fourteen years as aliment for the child. The defender appealed to the Court of Session, and the pursuer lodged a note in which she stated, *inter alia*—"The defender, who is a domiciled Scotsman, had been resident in this country for several years before the action was raised, and he remained in Scotland until about the month of March last. The pursuer and respondent has just learned that he then left for Canada, where he has now taken up his permanent abode. He has no heritable property in Canada." She craved the Court to ordain the pursuer and appellant to sist a mandatory. On the case appearing in the Single Bills of the Second Division counsel for the pursuer moved in terms of the prayer of the note. It was admitted at the bar that the pursuer had arrested on the dependence of the action £124 of the defender's funds.

Argued for the pursuer—The defender should be ordained to sist a mandatory—*D'Ernesti* v. *D'Ernesti*, 1882, 9 R. 655, *per* Lord Shand at p. 658, 19 S.L.R. 436; *Young* v. *Carter*, 1906, 14 S.L.T. 411 and 829; Mackay's Manual, p. 235; Shand's Practice, p. 159. In *Florence* v. *Smith*, 1913 S.C. 393, 50 S.L.R. 267, where the motion was refused, the defender had been assoilzied, and had left the country *bona fide* for the purposes of his business.

Argued for the defender —The motion should be refused. The sisting of a mandatory lay in the discretion of the Court, and in the case of a defender that discretion was liberally interpreted—*Simla Bank* v. *Home*, 1870, 8 Macph. 781, 7 S.L.R. 487; *Aitkenhead* v. *Bunten & Company*, 1892, 19 R. 803, 29 S.L.R. 659. In the present case the pursuer had arrested £124 of the defender's funds, which would more than cover the expenses.

The Court—LORD JUSTICE-CLERK, LORDS DUNDAS and SALVESEN—without delivering opinions ordained the defender to sist a mandatory.

Counsel for the Pursuer and Respondent—J. M. Hunter. Agents—Pairman, Miller, & Murray, S.S.C.

Counsel for the Defender and Appellant—Crawford. Agents—Laing & Motherwell, W.S.

Thursday, June 10.

FIRST DIVISION.

[Sheriff Court at Stirling.

CORSAR *v.* ARCHIBALD RUSSELL LIMITED.

Master and Servant—Workmen's Compensation—Industrial Disease—Certificate of Certifying Surgeon — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8.

A certifying surgeon certified on 3rd July that a workman was then suffering from ulceration of the corneal surface of the eye, and that disablement commenced on 21st April preceding; he further stated in the certificate as a leading symptom of the disease that the workman had lost his eye as the result of corneal ulceration. The eye had been removed on 9th June. An appeal to the medical referee was dismissed by him. *Held* (*dis.* Lord Cullen) that the certificate, being upon questions which were for the medical men to decide, was a valid certificate for the purposes of section 8 (1) (i) of the Act.

Opinion per Lord Cullen that the certificate was invalid, as the workman could not continue to suffer from a disease affecting an organ after it had been removed, and that the certificate being defective was not remedied by the subsequent dismissal of the appeal to the medical referee.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts, section 8—"(1) Where (i) the certifying surgeon . . . certifies that the workman is suffering from [a scheduled industrial] disease . . . and is thereby disabled from earning full wages at the work at which he was employed, or . . . and the disease is due to the nature of any employment in which the workman was employed within the twelve months previous to the date of disablement . . . he . . . shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of that employment." . . .

James Corsar, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Stirling (DEAN LESLIE) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), took an appeal by Stated Case in which Archibald Russell, Limited, coalmasters, Glasgow, were *respondents*.

