that is to say, not as a null agreement but as voidable on proof of minority and enorm lesion.

If so, the defenders say that the pursuer is not entitled to inquiry under the head of minority and enorm lesion, because no such case is made on record. I think there is considerable force in the defenders' contention. It is evident that the record was originally framed on the footing of getting rid of the agreement as null on the ground that it was entered into by the pursuer, a minor, without his curator. The question of Irish law has been properly raised by amendment both in the condescendence and pleas-in-law, while the only direct reference to enorm lesion is in plea 3. But I am prepared to concur in the view taken by Lord Dundas, that, in the absence of any prejudice to the defenders, the pursuer's pleadings on the question of enorm lesion, although not satisfactory, may be allowed to pass, to the effect of entitling him to inquiry.

On the mode of inquiry I concur that this is a case peculiarly unfitted for jury trial, and in which special cause has been shown why the whole matter should be remitted to probation before a Judge.

The Court recalled the interlocutor of the Lord Ordinary, repelled the second and third pleas-in-law for the defenders, sustained their fifth plea-in-law, and remitted the cause to the Lord Ordinary to allow the parties a proof before answer of their respective averments and to proceed therein as accords.

Counsel for the Pursuer and Respondent —Sandeman, K.C. — Macquisten. Agents —Alex. Morison & Company, W.S.

Counsel for the Defenders and Reclaimers — Constable, K.C. — Roberton Christie. Agents — R. & R. Denholm & Kerr, Solicitors.

HOUSE OF LORDS.

Monday, February 10.

(Before the Lord Chancellor (Haldane), the Earl of Halsbury, Lord Kinnear, and Lord Shaw.)

FREELAND *v.* SUMMERLEE IRON COMPANY, LIMITED.

(In the Court of Session, July 5, 1912, 49 S.L.R. 841 and 1912 S.C. 1145.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (3)—*Arbitration—Competency—"Question"—Duration of Compensation.*

The employers of a workman who had been totally incapacitated by accident admitted liability under the Workmen's Compensation Act 1906, tendered the compensation due, the amount of which was not in dispute, and asked the workman to sign a receipt which stated—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week, when application for payment is made." The workman, maintaining that he was entitled to an unqualified admission of liability such as he could embody in a memorandum of agreement, refused to sign the receipt, and initiated arbitration on the ground that there was a "question" as to the duration of the compensation. The employers challenged the competency of the arbitration proceedings.

Held that there was a question, unsettled by agreement, as to the duration of the compensation, and that arbitration was therefore competent.

The case is reported *ante ut supra.*

The employers, the Summerlee Iron Company, Limited, respondents in the Court of Session, appealed to the House of Lords.

At the conclusion of the argument for the appellants:—

LORD CHANCELLOR—The question in this appeal arises under section 1 (3) of the Workmen's Compensation Act 1906, which provides for recourse to arbitration in a case of dispute in the following terms:—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act." It is to be observed that duration is specified as one of the matters about which a question may arise, and that is not the less true because the Schedule, by Article 16, provides that from time to time there may be applications to review the amount of compensation. There may be a decision that the injury is *prima facie* of indefinite duration, that is to say, permanent; and what the schedule does is to provide machinery for the review of that matter from time to time as the question arises.

In this case the respondent, who was a workman in the employ of the appellant company, sustained injury to his right eye in the course of his employment as a miner in their colliery, and he has been totally incapacitated since the date at which the injury was received. There is no doubt as to the amount which the appellants are liable to pay, it is agreed that it is 14s. 9d. a week in respect of total incapacity in accordance with the Act. But a question has been raised, which is the subject of these proceedings, as to whether there is a dispute under the Act as to the duration of the compensation. The appellants, admitting liability to the extent which I

