convey it was by a conveyance of the lands, with the exception from the warrandice of the feu rights.

Here I am not going to decide that a disposition of right, title, and interest could never carry anything. It may be that if another case were to arise we should have to decide, taking all the circumstances, that that is a good title, but it is not an appropriate and proper title. And accordingly I think we should make that finding. If parties are satisfied with the judgment, nothing more need be done; but if there are any other questions between the parties, then we must remit to a conveyancer in order to adjust the terms of the disposition.

LORD M'LAREN—This is a question as to the form of the conveyance which is to follow on an agreement for a sale by Mr Hay to the Corporation of Aberdeen of all his right and interest in certain lands. Now right and interest are obviously not here used in the technical sense of conveyancers, because a conveyance of the granter's right and interest is only an auxiliary clause, and is interpreted by all the writers of authority as meaning that it covers such collateral rights as tend to fortify the grantee's title to the lands. But what is meant in this agreement is "right" in the absolute sense. Whatever be the legal nature of the right which the seller has to the estate, that is what he undertakes to make good to the purchaser, protecting himself at the same time by a clause which exposes him to no risk, because he only warrants the grant against his own past and future acts. This principle would apply to any transfer of the seller's right and interest in property, whether heritable or moveable, because it might be that the holder of moveable estate did not remember exactly how much stock he held or what was the amount of his interest, but agreed to sell his interest whatever it was.

The first subject of inquiry when a conveyance is being negotiated would be, What is the right and interest which the seller has, because he must make that good, and the purchaser cannot call upon him to do anything more. In the case of a sale of heritable property that question may be solved by looking to the seller's charter-chest. He would be bound to exhibit his titles. Then I think it would be the right of the purchaser to say—"We see from your titles that you profess to be the absolute disponee of these lands. It may be that there are objections to your title, and you are not asked to warrant it, but we claim that you should convey the fee of the estate to us just as you purchased it or inherited it, as the case may be." I see no good answer to such a claim under the agreement. The seller is protected by warrandice, and I think that upon a fair reading of the contract, when he sells all his right and interest he means that he is to give the very best title that he can—the best title that his own instruments and title-deeds enable him to give. That is what is asked in the present case. It may be that it is found on inquiry that the seller has only a limited interest. Of course under an agreement of this kind we should not compel an heir of entail or limited fiar to incur an irritancy by granting an absolute disposition. It is the substantial interest that we must look to, and he would be bound to give all the right which a limited fiar has during his tenure of the estate, that being the measure of the right and interest he possesses.

I therefore agree with your Lordship that the Lord Ordinary has fallen into error in conjuring up the ghost of some future and imaginary pursuer of an action of damages in this case. I think there is no real apprehension of such an action, and that there is no good answer to the demand of the Town Council to get the best title that Mr Hay can give them.

LORD KINNEAR—I am entirely of the same opinion.

LORD PEARSON—I also agree.

The Court recalled the Lord Ordinary's interlocutor, and found that in implement of the minute of agreement the pursuer was bound to grant a disposition of the subjects described in article 1 thereof, and in the said disposition to dispone the lands therein specified, with warrandice from fact and deed only so far as regards the lands described in article 1 (*a*).

Counsel for Pursuer (Respondent)—Wilson, K.C.—Macphail. Agents—Robertson & M'Lean, W.S.

Counsel for Defenders (Reclaimers)—Constable, K.C. — Moncrieff. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, January 15.

FIRST DIVISION.

[Lord Dundas, Ordinary.

DUNDONALD PARISH COUNCIL AND OTHERS *v.* CUNNINGHAME COMBINATION POORHOUSE HOUSE COMMITTEE.

Poor Law—Medical Officer of Poorhouse—Dismissal of Medical Officer—Sanction of Local Government Board—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 66.

Opinion per curiam that the medical officer of a poorhouse cannot be dismissed without the sanction of the Local Government Board, anymore than can the inspector of poor.

Opinions to the latter effect of Lord President M'Neill in *Board of Supervision* v. *Parish of Dull*, June 9, 1855, 17 D. 827; of Lord Shand in *Clark* v. *Board of Supervision*, December 10, 1873, 1 R. 261, 11 S.L.R. 121; of Lord President Inglis in *Board of Super-*

vision v. *Monkland Parochial Board*, January 17, 1880, 7 R. 469, 17 S.L.R. 297, *approved*.

Process — Title to Sue — Poor Law—Local Government—Parish Council—Combination Poorhouse — Dismissal of Medical Officer—Action by Parish Council.

