

dog, should be ignored, because the condescendence avers shock and says nothing of meningitis. Nor, I think, does it make a material difference that the child was predisposed to meningitis. It would involve the courts in endless inquiries and infinite subtleties and difficulties if they had to consider the varying measure of personal health or strength at the time of persons injured by a collision, an assault, or a breakdown, in order to apportion the precise liability of the defender, to whose fault such an accident is due."

The defender appealed, and argued—The judgment of the Sheriff was bad on two grounds—(1) The pursuer had failed to prove fault on the part of the defender. In order to prove fault the pursuer required to show (a) that the dog was a vicious animal, and (b) that it was known to the defender to be vicious—*Clark v. Armstrong*, July 11, 1862, 24 D. 1315, opinion of Lord Justice-Clerk Inglis, 1320. The pursuer had failed to establish either the one or the other. The evidence clearly showed that the dog was free from all vice. It possibly snapped now and then when at play, as all young dogs did. (2) The death was not the result of the bite. The child was predisposed to meningitis, and if he had not had this tendency no harm would have been caused by the bite.

Counsel for the pursuer and respondent were not called upon.

LORD JUSTICE-CLERK—I do not think that this is a case in which we ought to interfere with the judgment of the Sheriff. I think that the Sheriff was right in allowing the amendment of the record, and I also am of opinion that it is sufficiently proved that if this injury had not been done to the pursuer's child death would not have occurred.

In order to make out his case it was not necessary for the pursuer to prove that the dog was a vicious animal. Many dogs which are not in themselves vicious are notwithstanding dangerous. Sometimes a dog is dangerous through nervousness. A dog of this nature at times appears to be afraid that some injury is going to be done to itself, and in nervous fright turns round and gives a sudden snap. Such a dog is a dangerous animal although it may not be in the slightest degree vicious. I think there is no doubt that the dog in the present case was proved to have acted in a way that was dangerous to children, and I am satisfied on the evidence that the defender knew that children had on former occasions been snapped at by the dog. In these circumstances I cannot hold that the defender is not responsible for the act of the dog. I may also add that I consider the award of damages to be extremely moderate.

LORD YOUNG—I am of the same opinion. I need hardly say that I have great sympathy with lovers of dogs, and very much appreciate the feelings of the defender when he says that he would rather lose £5 than part with his dog. But at the same

time I am of opinion that the dog was kept at the defender's risk for any such calamity as the evidence shows has occurred here, viz., that this dog bit a young child in such a manner as to cause its death. The child certainly died a short time after it was bitten, and I agree with the Sheriff that the death was attributable, in part at least, to the bite of the dog. I also agree that the amount of damages awarded is extremely moderate. I should not have thought it amiss if in a case like the present, where parents have been suddenly deprived of a young child of four years, a very much larger sum had been awarded as damages.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff of Lanark dated 21st April 1903: Of new decern against the defender for payment to the pursuer of the sum of £15 sterling as damages."

Counsel for the Pursuer and Respondent—A. R. Brown. Agent—William Cowan, W.S.

Counsel for the Defender and Appellant—Salvesen, K.C.—Smith Clark. Agent—Henry Robertson, S.S.C.

Saturday, June 20.

FIRST DIVISION.

[Sheriff Court at Cupar.]

JAMIESON v. FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule I, secs. 1 (b) and 12—Total Incapacity—Amount of Compensation—Considerations in Fixing Compensation—Fall in Wages since Accident—Advanced Age of Workman—Original Application or Application for Review.

A miner received an injury by which he was totally incapacitated. For two years his employers paid him compensation without arbitration or any recorded agreement. Thereafter an application was made to the Sheriff as arbiter to fix the amount of compensation due. The Sheriff awarded a weekly payment of less than one-half of the man's average weekly earnings, and, in a case stated for appeal, stated that he had arrived at the amount he fixed upon by taking into account the facts (1) that there had been a large reduction in miners' wages since the date of the accident, and (2) that the miner was at the date of the arbitration sixty-four years of age, and that it was proved

that miners above that age did not usually earn the maximum wage. *Held* that whether the arbitration was to be considered as an original application or as an application for review it was not competent for the Sheriff in fixing the amount of compensation to take into account the circumstances above mentioned.