have indicated, tendered payment of compensation, but on terms only; they said to the respondent, "You must sign the receipt in these terms; at the first or any subsequent payment liability is admitted only for the compensation at the date of the payment; further liability, if any, will be determined week by week when an application for payment is made." The respondent objected to that on the ground that he was entitled either to an admission of liability embodied in an agreement so that he could have it recorded, or that he was entitled to arbitration on the ground that a question had arisen as to duration. The Sheriff-Substitute, while thinking there was no question, nevertheless properly stated a Case for the opinion of the Court, and the Second Division, taking a different view from his, laid down as law that in this case, as the contention of the appellants would have put the workman in the position of being *in petitorio* in any subsequent proceedings, he would, if it was allowed to prevail, be deprived of the right to which he was entitled to have a question of the *prima facie* duration of his injury immediately determined, subject to the remedy which the appellants would have if they could discharge the burden which lay upon them on an application under Article 16 of the schedule.

In that state of things the question comes before this House as to whether the decision of the Second Division was right, and reliance has been placed—I think not without apparent justification—by the learned counsel for the appellants on the case of *Payne* v. *Fortescue* (which is reported in 1912, 3 K.B., p. 346), a decision of the Court of Appeal in England upon a question which presented some analogy to the case before your Lordships.

I do not think it necessary to go in detail into the question whether *Payne* v. *Fortescue* was rightly decided. It is sufficient to say that there are observations in the judgment with which I do not find myself in agreement, and I cannot in this appeal from the Court of Session treat myself as bound by that decision. I therefore turn to the Act of Parliament itself as the only matter which concerns us here, and upon the construction of the section on which the argument turns I am of opinion that there is a question as to duration here which arose in these proceedings and which ought to have been decided, and upon which the respondent was entitled *in presenti* to have arbitration. I agree with the reasons for this conclusion given by Lord Salvesen in his judgment, and I cannot treat this case as disposed of by the principle laid down in general terms by Lord Pearson in the case of *Sweeney* (8 F. 965, 43 S.L.R. 690). The facts in this present case raise what in my opinion is a definite question.

Under these circumstances, I agree with the decision of the learned Judges in the Second Division, and move your Lordships that the appeal be dismissed.

EARL OF HALSBURY—I am of the same opinion.

LORD KINNEAR—I am entirely of the same opinion.

LORD SHAW—The case of *Sweeney* v. *Gourlay Brothers* was cited to your Lordships from the judgments of the Scottish Court. I desire to add, if I may do so, a reference to that case. As I gather the circumstances which were narrated in the judgment of Lord Pearson they were substantially these, that the employer of the workman had throughout, after the accident sustained by his employee, acknowledged liability, had paid compensation upon the amplest scale under which he would have been liable in law, that he continued that payment, and that he proposed to make no change in the relations so constituted.

In these circumstances there seems to me to underlie the judgment of the Second Division a still more elementary proposition than any that might arise under the statute, namely this, that so long as a party has secured by private arrangement the full rights which he had either by statute or at common law, and no suggestion of a challenge of these rights by the persons so admittedly liable is made, it hardly seems appropriate to invoke proceedings under a statute for giving him the very thing which he is then obtaining and has throughout obtained. In those circumstances I cannot hold that this House can consider the decision of Lord Pearson to which I have referred as assisting towards a conclusion in this case.

I desire particularly to add, with regard to the case of *Payne* v. *Fortescue*, that, like my noble and learned friend on the Woolsack, I do not find myself in agreement with certain observations there made by the learned Judges. The circumstances, moreover, do not equate with those of the present case. In the present case no payment has been made, and the issue is at once taken for the determination of the rights of parties. The dates are significant. On the 29th December this workman, totally incapacitated by reason of an injury sustained to his eye, was offered by his employers a certain weekly payment on condition of granting this receipt. He declined, and on the following 5th January—no payment by the employer by that time having been made (and no payment having yet been made)—he brought his application under the Workmen's Compensation Act. The whole question between the parties was stated timeously. The workman is in the position of having been injured; the employer is in the position of having declined to pay; and, with much respect to some observations which have been made in certain decided cases, the difference and dispute between the parties is not, as it humbly appears to me, confined to the mere question of the duration of compensation.

