parties are thus saved inordinate expense and waste of time, and in this way the jurisdiction exercised is of the greatest value.

In scrutinising a record, however, in order to ascertain whether relevant matter is contained in it, while that jurisdiction so exercised is delicate and valuable, in my opinion it ought always to be exercised with the most reasonable and ordinary construction of the words employed, and so as to avoid such an analysis as, pushed to an extreme, would evacuate simple and plain statements and tear their meaning to pieces. I therefore in that spirit examine this record, and I entirely agree with the judgment formed as to procedure by the Lord Ordinary and the Lord Probationer which favoured an inquiry. Upon the merits of the question submitted to us I further agree with the opinion pronounced in the First Division by the learned Lord Skerrington.

It is not usual, as your Lordships have observed, to make any remarks whatsoever upon the merits of a case which is ultimately to be tried, and I therefore make no suggestion whether in fact there was on the one hand either negligence on the part of the defenders, or on the other a case of contributory negligence on the part of the pursuer.

The case is truly and wholly one of fact. In such a case the citation of precedent is not of value. But as to the precedents cited I accept of course the view of the law laid down by Lord Robertson in *Toal's* case —1908 S.C. (H.L.) 29, 45 S.L.R. 683. But I wish in this House to go further and say that I think the judgment of my noble and learned friend Lord Dunedin, then President of the Court of Session, in *Campbell* v. *United Collieries Limited*, 1912 S.C. 182, 49 S.L.R. 140, is a judgment which is expressly applicable to the present case and cases such as the present. Dealing with the particular topic which is now before the House, he makes the following general proposition to which I desire to adhibit my assent. "If a pursuer," said his Lordship, "in his account of the accident tells such a story that he shows that according to his view the proximate cause of the accident was his own negligence, I do not doubt that in such circumstances the case cannot go on." That is a general proposition which I think is applicable in all these cases. But I cannot refrain from adding the two sentences which succeed it in the judgment to which I have referred, because they seem to me to be apt and appropriate to the present case—"When I look at the averments here I cannot say that I think they disclose such a situation. I think the pursuer's averments quite clearly disclose this, that there may be proved against him a case of contributory negligence, but they do not seem to me to be tantamount to saying that the deceased was guilty of contributory negligence."

I have referred to *Toal's* case and *Campbell's* case, and now one single word with regard to the case of *Driscoll*, 1900, 2 Fraser 368, 37 S.L.R. 274. I observe that that must have been cited before the First Division apparently as illustrative of some proposition which was relevant to the discussion of the present case. In my view *Driscoll's* case depended entirely on its own facts. But I also agree with Lord Skerrington's view which challenges the validity of *Driscoll's* decision as binding upon subsequent cases. He says of that case, "That the course adopted by the Court in withholding the case from a jury has been canvassed and its soundness has been doubted." I have examined *Driscoll's* case since it has been mentioned, and I think it right to say that in any future discussion of it the judgment of that most able and careful Judge, Lord Kincairney (the Lord Ordinary in that case), is worthy of most anxious and careful respect. In the Second Division of the Court of Session it will be noted that the two learned Judges, Lord Trayner and Lord Moncrieff, both treated the case as very narrow, and I must not be held as concurring in any respect with the general view laid down by the Lord Justice-Clerk in the case of *Driscoll*. It is necessary to go no further into that case, which may never again be heard of, but, if it is, I trust that the views of Lord Skerrington in this case will also, along with the views of Lord Kincairney in *Driscoll's* case, be very carefully considered by courts of law.

Their Lordships sustained the appeal, with expenses, and remitted the case to the Court of Session with a declaration that issues be ordered for trial of the cause.

Counsel for the Appellant—A. R. Brown. Agents—A. W. Lowe, Solicitor, Edinburgh —D. Graham Pole, S.S.C., London.

Counsel for the Respondents—Lord Advocate and Dean of Faculty (Clyde, K.C.) —M. P. Fraser. Agents—Campbell & Smith, S.S.C., Edinburgh—Sir John Lindsay, Town Clerk, Glasgow—Martin & Co., London.

COURT OF SESSION.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

DOBBIE *v.* COLTNESS IRON COMPANY, LIMITED.

Mines—Wages—Deductions—Payment by Weight of Mineral—Mode of Determining Deductions—"Mineral Contracted to be Gotten"—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 12 (1).

The Coal Mines Regulation Act 1887, section 12 (1), provides that if the owner and miners so agree deductions may be made from the gross weight of the mineral sent up in respect of "substances other than the mineral contracted to be gotten," and that these deductions may be determined (1) "in such special mode as may be agreed upon" between masters and

men, or (2) by some person (the weigher) "appointed in that behalf" by the masters, or (3) if there be a checkweigher, then by the checkweigher, or "in case of difference by a third person" to be appointed as provided in the section.

The owners of a coal mine where it had been agreed that deductions should be made, and where a checkweigher had been duly appointed, made deductions from the gross weight of coal sent up by the miners in the hutches in respect of material other than coal. These deductions were made on a principle of averages tested by occasional crow-picking of individual hutches, and by a comparison of the output and disposals of the colliery. The checkweigher refused to concur in determining these deductions on the ground that they were not authorised by the statute. In an action at the instance of a miner to recover the amount of the deductions affecting his output, *held* (*dis.* Lord Salvesen) that the deductions in question were illegal in respect that as a checkweigher was actually in office at the time, it was incompetent to make them without his concurrence.

Opinion per Lord Guthrie that the principle of average deductions adopted was a special mode in the sense of the statute.

Opinion per Lord Dundas *contra*.

Opinion per the Lord Justice-Clerk that the weigher and checkweigher, had they agreed to do so, might have legally acted on the principle of deduction by average.

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58) enacts — Section 12 (1) — "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 persons 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."

James Dobbie, miner, Torryburn, Fife, *pursuer*, brought an action in the Sheriff Court at Dunfermline against the Coltness Iron Company, Limited, Blairhall Colliery, Fife, *defenders*, whereby in the action as subsequently amended he concluded for payment of the sum of £6, 18s. 10d. in respect of deductions which pursuer maintained had been illegally made from his wages.

On 26th May 1916 the Sheriff-Substitute (UMPHERSTON) dismissed the action.

On 5th July 1916 the Sheriff (J. A. FLEMING) recalled the interlocutor of the Sheriff-Substitute and decerned in favour of the pursuer for £6, 18s. 10d.

The defenders appealed to the Court of Session, and on 22nd October 1917 the Second Division allowed the parties a proof of their averments. The proof was taken before Lord Salvesen, and the import of the evidence appears from the opinions of the Judges.

