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

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

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

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

LORD PEARSON—I also concur.

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

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

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

Wednesday, January 27.

SECOND DIVISION.

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

[Sheriff Court at Glasgow.

BURTON *v.* CHAPEL COAL COMPANY, LIMITED.

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

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

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

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

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

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

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

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

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

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

of the workers employed in said pit, and especially the pursuer."

He pleaded—"The pursuer having been injured through the fault and negligence of the defenders, is entitled to decree as craved."

The defenders averred, *inter alia*—"(Ans. 7) The alleged necessity for said action is denied, and explained and averred that same is incompetent. On 20th November 1906, pursuer having elected to claim under the Workmen's Compensation Act 1897, applied for arbitration in the Hamilton Sheriff Court, the interlocutor finally disposing of said claim being as follows—'*Hamilton, 4th February* 1907.—The Sheriff-Substitute having considered the cause, finds in fact (1) that the applicant on 3rd August 1906 was in the employment of the respondents as a bottomer at a mid-working, viz., the Kiltongue seam of the No. 1 pit, Chapel Colliery; . . . (3) that on said 3rd August 1906 he met with an accident by falling down the shaft upon the top of a cage below said mid-working; . . . . . (8) that the said accident, which has since incapacitated him from working, was directly due to his breach of said rule, and was the result of his own serious and wilful misconduct: Finds in these circumstances that the applicant is barred from recovering compensation in respect of said accident under the Workmen's Compensation Act 1897: Therefore assoilzies the respondents from the conclusions of the action, ...

'(Sgd.) A. S. D. THOMSON.'"

The defenders pleaded, *inter alia*—"(1) Pursuer having claimed compensation under the Workmen's Compensation Act 1897, and said claim having been dismissed on the ground of his own serious and wilful misconduct, he is now barred from insisting in the present action, which should be dismissed with expenses."

On 2nd August 1907 the Sheriff-Substitute (A. S. D. THOMSON) pronounced the following interlocutor:—"The Sheriff-Substitute having considered the cause, sustains the first plea-in-law for the defenders and assoilzies the defenders from the conclusions of the action."

The Sheriff (GUTHRIE) on appeal adhered, and issued this note.

Note. — "Sheriff Thomson seems to me rightly to found his judgment on the principle of *res judicata* rather than on the plea formally stated by the defenders, viz., election. The cases cited, such as *M'Donald* v. *Dunlop & Co.*, 7 F. 533, and *Beckley* v. *Scott*, in Ireland (1902, 2 K.B. Ir. 504) deal with the matter of election under the Act. sections 1 (2) and (4). But they do not affect the case where the workman having claimed compensation under the Act has carried through the proceedings to a determination on the merits. They only decide that where the workman has withdrawn his claim, or has been found not to have a claim that lies within the scope of the Act at all, he is not precluded by his mistake from suing for damages independently of the Act. But—unless it be the *dictum* of Lord M'Laren in *M'Donald's* case, which if well reported is inconsistent with the meaning of the other opinions, and still more with the opinions in *Rouse* v. *Dixon*, (1904) 2 K.B. 528—there is no authority for saying that a finding that a workman has suffered his accident through his own wilful misconduct cannot operate as *res judicata* to exclude an action of damages in which precisely the same question of his personal fault must be the sole or chief issue. In the Scots case the Judges, including Lord M'Laren, expressly say that the statute means that the employer is not to pay twice, and I think that that imports that he is not to be put to try the question of liability twice. In the English case, which lays down the same principle as *M'Donald* v. *Dunlop* upon the actual point in issue, the Judges quite clearly reserve and, as I read their opinions, distinguish the point here raised for decision."

The pursuer appealed to the Second Division of the Court of Session, and the case was eventually heard before Seven Judges.