The Case stated—"The following *facts* were proved or admitted—The appellant, who is forty-one years of age, was on or about 21st April 1919, and within twelve months previous thereto, employed by the respondents as a labourer at their Millhall Colliery, Stirlingshire. He worked at breaking up blocks of pitch for the making of briquettes. On the said date the pursuer left his employment. The respondents' foreman knew that he was doing so because of the condition of his eyes arising from his work. He consulted a doctor, who advised him to go to the Glasgow Eye Infirmary. He thereupon entered the said hospital and remained for five weeks, when he was advised that his right eye ought to be removed. He hesitated to submit to the operation and left the hospital. He stayed at home for two days and then returned to the hospital. His eye was removed on 9th June 1919. On 3rd July 1919 he obtained from Dr J. H. Murray, a certifying surgeon appointed under the Factory and Workshops Act 1901 for the district of Stirling, the certificate No. 4/2 of process. The certificate is in these terms—'I hereby certify that, having personally examined James Corsar on the 3rd July 1919, I am satisfied that he is suffering from a disease to which the Workmen's Compensation Act applies, namely,

the disease mentioned in the schedule below, against which I have placed my initials, and is thereby disabled from earning full wages at the work at which he has been employed, and I certify that the disablement commenced on the 21st day of April 1919.' The disease in the schedule against which the certifying surgeon's initials are placed is 'ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product or residue of any of these substances.' As leading 'symptoms of disease,' the surgeon certified 'he has lost his right eye as the result of corneal ulceration.' The certificate is dated 3rd July 1919. A form of the certificate is appended to the case. On 4th July 1919 notice of disablement was sent to the respondents. The respondents appealed to the medical referee against the certificate of the certifying surgeon. On 15th July 1919 the medical referee wrote to the Sheriff-Clerk in these terms—'Dear Sir, —James Corsar appeared before me yesterday. I regret, however, that I am not in a position to give a decision regarding the certificate of disablement given him by Dr J. H. Murray on the 3rd July 1919. The certificate bears that Corsar is suffering from ulceration of the corneal surface of the eye, but as his right eye (the one affected) has been removed by operation I cannot, of course, say whether the enucleation was performed for ulceration of the cornea. It seems to be a matter for proof.—Yours faithfully (Signed) A. MAITLAND RAMSAY.' This letter was communicated to the parties by the Sheriff-Clerk. On 11th August 1919 the medical referee dismissed the appeal. On 3rd July there could have been no evidence from personal examination to enable anyone to say that on 21st April the appellant was suffering from ulceration of the right eye. The respondents do not supply goggles to their workmen unless specially asked for. Some of their workmen provide themselves with goggles. The appellant did not wear goggles at his work. Before being employed at breaking pitch the appellant had been working at colliery picking tables. He was not a fully able-bodied man. His average weekly earnings amounted to £2, 5s. He is now able to work at picking tables, and could earn a weekly wage of £2, 7s. 9d.

"On these facts I found—1. That the certificate No. 4/2 of process is not a certificate of the alleged disablement as required by section 8 (1) of the Workmen's Compensation Act 1906. 2. That the decision of the medical referee did not make effective the certificate No. 4/2 of process. 3. That if No. 4/2 of process were a valid certificate, the pursuer gave notice as soon as practicable after the alleged disablement as certified. And 4. that the defenders have not been prejudiced by want of notice.

"I dismissed the application, and found the appellant liable to the respondents in expenses."

The *questions of law* were—"1. Was I justified in finding that the certificate No. 4/2 of process was not a certificate of disablement as required by section 8 (1) of the statute? 2. If the first question is answered in the affirmative, was I justified in finding that the decision of the medical referee did not make effective the certificate No. 4/2 of process?"

To his award the arbitrator appended the following *note*—"The certificate on which the pursuer founds his claim is on the face of it self-contradictory. A man who on 3rd July had no right eye could not on that date be suffering from ulceration of the right eye —*Mapp* v. *Straker*, 7 Butt. 18. I allowed medical evidence to the effect that without an eye there could not, from personal examination by a diagnosis, be ulceration. But such evidence was unnecesary for the formation of an opinion on the certificate.