The *averments* of the parties and the *facts* of the case sufficiently appear from the following narrative, which is taken from the opinion of the Lord Justice-Clerk:—"The pursuer avers in condescendence 1 that by the contract between him and the defenders he was 'employed to win coal, his wages being dependent on the weight of mineral gotten by *him*,' and this is admitted by the defenders. It is further matter of admission on record that a checkweigher at the colliery in question was appointed in November 1914, but a question is raised as to whether the checkweigher was in office during the period from 15th March till November 1915. The defenders aver that prior to November 1914 they 'employed a weigher to determine the weight of foreign material in *each* hutch,' which 'was deducted from the gross weight of the hutch and the net weight registered,' and they explain that 'from long experience and frequent crow-picking of hutches, and from the appearance and gross weight of the contents of *each* hutch as it passed the weigh-bridge, the weigher so appointed was well able to determine the weight of stones and dirt in *each* hutch with fairness and practical accuracy, and, deducting the same from the gross weight, to arrive at the weight of clean coal.' There was thus no crow-picking of each hutch. It was explained to us at the hearing that an agreement between the owners and the miners, as permitted by the opening clause of the proviso to section 12 of the Act of 1887, had been come to. The parties were also agreed that no 'special mode' had been agreed on for determining these deductions, and they were further agreed that the deductions from weight and from wages had in fact been made as regards the pursuer as shown in No. 17 of process, with the exception of the entry under date 24th April, which the pursuer admitted had been included by mistake, thus reducing the amount sued for to £6, 17s. 2d. The pursuer says there was a checkweigher during the whole period

covered by No. 17 of process, and that he never agreed to any deductions or joined with the weigher in determining any such deductions, the result being, as he maintains, that no deductions were determined in terms of said proviso, and therefore he argues no deductions were legally made or can be allowed. The defenders in answer 4 aver that in January 1915 the 'trade union of which the pursuer is a member conceived the purpose of compelling the defenders to pay upon the gross weight of all material sent up in the hutch,' and that thereupon the checkweigher took up the position that as no special mode had been agreed to 'no deductions should be allowed from any hutch unless they had been actually crow-picked.' He accordingly refused to apply 'his mind to the ascertainment of what, if any, deductions ought to be made from the gross weight of any hutch other than those crow-picked, and refused to consider the net weight of clean coal in each hutch found and registered by the weigher. He simply noted the gross weight of each hutch.' They then say that between 27th March and 1st May there was an agreement between the checkweigher and his deputy as to deductions, and this is, I think, admitted by the pursuer, and accordingly there is no claim in respect of that period. But then the defenders go on to aver that 'on 3rd May 1915 the checkweigher reverted to his former attitude, and intimated to the defenders' colliery manager that he would thereafter allow no deductions unless each hutch was crow-picked.' I think the evidence, both oral and documentary, shows that this was practically the position which the checkweigher took up. The defenders then aver that 'in adopting this course the checkweigher proceeded upon an erroneous view' as to the interpretation of the statute, which if correct would have proved in actual working 'impracticable,' and would have involved the 'stoppage of the colliery.' In the proof parties are agreed that to crow-pick every hutch would have been impracticable. But as alternatives to stopping the colliery there could have been a modification of the tonnage rate or an agreement as to 'a special mode,' or perhaps the award of a third party if there was a 'difference' between the weigher and the checkweigher. Even, however, if the result had been to stop the colliery, the avoidance of that alternative would not justify the adoption of an illegal deduction. The defenders further aver—'In adopting this attitude the checkweigher's object was to concuss the defenders into paying for the gross weight of material sent up in each hutch whatever its character. The course thus followed by the checkweigher was a dereliction of his duty, and was directed to impeding and interrupting the working of the mine. The figures fixed by the weigher for the appropriate amount of deductions from the respective hutches were in no case criticised or disputed by the checkweigher as inaccurate or unfair. The sole objection taken to them was that they had not been determined by crow-picking.'"

The defenders *pleaded, inter alia*—"1. The pursuer's averments being irrelevant and lacking in specification the action should be dismissed. 2. The pursuer being in the circumstances condescended on barred by the actings of the checkweigher from insisting in the present action, it ought to be dismissed. 3. The deductions complained of having been validly determined as set forth the defenders should be assoilzied. 4. The pursuer not being entitled, where no special mode of computing deductions is agreed to within the meaning of the statute, to be paid for the gross weight of all material sent up by him including dirt and other foreign substances the defenders should be assoilzied. 5. *Separatim*—The checkweigher appointed by the pursuer and his fellow-miners having repudiated his functions and contravened the statute, the pursuer's objections to the defenders' deductions ought to be repelled."

Argued for the pursuer—The deductions had not been made in accordance with the provisions of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), section 12 (1), which was clearly meant to form a sufficient code for payment. The Act authorised a special mode for determining deductions only where there had been an express agreement between the masters and the men. It had been established that there was no such express agreement in the present case. The standing deduction put in force was illegal, in respect that it was a special mode and that it had not been agreed to between masters and men. It was incompetent for the weigher and the checkweigher to agree to a standing deduction, because that would have been an agreement as to a special mode and the weigher alone could not fix a special mode by adopting a standard average deduction. He must crow-pick each hutch. In any event there had been no consent between weigher and checkweigher, but rather a difference of opinion between them, both in fact and in law, as to the competency of applying average deductions to the individual. There had been no abrogation by the checkweigher of his functions under the statute, but in any event the actions of the checkweigher could not bar the pursuer from claiming that illegal deductions should not be made from his wages as he was not the pursuer's agent. Further, even if the checkweigher refused to act, that would not entitle the weigher to act in the way he did—section 13 (3). The competency of such deductions had already been considered in a number of English cases—*Netherseal Colliery Company* v. *Bourne*, 1888, 20 Q.B.D. 606, 1889, 14 A.C. 228; *Huggins* v. *London and South Wales Colliery Company*, [1891] 1 Q.B. 496; *Brace* v. *Abercarn Colliery Company*, [1891] 2 Q.B. 496; *Kearney* v. *Whitehaven Colliery Company*, [1893] 1 Q.B. 700. In two Scots cases the reasoning in the English cases had been applied—*Ronaldson* v. *Mowat*, 1894, 21 R. (J.) 55, 31 S.L.R. 896; *Atkinson* v. *Hastie*, 1894, 21 R. (J.) 62, 31 S.L.R. 892. These cases showed that there was no real difference between the Coal Mines Regulation Act 1887 and the earlier Act of 1872—Coal Mines Regulation Act 1872 (35 and 36 Vict. cap.

76), section 17, and further that the statutory rule was very strictly applied. There was an apparent difference introduced in the later Act between mineral contracted to be gotten and mineral gotten, but this difference simply meant that the miner was to be paid by the kind of mineral he contracted to get, and it did not apply to a dirt scale. The defenders subjected the section to an unworkable interpretation. The rule of payment was by gross weight—*Netherseal Colliery Company* v. *Bourne* (*cit. sup.*), *per* Lord Bramwell at p. 237, and *Brace* v. *Abercarn Colliery Company* (*cit. sup.*), *per* Lord Lindley at p. 703, and *per* Lopez, L.J., at p. 706. It was not to be presumed that Parliament would allow a standing deduction by average apart from a special agreement between masters and men. This was supported by the fact that the whole principle originated with the Act of 1872, where there was nothing as to special mode. Under that Act no rule of thumb not based on individual output could be applied by weigher and checkweigher. By the "special mode" introduced in the Coal Mines Regulation Act 1887, the statute intended to give to masters and men a larger and more arbitrary power than could be conceded to weigher and checkweigher. Any check made by the weigher and checkweigher must be applied to the output of the individual, though as long as this was fair the Court would not scrutinise it too closely. The words in the proviso, "in case of difference," meant as to fact or law or any point of procedure arising incidentally—*Sinclair* v. *Fraser*, 1884, 11 R. 1139, at p. 1141, 21 S.L.R. 768. In a *casus improvisus* the *nobile officium* of the Court could be invoked.