Argued for the appellant—(1) The object of section 1 (2) (*b*) was to prevent the employer having to pay compensation twice, not to exclude the possibility of his having to contest the question of his liability twice. The only case therefore in which a workman was prevented from bringing a second action was where in the first action he had carried his claim to a successful issue. If this were not so, no reasonable meaning could be given to the latter part of the sub-section beginning with the words "but the employer . . . ." In other words, nothing short of a claim prosecuted to a successful issue could be regarded as an exercise of the option provided by section 1 (2) (*b*). This was clearly laid down in the case of *Beckley* v. *Scott & Company*, [1902] 2 I.R. 504, which was expressly approved of by Lord Alverstone (C.J.) and Wells (J.) in *Rouse* v. *Dixon*, [1904] 2 K.B. 628. This view was also strongly supported by the following Scotch cases—*M'Donald* v. *James Dunlop & Company*, February 25, 1905, 7 F. 533, 42 S.L.R. 394; *Blain* v. *Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639. The case of *Mulligan* v. *Dick & Son*, November 19, 1903, 6 F. 126, 41 S.L.R. 77, so far as analogous or applicable, was not adverse—see Lord Kinnear, who speaks of "an effective claim"—and *Baird* v. *Higginbotham & Company Limited*, March 14, 1901, 3 F. 673, 38 S.L.R. 479; and *Edwards* v. *Godfrey* [1899] 2 Q.B. 333, were cases dealing with procedure under section 1 (4), and were not really in point. *Cribb* v. *Kynoch Limited*, [1908] 2 K.B. 551, was wrongly decided. (2) The pursuer was not barred by *res judicata*, the requisites for which were laid down by Lord Rutherfurd Clark in *Scott* v. *Macdonald*, May 27, 1885, 12 R. 1123, 22 S.L.R. 666—see also *Leith Dock Commissioners* v. *Miles*, March 12, 1866, 4 Macph. (H.L.) 14, 1 S.L.R. 213; *Heddle* v. *Baikie*, January 14, 1846, 8 D. 376. The *media concludendi* were entirely different, the one proceeding being for indemnification, independently of contract or fault, the other being an action founded on fault or negligence.

Argued for the respondents—Section 1 2 (*b*) gave the workman an "option" of proceeding under the statute or raising an action at common law. From the very nature of the word "option" it followed that he could not do both. The only question, therefore, came to be what constituted the exercise of the "option," and the answer was that the workman had exercised his option when he had brought a proceeding in one form or other for the trial of the case, had allowed it to go to trial, and had obtained a final adjudication. This view was confirmed by the enactment in section 1 (4), which provided for an exception in one particular case only; and was settled by the following cases of *Cribb* v. *Kynoch Limited* (*cit.*); *Edwards* v. *Godfrey* (*cit.*); *Neale* v. *Electric and Ordnance Accessories Limited*, [1906] 2 K.B. 558. None of the cases cited by the pursuer were contrary decisions, although undoubtedly in *Beckley* v. *Scott* and *Rouse* v. *Dixon* contrary opinions had been expressed. In all the cases founded on by the pursuer—*e.g.*, *Beckley* v. *Scott* (*cit. sup.*), *Rouse* v. *Dixon* (*cit. sup.*), *Blain* v. *Greenock Foundry Company* (*cit. sup.*), *M'Donald* v. *Dunlop & Company*—the workman had no real option at all, because for one reason or another it became apparent in the original arbitration proceedings that the workman was not within the Workmen's Compensation Act at all, and all that the cases decided was that a mistaken claim under the Act did not bar a claim at common law. (2) The matter was *res judicata*, the award of an arbiter being *res judicata* in subsequent proceedings in a court of law—see *North British Railway Company* v. *Lanarkshire and Dumbartonshire Railway Company*, February 23, 1897, 24 R. 564, 34 S.L.R. 415.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case brought a claim for compensation under the Workmen's Compensation Act before the Sheriff as arbitrator and failed, the Sheriff holding that the pursuer having been guilty of "serious and wilful misconduct" was excluded from the benefits of the Act.

He then brought this action, and is met by the plea that having made a claim before the Sheriff as arbiter and failed, his action is barred. The defenders' plea has been dealt with in the Sheriff Court as if it were a question of *res judicata*. I do not think it necessary to consider whether the case technically falls within the scope of a plea of *res judicata*. It seems to me that it can be decided on a simple ground, to be found in the statute itself.

Under the Act, section 1, sub-section 2 (*b*), the workman can claim under the Act, or if he maintains fault of the master, can bring an ordinary action for damages. That rather points to a choice to be made between two things, and had there been nothing else, I cannot but think that the only possible view would be that he could not try one remedy and then after failure try the other. But there is a special provision in the sub-section, by which it is declared that "the employer shall not be liable to pay compensation . . . both independently of and also under this Act." I do not think that the workman seeking to have a second remedy, when he has gone to proof and failed upon the first, can found on these words. The words I have read were plainly intended to shut out the idea that by the Act the injured man was not free to proceed by ordinary action on the ground of fault.