A parish council, being one of the contracting constituents in the formation of a combination poorhouse, has no title to sue for declarator that the dismissal, by the house committee, of the medical officer of the poorhouse is, without the sanction of the Local Government Board, *ultra vires*, the medical officer not being a party to the action.

Contract—Poor Law—Power Conferred to Combine Certain Offices Held to Exclude Power to Combine Others—Medical Officer of Combination Poorhouse—House Governor—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 83) *sec.* 66.

A contract was entered into by several parishes for a combination poorhouse and by article 4 a house committee was established "for the superintendence, management, and control of the affairs of the poorhouse and all matters and things connected therewith." By article 11 the committee was "authorised and directed to appoint a house governor, a matron, and a porter, with such assistants as may be necessary. . . . . The house committee shall also appoint a surgeon or other medical attendant, a chaplain, a teacher, or chaplain and teacher, with assistants if required, a treasurer, a secretary, or treasurer and secretary; . . . The house committee if it sees fit may appoint the same person to the offices of governor and secretary. . . ."

Held that the committee had no power to combine the offices of house governor and medical officer.

Opinion by Lord M'Laren that, even apart from the contract, the offices could not have been combined, as that would have been an evasion of the Poor Law Amendment (Scotland) Act 1845, section 66.

The Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83), section 66, enacts —"In all cases in which poorhouses shall be erected, or enlarged or altered, under the provisions of this Act, there shall be proper and sufficient arrangements made for dispensing and supplying medicines to the sick poor, under such regulations as the parochial board shall make and the Board of Supervision approve; and there shall be provided by the parochial board proper medical attendance for the inmates of every such poorhouse, and for that purpose it shall be lawful for the parochial board to nominate and appoint a properly qualified medical man, who shall give regular attendance at such poorhouse, and to fix a reasonable remuneration to be paid to him by such parochial board: Provided always that if it shall appear to the Board of Supervision that such medical man is unfit or incompetent, or neglects his duty, it shall be lawful for the Board of Supervision to suspend or remove such medical man from his appointment and attendance."

The Parish Councils of the Parishes of Dundonald, Galston, Kilwinning, and West Kilbride, being four of the eighteen Parish Councils which formed the constituent members of "the Cunninghame Combination or Union Poorhouse," raised an action against Charles Torrance and others, being the whole members of the House Committee or Board of Management of the said Combination Poorhouse, against its secretary, and also against the remaining fourteen Parish Councils. The pursuers sought declarator — "(1) That the said Board has no power under the said contract and agreement to combine the offices of house governor and medical officer of the said poorhouse, by appointing the same person to hold both of the said offices; and (2) that the said Board has no power to dismiss the medical officer of the said poorhouse without the sanction of the Local Government Board for Scotland and the General Board of Lunacy for Scotland previously had and obtained." Conclusions followed for reduction "if need be" of minutes of the house committee purporting to record resolutions to combine these offices and to dismiss from his appointment Charles Auld, M.D., medical officer of the said poorhouse, and interdict was sought against the carrying out of these resolutions.

The contract and agreement between the contracting parishes for the erection and maintenance of the said Combination Poorhouse narrated the powers conferred on them by sections 60 and 61 of the Poor Law (Scotland) Amendment Act 1845, and, *inter alia*, provided—"*Fourth.* A House Committee or Board of Management shall be, and is hereby established, for the superintendence, conducting, management, and control of the affairs of the poorhouse, and all matters and things connected therewith. . . . *Eleventh.* The House Committee or Board of Management shall, after the house is open and ready for the reception of paupers, or at the first of its meetings thereafter, have power, and is hereby authorised and directed, to appoint a house governor, a matron, and a porter, with such assistants as may be necessary for the establishment, and who shall all be bound to reside within the said poorhouse or buildings in connection therewith, within the bounds of the land on which the said poorhouse is erected. The House Committee shall also appoint a surgeon or other medical attendant, a chaplain, a teacher, or chaplain and teacher, with assistants if required, a treasurer, a secretary, or treasurer and secretary, and any other officers, assistants, or officials that may be considered or found necessary, but who shall not necessarily be required to be resident in the poorhouse or buildings in connection therewith, within the bounds aforesaid; and the House Committee, if it see fit, may appoint the same person to the offices of governor and secretary, and these for such periods and on such terms as may be