Argued for the defenders—The method of deduction adopted in the present case was not illegal. Section 12 (1) of the Coal Mines Regulation Act 1887 provided two schemes for the payment of the mineral. The first was contained in the enacting clause and the second in the proviso. In the first there was a difference between the provision as to weighing (mineral gotten) and the provision as to payment of wages (mineral contracted to be gotten). Mineral contracted to be gotten meant coal, and the miners' right was to be paid by the weight of the coal won. The enacting clause meant that where payment was made by weight payment of wages was determined by selected weight. In practice this meant payment by gross weight subject to adjustment of rate. This was not a deduction method. The proviso remedied the deficiencies in the enacting clause and provided a nearer parallel between weighing and paying by enacting several methods for determining deductions in cases where an agreement was arrived at between masters and men that deductions should be made. In the present case there was such an agreement for deductions to be made in statutory form, and these deductions could be made either by agreement as to a special mode or by delegation of authority. It did not, however, follow that because deductions by average were competent as a special mode, they were incompetent by delegation of authority. Up to 1887 the method of averages had been used, and there was nothing in the Act of 1887 to make it illegal. A proper construction of the Act presupposed the method of averages. The special mode contemplated by the Act would apply to a standing deduction based on the adjustment of average as between the contracting parties. but did not exclude deduction by average by delegation of authority in the particular way it was arrived at in this case. The jurisdiction committed to delegates was—(1) To the weigher, (2) to the weigher and checkweigher, (3) to a third party, called in to determine differences between the weigher and checkweigher. On the evidence in the present case, however, it must be held that the only competent delegation made was to the weigher. As regards the determination of deductions the checkweigher must be held to have been absent, because he did not choose to exercise his voluntary functions even though physically present—*Mackay* v. *Dick & Stevenson*, 8 R. (H.L.) 37, *per* Lord Watson at p. 45, 18 S.L.R. 387. As a matter of fact in offering to co-operate he had assumed functions under the enacting clause which the statute did not give him, and had refused functions under the proviso which the statute did give him. Further, it could not be maintained in the circumstances that it was the duty of the appellants to call in a third party, an arbitrator, because there was no difference on which a reference could be taken—Bell on Arbitration, p. 189. The reference to arbitration was merely as to whether the percentage deducted was a just one, and in the present case there was a refusal to allow deductions at all. To make the reference competent there must be a difference arising in the performance of duties and not a refusal to perform duties. The sole difference in the present case was one of law as to the interpretation of the statute, and this could not be referred to arbitration. The weigher was therefore in law the only person who could act, and during the whole period he acted alone, and in so acting employed a system which was not open to challenge, viz., deduction by average checked by crow-picking of selected hutches. The authorities quoted by the pursuer were not in point. In *Netherseal Colliery Company* v. *Bourne* (*cit. sup.*) and *Kearney* v. *Whitehaven Colliery Company* (*cit. sup.*) there was no consideration of the separation from coal of material other than coal. Both these cases were decided on the Act of 1872. In *Brace* v. *Abercarn Colliery Company* (*cit. sup.*) there was a recognition of the difference between the two statutes, but there was no question such as was raised in the present case, viz., as to deduction of dirt. Reference was also made to the Law Relating to Mines issued by the Home Office, p. 129.

At advising—

LORD JUSTICE-CLERK—I have found it difficult to arrive at an opinion in all respects satisfactory to my own mind on the merits of this case. This is to some extent due to the difficulties natural to the questions raised, but also to no inconsiderable extent to the pleadings and the character of the

proof, which seem to me to indicate that the parties had failed clearly to appreciate and to state their respective positions.

This case, which is a test case, was originated in the Sheriff Court, but very material amendments on the record were made both in the Sheriff Court and in this Court. It is now a simple petitory action for a small sum of money—£6, 18s. 10d. (which, however, represents a large sum amounting to thousands of pounds when the aggregate number of miners interested is taken into account)—the precise amount is made up as shown in the statement, which covers the period from 11th January 1915 to 6th March 1916, with the exception of the month of April 1915.

On 23rd October 1917 we allowed a proof to proceed before Lord Salvesen on 15th November 1917. This proof was not printed by the parties until 16th October 1918. We thereafter heard the parties on the whole case and have now to pronounce judgment.

[*After the narrative given supra his Lordship continued*]—I do not think the averment as to the checkweigher's object is relevant. If the tonnage rate had been properly adjusted there was nothing illegal or even unfair in such an object. I do not think in any case that his object was contrary to law. For any impeding or interrupting of the working of the mine the statute provides a remedy. This the defenders did not adopt, and I do not think they would have succeeded if they had sought to have the checkweigher removed on the ground stated by them, though I think other means could have been taken to have the difficulty removed.

In my opinion the case must be dealt with on the footing that the checkweigher did not vacate office for the period from 15th March to November 1915. The proof is far from satisfactory as to the precise facts. But I think it is clear that while the checkweigher may have been absent for a few days in the latter part of March, for the whole of the rest of the period he was in fact acting as checkweigher; he was recognised by the defenders and their weigher as being the checkweigher; he was paid by the checkweigher's committee as such checkweigher, and the pursuer during the whole time contributed his proper quota to the checkweigher's wages. The papers in the joint print of documents (which in my opinion are of primary importance) and the proof establish that during the whole time the defenders recognised that the checkweigher was in attendance as such and was acting for the miners in that capacity, though, as the defenders maintain, erroneously and unjustly. There may have been a few days in March when he was absent, not from illness but because he did not like his job (as it is plain from the correspondence he did not) on account of the friction which the position he thought it was his duty to take up caused between him and the weigher. But this would only represent a few shillings (five or six at the most), and no point was made of it in the argument before us. The parties agreed in the course of the debate to lodge papers showing the findings which they asked. Two of the findings asked by the defenders were—"7. That the said checkweigher refused to be a party to the ascertainment of deductions as aforesaid," and "12. That the only cases in which the said checkweigher was willing to allow deductions to be made were in the case of hutches actually crow-picked."

I hold that for the whole period there was a checkweigher. I am of opinion that there was no determination of the deductions by the weigher and the checkweigher. If there was a "difference," as I rather incline to think there was, the "difference" was not solved by the method prescribed by the statute, assuming that to be applicable in Scotland, and it was conceded that if it was not applicable that would not justify the weigher in proceeding at his own hand to determine the deductions.

It is said that the method adopted by the weigher and given effect to by the defenders was in itself fair and reasonable. That may be so, though it has to be noted that during the whole period in question apparently only one hutch of the pursuer was crow-picked and it showed 50 lbs. of dirt in 9 cwts., while his average for six months was 57 lbs. But in my opinion the fact that the method adopted may have been fair and reasonable does not really affect the question. I think no deductions can be held to be legal even if the parties were at one on the matter unless they are determined in one or other of the modes authorised by the statute. It is further said that the checkweigher noted the weigher's net weight in his book, and so indeed he seems to have done. He may have done so in order to have a convenient note of the deductions actually made. I think it is established that he did not do so for the purpose of determining the deductions; on the contrary, he protested all along that no deduction could be made or was properly or legally made. Further, I have already pointed out that the defenders on record make it a ground of complaint against the checkweigher that he refused to apply his mind to the "ascertainment of what, if any, deductions ought to be made from the gross weight of any hutch other than those crow-picked, and refused to consider the net weight of clean coal in each hutch found and registered by the weigher. He simply noted the gross weight of each hutch." The defenders do not suggest that the checkweigher agreed with the weigher as to the deductions subject to the determination by the Court of a legal question—on the contrary their record, as I read it, negatives any such position having been taken up. The real truth was that the weigher wished to make a deduction on a principle of averages and that the checkweigher refused to proceed on any such principle. The deductions actually made were made on that principle, against which the checkweigher protested and as to which he never agreed. I incline to think they might have legally acted on that principle if they had agreed to do so. But they never so agreed.