The only case in which the workman can avail himself of a claim both by ordinary action and by invoking the Workmen's Compensation Act, is the case of his having brought an ordinary action and failed. In such a case he may still ask for compensation under the Act, but he can only get that from the judge who tried the case, and only under condition that the employer's expenses in the ordinary action may be set against the compensation allowed. That being an exception, and there being no other in the Act, it must be held to be the only one. The exception involves no two trials in separate courts. It does not impinge upon the evident intention to exclude the workman from taking proceedings in a new court when he has failed after litigating in another. Of course, where he is found not to have a good action, from incompetency or any other excluding cause, and is therefore not allowed to proceed with his case, that will not prevent him raising another case in a competent court and on competent grounds.

Cases were quoted at the debate which are in consonance with this view, but a decision tending in an opposite direction was pronounced in a case which was before the courts in Ireland—the case of *Beckley* v. *Scott*. I have found myself quite unable to agree with the views expressed by the majority of the learned Judges in the Court of First Instance and in the Court of Appeal in that case. Nor can I concur in the opinions in the English cases founded on, which approved of the views of the majority of the courts in the Irish case of *Beckley*. A single sentence in the opinion of Lord Justice Holmes expresses my views in short and terse words. He says—"If the employer is not to be liable to pay compensation both under and independently of the Act, is he to be subjected to the expense, trouble, and inconvenience of two sets of proceedings." I agree with the Lord Justice that the answer to that question must be negative. It has been decided in the case of *Cribbes* v. *Kynoch* that when a party had proceeded to trial in an ordinary action as for fault, he cannot thereafter bring a claim under the Compensation Act. On what principle it should be held to be otherwise in the converse case I cannot understand. It appears to me that the distinct words of Master of the Rolls Cozens Hardy are conclusive, where he says—"I think the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail and then proceed by common law action, and also can-

not proceed by common law action, and having failed in that action then proceed under the Act. There we have a claim which has proceeded to decision." Every word of that opinion is applicable to the present case, and is in my opinion sound.

I do not enter at greater length into the cases which were referred to at the debate, as I have had an opportunity of reading an opinion prepared by my brother Lord Low, in which he considers the cases more fully, and expresses views on them in which I entirely concur.

LORD M'LAREN—In my opinion this is not a question of *res judicata*, which could not arise when the one proceeding is for indemnification independently of contract or fault, and the other is an action founded on negligence or fault. It is a question of the construction of a statutory enactment which provides that the employer "shall not be liable to pay compensation . . . both independently of and also under this Act."

In the course of the argument it was pointed out by one of your Lordships that the proviso was directed against double liability, and I think this is the key to the right solution of the case. The hypothesis of the statute is that there are two grounds of liability, one of them depending on statute, and the other independent of statute. The two claims are not necessarily well founded on the merits; it may be that neither of the claims is well founded on the facts. But there are two claims, either of which may be the subject of investigation with a view to decision; and as double liability is excluded, it follows that when the claimant has elected to follow out one of the claims, the liability of the employer ceases with respect to the alternative claim.

Upon an equitable view of the meaning of the proviso, it has been held that if the claimant has not a title to claim compensation because he is not within the class of persons who are described as dependants, his failure to show a title does not preclude him from setting up his claim at common law. In such a case there is no real option, because the party has only one claim. The case is therefore not within the proviso we are considering, which presupposes two claims, one of which only is to be heard and determined.

But in the present case the claim under the Compensation Act was tried and decided against the claimant on its merits, and he is now attempting to follow out by action at law the alternative claim, which is founded on the alleged fault of the employer. This proceeding, as I think, is contrary to the letter and the spirit of the statutory provision against double liability.

Under another provision of the Compensation Act, if a workman brings an action at law and fails he may move the Court to award him compensation, subject to certain conditions as to costs. This provision strongly confirms the interpretation which I put upon the provision against double liability, because it is clearly implied that, were it not for this relaxation of the general rule the workman would have had no further claim.

In a case like the present, where the claimant has elected to proceed under the Compensation Act and the claim has failed, there can be no legitimate object in taking proceedings at common law, because it is difficult to conceive a case where there is no right to compensation, and where, notwithstanding, the employer shall be held liable as for fault. I only mention this point because it may explain the motive of the exclusion of double liability. But the exclusion, as I think, is reasonably clear on the face of the statute; and in my opinion the present action must fail as a consequence of the statutory limitation of liability.