arranged, and to remove all such officials, or any one or more of them, from time to time at the discretion of the said House Committee or Board of Management, and without being bound to assign any reason for such removals, and to supply all vacancies that may occur from time to time in any of the aforesaid offices, either by death, resignation, removal, or any other cause, and to prescribe the duties and make rules for the government and guidance of the said several officials in their several departments, in terms of the foresaid statute, and subject always to the approbation of the foresaid Board of Supervision. . . . *Eighteenth.* It is further agreed that in all cases where the sanction of the Board of Supervision is, under the foresaid statute, required to any act or thing in connection with the poorhouse, or with the working of the said combination or union, or with the management or maintenance of the officials thereof, and inmates therein, such sanction, whether specially provided for or not specially provided for or referred to herein, shall always be previously had and obtained before the act or thing contemplated is commenced."

On 12th March 1908 the Lord Ordinary (DUNDAS) assoilzied the defenders.

Opinion.—[*After narrating the conclusions of the action*]—"Upon the first of the two questions thus raised, I am of opinion that the defenders are entitled to succeed. I can find nothing in the Poor Law Act or in the agreement to prevent the House Committee from combining, if so advised, in one person the offices of house governor and medical officer. The fourth article or 'rule' of the agreement provides for the constitution of the House Committee 'for the superintendence, conducting, management, and control of the affairs of the Poorhouse, and all matters and things connected therewith,' and confers upon it power, *inter alia*, 'to act in all matters falling under or proper to the province, and subject to the administration of the House Committee or Board of Management.' By the eleventh rule more specific powers are conferred upon the House Committee as to the appointment of the various officials necessary for the establishment. The pursuers' counsel pointed out that in some instances power is expressly given to combine offices, viz., 'a chaplain, a teacher, or a chaplain and teacher . . . a treasurer, a secretary, or a treasurer and secretary . . . and the House Committee, if it see fit, may appoint the same person to the offices of governor and secretary'; and they argued that the expression of such power in certain cases negatived by implication its existence in any others, and in particular as regards the offices of governor and medical officer. My opinion is adverse to this argument as matter of construction; and I think that the maxim *Expressio unius est exclusio alterius*, though sound enough within its proper limits, is one which can easily be pushed too far.

"The second question in the case, viz., as to the House Committee's power to dismiss the medical officer without the sanction of the two authorities already referred to previously had and obtained, is, in my judgment, attended with more difficulty than that with which I have just dealt. But in regard to it also my opinion is in favour of the defenders, and against the pursuers. The eleventh rule, already referred to, expressly gives the House Committee power 'to remove all such officials or any one or more of them from time to time at the discretion of the said House Committee or Board of Management, and without being bound to assign any reason for such removals, and to supply all vacancies that may occur from time to time in any of the aforesaid offices, either by death, resignation, removal, or any other cause.' But it was suggested that these powers—and indeed I apprehend the whole preceding portion of the eleventh rule—are controlled by the words which occur shortly after, viz., 'and subject always to the approbation of the foresaid Board of Supervision.' I do not agree with this view. I think the words just quoted relate exclusively to the power conferred (immediately before their occurrence) 'to prescribe the duties and make rules for the government and guidance of the said several officials in their several departments, in terms of the foresaid statute,' *i.e.*, the Poor Law Act (Scotland) 1845, which by section 64 (expressly referred to in the same part of the said eleventh rule) ordains parochial boards to frame rules and regulations for the management of the poorhouse, which are to be submitted to the Board of Supervision 'for approval.' This is, I think, the proper construction of the eleventh rule, although it is not very artistically framed; and my impression is confirmed by looking at the twelfth rule, which gives power to the Visiting Committee of the Board 'to suspend any one or more of the officials to be appointed under article eleventh, until the opinion of the House Committee or Board of Management can be obtained on the cause of such suspension.' But the pursuers' counsel further relied upon the eighteenth rule, as importing by implication into the language of the eleventh rule, in regard to the House Committee's power of dismissal, section 66 of the Poor Law (Scotland) Act 1845. The argument does not, in my opinion, advance the pursuers' case; for that section, as I read it, merely confers upon the Board of Supervision power in certain cases to suspend or remove a medical man whom the parochial board had appointed in a poorhouse, but does not override or negative the power of that board to dismiss, if they see fit, the man whom they themselves appointed. I should say that my attention was called to the view expressed by the Secretary to the Local Government Board in one of the letters produced, that 'the medical officer of a poorhouse is appointed under statute, and cannot be dismissed at the will and pleasure of the directors of the poorhouse'—and to the reference he makes to a departmental report in 1904. In that report the statement is made that 'it is considered that medical officers of poorhouses have the same tenure of office as inspectors of poor; that is, they