Various legal points were argued before

us which I do not think it necessary to determine in order to decide this case. I do not think it necessary to construe the main enacting part of section 12. But while I do not think any of the cases cited have much bearing on the present except so far as they bear on the point that only deductions determined in terms of the statute can be allowed, I may say that, as at present advised, I incline to agree with Lord Wellwood's views. Speculations as to how the difference in this section between the Acts of 1872 and 1887 was brought about seem to me to be valueless. But as matter of historical fact the reports in Hansard show that the alteration was made in order to correct what was thought to be the effect of the decision by the Queen's Bench Division in the *Netherseal* case, which was, subsequent to the Act, affirmed by the House of Lords in 1889.

I am of opinion that no deductions can be allowed other than those "determined" in one or other of the statutory modes, that the deductions in question were not so determined, and that the pursuer is entitled to decree for the sum sued for under deduction of the 1s. 8d. before referred to.

Certain moral and economic considerations were mooted in the course of the discussion. I do not think that even as they were advanced these should affect the legal result. Parliament has legislated on the footing that on grounds of public policy coalmasters and miners cannot be left to manage their own affairs, and we must deal with the statute as we find it. But I am not satisfied that either the moral or economic considerations urged by the defenders are well founded.

In my opinion the pursuer is entitled to decree for £6, 17s. 2d.

LORD DUNDAS—When the case was last before us we allowed a proof before answer. The pleadings, which were somewhat vague and unsatisfactory, contained conflicting averments in fact, especially in regard to the alleged action, or failure to act, of the checkweigher, and we thought it safer and better to have the facts fully ascertained before deciding the case. The proof has now been led at I think quite unnecessary length—considerable parts of it consist in sheer wrangling with witnesses about the construction of an Act of Parliament—and we must arrive at a decision.

With the facts before us the issues raised seem really to turn upon the proper construction of section 12 of the Act of 1887. The pursuer avers (condescendence 1) that he has since July 1913 been employed by the defenders as a miner at Blairhall Colliery, and that under the verbal contract of employment he was employed to win coal, his wages being dependent on the weight of mineral gotten by him. He further avers (condescendence 3) that when he entered the defenders' service it was understood and agreed that deductions should be made from the gross weight of the mineral sent up the pit by him in respect of stones or substances other than the mineral contracted to be gotten, or in respect of improper filling, and that these deductions should be ascertained as provided by section 12 of the Act of 1887. So far there is no dispute, and we are thus led directly to consider whether in the pursuer's case deductions have been ascertained in accordance with one or other of the modes provided by section 12. That section provides that deductions may be determined (1) in such special mode as may be agreed upon between the masters and the men, or (2) by some person (the weigher) appointed in that behalf by the masters, or (3) if there be a checkweigher then by the weigher and checkweigher, or "in case of difference" by a third person to be appointed as provided in the said section. The pursuer maintains that no one of these methods of determining deductions was put in operation at Blairhall during the period in question. He claims that certain deductions which were in fact made were illegal, and to be paid the amount of wages corresponding to these, *i.e.*, to be paid on the gross contents of all his hutches. I have come to the conclusion that the pursuer is entitled to succeed.

It is common ground between the parties that the first of the three methods was not here resorted to.

As regards the second some questions of fact and law must be noticed. It appears that prior to and during the period in dispute it had been the practice of the weigher at Blairhall to make an average deduction from the gross weight of all hutches—a mode which the defenders assert to be both legal and one affording a fair overhead result as tested by occasional crow-picking and by a comparison of the output and disposals of the colliery. In November 1914 a checkweigher, Charles Tuke, was appointed; on 8th March 1915 he posted a notice at the pithead of his intended resignation, but a few days later at the request of the miners withdrew the notice and resumed office; he was reappointed in November 1915 after a strike. There is dispute between the parties as to the effect of the posting and subsequent withdrawal of Tuke's notice, and whether he was legally checkweigher from March to November 1915. I do not think it necessary to decide these points. Tuke was at all events in the ostensible occupation of the post during practically all the period in dispute. But a question is raised whether a "case of difference" arose between Tuke and the weigher Peter Warden in the sense of section 12. I am rather disposed to think that no such difference arose. What lay between Tuke and Warden was truly a question of principle as to the legitimacy (or the reverse) of a system of averages. Mr Ritchie sums the situation thus—"So far as I know there was never at any time any dispute between the checkweigher and the weigher as to the amount of the deduction, the dispute was whether any deduction was to be allowed, and that dispute arose entirely upon a construction of section 12 of the Act. The view that was taken by the checkweigher was that he would not apply his mind at all to the question of deduction because he did not consider it was legal for him to do so." I

doubt whether a dispute of this sort raised a "case of difference" within the meaning of section 12. If a weigher and checkweigher fail to agree as to the practical determination of the amount of deduction to be made from gross weight, a case of difference would arise, but I doubt whether the statute intended that a third person should be called in where a checkweigher declines as matter of legal principle or legal construction to apply his mind to the question of deduction at all. It is not, however, necessary to decide whether or not a "case of difference" here arose between Warden and Tuke, for assuming that it did then the machinery for calling in a third person was not in fact put in operation. But the defenders urged that Tuke's attitude, and his declinature—conscientious no doubt—to perform the functions of a checkweigher, brought into play the provision of section 13 (3) of the Act, for a man's persistent refusal to apply his mind to the practical duty before him must (it was maintained) be held as equivalent to his "absence." The result, in the defenders' view, would therefore be that the case must be decided as if no checkweigher had been stationed at this pithead and as if the weigher had all along been acting alone. The contention thus sketched was not to my mind without force, but I find it impossible to decide that Tuke was in law "absent" though he was physically present in the ostensible occupation of his post as checkweigher, and was being paid as such at least by the majority of the miners. It appears to me therefore that the second of the three modes provided by section 12 was not here resorted to.

It seems pretty clear that the same answer must be given in the case of the third mode. The defenders did not argue that there was here any determination of deductions by the weigher and checkweigher jointly. Their pleadings directly negative this view. It is true that Tuke's practice was, as he explains, "during working hours to record only the gross weight, but after working hours to consult with the weigher and get from him the figures showing the deductions he had made. When I got these figures from him I then entered them in my book." But it is not, I think, possible to construe Tuke's *de facto* acceptance of Warden's figures in face of his expressed objection to the legality of the method upon which the deductions proceeded, as importing acquiescence such as to constitute a joint determination in the sense of section 12.

If I am right in thinking that there was in fact no resort to any one of the three methods of determining deductions provided in that section, there seems to be an end of the defenders' case. It is unnecessary in that view to consider or decide whether a method involving average is a "special mode" such as can be legal only if it has been agreed on between masters and men. As at present advised I should say it was not. I see no warrant express or implied in the statute to support the contrary view. Unless every hutch is to be crow-picked—which is admittedly impracticable—average or estimate of some sort must I suppose be resorted to. I do not see why a method based on average must be regarded as one which cannot be validly adopted by a weigher, or by a weigher and checkweigher jointly, but only by antecedent agreement between masters and men.