"It was contended for the pursuer that an appeal having been taken to the medical referee and dismissed there was an end to all challenge of the certificate. But the appeal does no more than confirm the original certificate. It cannot make good what really was not a certificate.

"The defenders have a plea that they were prejudiced in their defence through delay in serving notice of the disablement. If the certificate was a valid one the notice was in fact given as soon as practicable, namely, the day after the date of disablement was fixed, in the only way that that date could be fixed. It is for the certifying surgeon to fix the date. He did so in this case on 3rd July. Notice on the 4th July was therefore as soon as practicable. Besides, it was clearly brought to the knowledge of the defenders' foreman that the reason for the pursuer being off work was on account of trouble with his eyes contracted in their employment.

"The defenders produced by the hand of the Sheriff-Clerk a letter received by him from the medical referee, dated 15th July 1919, in which he said that he was not in a position to give a decision regarding the certificate of Dr. J. H. Murray because of the removal of the eye. I allowed the evidence, reserving all pleas to the parties thereupon. If this statement had been adhibited to the decision of the medical referee I might have remitted to him for a further decision. The letter was written before the decision, and the decision itself is quite unambiguous. I have therefore not taken the letter into consideration in disposing of the cause."

Argued for the appellant—The provisions of section 8 of the Workmen's Compensation Act 1908 (6 Edw. VII, cap. 58) were satisfied when the certifying surgeon certified that the workman was suffering from an industrial disease and was disabled by it, and the workman was therefore entitled to compensation. In the present case the appellant had such a certificate, and his work was of the requisite kind. The question as to what disease a man was suffering from was one for the certifying surgeon and for him alone. His diagnosis could be challenged before the medical referee, but could not be controverted by the Court. He must proceed upon personal examination, but he was not limited to that method alone in arriving at

his conclusion. Further, the certificate in the present case had been confirmed by the medical referee, and that was final—*Chuter* v. *J. J. Ford & Sons, Limited*, [1915] 2 K.B. 113; *Frost* v. *Clanway Colliery Company, Limited*, [1920] 1 K.B. 423. *Mapp* v. *Straker & Son, Smith Bros., Limited*, [1914] 7 B.W.C.C. 18, was distinguished, for the certificate was self-contradictory. Here the certificate was not self-contradictory. A man might well suffer from a disease though the part affected were removed. Even if personal examination could not yield any basis for diagnosis, the certificate was not bad, for the surgeon might have proceeded upon facts discovered otherwise. It was quite possible that though the affected eye was removed the disease still affected other parts of the man's body. In any event it was a fair reading of the certificate to construe suffering as including all indisposition resulting from the disease until absolute cure. If death had resulted from the operation compensation would have been due. If the respondent's argument were adopted, and a man suffered from industrial disease, his right to compensation would depend on whether or not he had the affected part removed by operation. Regulations dated June 21, 1907, as to the Duties and Fees of Certifying and other Surgeons, regulations 2, 5, and 14, were referred to.

Argued for the respondents—The certificate was not in terms of the statute. It must proceed upon personal examination, though not on that alone. Personal examination was out of the question here, for owing to the sequence of events for which the appellant was responsible, the eye having been removed, such examination could reveal nothing. The disease in question was a disease of the eye; if the eye were removed the disease could no longer exist. Even if the eye removed had been shown to the certifying surgeon the result would have been the same. The certificate must relate to the man's condition on the date of examination. He had then no cornea, and consequently could not suffer from corneal ulceration. *Mapp's* case and *Chuter's* case were both adverse to the appellant. The appellant might be said to be suffering from the effects of a disease, but that would not avail him, for no *sequelæ* were scheduled in regard to the disease in question, which indicated that such *sequelæ* were not considered as industrial disease. In the case of death from industrial disease—section 8 (1) (iii)—where the workman had died without obtaining a certificate, the disablement was to date from the date of death—section 8 (4) (*b*). On the analogy of that provision the certifying surgeon could not revert to the period when the appellant had not had his eye removed. If the certificate was bad the referee's decision was ineffectual to set it up.