can be dismissed only by the Local Government Board.' The authority for that statement is noted as sections 56 and 66 of the Poor Law Act 1845, and the *Old Monkland Case*, 1880, 7 R. 469. I am, with the greatest respect, unable to concur in the views thus indicated. The cases about inspectors—of which *Clark*, 1873, 1 R. 261, is one of the most important—seem to me scarcely to warrant the statement in question; and I observe that the departmental report, quoting from an earlier report in 1895-96, announces that 'the claim'—*i.e.*, that such medical officers should not be removable without the sanction of the Local Government Board—'has been frequently preferred by the representatives of the parochial medical officers, and clauses have been introduced into Bills with the view of giving effect to the claim, but from one cause or other the Bills have failed to pass.' This account of the matter accords with the view which I take of section 66, as it stands, and the construction I am disposed to put upon it; and seems to infer that, if medical officers of poorhouses are to be placed in the position desired, that end must be achieved by legislation. For the reasons I have now expressed, I do not think that there is any need for the House Committee to obtain the sanction of the Local Government Board as a condition-precedent to the dismissal of the medical officer. As regards the alleged necessity for obtaining the antecedent sanction of the General Board of Lunacy, it seems enough to observe (1) that the eighteenth rule, referring as it does only to the sanction of the Board of Supervision under the Poor Law Act of 1845, cannot, so far as I see, aid the pursuers upon the point in question; and (2) that I am unable to find upon the record any averments of fact, by which the case is brought in any way within the scope of the third section of the Lunacy (Scotland) Act 1862, or the rules and conditions prescribed thereunder, particularly Rule XVI.

"For these reasons, I think the defenders are entitled to succeed in the action. I propose to repel the whole pleas-in-law stated for the pursuers, and to grant decree of absolvitor."

The pursuers reclaimed, but, with the exception of the Parish Council of the parish of Kilwinning, abandoned the reclaiming note.

Argued for the reclaimers—(1) The defenders were not entitled to combine the offices of house governor and medical officer. It was true that article 4 gave general powers of management to the House Committee, but article 11 provided for both a house governor and a medical officer, and although it carefully specified that the offices of chaplain and teacher might be combined, and also those of house governor and secretary, there was no such provision for combining the offices of house governor and medical officer. The maxim *expressio unius est exclusio alterius* applied. (2) Moreover, the combination was not one which would work satisfactorily. Although the house governor was dismissible by the House Committee, the medical officer was only dismissible by the Local Government Board, the successors of the Board of Supervision—Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83) sec. 66. By that section the medical officer of a poorhouse was put in the same position as regards dismissal as was the inspector of poor by sections 32 and 56. Though it had not been actually decided that an inspector of poor could only be dismissed by the Local Government Board, yet there were expressions of opinion to that effect in *Board of Supervision* v. *Parish of Dull*, June 9, 1855, 17 D. 827, Lord President M'Neill at 831 (the medical officer there referred to was appointed under section 69, not under section 66); *Clark* v. *Board of Supervision*, December 10, 1873, 1 R. 261, Lord Shand at 263, 11 S.L.R. 121, and it was assumed in the judgment of Lord President Inglis in *Board of Supervision* v. *Parochial Board of Old Monkland*, January 17, 1880, 7 R. 469, 17 S.L.R. 297. Parishes could not contract contrary to the provisions of the Act, and here indeed, by section 18, the sanction of the Local Government Board was provided for. (3) As to their title to object to the combination of the offices, they were entitled to the staff they had contracted for. As to their title to object to the dismissal of Dr Auld, they were asking for the enforcement of the 18th article, providing that when antecedent authority was required it should be obtained.

Argued for the defenders and respondents—(1) Clause 4 was the master clause of the contract; it conferred uncontrolled powers of management except when the contrary was expressly stated. There was no reason the two offices should not be combined. The maxim referred to did not here apply. (2) The Poor Law Amendment (Scotland) Act 1845, sec. 66, conferred a concurrent right of dismissal on the Local Government Board; it did not prevent the ordinary rule operating that the person who had the power to appoint had also the power to dismiss. (3) The reclaimers had no title to object to the dismissal of Dr Auld. Neither Dr Auld nor the Local Government Board were parties to the case, and there was nothing to show that they did not acquiesce in what was done. A medical officer was not in the same position as a town-clerk, who could not be dismissed without process of law—*Rothesay Magistrates* v. *Carse*, January 27, 1903, 5 F. 383, 40 S.L.R. 314.