I do not concern myself with the motives or supposed motives which may underlie the conduct of either of the parties in this unfortunate litigation, nor with the consequences or suggested consequences of any judgment we may pronounce. Nor do I think it is relevant to consider the matter from the standpoint of general equity or supposed equity; it is one in my judgment of legal construction. The proof seems to establish that the practical method in use at Blairhall is very fair and reasonable in result from the miners' point of view, as an overhead system; and Tuke goes so far as to admit "if I had thought it was legal to fix an average day by day or week by week I think that could have been fairly done by taking sample hutches at random and ascertaining by crow-picking the amount of dirt in each sample hutch." But the question is not what may be fair but what is legal. The result of our judgment may be a hard one for the defenders, but that would not in itself form a reason for deciding in their favour; it has often been observed (with some truth) that hard cases are apt to make bad law. In my opinion the pursuer must have decree for the sum sued for, under deduction of the sum of 1s. 8·40d., which was admitted during the proof to have been included by mistake in his claim.

LORD SALVESEN—In the form which after many amendments it has now assumed, this action is one for the recovery of £6, 18s. 10d., which is the cumulo amount of certain deductions from the pursuer's wages which have been made between January 1915 and 6th March 1916. The main ground of the action is that the deductions were not made in terms of section 12 of the Coal Mines Regulation Act 1887, and that accordingly the pursuer falls to be paid on the gross weight of the contents of the hutches which he sent up while working during the period in question as a miner in the defenders' employment. He does not anywhere say that the deductions which were made in respect of stones or substances other than coal were in excess of the deductions which might properly be made. He admits that in the seam in which he worked in the ordinary course of working it was impracticable to send up only clean coal. His claim therefore is to be paid, not merely on the amount of coal which he cut from the seam where he was working, but of whatever quantity of dirt or stones he had sent up along with the coal. As the rate of his wages was fixed by reference to the amount of coal extracted by him, and which, to use the language of the Act, was the mineral contracted to be gotten, this involves an apparent injustice, for if the claim were sustained it would result in the pursuer being paid in respect of substances other than coal which he chose to send up to the pithead. If,

however, the deductions have not been ascertained in one or other of the methods prescribed by section 12 of the Act, it may be that this is the necessary result.

The original provision in the Coal Mines Regulation Act of 1872 (35 and 36 Vict. cap. 76), section 17, for which section 12 of the Act of 1887 was substituted, is as follows:—"Where the amount of wages paid to any of the persons employed in a mine to which this Act applies depends upon the amount of mineral gotten by them such persons shall after the first day of August One thousand eight hundred and seventy-three, unless the mine is exempted by a Secretary of State, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly." I do not think the meaning of this section admits of much doubt. It provides that in the case where the amount of wages paid to the coal miner depends upon the amount of coal gotten by him, the total contents of each hutch which he sends up shall be truly weighed at a place close to the pit mouth. It further provides that the miner is not to be paid on the gross contents of his hutch, but only according to the actual weight cut by him of the coal which he has been employed to extract. If there were nothing more in the section it would seem to follow that if the mine-owner only weighed the total contents of the hutch and did not separate out the foreign materials from the coal and weigh the amount of coal after such separation, he must be assumed to have been content to regard the total contents of the hutch as consisting entirely of coal, and unless a second weighing of the net amount of coal contained in the hutch were made the miner would fall to be paid on the assumption that he had only extracted and sent up coal.

In 1887, however, the Legislature had apparently realised that in coal mining second weighing to ascertain the net contents of coal in each and every hutch was impracticable. If each hutch had to be crow-picked, which is the term used for the operation of taking out stones and other materials from the mixed amount which the miner sends up, the operation of the mine would be so impeded as necessarily to decrease its output, or at all events the expense of such an operation would be out of proportion to the amount of foreign materials which are usually present in the hutches as they are sent up by the miners. The pursuer himself says that the hutches pass over a steelyard for the purpose of having the gross weight of the contents determined at the rate of 350 per hour in this particular colliery, the output of which is some 800 tons per day, and the ordinary method of separating out the stones and foreign material from the coal is by the use of machinery and picking tables, which are not so devised as to keep a record of the amount of stones and material in each hutch, although the average quantity can be ascertained by comparing the total output of coal with the gross weight of the contents of the hutches containing the mixed material. Accordingly the Act provided three methods by which deductions in respect of such foreign materials could be ascertained without the cumbrous process of their separation in each hutch from the coal and a second weighing of the net coal contents of each hutch.

The first of these methods was by agreement between the coalowner and the miners as a body as to the average amount of the dirt and stones which might be regarded as inevitably present in the produce of a particular seam of a particular colliery. They for this purpose might agree that so many pounds of dirt might be assumed to be present in each hutch sent up from the pit bottom, and that a deduction might lawfully be made by the mineowner from the wages calculated on the gross weight corresponding to the amount of foreign material assumed to be present. According to this method a particular miner might conceivably get less than he was entitled to if he sent up coal which was cleaner than the coal sent up by his neighbour, but assuming the deduction to be a fair one, the miners as a whole would be paid on the full amount of coal which they extracted. This method of arriving at the deduction need not further be considered, as it is common ground that no agreement of the kind had been made between the miners employed along with the pursuer in the pit in question and the defenders. Second, another method sanctioned by the Act in the proviso to section 12 was that the deduction might be determined by some person appointed in that behalf by the owner, agent, or manager of the colliery. Such a person is usually termed the "weigher," and his function is, applying his knowledge and experience of the amount of stones and dirt which cannot be separated from the coal of a particular seam, to estimate as nearly as he can the amount of deduction to be made from each hutch. A separate record is kept for each miner of the deductions for the week's output of the miner based upon the estimate. In the present case the weekly deductions vary from between 2 or 2½ per cent. to about 5 per cent. of the gross contents of the hutches sent up by the pursuer.

The third method applies only if any checkweigher has been stationed for the purpose to act along with the weigher, with the view of protecting the miners by whom he is appointed and paid, and whose duty, in terms of section 13 (1) of the Act, is "to take a correct account of the weight of the mineral or determine accurately the deduction as the case may be." He accordingly fulfils the same function as the weigher on behalf of the mine-owner, for these are the duties that are imposed upon him; but as he is appointed by the miners and paid by them he is specially charged with their interests both as regards checking the gross weight of the contents of each hutch and in seeing that no more than what is just is deducted in respect of stones or other substances not coal. Where such a checkweigher has been appointed, then the deductions are to be determined by the weigher and the checkweigher, or in case of difference by a third person mutually

agreed on by the coalowner and the miners, or failing agreement by a person appointed by the Chairman of a Court of Quarter Session within the jurisdiction of which the shaft of the mine is situated. The dispute in the present case has arisen from the action of the checkweigher, who has declined to estimate the deduction applicable to each hutch, or to agree with the weigher on an average deduction, and who has refused to debit what he calls "any unascertained deduction" from the output, or (as he says) "to be a party to not truly weighing the mineral contracted to be gotten." In other words he insists that no deduction shall be allowed unless in the case of each hutch the contents are carefully gone over and crow-picked, and the coal in the hutch weighed after the foreign material has been separated. As he knows that this is absolutely impracticable, the scarcely disguised object of his action is to compel the mine-owners to pay wages not on the amount of mineral contracted to be gotten but on the gross contents of the hutches sent up by the miners, although these necessarily contain a certain proportion of foreign substances which are of no value to the coalowner.