Question, whether the arbitration was to be considered as an original application under section 1 (b) of Schedule I., or as an application for review of a weekly payment under section 12 of said schedule.

The Workmen's Compensation Act 1897 enacts (Schedule I., section 1)—“The amount of compensation under this Act shall be . . . (b) where total or partial incapacity results from the injury a weekly payment during the incapacity after the second week, not exceeding fifty per cent. of his average weekly earnings during the previous twelve-months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.”

(2) “In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from his employer during the period of his incapacity.”

(12) “Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.”

This was a case stated for appeal by the Sheriff-Substitute (ARMOUR) at Cupar, Fife, in an arbitration under the Workmen's Compensation Act 1897 between William Jamieson, miner, Leven, claimant and appellant, and the Fife Coal Company, Limited, respondents.

The facts, and the findings of the Sheriff, were set forth as follows:—“The following facts, *inter alia*, were proved—Many years ago the appellant sustained a serious injury to his left eye which almost entirely deprived him of the use of the eye. He was able, however, to continue his vocation as a miner, the right eye being unimpaired. On 6th August 1900, while in the employment of the respondents, the appellant, while hewing coal, was struck in the right eye by a splinter of coal from the point of the pick. The appellant's right eye was so seriously injured that he has since been entirely incapacitated from work. The accident happened at the respondents' No. 4 Pit, Leven, which is a ‘mine’ in the sense of the Workmen's Compensation Act 1897, the respondents being ‘undertakers’ within the meaning of that Act.

“In the defences lodged for the respondents it was admitted that they had paid

the appellant compensation at the rate of 18s. per week up to 23rd June 1902, but they averred that these payments had been made in error, and that the average weekly earnings of the appellant while in their employ were only 26s. 11d. In the course of the proof the agents of the parties agreed that for the purposes of the case the appellant's average weekly earnings should be held to be 30s. On advising the case, as there was no note of this agreement in process, I fixed the appellant's average weekly earnings in the light of such evidence as had been led upon the point, and found them to be 27s. 1½d. per week.

“It was admitted that miners' wages in Fife had been greatly reduced since the accident. It was proved that the appellant, who is sixty-four years of age, was incapacitated from work in consequence of his injuries and not through physical deterioration due to age, but that a miner above sixty-four years of age does not usually earn the maximum wage.

“I awarded the appellant compensation at the rate of 11s. per week on the footing that his average weekly earnings were 27s. 1½d. On the basis of the agreement I would have awarded 12s. 6d.”

The following questions of law were stated—“1. In fixing the compensation payable to the appellant was it competent to take into account these facts—(1) That there had been a large reduction in the wages paid to miners in the county of Fife since the appellant sustained his injuries; and (2) that the appellant is now a man of sixty-four years of age? 2. Was the appellant entitled to decree for 50 per cent. of his average weekly earnings?”

Argued for the appellant—The Sheriff was wrong in taking into account either the general fall of wages or the man's age. If this was to be taken as an original application it was clear that supervening circumstances, such as a fall in wages, were irrelevant in fixing compensation, because the compensation ought to be fixed as at the time of the accident. Even if this was an application for review of a weekly payment under section 12 of Schedule I. (quoted *supra*), such a consideration was still irrelevant. Under that section a weekly payment might be altered in respect of circumstances affecting the workman himself, *e.g.*, his partial recovery, not in respect of circumstances in which he had no concern, such as a general fall or rise in wages. Nor was the man's age a proper consideration. There was nothing in the Act to justify a reduction of the compensation as a man grew older. The employers really paid less in the case of an aged workman, because they were entitled to redeem the weekly payment, and could redeem it more cheaply if the workman were of advanced years.

Argued for the respondents—The Sheriff was right in taking into account the circumstances mentioned in the first question of law. He was not tied down by the Act to an invariable award of half the average weekly earnings—*Geary v. William Dixon, Limited*, July 19, 1902, 4 F. 1143, 36 S.L.R. 640; *Parker v. William Dixon, Limited*,

July 19, 1902, 4 F. 1147, 39 S.L.R. 663. If other circumstances besides average weekly earnings were to be taken into account, a fall in the rate of wages and the advanced age of the workman were both relevant—*Free-land v. Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599.