At advising—

LORD PRESIDENT (CLYDE)—The leading characteristic of the method adopted in the Workmen's Compensation Act 1906 for applying to industrial diseases the general provisions of the Act relating to compensation for personal injuries by accident is the enactment in section 8 (1) that such a disease is to be regarded as if it were a personal injury by accident. Given (1) a certificate that the workman is suffering from an industrial disease and is disabled thereby, and given (2) the fact or the presumption (see section 8 (2)) that the disease is due to the nature of his employment at any time within the twelve months preceding disablement, the workman becomes entitled to compensation "as if the disease were a personal injury by accident arising out of and in the course of that employment," and the disablement is "treated as the happening of the accident."

The appellant founds on a certificate that he is suffering from the industrial disease described in the schedule as "Ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue of any of these substances," and is disabled thereby, and (2) on the fact that his employment immediately prior to his disablement consisted in breaking up blocks of pitch. The disablement or "happening of the accident" is certified to have occurred on 21st April 1919. It was on that date that the appellant left his employment. Then or about that time he consulted a doctor, who sent him to the Glasgow Eye Infirmary. There it was found necessary to remove his right eye—the only one, I understand, on which ulcers had actually formed. Stated thus generally, the case seems to comply with the statutory requirements as contained in section 8 (1) (2) and (4), and to be on all fours with a case of personal injury by accident in which the injured limb has been removed by surgical operation consequent on the injury.

But it is pointed out that the eye was removed on 9th June 1919, while the certificate is dated nearly four weeks later, on 3rd July 1919. Under the heading "Leading symptoms of disease" the certificate cites the fact that the appellant "has lost his right eye as the result of corneal ulceration." In these circumstances it is said that the certificate contradicts itself, and cannot be taken as affirming at its date that the appellant "is suffering from the disease" described in the schedule as "ulceration of the corneal surface of the eye," because a man who on 3rd July had no right eye could not on that date be suffering from ulceration of the right eye. The learned Sheriff-Substitute has adopted this reasoning and dismissed the application.

The reasoning in question is based in the first place on a strictly literal construction of the phraseology which occurs in the Act and is echoed in the certificate, viz., "is suffering from an industrial disease." If this strictly literal construction is the correct one the right of the workman, whose industrial disease has compelled resort to the surgeon's knife in order to eliminate the organ in which the headquarters of the disease were situated, is made to depend, not on the fact (however indisputable) that industrial disease did disable him, but on

the accident or the necessity which caused the operation (however urgent) to precede the certificate, instead of the certificate preceding the operation, in point of time. Removal of the diseased organ is not the same thing as the cure of the disease. The disease may, no doubt, be removed along with the organ, but only at the price of mutilation. Again, while the necessity of compliance with the technical requirements of the Act thus literally construed jeopardises the right of the surviving workman to compensation, no similar hazard attends the claim of his dependants if he succumbs (section 8 (1) (3)). It has to be kept in mind that the certifying surgeon's means of information are not limited either by the Act or by the regulations made by the Secretary of State under sections 8 and 10 to information obtained by medical examination alone, but include such further information respecting the case as in the particular circumstances he may deem necessary. It may be that the expression "suffering from an industrial disease" can be or ought to be construed so as to include "suffering from the results of surgical operation properly incident to the treatment of the industrial disease." But it is unnecessary to resolve this question in the present case, which can be decided on other and less general grounds.