In my opinion the checkweigher in so acting or failing to act has entirely misconceived the scope of his duties. If he were right the whole proviso with its three alternative methods of estimating deductions without actually weighing them would be rendered nugatory in the option of the miners. The coal miners would never enter into an agreement with the coalowner as to any special mode of estimating the average deduction to be made from the gross contents of each hutch if by adopting the simple expedient of appointing a checkweigher who refused on their instructions to fulfil his functions they could secure payment of wages calculated not on the amount of mineral contracted to be gotten but on the total amount of mineral which they chose to send up in the hutches. The proviso itself would be unnecessary if in the absence of an agreement the coalowner could be compelled to have each hutch crow-picked and the amount of coal in each actually weighed. That is a course which is always open to the mine-owner, although in the case of coal mining it is well known to be impracticable. The object of the proviso was to avoid the necessity of a second weighing and to substitute some method of estimation which would otherwise fairly ascertain the proper deduction to be made. The checkweigher's duty is exactly the same as the weigher's, namely, to estimate the average amount ascertained from time to time by crow-picking of sample hutches, and if necessary by comparing the result so obtained with the monthly returns of all clean coal. These are the methods which the defenders say their weigher adopted in estimating the deductions, and they offer to prove that the deductions made have in fact been less than if the actual amount of stones and dirt had been separated by crow-picking. They may not be exhaustive of all the means by which the approximate amount of foreign substances contained in the gross mineral output of an individual miner may be ascertained without weighing, but they at all events afford certain data—and the only ones which I can figure—on which a skilled person may proceed in determining the quantity of foreign material present in each miner's output. In the absence of a checkweigher the deductions so determined by the weigher appointed by the coalowner are conclusive against the miner, and the statute accordingly recognises the weigher's determination of the deductions to be made as settling the amount of these deductions for the purpose of payment of the miner's wages.

The pursuers, however, maintained that there was here a difference between the checkweigher and the weigher as to the amount of the deductions; that as parties have not agreed on a third person to settle this difference, and no application had been made as provided by the Act for the appointment of a neutral oversman, the defenders have failed to have the deductions determined in the statutory manner, and that accordingly the miners fall to be paid on the gross contents of the hutches which they have respectively sent up—that being the only figure which the checkweigher has chosen to record. In dealing with this argument the first thing to consider is whether there has been such a difference as the statute contemplates. In my opinion there has not. The checkweigher has declined to apply his mind to the determination of the very thing which it is his main function to perform. The legal point whether the checkweigher can always insist on each hutch being crow-picked and the coal remaining after the separation of the foreign materials weighed is not such a cause of difference as the Act provided for by the appointment of an oversman. No oversman could decide this point so as to be binding on either party. His functions are limited to settling a dispute where a difference arises between the checkweigher and the weigher as to the determination of the deduction to be made, and I apprehend what is contemplated is a difference of a kind which when once settled will regulate the smooth working of the colliery for the future. The Act cannot have contemplated the appointment of an arbiter or a series of arbiters to adjudicate with regard to each individual hutch that goes up to the pit mouth; but at all events it appears to me quite plain that before the Court of Quarter Sessions can be applied to for the appointment of an arbiter the parties must have failed to come to an agreement as to the determination of the deductions to be made. In other words, both the weigher and the checkweigher must have formed an estimate of the deduction to be made and found themselves in disagreement. In the present case it is plain that the checkweigher has not attempted to determine the appropriate deduction on the ground that such deduction can only be ascertained by crow-picking and weighing each individual hutch. In short, he has entirely declined to exercise the main function which he was

appointed to discharge. What he has done is simply to record the figures of gross weight of each hutch exactly as recorded by the weigher—a duty which could be performed by any person capable of reading a steelyard. As regards the determination of the deduction, he has left that entirely to the weigher, protesting or pretending that he is unable to give him any assistance in reaching such determination. Now the Act provides, section 13 (3), that "the absence of a checkweigher from the place at which he is stationed shall not be a reason for interrupting or delaying the weighing or the determination of deductions at such place respectively, but the same shall be done or made by the person appointed in that behalf by the owner, agent, or manager." No doubt the Act expressly deals only with the case of an absent checkweigher, but a checkweigher who is present and does not fulfil his duties is, I think, legally in exactly the same position. In either case he leaves the determination of the deductions entirely to the weigher, and where the weigher acts alone his determination settles finally the amount of the deduction.

I am therefore of opinion that the pursuer has failed to disclose any relevant ground in support of his claim. I may add that having read and considered the decisions to which we were referred they appear to me to have no bearing on the subject-matter of this dispute, although some *obiter dicta* wrested from the contents of the opinions delivered by the learned Judges may at first sight appear to give some guidance. The facts, however, on which the decisions proceeded were in each case entirely different from those that are present here. It was held illegal to make deductions in respect of slack or small coal whether agreed to by the miners or not, because such slack formed part of the mineral contracted to be gotten, and fell therefore to be taken into account in fixing the wages of the coal miners. None of them dealt with deductions which may properly be made in respect of materials which could not be described as "the mineral contracted to be gotten."

So far as I have gone I had written this opinion after the case was debated on the amended record, as I was at that time prepared to decide it without inquiry. Your Lordships, however, thought that matters which appeared to be ambiguous or not clearly stated might be cleared up by evidence. A proof was accordingly led before myself, which I duly reported to the Court, and after an interval of a year it has now been printed and the case again argued. The proof has made quite clear the facts which I inferred from the statements of parties. 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 particular 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) That the object of the checkweigher in adopting this attitude was to force the coalmasters to pay on the gross weight at the rate of wages agreed on for winning pure coal. (5) That the defenders' deduction of half a hundredweight per hutch was on an average far below the amount of dirt inmixed with the coal which the pursuer and his fellow-miners sent to the surface. (6) That after the miners came to believe that they would be paid on the gross weight without deduction the average amount of dirt sent up in the hutches was more than doubled. (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.

Now if the position taken up by the checkweigher be sound in law, and the Act of 1887 really contemplated as the only means apart from agreement of estimating deductions for dirt, one that involves the stoppage of all work, then plainly the defenders must suffer, for they resolved rather to take this risk than limit their output during a period of national crisis. But this is not the view that I understand the majority of your Lordships take. Assuming then that the checkweigher took up a position untenable in law and one which prevented him from discharging one of his statutory functions, what puzzles me is to understand why the defenders are to suffer for this and not rather the miners on whose behalf and on whose instructions Tuke acted. Your Lordships hold that there must be agreement between the checkweigher and the weigher as to a deduction before such deduction is legal, and yet that although there is provision for calling in an arbiter to settle differences between them, that this provision was in the circumstances inapplicable. It results from this that where the parties entrusted with the duty of determining deductions honestly apply their minds to the problem and honestly differ the Act provides machinery by which the proper deduction can be ascertained; but if one of them mistakenly or dishonestly declines to perform his duty his constituents shall be relieved of any deduction, and shall be paid on whatever rubbish they choose to send up with the coal, for which alone they were in terms of their own agreement to be paid. I cannot be a party to such a construction of a statute that has been in practical operation for thirty years. Not merely does it inflict a great injustice in the present case, but it puts a premium on careless and dishonest mining in the future. The effect of your Lordships' decision is that the statute provides no means of adjusting differences arising between parties as to the amount of deductions, and so makes the provisions of section 12 binding on the

mineowners only. It is not difficult to forecast the consequences. The Court's approval of Tuke's conduct in this case will ensure that his example will be followed by other checkweighers with results that may be disastrous to the industry as well as to the interests of consumers.