LORD KINNEAR—I think that the question to be considered is one of some difficulty, because although a great deal of useful light has been thrown upon it by learned Judges in England and Ireland, the opinions are conflicting, and we cannot follow one high authority without rejecting another. I think, however, the sound view is that taken by the Court of Appeal in England in the case of *Cribbs* v. *Kynoch, Limited*, [1908] 2 K.B. 551, and although there is one not immaterial distinction between the two cases, I think the present is covered by that decision, and it is certainly covered by the reasoning of the learned Judges, with which, if I may respectfully say so, I entirely concur. I therefore hold that when the statute gives to a workman an option between two different proceedings before two different tribunals, it means that he may take either the one or the other as he thinks fit, but that he cannot take both. I do not see that any other meaning can be ascribed to the words of the Act. The workman may, at his option, do one thing or another. It is necessarily involved in my opinion that he is not to do both. I think the true meaning of the statute is exactly expressed in the language which your Lordship cited from the opinion of the Master of Rolls, when he says that a workman cannot proceed to trial under the Act and fail and then proceed by common law action, and also that he cannot proceed by common law action and having failed in that action then proceed under the Act. If that be the true meaning of the option offered to the workman by the Act, then the question arises—and it may sometimes be a question of delicacy—whether in a particular case he has determined his election by finally and conclusively exercising his option in one way. That may in certain cases be a question of difficulty, but I am very clearly of opinion that he must be held to have exercised his option when he has brought a proceeding in one form or other for the trial of the case, has allowed it to go to trial, and has obtained a final adjudication. The option given to him is not between two adjudications one of which he may think more favourable to him than the other, but it goes back to the initiation of the proceedings, for the words of the Act are that he

may either claim compensation under the Act or take proceedings independently of the Act. Now to claim compensation is to make a demand as of right, and when a man has made his demand as of right in the form which the statute prescribes, and has obtained a judgment, I see no reason for doubting that he has exercised his option and is precluded from taking the other course.

I think that this view is confirmed by the enactment in sub-section 4, because when a special provision is made for a particular case which would otherwise have fallen under the general rule already laid down, we must presume that such special provision was necessary for its purpose, and therefore that if that case had been left to the operation of the general rule the special remedy would not have been open, and so when the statute provides that in one particular case a workman who has failed in his action may go on and take other proceedings under certain conditions, I think it follows that that is the only case in which Parliament meant that he should be allowed this second chance.

I need not examine the previous decisions in England and Ireland in detail, because so far as they are consistent with the judgment in the case of *Cribb* v. *Kynoch* they raise no difficulty; and so far as they are irreconcilable with that judgment it follows from what I have already said that since they are not binding upon us we ought not to follow them.

But there are two cases in this Court to which it is probably right that we should advert—the case of *Blain*, 5 F. 893, in this Division, and the case of *M'Donald*, 7 F. 533, in the First Division. As I understand these two cases, and particularly the case of *Blain* (because *M'Donald* was in terms a decision which followed upon your Lordship's judgment in *Blain's* case), they decide that when a man who has brought a proceeding under the Workmen's Compensation Act has no title to take proceedings under that statute at all, he will not be prevented thereafter from raising an action which, *ex hypothesi*, he has a title to raise at common law against an employer through whose fault he says he has been injured. That appears to me to stand entirely independent of the question we are now considering. The meaning of the decision is really that the Workmen's Compensation Act did not apply, because the man who desired to have the statutory remedy was not within the terms of the statute at all. He was just in the position of having chosen a wrong remedy, and when the remedy failed and the action was thrown out, there was no rule of the common law to prevent him from bringing a new action upon a right ground. If the pursuers in these cases were not within the Workmen's Compensation Act at all there was no statutory provision to deprive them of the ordinary remedies which the common law allows to persons who are injured by the negligence of others. The section which gave the option applied to them no more than any other section of the Workmen's Compensation Act. Therefore I am of opinion that these cases raise no difficulty in the determination of the present question.