LORD PRESIDENT—This is an application under the Workmen's Compensation Act for review of an award of compensation made to a workman who lost his sight by an accident. After the accident a payment at the rate of 18s. per week was made to him by his employers, and this was continued until 23rd June 1902, when it was discovered that these payments had been made in error as the applicant's average weekly earnings only amounted to 26s. 11d. At the proof it was admitted that 30s. might be taken as the amount of his average weekly earnings, and on that basis the award would naturally be 15s. per week. But then the Sheriff has given a less award because there has been a large reduction in miners' wages in Fife since the date of the accident; and further, because the applicant is now 64 years of age. Both these things have emerged since the date at which compensation should have been fixed, and it appears to me that subsequent and extrinsic circumstances of this kind are not relevant to affect the award. To admit them would involve the theory that the award should be reduced by a falling rate of wages, and conversely that if wages had gone up the workman would have been entitled to claim an increased rate of compensation, not because of anything connected with his injury, but because of things subsequent to the accident and also to the ascertainment of the compensation under the Act. As to the statement that the man is now 64 years of age, there is no doubt that he is growing older, as everybody does, and apparently the idea is that because his wage-earning capacity has grown less in the course of time his compensation should be reduced. Instead of confining his attention to the state of things which existed at the date of the accident, the Sheriff has taken into account the decaying powers of nature. On that theory the compensation should be diminished every year as the man grows older, and when he became so old as to have no wage-earning capacity it would seem to follow that the compensation should cease altogether. I am unable to find anything in the statute to justify the view taken by the Sheriff-Substitute, and I am therefore of opinion that the first question should be answered in the negative.

As to the second question, it is not a question of law but a question of fact in the case, which is for the Sheriff to determine. I think it is unnecessary to give any answer to it, as in answering the first question we determine the only practical point as to which the parties are at issue.

LORD ADAM—The appellant sustained an injury to his right eye on 6th August 1900 by which the sight of that eye was practically lost. Unfortunately he had previously sustained an injury to the left eye, so that

the accident of 6th August rendered him so blind that after that date he was totally incapacitated for work and still remains totally incapacitated.

In these circumstances the statute provides by Sched. I, i. (b), that he shall be entitled to a weekly payment from his employers which is not to exceed 50 per cent. of his weekly earnings prior to the accident. What happened in this case was this, that his employers paid him 18s. a-week on the footing that his wages before the accident were 36s. a-week. It was discovered that this assumption was erroneous, and that his wages before the accident were in fact 30s. a week, and in the proceedings before the Sheriff the parties agreed by minute that his wages before the accident should be taken as 30s., thus making the maximum compensation to which he was entitled after the accident 15s. a-week.

The employers continued to make the payment until 23rd June 1902, and the present application is in my opinion to be regarded as an application for review of this weekly payment under sec. 12 of the schedule. It appears to me that it does not displace the application of that section that no memorandum of agreement to make these payments was registered.

If this is so, then the question we have to decide is whether any valid ground has been shown why the amount of this weekly payment (taken at 15s.) should be diminished, and in particular, in the first place, is it relevant to take into account the fact that since the date of the accident there has been a fall in the rate of wages of miners in Fife? I agree with your Lordship that that fact is not a relevant consideration. It is only the wages at the time of the accident that are to be looked at. If the wages are low at that time the employer gets the benefit, and if they are high the workman, and accordingly the matter is equalised on the average, and the employer has no interest to maintain the contention which is put forward in this case. If the principle for which he contends in this case were to be given effect to, it would follow that an application for review might be made every time the rate of wages changes. I do not think this was contemplated by the Legislature at all.

I agree with Mr Salvesen that when the weekly compensation has once been determined the amount continues fixed until under sec. 12 a new award is made, and I think the same rule applies if weekly compensation at a rate agreed on by the parties is voluntarily made by the employer. In either case what the Sheriff has to consider is what is the condition of the workman at the time when he is asked to review the payment.

The other consideration which is maintained by the employers is that the workman is getting older and that his wage-earning capacity is thus, apart from the accident, becoming less. I do not consider this a relevant matter to be taken into account. The employer can get a weekly payment redeemed by paying a lump sum, and in fixing the amount the age of the

workman would necessarily be taken into account, but he cannot get a weekly payment diminished because the workman's age is increasing. I agree that we are not bound to answer the second question, but would say this, that if the workman was entitled at the time of the accident to the maximum compensation he is no less entitled to it now.