I shall only add that I cannot see what purpose the proof has served in view of the opinions your Lordships have expressed. On the face of the pleadings one thing was perfectly clear, viz., that the weigher and checkweigher did not in fact agree as to an appropriate deduction for dirt. If this is sufficient for the disposal of the case the long proof before me was a mere waste of time and money.

LORD GUTHRIE—It is no doubt desirable in the interests of masters and men that a judicial decision should be obtained on several of the questions debated before us arising on the construction of section 12 of the 1887 Act, as, for instance, the right of a weigher alone, or of a weigher and checkweigher, to determine statutory deductions by average. This question was argued before us, and our decision was asked on it. It does not appear to me to be necessary to decide it or another question of construction to which I shall afterwards refer. But after the full argument we heard, and the difference of judicial opinion in England and Scotland, and because another view may be taken elsewhere of the special point which I think sufficient for the decision of the case, it may be proper to indicate an opinion on these two questions of construction.

The parties have joined issue on a record, which, as appears from condescendence 5 and answer 2, and the oral evidence and correspondence, does not disclose the real dispute between them. Both parties are agreed that in working coal seams such as the seams in the defenders' colliery (other than the Dunfermline splint seam), which involve mining and bringing to the surface along with the coal a considerable quantity of material other than coal (which I shall call "dirt"), the miners are not entitled to be paid as if the whole material mined and brought to the surface were pure coal, and yet that is the result of the pursuer's contention. The owners will not have the miners' way of arriving at an allowance. The miners will not have the owners' way, and the miners say the result, however inequitable, is that in the circumstances of this case no allowance can be made. It is also common ground (*a*) that to crow-pick and weigh, so as to ascertain the quantity of dirt in each hutch is impracticable if a coal pit is to be worked to normal or it may be to any profit, and (*b*) that whatever method is employed deductions must be determined fairly and not arbitrarily or at random. In these circumstances the owners wish the allowance to be made by deducting from the gross weight of each hutch an average amount of dirt fairly ascertained by sufficiently frequent crow-picking and weighing the contents of fairly selected individual hutches, and they maintain that all round this is the fairest and best system for all parties. The miners, on the other hand, desire a simpler method, namely, that dirt should be allowed for by adjustment of the rates to be paid to them on the coal raised by them, and that deductions for dirt should only be made in the case of hutches which are manifestly fraudulently loaded. The miners equally maintain that this system is all round the fairest and the best for all parties. No doubt in both cases the respective parties, consciously or unconsciously, advocate the system which suits their own interests best. The dispute is an intelligible and reasonable one, both systems having been tested by experience. As between them I have no opinion. Both methods may be and I think are legal, each being in my opinion a "special mode," which may be the subject of agreement between the owners and the persons employed in the mining, under section 12 of the 1887 Act, or if the miners' method is not such a "special mode" (because it proceeds by adjustment of rates, and not by deductions for dirt), then it is legal, because securing payment as it does for all the mineral raised, it is not struck at by anything in the statute as interpreted by the decisions quoted to us.

But in my opinion this question does not arise for decision here, because there was no agreement between the owners and men employed to adopt either of the methods above mentioned either as special modes within the statute or as modes outwith the statute. It is admitted that the miners' agreement that deductions should be made was limited to deductions ascertained as provided by the statute. Nor in the view I take does the question arise for decision whether supposing the weigher alone or the checkweigher with the weigher had in view of the impossibility of crow-picking and weighing the dirt in each hutch resolved to determine the amount of dirt deductible from each miner's earnings by an average deduction applicable to each hutch sent up by him, such method of determining deductions would have been legal. As I read the evidence there was no period between 1st January 1915 and 6th March 1916 (in respect of which a claim is now made) when the owners' weigher was entitled to act except along with the men's checkweigher. During the whole period the checkweigher was either acting, and recognised by the defenders to be acting, or at all events he was not "absent" in the sense of section 13 (3) so as to entitle the weigher to act alone. Nor had he "interfered with the weighing" in the sense of section 13 (4) so as to warrant a complaint to a Court of summary jurisdiction, and in any event no such complaint was made. The deductions now claimed by the owners were not agreed to by the men's checkweigher, and therefore the condition under which alone in the circumstances the defenders' claim can be allowed was not satisfied.

This seems to me sufficient to compel us to reject the deductions claimed by the defenders, and to grant decree for the restricted sum now claimed by the pursuer.

But it is said with force that the checkweigher's refusal to concur with the weigher ought to be ignored and the case to be dealt with as if after an agreement by the owners and the men for deductions a weigher had been determining the deductions without a checkweigher having been appointed. This view is maintained on the ground that the checkweigher's objection to concur with the weigher in ascertaining deductions by average was based on the erroneous view in law that it was not open under the statute for him and the weigher to ascertain deductions by average, and that in these circumstances he had no course open to him in the absence of any agreement for a special mode between the masters and the men but to insist that the method of crow-picking and weighing the dirt in each hutch should be resorted to—a method which is admittedly impracticable. In my view if there was no agreement between the two men, whatever the reasons for the failure to agree may have been, then the method of determining deductions which the parties agreed to adopt failed and no deductions can be allowed.

But if, contrary to the view already expressed, it be necessary to decide as between the weigher's view and the checkweigher's, I am of opinion that the checkweigher was right. I read the first part of section 12 as providing that, unless in the special circumstances dealt with in the succeeding proviso, the miners shall be paid on the gross weight of the hutches, including coal, loose dirt, and the dirt which can only be freed from the coal by washing. The introduction into the first part of section 12 of the Act of 1887 of the words "contracted to be gotten," and the use of these words in the proviso of that Act, and in the proviso of section 17 of the Act of 1872, undoubtedly introduce a difficulty. But if the introduction of these words is not due to careless adjustment of the clause, I think they may be sufficiently accounted for as intended to exclude the case where, in coal mining, some other mineral such as ironstone is met with and hutches containing that mineral, alone or in combination with dirt, are brought to the surface. This view is in accordance with the framework of the clause. The proviso does not stipulate that deductions falling to be ascertained under the first paragraph on the footing of that paragraph dealing with nett coal may or shall be ascertained in certain ways, but is thus expressed, "provided that nothing in this section shall exclude" such subsequent ascertainment.

Whether this be so or not, the proviso admittedly only comes into force if the owners and men agree that deductions shall be made, and in this case it is admitted that the owners and men did so agree. These deductions were to be ascertained in terms of the statute, namely, either (*a*) by the owners and men agreeing on a special mode for determining them, or (*b*) by the owners' weigher, or (*c*) by the owners' weigher and the miners' checkweigher, and in case of difference by a third person, to be appointed in the manner stated in the Act. As I read the proviso the deductions are to be determined, in the case of a weigher, or a weigher and checkweigher, by weighing the dirt in the ordinary way, that is, by weighing the whole of it, estimation by area being only allowed in exempted collieries. Take the case as it actually occurs. The weigher and the checkweigher are at the pit head. A loaded hutch comes up and is weighed. Then the checkweigher proposes to weigh the dirt. The weigher refuses, and says that it is impracticable to do so, because the result would be the stoppage of the colliery. The checkweigher replies that if they are acting under the statute the statutory method must be followed. The weigher answers that he knows a way out of the difficulty, namely, by the special mode of taking an average deduction, and thus avoiding the necessity of individual weighing, to which the checkweigher replies that such a method, whatever its advantages, is a special mode, and the statute only allows a special mode, avoiding ordinary individual weighing, if the owners and men so agree.