The question of fact whether at the date of the certificate the appellant was or was not suffering from industrial disease, and was or was not disabled thereby, is one the ascertainment of which is made by the Act to depend on a medical verdict pronounced by a qualified medical expert. In the present case such a verdict affirms the appellant's qualifications on both points for compensation. We are asked to take the view that the certificaet does not mean what it says, because it discloses—and it is the fact—that the eye in which the disease had its headquarters had already been removed. This means that the removal of the ulcerated organ is pathologically and necessarily inconsistent with the existence in the patient's body for any time thereafter of the disease described by medical men as ulceration of that organ's surface. It may be so, but I know nothing of the disease so described, or of the character or extent of the suffering it entails, beyond what may be gathered from its name, and in face of an express medical certificate I am not prepared to adventure myself on such fallible inferences as to the pathological characteristics of the disease as may *prima facie* commend themselves to a mere layman in these matters like myself, from the name which medical men employ to designate the state of disease in question.

Accepting therefore the language of the Act and of the relative certificate in its literal interpretation, I cannot take it for granted that the excision from so complex a system as that presented by a living human body, of the organ in which a disease has its headquarters necessarily carries with it, either immediately or within a period of less than four weeks, the removal of the state of disease from the whole body. Both the name of a disease and the seat of its activity in the human frame may be strictly local in character and yet the morbid conditions which are part and parcel of the disease may be widely distributed. In like manner, while a surgical operation, rendered necessary lest worse should befall, may be the indispensable condition of recovery, yet the patient may still continue, for a time more or less protracted, to suffer from the disease after its headquarters have been destroyed. In the present case the affirmation by the certificate that the appellant was at its date suffering from the disease known as ulceration of the cornea is not necessarily contradicted by the citation, as a "leading symptom," of the fact that his right eye had been lost as the result of the disease, unless, indeed, it were held to be established that the state of disease is, pathologically and necessarily, confined to the corneal surface, or at any rate to the eye. What the morbid conditions of this particular state of disease may be, or what their extent and relative permanence in the human body, I have no means of judging, either in general or in the particular case of the present appellant. The matter is one, as I have said, for medical opinion, not for legal decision. I find myself therefore unable to condemn the certificate in the present case merely because the eye to which the ulcerated cornea belonged had been removed a few weeks before.

The respondents did not press the plea founded on prejudice due to alleged delay by the appellant which they originally stated in answer to his application, and it is therefore unnecessary to say anything about it.

It remains, however, to deal with the criticism which was directed against the certificate with reference to the proceedings in the appeal which was taken against the certificate to the medical referee. It appears that the referee before disposing of the appeal communicated through the Sheriff-Clerk with the parties on 15th July 1919, stating that he was not in a position to give a decision, because without proof he could not say whether or no the operation of removing the eye had been performed for ulceration of the cornea. The only sequel to this, recorded in the Stated Case, is that on 11th August 1919 the medical referee dismissed the appeal. The suggestion made is that whatever may have been the appellant's state of health on 3rd July 1919, when the certificate was granted, it cannot have presented any trace of morbid condition (apart from the absence of the right eye) when the medical referee saw him twelve days afterwards, viz., on 15th July 1919. It is possible that this suggestion may be well founded, but the fact remains that nearly four weeks later the medical referee found himself in a position to give a decision, and did so by dismissing the appeal, and thus confirmed the certificate.

I think the first question in the Stated Case should be answered in the negative; if that be done, the second question becomes superseded.

LORD MACKENZIE — The arbitrator has refused to allow the workman compensation although he has obtained a certificate from the certifying surgeon, confirmed on appeal by the medical referee. The certificate bears — (1) That the workman is disabled from earning full wages at the work at which he had been employed, and (2) that the reason of this is that he is suffering from ulceration of the corneal surface of the eye.

The two facts thus established, and their relation to cause and effect, are purely matters for the medical men. What effect ulceration of the corneal surface of the eye may have upon the system I do not know. The certificate bears that the workman is "thereby" disabled from earning full wages. This necessarily means that he has not recovered from the disease. The argument for the respondents involves this, that though a workman is told his eye must instantly be removed, yet if he submits to this he loses his right to apply for a certificate under section 8. This seems to me not a reasonable construction. Apparently the same result would not follow if the eye was left, although it might be atrophied so as to be an eye only in name. The view taken by the medical men was that though the part locally affected had been removed, yet the workman was suffering from the disease. The Court is asked to say that this is an impossibility. I am unable to do so when the medical men affirm that it is the fact.