At advising—

LORD PRESIDENT — This is an action originally brought by several parish councils, but now insisted in only by the Parish Council of the parish of Kilwinning, against the constituent members of the Cunninghame Combination or Union Poorhouse, and it seeks for declarator of the illegality of certain actions of the House Committee of the said Combination Poorhouse. The two actions which are complained of are (first) a proposal to combine the offices of house governor and medical officer, and (secondly) the dismissal of the existing

medical officer without the sanction of the Local Government Board of Scotland. The Lord Ordinary has assoilzied the defenders from both the conclusions.

Your Lordships are familiar with the constitution of the combination boards under the provisions of the Poor Law Act, and, speaking generally, I think it is quite safe to say that any number of parochial authorities—in old times the parochial boards, now the parish councils—are free to contract on these matters provided only that they do not infringe the provisions of the statute.

The particular contract which was made by these parties is contained in a contract and agreement which has been produced in this process, and bears the date of 1857 and 1858. Now, by the fourth provision of that contract—the contract I may say was made by various parishes (I need not enumerate them) of whom the present persisting pursuer is undoubtedly one—there was constituted a house committee or board of management for the superintendence, conducting, and management of the affairs of the poorhouse and all matters connected therewith. The eleventh provision of the contract is that "the house committee is hereby authorised and directed to appoint a house governor, a matron, and a porter, with such assistants as may be necessary. . . ."—I leave out words which are not material—"the house committee shall also appoint a surgeon or other medical attendant, a chaplain, a teacher, or chaplain and teacher, with assistants if required, a treasurer, a secretary, or treasurer and secretary, and any other officers, assistants, or officials that may be considered or found necessary." It goes on—"The house committee if it see fit may appoint the same person to the offices of governor and secretary, and this for such periods and on such terms as may be arranged," and then there are provisions as to removal. Now it seems to me that, there being nothing in these arrangements inconsistent with the statute, they were perfectly proper arrangements to make, and that, being arrangements made by a body of persons who were stipulating what was to be the management of the new poorhouse, they must be treated, so to speak, from a contractual point of view, and the whole question therefore comes to be the interpretation of the eleventh provision of the contract.

It is quite true that by the fourth provision the house committee is given general powers of management. But then the contracting parties are not satisfied with leaving the matter there; they go on to describe certain things that the house committee must do, and they enumerate certain officers whom the house committee are to appoint. I should think that, even if that stood alone, it could not be said that the house committee could practically suppress one of these offices; but I think the matter is made more than clear when you consider the phraseology of the clause which I have already read. That clause in certain cases provides for a combination of offices such as "a chaplain, a teacher, or chaplain and teacher," and then, in the particular case with which we have to deal—that of house governor—it provides that the house committee may, if it sees fit, appoint the same person to the office of governor and secretary. This provision was inserted, I suppose, because it was considered that in the absence of such a provision the same person could not have been appointed to the offices of governor and secretary, the reason being that the governor and secretary had been already enumerated as separate appointments to be made. I think, therefore, that the provision for the combining of certain offices, upon an application of the rule which is sometimes called *expressio unius est exclusio alterius* and sometimes *exceptio probat regulam*, makes it clearly *ultra vires* to combine these offices. That there should be a very good reason for holding so is, I think, apparent. There may be nothing peculiarly incompatible in the position of a governor and medical man combined, but there are several of the offices enumerated here which would obviously be incompatible. Accordingly, I am of opinion that, upon the first matter, the pursuers are entitled to the declarator that they ask.

As regards the second question in the case, the Lord Ordinary has held that the pursuers are not entitled to the declarator they ask because they are wrong upon the merits. Now, it is quite certain—as has been shown to us and as, perhaps, one may know otherwise—that the Local Government Board and, before them, the Board of Supervision, have always taken the view that these medical officers of poorhouses could not be dismissed without the sanction of the Board. If that is against the proper view it cannot be helped, but I do not think it is against the proper view. It seems to me that although this matter has not actually been decided in the case of such medical officers, it has been settled by the authority of Lord President M'Neill, of Lord Shand, and incidentally of Lord President Inglis in the case of inspectors, and I cannot see that there is the slightest difference in the argument upon the position of medical officers. If you take the 66th section of the Poor Law Act of 1845 on the one hand, and compare it with the combined effect of the 56th and the 32nd sections on the other, it seems to me that the 56th and the 32nd sections do, in phraseology, for an inspector precisely what the 66th section does for a medical officer, and that the argument which prevailed in the case of an inspector, namely, that where you have in the statute which provides for appointment a special provision that a certain body shall have the power to dismiss, you must fairly conclude that the Legislature did not intend that any other body should dismiss, applies equally well in the case of a medical officer of a poorhouse.