There are three points no doubt, as was

properly stated, upon which arbitration can proceed. There is the point of liability itself; there is the point as to the amount; and there is the point as to duration. What are the conditions appended to the receipt tendered to this workman as conditions under which he was to be bound before he received any payment? They are thus expressed, viz., "At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made." These conditions appear to me to amount fundamentally to a possible challenge of all these three points. It appears to me that after one week had elapsed it was open to the employer, under the form of that receipt, substantially to challenge all liability whatever under the statute, also to challenge the amount, and also to challenge the duration. And therefore here is a condition tendered as attached to this receipt which is a negation of all the very points which the workman is entitled to have secured, and secured in such a way that an agreement can be recorded.

I do not proceed to the further point. The policy of the statute is that there must be something which both parties can look to; business could not be conducted unless both parties, employer as well as employed, were in the position of having something definitely fixed to which reference could be made in subsequent weeks, quarters, or years. It is quite true, as has been said by Lord Salvesen, that a workman accepting payment under such a receipt would, if he sought to change the situation which was thus established, be put *in petitorio*. I do not find myself in any difference with the judgment of the Second Division, and I desire to say, for my own part, that there are passages in the judgment of Lord Salvesen, notably the second and third passages of his judgment, which I entirely accept and respectfully adopt.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellants — Munro, K.C. — H. W. Beveridge. Agents — W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh — Beveridge, Greig, & Company, Westminster.

Counsel for the Respondents—Moncrieff, K.C. —Fenton. Agents—Hay, Cassels, & Frame, Hamilton—Simpson & Marwick, W.S., Edinburgh — Deacon & Company, London.

Monday, February 17.

(Before the Earl of Halsbury, Lord Kinnear, Lord Shaw, and Lord Mersey.)

SCHULZE AND ANOTHER (LEES' TRUSTEES) *v.* DUN AND OTHERS.

(In the Court of Session, November 4, 1911, 49 S.L.R. 50, and 1912 S.C. 50.)

Trust—Liability of Trustees—Mora—Action by Assumed Trustees many Years after Assumption to enforce, in Interest of Beneficiaries, Liability for Negligence against Representatives of Original Trustee.

In 1909 two trustees who had been assumed in 1887, acting solely as trustees, though one was also a beneficiary of the trust, brought an action against the representatives of an original trustee, who had died in 1887, to recover funds alleged to have been lost to the trust through his negligence. The defenders pleaded that the pursuers were barred by *mora*, and by the fact that they themselves had been guilty of negligence in not having attempted to recover the funds till 1902 when it was too late.

Held that the action, being on behalf of the beneficiaries whom the pursuers represented, could not be barred because of a plea which might be open against the pursuers as individuals.

Interest—Rate of Interest—Rate where Trustee held Personally Liable to Refund.

The representatives of a deceased trustee, having been found liable to refund to the trust a sum of money lost through his negligence, were *held* liable to simple interest only, and at the rate of 3½ per cent. as being the averate rate of trust interest.

This case is reported *ante ut supra.*

Cross-appeals were taken. At the conclusion of the arguments:—

EARL OF HALSBURY—I am disposed to think that in this case the matter may be very summarily disposed of. I am of opinion that the judgments of Lord Salvesen and Lord Dundas should be adhered to, and I am content with the reasons given by Lord Salvesen.

With regard to the question which has been suggested as to the amount of interest due, I am of opinion that it is absolutely unarguable, and I move your Lordships that both appeals be dismissed with costs.

LORD KINNEAR—I agree entirely with the opinion expressed by the noble and learned Earl, and I have nothing to add.

LORD SHAW—I also agree except to this extent, that I think it is unnecessary to pronounce any opinion with regard to the larger portion of the observations in Lord Salvesen's judgment, because in my opinion the matter is brought to its proper and only issue in one of the concluding sentences of that learned Judge's opinion when he