I think with your Lordships that it may probably be unnecessary to determine the other question of *res judicata* which has been decided by the learned Sheriffs, but at the same time since that question has been argued it seems to me to be only respectful to these judgments (which are entitled to respect) to say that, so far as I am concerned, I cannot concur in them. I see great force in the observation of Lord Justice Holmes, that when such a question as is raised in this case was tried before the arbiter, it might very frequently be exactly the same question of fact as would be tried in an action for negligence at common law, and that it would be vexatious that an employer, after having fought out a question of that kind to a final adjudication, should be thereafter subjected to another proceeding for trying the same question of fact in another Court. I think that is a very material observation for the purpose which the learned Judge used it as an illustration of his own view of the construction of the Workmen's Compensation Act. But it does not follow that if there were no clause in the Act confining the workman's remedies to a choice between two, the decision by an arbiter upon the question of compensation would be *res judicata* of the question raised in an action for negligence at common law. I am unable to see that it would. I think the establishment of a matter of fact in one action, however necessary and conclusive for the purpose of that action, does not prevent the question of fact being litigated again in another process for a different purpose between the same parties. The distinction between the two processes appears to me to be obvious, because the question which the arbiter had to consider under the Workmen's Compensation Act was whether the workman was entitled to compensation irrespective of fault on the part of the employer, and the question at issue in this action is whether the accident by which he was injured was due to the employer's fault or negligence? I quite agree that if the accident were attributable to the workman's misconduct, as was found in the compensation proceedings, it is extremely probable that it could be proved that he suffered from his own negligence in the action at common law. But the questions are quite different, because the Sheriff as arbiter had not to consider any question of fault on the part of the employer at all. It may very well be that the workman may be at fault, and yet there may be a question whether the approximate cause of the injury which he suffered is the employer's fault or his own, and that is the question to be decided in this action.

I am therefore of opinion that the true ground for disposing of this appeal is, as was stated by your Lordship, that the action is excluded by Act of Parliament, inasmuch as the pursuer has exercised the

option given him by the statute, and cannot go back upon it and proceed by a new process.

LORD LOW—The pursuer is a miner, and in this action he sues the Chapel Coal Company, Limited, for damages in respect of injuries which he received while working in their pit. It appears that the pursuer claimed from the defenders compensation under the Workmen's Compensation Act 1897 in respect of the accident to which the present action relates; that arbitration proceedings were instituted in the Sheriff Court at Hamilton, and that the Sheriff-Substitute assoilzied the defenders in respect that the accident was the result of the serious and wilful misconduct of the pursuer. In these circumstances the question arises whether it is competent for the pursuer to sue the present action. The defenders maintain that it is not, their first plea-in-law being — "Pursuer having claimed compensation under the Workmen's Compensation Act 1897, and said claim having been dismissed on the ground of his own serious and wilful misconduct, he is now barred from insisting in the present action, which should be dismissed with expenses."

Both the learned Sheriffs have sustained that plea, but they have done so on the footing that the plea is in substance, or at all events includes, a plea of *res judicata*. I think that the plea as stated may legitimately be read as covering a plea of *res judicata*, but its phraseology leads me to the conclusion that it was intended, at all events primarily, to be a plea founded on the provisions of the Workmen's Compensation Act, and not the common law plea of *res judicata*. And seeing that the right to compensation conferred by the Act upon a workman who has been injured in the course of his employment was a new and entirely statutory right, and the question at issue being whether or to what extent a claim by a workman for statutory compensation in respect of an injury bars him from claiming damages independently of the Act for the same injury, it seems to me that the first inquiry must be whether the Act contains any provisions on the subject, and if so, what is their effect?

Now the Act does contain—in the 2nd sub-section of the 1st section—provisions regulating a workman's right to claim compensation under the Act on the one hand, and damages independently of the Act on the other, and the present case must be ruled by these provisions if and in so far as they are applicable to the circumstances.

By sub-section 2 (*b*) it is provided that "when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act."

Pausing there, I think that the words which I have read, if they stood alone, could only have one meaning, namely, that the workman must elect either to claim compensation under the Act or to sue for damages independently of the Act, and cannot adopt both courses either concurrently or consecutively. It was argued, however, that although that might be the natural construction of these words if read alone, the second clause of the sub-section showed that the option given to the workman of adopting one of the two courses open to him did not absolutely preclude him from subsequently adopting the other course. The clause is in these terms—"But the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

The argument upon that clause was that it showed that the sole purpose of putting the workman to his election was to secure that the employer should in no case be liable to pay double compensation, and that therefore there was nothing to prevent a workman who had unsuccessfully claimed compensation under the Act from afterwards bringing an action of damages. That argument is not without force, because if by the first clause it was intended to put the workman to his election in the strict and proper sense, the second clause was not required to protect the employer from a second claim. I think, however, that the true construction of the enactment is that the first clause defines the rights of the workman—he is not to lose the remedies which he had prior to the passing of the Act, but he must elect between these remedies and that provided by the Act; while the second clause deals with the rights of the employer and makes it clear that in no case shall he be liable in double compensation.

That view appears to me to be confirmed by the provisions of the 4th sub-section, which in certain circumstances allows an exception to the rule enacted in the first clause of sub-section 2 (*b*).