I am accordingly of opinion that the first question should be answered in the negative.

LORD SKERRINGTON—I concur.

LORD CULLEN—The 8th section of the Act of 1909 authorises the certifying surgeon to certifiy that a workman is "suffering from a disease" of one or other of various kinds, and is thereby disabled from earning full wages at the work at which he was employed. Under an Order made by the Secretary of State by virtue of the powers of the Act, one of the diseases in question is "ulceration of the corneal surface of the eye due to tar, pitch, bitumen," &c.

In the present case the body of the certificate is to the effect that the appellant was at its date suffering from the disease of ulceration of the corneal surface of the eye. But appended to it there is entered, under the title of "Leading Symptoms" the following:—"He lost his right eye as the result of corneal ulceration." Taking this along with the body of the certificate, I read the certificate as meaning that the appellant's condition of disablement at its date was that of having had his right eye removed in consequence of his having suffered from ulceration of its corneal surface.

On this footing the question arises whether the appellant's case as so certified falls within section 8. The Sheriff-Substitute has held that it does not. I agree with the view he has taken. The words "suffering from ulceration of the corneal surface of the eye" seem to me to imply that the diseased eye forms part of the bodily organism of the sufferer who has become disabled through having an eye so diseased. If the diseased eye is taken out he becomes subjected to the disablement of being a one-eyed man and he may be left suffering otherwise. But according to the ordinary use of language it appears to me that his condition ceases to be definable as that of "suffering from ulceration of the corneal surface of the eye," although he may be suffering from the effects of having had such ulceration.

Against this view the following line of argument is presented. It is first said that ulceration of the corneal surface of the eye may cause adjoining parts of the body to become diseased in some way or other, and that these parts may continue to be so diseased after the eye with its ulcerated cornea has been removed. This may very well be so. Then it is said that if this should be so, it may, for aught we know, be in accordance with medical nomenclature and practice to define in a certificate such diseased condition left in adjoining parts, whatever may be its character, as "ulceration of the corneal surface of the eye," without any indication of what are the parts so left diseased, or of the manner in which they are affected. I think this suggestion too improbable for acceptance. The object of a certificate is to give information as to the nature of a workman's disablement, and a certificate such as is suggested under the conditions supposed would not be useful to give any information as to the condition of the adjoining parts — as to which of them were affected or in what way they were affected, or as to the existence and degree of disablement arising therefrom.

A further line of argument is presented. It is urged that the words "suffering from a disease" fall to be read as including the case of a workman suffering from any disabling effects left by a disease no longer resident in the body. This seems to me to involve too wide an extension of the ordinary meaning of the words of the Act. The question at issue relates to the state of matters at the date when the certificate is given. The disabling effects of a disease may last for a long time. Accordingly it would, on the view suggested, be optional to the workman either to obtain a certificate that he was "suffering from a disease" while the disease was current, or to obtain it long after the disease had abated in respect of some disabling effect it had left behind it. I think the only fair reading of the words of the Act to be that the certificate falls to be given while the disease is current. From the point of view of the workman this does not seem in any way an unreasonable requirement. From the point of view of the employer it would be putting him at a serious disadvantage in his inquiry if the certificate of "suffering from a disease" could competently be given after the disease had disappeared. In the present case I see no reason why the appellant should not have obtained his certificate before his diseased eye was removed.

If the certificate of the certifying surgeon was not of the required statutory quality

on its merits, I do not think that it could acquire such quality through the dismissal by the medical referee of the appeal taken to him.

I am of opinion that the questions in the case should each be answered in the affirmative.

The Court answered the first question of law in the negative.

