

of the trust funds, because it is perfectly clear that the payment referred to is the payment under the course of administration which the testator has himself prescribed. The proposition which we are invited to affirm in effect involves an anticipation of the period of vesting of the fee by an arbitrary interference with the prescribed administration, and such an anticipation is, I think, contrary to settled principles of vesting, as these are expounded in the decision of the House of Lords in the case of *Muirhead* (17 R. (H.L.) 45). The testator was under no disability as to the disposal of his estate, and it is quite within the limits of the testamentary power that he should make the vesting of his estate in an institute of entail contingent on the survival of an event which might either be a time certain or a time defined by reference to financial possibilities. The right is plainly expressed to be contingent, because the donee is to be the person for the time being entitled to the dignity of the Abinger peerage (subject to the exception referred to) and the pursuer can only satisfy this condition by surviving the period prescribed.

The fallacy of the pursuer's case is in the assumption that the trusts of Lord Abinger's will had no other object than that of the payment of debts. If that had been the case, Lord Abinger might have directed the immediate execution of an entail in favour of the pursuer by name and the other heirs in their order, but subject to the burden of a trust for payment of debts. If this had been the direction I do not say that the pursuer would have been entitled to the decree which he asks, but he would have been in a more favourable position for demanding that he should be put into possession of the estate upon making provision for the fulfilment of the other trust purposes. He would in the case supposed be able to say that his proposal did not involve any very substantial interference with the contingent rights of the other parties. But I do not consider further a case which is very different from the real case and which I only put by way of contrast to it.

There are other provisions in Lord Abinger's will of a discretionary nature, for the performance of which a continuing trust appears to be necessary. These are considered in the Lord Ordinary's opinion. In what I have said I have endeavoured to confine my observations to the main lines of the argument. In the result I have come without difficulty to the conclusion that the Lord Ordinary's judgment should be affirmed.

LORD PEARSON—I think that the Lord Ordinary has rightly decided this case, and that the pursuer's proposal to accelerate the closing of the trust must fail; and I agree in all that has been said by Lord M'Laren. I would only add a word as to the form of the pursuer's claim. It is not necessary to consider what the result might be if the debts were actually paid off otherwise than in the normal course of the trust

administration. They have not been paid, nor does anyone offer to pay them; but the pursuer asks the Court to supply him with an opinion that if he does certain things, which he makes no offer to do, certain other things will follow and certain rights will emerge. I doubt whether according to our practice the Court could be asked to solve questions so hypothetical, even in a special case to which the trustees and the beneficiaries were parties. But this action is raised against the trustees and beneficiaries by one who in this matter is really an outsider, and whose purpose plainly is to bring the trust to an end for his own advantage, if he can get the Court to aid him by furnishing him with an opinion on a hypothetical case. When so regarded, the position is very similar to that which was presented in the case of *Cattanach v. Thom's Executors* (1858, 20 D. 1206, 2nd point) where the Court declined to pronounce a hypothetical and prospective declarator as to the legal effect of an annuitant and a life-renter renouncing the annuity and the life-rent, which it was averred by the pursuer they were willing to do. I content myself with referring to the opinions in that case, which seem to me to apply here.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—The Dean of Faculty (Campbell, K.C.)—Spens. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders (Respondents) (Lord Abinger's Trustees)—Blackburn, K.C.—C. D. Murray. Agents—Dundas & Wilson, W.S.

Counsel for the Defenders (Respondent) (Helen Lady Abinger)—M'Clure, K.C.—Lord Kinross. Agents—Mackenzie & Black, W.S.

Wednesday, March 13.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

VALENTI v. WILLIAM DIXON,
LIMITED.

Reparation—Master and Servant—Damages for Personal Injury—Bar to Action—Acceptance of Compensation—Receipt—Election—Foreigner—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (b).

An Italian workman, who spoke little English and could not read it, having lost two fingers in the course of his employment, and knowing that a fellow Italian workman had, in consequence of injuries sustained, received half wages, went to his employers and asked for "money for fingers." He received on two occasions sums for

which he granted receipts bearing that the money was "accepted as the amounts payable under the Workmen's Compensation Acts 1897 and 1900." These receipts were not read over to him.

Having brought an action against his employers at common law and under the Employers' Liability Act 1880, held, that as pursuer was a foreigner, and it did not appear that he knew how his claim to compensation arose, or that he had or might have other remedies, he was not barred from pursuing the action.

Opinions (per Lord Low and Lord Ardwall) that had pursuer not been a foreigner he would have been barred.

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, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid."

In December 1905 Lauterio Valenti, pit-head worker, Low Blantyre, raised an action in the Sheriff Court at Glasgow against William Dixon, Limited, iron and coal masters, Glasgow, for damages at common law or under the Employers' Liability Act 1880 for personal injuries, the loss of two fingers, caused as he alleged through the fault and negligence of the defenders his employers.