By sub-section 4 it is provided that if a workman fails in his action for damages (timeously raised) he is not thereafter at liberty to institute separate proceedings for compensation under the Act, but if it appears that such compensation is due, the amount is to be assessed by the Court in which the action for damages was tried. Further, compensation is only to be assessed by that Court if the workman "shall so choose." That provision was probably inserted in view of the power given to the Court to deduct the costs of the action from the compensation; but however that may be, it is plain that if the workman does not choose to have compensation assessed by the Court he cannot claim compensation at all. Therefore a special method by which the workman may obtain compensation being provided, all other methods are excluded, and I should be inclined to add that a special exception

being made to the option given by sub-section 2 (*b*), that is presumably the only exception allowed.

I cannot regard the 4th sub-section as being designed merely to regulate procedure. I think that it was intended as a concession to a workman in the circumstances described in the sub-section, whereby he was allowed in these circumstances —and in no other, and subject to the conditions imposed—to claim compensation under the Act although he had already elected to take proceedings independently of the Act. Accordingly, the construction which I put upon sub-sections 2 (*b*) and 4, is that, except in the one case provided for in the latter sub-section, the workman must choose between his remedy under the Act and any remedy open to him independently of the Act, and whichever course he chooses he is excluded from the other.

That construction of the meaning and effect of section 1, sub-section 2 (*b*) and 4, of the Act is supported by the opinions of the learned judges in the Court of Appeal in England in *Edwards* v. *Godfrey* (1899, Q.B.D. 333), and in *Cribb* v. *Kynoch Limited* (1908, 2 K.B. 551). There are, however, two cases in which, although what was actually decided was not inconsistent with the views which I have expressed, the judgments proceeded upon an entirely different construction of the enactments in question. I refer to the Irish case of *Beckley* v. *Scott & Co.* (1902, 2 I.R. 504), and the English case of *Rouse* v. *Dixon* (1904, 2 K.B. 628).

In the former case the claim of a workman for compensation had been dismissed on the ground that he was not entitled to the benefit of the Act, as he had not been in the employment for at least two weeks. He then brought an action of damages against his employer at common law, and the question which was raised was whether, having claimed compensation under the Act, he had not exercised the option conferred by section 1 (2) (*b*), and was therefore barred from claiming damages independently of the Act? The Court held by a majority that the workman was not barred from suing an action of damages. That decision was quite in conformity with certain judgments which I shall presently notice both in this Court and in England, and the case is only important by reason of the grounds upon which the judgment proceeded. The view adopted by the majority of the learned Judges was, shortly stated, to the following effect: The leading objects of section 1 (2) (*b*) of the Act were, on the one hand to preserve to the workman his right at common law and under the Employers' Liability Act, and on the other hand to secure that the employer should not be liable to pay compensation both under the Act and independently of the Act. Accordingly the clause giving the workman the option of claiming either under the Act or independently of the Act was regarded merely as prohibiting him from instituting proceedings both under the Act and independently of the Act, concurrently. If he elected to commence with an action at common law or under the Employers' Liability Act, the result was regulated by sub-section 4; but if he elected to commence with a claim under the Act, there was nothing to prevent him thereafter bringing an action at common law or under the Employers' Liability Act, except the declaration that the employer should in no case be liable to pay double compensation. In other words, if a workman elected to begin with a claim under the Act and failed to obtain compensation, he was at liberty to bring an action of damages. If that view be sound then there is nothing in the statute which renders the present action incompetent.

The construction put upon the Act in *Beckley* v. *Scott* was approved in the English case of *Rouse* v. *Dixon*, 1904, 2 K.B. 628, the Lord Chief-Justice saying "the reasoning in *Beckley* v. *Scott* is unanswerable," and Willes, J., saying "the reasoning of the Court of Appeal in Ireland in *Beckley* v. *Scott* is entirely satisfactory."

With great respect for the opinions of these learned Judges, I am unable to read section 1 (2) (*b*) of the Act as bearing the meaning which the majority of the Court in *Beckley* v. *Scott* put upon it, for the simple reason that, construing the language of the sub-section according to its ordinary meaning, the workman is expressly put to his option between two courses, and the essence of an option between two courses is that whichever is adopted the other is altogether rejected.

The only other cases to which I need refer are the case of *Blain* v. *Greenock Foundry Company*, 5 F. 893, which was decided in this Division, and the case of *M'Donald* v. *James Dunlop & Company*, 7 F. 533, which was decided in the First Division. In *Blain's* case certain children of one William Blain, who had been killed while in the employment of the Greenock Foundry Company, brought an action against the company for *solatium* and damages in respect of the death of their father. One of the pursuers, James Blain, had already made a claim against the company under the Workmen's Compensation Act, but the Sheriff had found that he had no title to insist in the proceedings, as he was only partially dependent on the deceased. In these circumstances the Court held that James Blain was not barred from suing the action of damages.