Counsel for the Appellant—Wilton, K.C. —Maclaren. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for the Respondents—Sandeman, K.C.—T. G. Robertson. Agents— W. & J. Burness, W.S.

Friday, June 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

ESPIE *v.* BRITISH BASKET COMPANY LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising Out of and in the Course of*"—*Voluntary Action Outwith Ordinary Performance of Duties.*

A boy while employed as an assistant attendant at a circular saw, went into the saw-pit to recover a can belonging to another employee, and while doing so was injured by the saw. In the ordinary performance of his duties he was not required to enter the saw-pit. *Held* that the accident did not arise out of and in the course of his employment—*M'Lauchlan* v. *Anderson*, 1911 S.C. 529, 48 S.L.R. 349, *distinguished.*

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Stated Case—Arbitrator's Note—Competence of Referring to Note.*

Observed per Lord Justice-Clerk that while it was not legitimate for the Court to use statements in the arbitrator's note for the purpose of supplementing the specific findings of fact in the Stated Case, it was legitimate to use the note in order to discover the ratio in law of the arbitrator's judgment.

The British Basket Company Limited, Glasgow, *appellants*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (LEE) at Glasgow granting an application by John Espie junior, residing with his father John Espie, Glasgow, with his father's consent, *respondent.*

The Case stated—"The case was heard before me, and proof led, when the following *facts* were established — (1) That on 2nd December 1919 and for some weeks before said date the respondent was employed as an assistant attendant at a circular saw by the appellants at their works at 250 Crownpoint Road, Glasgow; (2) that the respondent's average weekly earnings in said employment are agreed to have been 12s.; (3) that on the afternoon of 2nd December 1919 the respondent went into the saw-pit, under the saw at which he was employed, to recover a tea can which had been inadvertently dropped into said pit, either by the respondent or by another boy to whom said tea can belonged; (4) that while in said pit the respondent in some way not ascertained brought his head into contact with the circular saw, and thereby sustained an injury as the result of which he has from said date been, and still is, totally incapacitated for work; (5) that said injury has resulted in the respondent's serious and permanent disablement; (6) that while the respondent knew that there was some danger in going into said saw-pit it is not proved that he had been forbidden to do so either by printed notice or by verbal warning; (7) that in the ordinary performance of the duties of the respondent's employment he was never required to enter said saw-pit; (8) that in entering it on the occasion in question he acted foolishly and rashly, but for a purpose which was incidental to his employment; (9) that the said injury was sustained by accident arising out of and in the course of his employment; and (10) that the respondent is under twenty-one years of age.

"I therefore on 30th March 1920 pronounced an award and found that the appellants were liable to the respondent, under the provisions of the Workmen's Compensation Act 1906, in payment of compensation at the rate of 10s. weekly from 2nd December 1919, and so long as he should continue to be totally incapacitated as the result of said injury. I found the appellants liable to the respondent in expenses."

In a *note* appended to his award the arbitrator stated, *inter alia*, as follows—"In my opinion this accident arose out of the pursuer's employment as well as in the course of it. It is true that what directly exposed him to the risk of accident was something outwith the ordinary duties for which he was employed, but it was something within the ordinary and permissible incidents of his day's work. I do not think that the case is distinguishable from *M'Lauchlan* v. *Anderson*, 1911 S.C. 529. The injury in this case, just as in that, arose from a risk to which the workman was exposed by the nature of his work. He was employed at a saw, and was injured by it while doing something reasonably incidental to his employment. Even if he acted in a dangerous and unauthorised manner, the accidental injury arose out of the employment and is one for which he is entitled to be compensated under the Act."

The *question of law* was—"On the evidence could I competently find that the injury sustained by the respondent was by way of accident arising out of and in the course of his employment?"

Argued for the appellants—The accident did not arise out of the employment. A prohibition was not necessary to make the act outwith the boy's duties. If the thing done was dangerous and it was not reasonable for him to do it, then an accident