But, although that is my opinion—and I think it necessary to express that opinion, because, otherwise, the judgment of Lord Dundas would throw doubt upon what has been the long-established view of the Local Government Board and the Board of Super-

vision—I do not think that the pursuers can have declarator to that effect, because I do not think they have got the title to raise the question. The person that was dismissed was a certain Dr Auld. Now, Dr Auld is not here, and it is quite clear that Dr Auld might, if he choose, acquiesce in his dismissal. And accordingly, behind Dr Auld's back and at the suit of the pursuers who have no direct interest in Dr Auld's being continued, I do not think we can pronounce decree.

I advise your Lordships to grant decree in terms of the first conclusion, and *quoad ultra* to dismiss the action.

LORD M'LAREN — I concur with your Lordship, and will only add that while it is sufficient for this case that the contract under which the parishes combined provided for the appointment of a medical officer, I do not see that having regard to the statute the arrangement could have been different, because under the 66th section of the Poor Law Act of 1845 it is declared that "it shall be lawful for the parochial board"—that is evidently it shall be obligatory on the parochial board—"to nominate and appoint a duly qualified medical man. . . and to fix a reasonable remuneration to be paid to him by the parochial board." Therefore in providing for the appointment of a medical officer the combination were only carrying out the express provision of the statute. It follows that the obligation cannot be evaded by annexing the office to that of governor of the combination.

LORD KINNEAR—I am of the same opinion as your Lordship.

LORD PEARSON—I also concur.

The Court granted decree in terms of the first conclusion of the summons, and *quoad ultra* dismissed the action.

Counsel for the Pursuers (Reclaimers)—Macmillan—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Defenders (Respondents) — Hunter, K.C.—Munro. Agents — Macpherson & Mackay, S.S.C.

Wednesday, January 27.

SECOND DIVISION.

(With Lords Kinnear, M'Laren, and Pearson.)

[Sheriff Court at Glasgow.

BURTON *v.* CHAPEL COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (2) (*b*)—*Claim by Workman Refused by Arbiter on Ground of Serious and Wilful Misconduct—Subsequent Action of Damages against Employers at Common Law—Competency.*

A claim for compensation for accidental injuries brought by a miner against his employers under the Workmen's Compensation Act 1897 was refused by the arbitrator on the ground that the miner had been guilty of serious and wilful misconduct; thereafter he brought an action at common law against his employers for damages for personal injuries sustained in the accident.

Held that having elected to claim compensation under the Act, and having obtained a final judgment upon that claim, he was barred by the provisions of sec. 1 (2) (*b*) from suing an action of damages at common law.

Cribb v. *Kynoch Limited* (*No.* 2) [1908] 2 K.B. 551, *approved.*

Beckley v. *Scott & Co.*, [1902] 2 I.R., 504; *Rouse* v. *Dixon* [1904], 2 K.B. 628; *Blain* v. *Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639; *M'Donald* v. *James Dunlop & Company, Limited*, February 23, 1905, 7 F. 533, 42 S.L.R. 394, *distinguished.*

Res judicata—Arbitration under Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*Common Law Action for Damages.*

Opinions (*per* Lords Kinnear and M'Laren) that the decision of an arbitrator upon a question of fact in an arbitration under the Workmen's Compensation Act 1897 was not *res judicata* in a subsequent common law action of damages by the workman against his employers, the arbitration being a proceeding for indemnification irrespective of contract or fault, whereas the action was a proceeding based on fault or negligence.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (*b*), enacts—"When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act, but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . . ."

James Burton, Barrhead, Larkhall, miner, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the Chapel Coal Company, Limited, in which he sued for £650 as damages for personal injuries sustained by him while working in a pit belonging to the defenders.

The pursuer on record set forth at length the circumstances under which he was injured, and averred—"(Cond. 5) The said accident to the pursuer and his consequent injuries were caused through the fault of the defenders, in respect that they failed to take reasonable precautions for the safety