The circumstances in the case of *M'Donald* were very similar. A mother claimed compensation under the Act for the death of her son, but her claim was refused on the ground that she was not dependent upon her son at the time of his death. She then brought an action of damages against the employers, and it was held that she was entitled to do so.

It is plain that neither of these cases is an authority in favour of the pursuer in this case, and I would point out that the same thing may be said of the cases of *Beckley* and of *Rouse*, if what was actually decided in these cases is alone regarded, apart from the reasoning upon which the judgments proceeded. In *Beckley's* case, as I have already said, the workman's

claim for compensation under the Act had been thrown out by the Recorder of Dublin upon the ground that he had not been two weeks in the employment. I understand that it was subsequently decided in the House of Lords that in order to entitle a workman to compensation under the Act it was not necessary that he should have been two weeks in the employment, but that was the assumption upon which the Irish Court of Appeal dealt with the case. In the case of *Rouse* the workman had been injured while employed in the erection of a building, but after his application for compensation under the Act had been made it was discovered that the building did not exceed 30 feet in height. He accordingly withdrew his claim under the Act and brought an action of damages.

In these two cases, therefore, as in the Scotch cases, the parties who were held to be entitled to raise actions of damages after having failed in a claim for compensation under the Act had so failed because it was found that they did not fall within the scope of the Act at all, or in other words, had no title to claim compensation under the Act. In my opinion the right of a workman in such a case to bring an action of damages notwithstanding the previous unsuccessful claim under the Workmen's Compensation Act may be affirmed upon a very short ground. The enactments of section 1 (2) (*b*) are intended to meet the case of a workman who has in fact an option between a claim under the Act and a claim independently of the Act, and therefore have no application to the case of a workman who does not fall within the purview of the Act and has no title to claim compensation under it. What, however, would be the result if a workman who had a title to claim compensation under the Act made such a claim but withdrew it before final judgment, is a question upon which I would desire to reserve my opinion.

The conclusion, therefore, at which I arrive is, that the present action is incompetent, in respect that the pursuer having elected to claim compensation under the Act, and having obtained a final judgment upon that claim, is barred by the provisions of section 1 (2) (*b*) from suing an action of damages at common law. Upon that ground, but upon that ground alone, I am of opinion that the interlocutor under appeal should be affirmed.

LORD PEARSON—In this case the workman to whom the accident happened submitted his claim to the Sheriff as arbiter under the Workmen's Compensation Act.

His claim, regarded in itself, was a good claim, and satisfied all the positive requirements of the Act, both as to the contract of service, the injury from accident arising out of and in the course of his employment, and the notice of claim. But he was met by the employers with the statutory plea that the accident had been caused by his own serious and wilful misconduct, and this being proved to the satisfaction of the arbiter the claim to statutory compensation was disallowed. He has now raised a common law action of damages for injury, and the question is, whether that remedy is still open to him, or whether it is barred by his having elected to claim under the Act and taken the judgment of the Sheriff upon it.

We had a full citation of authorities, of which, however, only a few are really applicable. I think we must set on one side the whole series of cases in which the claimant for one reason or another was not within the Act at all, and where it turned out to have been a mere mistake to lodge a claim under the Act. Of this class were the cases of *Blain* and *M'Donald* in this Court, where the claim was made by relatives in the capacity of dependants of the injured man, and it turned out that they were not dependants within the meaning of the Act. So in the English case of *Rouse* v. *Dixon*, a claim was made for injury sustained during a building operation, and it turned out that the building was under 30 feet in height and that for that reason the Act did not apply. So again in the Irish case of *Beckley* v. *Scott & Company*, the Recorder of Dublin, before whom the claim was made as arbitrator, dismissed the application as not within the Act on the ground that the workman had only been in the employer's service for one week at the time of the accident, a circumstance which, as the law then stood, had been held to be a good objection to a claim under the Act. In all these cases it was held that the claimant had no real option at all; that the claims made as under the Act were really outside of the Act altogether, and that a claim made and refused on such grounds was no bar to a claim at common law.

Nor is it necessary to consider the further question whether, in cases to which the Act applies, it is open to the claimant at any time before the final award to withdraw his claim and resort to his common law remedy, or whether the setting up of the arbitration is itself an exercise of the option importing a final election.