In this attitude I think the checkweigher was right. He seems also to have been influenced by a general view against the use of averages, because they are or may be unfair to individual men of exceptional care. In any event that view is irrelevant in the present question. But I may say that although no doubt academically sound, it seems to me a view that is inapplicable to such joint work as coal mining, involving the employment of careless as well as careful men, and in which the practical conditions make ordinary detailed methods impossible. Indeed, the system which the men wish the masters to adopt—that of leaving the allowance for dirt to be settled by adjustment tonnage of rates—equally involves the principle of averages. Further, the checkweigher may have been right or wrong in rejecting the old system, under which the weigher, from long experience and frequent crow-picking of hutches, and from the appearance of each hutch as it passed the weighbridge, was thought to be able to determine the dirt with fairness and practical accuracy notwithstanding the number of hutches, the rapidity with which they pass the steelyard, and the difficulty of telling the contents of a hutch from its surface appearance. But however mixed the checkweigher's motives may have been, the question remains whether he was not acting within his statutory rights in refusing to be a party to the ascertainment of deductions by average, because the statute did not give him authority to do so, and I am of opinion that he was. The statute specifies deduction by special mode in the case only of agreement between the owner and men, and the substitution of average deduction for individual weighing seems to me a clear instance of special mode. No doubt special mode is not expressly forbidden in the case of deductions determined by the weigher or by the weigher and checkweigher. It seems to me that such exclusion is implied. It is difficult to believe that a special mode would be specifically authorised in the case of agreement between masters and men if the weigher alone at his own hand could intro-

duce any special mode he chose (provided always it were fairly carried out), however much such special mode might be open to reasonable objection on the part of the men. I read the proviso as if the order had been reversed and had said that deductions for dirt are to be determined (*a*) by the weigher, or (*b*) by the weigher and the checkweigher, or (*c*) in such special mode as may be agreed upon between owners and men.

But, as I said before, it seems to me sufficient for the decision of the case that the parties having agreed that there should be deductions under the statute, selected a method which involved agreement between the weigher and checkweigher, that no such agreement is proved, that the only method in the statute for meeting such a situation was not invoked, and if it had been would have been inapplicable, because there was no such difference between the weigher and checkweigher as warranted the appointment of the statutory arbiter, and therefore that the deductions claimed by the defenders, not having been ascertained by any of the statutory methods, cannot be allowed, although the result is admittedly inequitable, because both parties are agreed that allowance for dirt ought to be made by some method.

The Court decerned against the defenders for payment of £6, 17s. 2d.

Counsel for the Pursuer (Respondent)—Constable, K.C.—Scott. Agents—Macbeth, Macbain, Currie, & Company, S.S.C.

Counsel for the Defenders (Appellants)—Moncrieff, K.C.—W. T. Watson. Agents—Wallace & Begg, W.S.

***Saturday, December* 21.**

WHOLE COURT.

WYLIE'S TRUSTEES *v.* BRUCE.

Succession — Vesting — Conditional Institution of Heirs—Direction to Convey on Dies certus — Period at which Heirs Ascertained.

A testator directed his trustees on the death of the survivor of himself and his wife to convey his house and furniture and the sum of £3000, subject to a liferent of the same in favour of his wife, to his cousin or his heirs in heritage. The testator was survived by his wife and by his cousin, who, however, predeceased the liferentrix leaving issue, of whom his eldest son, who survived him, also predeceased the liferentrix. Questions having arisen as to who was entitled to the fee of the legacy, *held* (1) that the destination-over to the heirs in heritage of the testator's cousin had the effect of suspending vesting until the death of the liferentrix, there being no indication of a contrary intention in the settlement, and (2) that the heirs in heritage fell to be ascertained as at that date.

Held that the dicta in *Bowman* v. *Bowman*, 1899, 1 F. (H.L.) 69, *per* Lord Watson at p. 73 and Lord Davey at p. 76, 37 S.L.R. 959, overruled the decision in *Hay's Trustees* v. *Hay*, 1890, 17 R. 961, 27 S.L.R. 771.

Andrew Bethune Duncan and others (the testamentary trustees of the late George Wylie), *first parties;* Lewis Campbell Bruce, a son of Alexander Andrew Bruce, a cousin of the late George Wylie, *second party;* Lewis Campbell Bruce and another as executors of Alexander Montgomery Bruce, eldest son of Alexander Andrew Bruce, *third parties;* and as testamentary trustees of Alexander Andrew Bruce, *fourth parties;* James Semple Bruce and others, the other surviving children of Alexander Andrew Bruce, *fifth parties;* James Semple Bruce as executor of Bethune Duncan Bruce, a deceased son of Alexander Andrew Bruce, *sixth party;* and James Semple Bruce, as executor of Mrs Ada Campbell Semple or Bruce, widow of Alexander Andrew Bruce, *seventh party*, brought a Special Case to determine questions relating to the fee of a legacy left by the late George Wylie.

The *trust-disposition and settlement* provided, *inter alia* — "On the death of the survivor of me and my said wife, my said trustees shall assign, transfer, dispone, convey, and deliver to my cousin the said Lieutenant-Colonel Alexander Andrew Bruce, or his heirs in heritage, my said dwelling-house No. 17 Blackford Road, Edinburgh, together with the whole household furniture and plenishing of every description therein appointed, to be liferented by my wife as aforesaid, and shall pay to him or his heirs in heritage the sum of £3000 hereinafter provided to be liferented by my wife."

The testator died on 4th May 1878 survived by his wife, who died on 11th February 1917. The testator's cousin Alexander Andrew Bruce predeceased Mrs Wylie, having died on 17th June 1908 leaving a will disposing of his whole estate and survived by seven children. The eldest of these, Alexander Montgomery Bruce, also predeceased the testator's widow, having died unmarried on 24th November 1909 leaving a will, dated 28th May 1908, disposing of his whole estate. The immediately younger brother of Alexander Montgomery Bruce, Lewis Campbell Bruce (the second party), survived the testator's widow and was heir in heritage of his father Alexander Andrew Bruce as at the date of her death.

The *questions of law* were — "1. Did (*a*) the said dwelling-house in Blackford Road, (*b*) the price of the furniture therein, and (*c*) the said sum of £3000 sterling, or any of them, and if so which, vest *a morte testatoris* in the said Alexander Andrew Bruce? or 2. Did the said subjects or any of them, and if so which, vest at the date of the death of the said Alexander Andrew Bruce in the said Alexander Montgomery Bruce? or 3. Was the vesting thereof postponed until the death of the testator's widow so as to vest in the second party?"

On 21st June 1918 the Court, in respect of the importance of the questions of law raised in the Special Case, appointed the cause to be considered by the whole Judges of the Court, and ordered minutes of debate.