LORD M'LAREN—If it would make any difference in the result, it would be material to inquire whether this is an application under sec. 12, or under sec. 1 (b), of Schedule I. of the Act. On that point I should rather be inclined to agree with Lord Adam that the case comes here under sec. 12. Sec. 12 enacts that any "weekly payment may be reviewed at the request either of the employer or of the workman." I think that the "weekly payment" which may be reviewed may be either a sum arrived at by agreement of parties, or a payment settled as the consequence of arbitration. By the statute a weekly payment by agreement is put on a par with a weekly payment fixed by arbitration. It provides that if the amount cannot be settled by agreement, then it is to be settled by arbitration. But it makes no difference in the result whether this case is to be looked at as an application under section 12 or section 1 (b), because the conditions, so far as the first question is concerned, are the same. The two heads of the first question are whether the Sheriff was right in taking into account the fact that there had been a large decrease in miner's wages since the appellant sustained the injury, and whether he was right in taking into account the appellant's increased age. These are both supervening circumstances, which apparently could only be taken into account in an application for review. There are two elements to be considered in assessing compensation in an application in a case of total incapacity—a positive element and a negative. The positive element is the amount of the applicant's average weekly earnings; the negative element is that the compensation is not to exceed half of what he actually earned, and in any event is not to exceed one pound per week. As regards the positive element, I see no ground for taking supervening circumstances into account; the only things to consider are what was the man earning, and then that the weekly payment is not to exceed half the amount of those earnings, or £1 a-week. If that is right, it follows that the weekly payment should neither be increased nor reduced by a rise or fall in wages, or by the increased age of the workman. When in an application for review you have to consider wage-earning capacity, that is a thing which may vary from time to time, and if this were a question of wage-earning capacity it might be right for the arbiter to consider the present rate of wages. But there is no question of wage-earning capacity in the present case, because the workman is blind and unable to earn any wage, and not likely ever to do so. For these reasons I am clearly of opinion that the first question should be answered in the negative.

As regards the second question, I agree with your Lordships that it is unnecessary to make any finding upon it. No other elements tending to reduce compensation, except those referred to in the first question, are mentioned in the case. There might have been such elements—for instance, the 20s. limit. But as the facts stand it may be left to the Sheriff to consider whether, as the first question has been answered in the negative, there is any alternative open except to fix the compensation at one-half of the sum agreed on as the workman's average weekly earnings.

LORD KINNEAR concurred.

The Court answered the first question in the case in the negative, and found it unnecessary to answer the second question.

Counsel for the Appellant—Salvesen, K.C.—Wilton. Agent—P. R. M'Laren, Solicitor.

Counsel for the Respondents—G. Watt, K.C.—W. Thomson. Agents—Anderson & Chisholm, Solicitors.

Thursday, June 11.

FIRST DIVISION.

[Sheriff of Dumfries.

JARDINE v. PEEBLES.

Church—Seats—Allocation of Sittings—Rights of Heritor in Allocated Sittings—Interdict.

The proprietrix of lands in a parish, who was a heritor but did not reside in the parish, having had allocated to her in respect of her lands certain sittings in the Parish Church, including 7 feet 11 inches in a pew the total length of which was 10 feet 9 inches, brought a petition in the Sheriff Court against a parishioner resident in the parish for declarator that the right to use the pew in question to the extent of 7 feet 11 inches belonged to her, exclusive of any right thereto on the part of the defender, and for interdict against the defender from occupying that portion of the pew, or any part of that portion, either by himself or his family, or others having his authority, and from interfering with her, or those having her authority, in the full use thereof. The pew in question was not occupied by the complainer or her tenants or dependants, but she had given permission gratuitously to another person to occupy, by himself or his household, the space allocated to her in the pew. A particular part of the church area had, in the allocation, been assigned to the lands on which the defender resided.

Interdict *refused*, in respect (1) that the complainer's right in the portion of the pew allocated to her was not such as could support the absolute and exclusive right asserted by the complainer,