrs Crawford, who had adopted her as their daughter, her own parentage being somewhat obscure.

"The boy and girl became intimate to the extent that carnal intercourse took place frequently between them from the time shortly after they got to know each other until the month of May 1916. They then had a quarrel and ceased to be intimate until the end of that year. On 8th November 1916 the pursuer had a very serious accident. He had his left arm torn from his body, his right arm broken in three places, and he sustained serious injuries to his head, the result of which was that his mental powers were seriously impaired then, and in my opinion have not entirely been recovered even now.

"When he was in the infirmary recovering from these terrible injuries the defender Ruth Crawford visited him, being desirous to renew her friendship with him, and she continued practically daily to go and see him in the infirmary until he left the infirmary about 26th February 1917. Thereafter she saw him on a few occasions at his parents' house, but again, about the beginning of the year 1917, a coolness sprang up between the two and admittedly continued for some months.

"The parties are at issue—and this is an important fact in the case—as to when inti-