These questions do not arise here, for the claim, regarded by itself, was a good and relevant claim under the statute, and it was pressed to final judgment by the appellant himself on its merits. It is true that the claim failed; but it failed on no preliminary or prejudicial plea, but because the statute itself furnished a plea in defence on the merits, which was sustained by the arbiter after a proof. In such a case I think it clear under the statute that the election is final and that the present action is excluded.

LORD ARDWALL—I have had the benefit of reading the judgment of Lord Low, and I entirely concur in it.

LORD DUNDAS—I am of the same opinion. I desire to adopt the language of Cozens-Hardy, M.R., in *Cribb* v. *Kynoch, Limited* (No. 2) (1908, 2 K.B. 551), which has already been referred to by more than one of your Lordships. The learned Judge said—"I

think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail and then proceed by common law action; and also cannot proceed by common law action and having failed in that action then proceed under the Act. The single exception is contained in subsection 4 of section 1, and it strongly confirms that view, and seems to me to negative any wider or inconsistent right." Subject to the "single exception" indicated, it appears to me that the workman, having a statutory "option" to take one or other of two different courses, is, from the very nature and essence of an "option," not entitled to take both; and that where there exist in fact a real option to exercise and a real exercise of that option, the election of one of the alternative courses is final and irrevocable. There have been cases, of which *M'Donald*, 1905, 7 F. 533, and *Rouse*, 1904, 2 K.B. 628, are examples, in which—a claim for compensation under the Act having been rejected by the arbitrator on the ground that the case did not fall within the Act at all—the workman has been held free to make his claim at law, because he truly had in fact no option to exercise. But in the present case the workman elected to proceed under the Act; the matter was fought to a finish, and decided against him upon the merits of the dispute. He cannot, in my judgment, now revert to the discarded alternative of an action at law. I therefore think that the learned Sheriff and Sheriff-Substitute have reached a sound result, though I do not agree with the grounds of judgment expressed in their notes. It is unnecessary for the decision of this case to attempt to lay down any general or exhaustive definition of what might or might not, under varying circumstances and conditions, be held in cases of this sort to amount to a conclusive exercise of the workman's option.

The Court dismissed the appeal.

Counsel for the Pursuer (Appellant)—Crabb Watt, K.C.—J. A. T. Robertson. Agent—Alex. Wylie, S.S.C.

Counsel for the Defenders (Respondents)—Horne—Strain. Agents—W. & J. Burness, W.S.

Friday, February 5.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

THE SUMMERLEE AND MOSSEND IRON AND STEEL COMPANY, LIMITED *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Contract—Accommodation Work—Level-Crossing—Obligation to Make Level-Crossing for Proprietor—Accessories and Appliances in alieno solo—Approval of Board of Trade—Railway Regulation Act 1842 (5 and 6 *Vict. cap.* 78), *sec.* 5—*Regulation of Railways Act* 1871 (34 *and* 35 *Vict. cap.* 55), *sec.* 4.

A railway company, under a disposition in 1841 of a strip of ground acquired by agreement for the railway, undertook, and the obligation was declared a real burden, that the disponers "and others having right from them shall be allowed to cross at four level-crossings, either by railroad or cart road as they may choose, the said railway at any period at such points as may be most convenient for them, and which crossings, as now delineated on said plan first above mentioned, shall be made and maintained by my said disponees and at their expense, and my said disponees shall also be bound to place and maintain field gates on said crossings."

Held, in an action in 1904 by the disponer's successors against the railway company, that whether the sanction of the Board of Trade was, under the Railway Regulation Act 1842, sec. 5, and the Regulation of Railways Act 1871, sec. 4, necessary or not to enable the crossings to be used, the obligation of the defenders was to construct such crossings as could be used with reasonable safety, and that they were bound to make and maintain them, together with all such adjuncts or appliances as might be necessary (in the opinion of the Board of Trade or such other expert as the Court might consult) to secure the safety of the public and the traffic on the railway, whether such adjuncts or appliances might require to be constructed on their own or on adjoining land.

On 12th December 1904 the Summerlee and Mossend Iron and Steel Company, Limited, brought an action against the Caledonian Railway Company. In it the pursuers sought, *inter alia*, declarator that the "defenders are bound and obliged to make and maintain at their own expense a level-crossing by railroad or cart road as the pursuers may choose at any period and at such a point as may be most convenient to the pursuers upon and across that part of the defenders' railway where the same passes through the pursuers' lands of Patonswell and Summerlee, in the county of Lanark, under and by virtue, *inter alia*, of a