In defence the defenders pleaded—"(1) Pursuer having agreed to accept the compensation payable to him under the Workmen's Compensation Act 1897, in respect of his said injury, is barred from insisting in the present action, which should be dismissed with expenses."

The averments of parties regarding this plea were as follows—" (Cond. 7) . . . Specially denied that pursuer elected to take compensation under the Workmen's Compensation Act 1897, and explained that the payments in question [certain payments for which receipt given as for compensation] were received by pursuer *ex gratia*, and the object for which said payments were made was not explained to pursuer. Said receipt sheet was not read over to or understood by or explained to pursuer, who cannot read, write, or understand English. Pursuer did not settle his claims with defenders, or elect to accept the provisions of said Act. The payments in question were handed to pursuer without any explanation, and he was shown where

to sign for same, and did so without committing himself in any way or settling his claim for compensation against defenders. The pursuer hereby tenders to defenders repayment of the amount of the sums so paid to him, and amounting in total to £1, 10s. 3d. . . (Ans. 7) . . . Explained and averred that pursuer elected to take the compensation due to him under the Workmen's Compensation Act 1897, in respect of his said injury, and as a matter of fact the defenders having agreed to pay pursuer said compensation, and the pursuer having agreed to accept same, they made payment to him of the sum of £1, 0s. 2d., being two weeks' compensation, on 19th October 1905, and of the further sum of 10s. 1d., being the weekly payment due on 26th October 1905. Defenders have all along been willing to continue payment of pursuer's said compensation, and are still willing to do so. The receipt sheet for the above payments is herewith produced and referred to. Pursuer's statements in answer are denied."

On 14th February 1906 the Sheriff-Substitute (BOYD) allowed the defenders a proof of their averments in article 7 of their answers, and to the pursuer a conjunct probation.

The following facts appeared from the proof—The pursuer was an Italian, and had been about four years in Scotland, but could speak little English. He could not read English, printed or written, but could read a little in Italian. The accident occurred on 20th September 1905, and about three weeks later pursuer had an interview with Archibald Barr, surface superintendent at the colliery at which the accident occurred, of which Barr gave the following account:—"About three weeks after he (the pursuer) met with the accident I met him near the office and asked how he was getting on. He told me, and I asked how his hand was getting on. He told me not very well. He said a little more, and I made to go away, when he added, 'Oh, Mr Archie, money.' I said, 'What money, you know you have no money in the office.' This was three weeks after the accident, and all his money was given up the first week. I therefore said, 'What money do you want?' and he said, 'Oh, money for fingers.' I said, 'That will be your compensation you want,' and he said, 'Yes, Mr Archie.' I then said, 'You will require to go and ask Mr Douglas for it.' We went down together to the office, and when we went in Mr Douglas asked pursuer what he was wanting. Pursuer looked at Mr Douglas, and then I told Mr Douglas that I thought he was after his compensation. Mr Douglas told him to come back on Thursday, as his papers had not arrived yet, and he said 'All right.'"

The evidence of Douglas, the cashier, regarding the circumstances in which compensation was paid, was as follows:—"I remember pursuer coming to the office along with Mr Archibald Barr; that was after his accident. Barr explained to me when he brought him in that he was at him for some money. I said to pursuer,

'Is it your compensation you want?' and he nodded his head. (Q) Was there any compensation money for him at that time?—(A) His sheet authorising payment of the compensation was not forward, and I told him so, but I added that if he came back on Thursday it was more than likely it would be then. He came back on Thursday, 19th October, and the two first payments mentioned in the sheet No. 7/1 of process were made to him. These payments were 10s. 1d. each, making the total £1, 0s. 2d. Mr Hague has signed that sheet, and I have signed it also. Mr Hague, the clerk, made the payments, and I witnessed the signature. Looking to the way in which pursuer called at the office, I did not consider it necessary to read over the receipt at all."

The evidence of Hague was as follows:—
"About two or three weeks after the accident happened Barr came to the office and said that pursuer was outside wanting to know when he would get his money. I asked him if that was pursuer's compensation, and Barr said yes. Either I or the cashier looked up, and said it would be due on a certain date. About four weeks after the accident the pursuer called. I said to him, 'Have you come for your compensation,' and he nodded his head. I then filled up the receipt sheet. (Shewn No: 7/1 of process)—That is the receipt sheet I filled up. I wrote in the pursuer's name, and he made the mark that is shewn there. He called on the 19th October, and received two weeks' payment, two weeks' payment then being due. I did not read over the receipt, nor did he read it over."

The receipt (No. 7/1 of process) was as follows:—

"Name of Workman—Lavotere Valente.
Occupation—Runner, No. 2 Blantyre.
Date of Accident—20th Sept. 1905.
Date from which Compensation begins to run—5th Oct. 1905.
Amount of Weekly Payment authorised—10s. 1d.

ABOVE GROUND.

For Week ending 1905.	Amount.	Date of Payment. 1905.	Signature of Claimant or near Relative.	Witness.
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The undernoted sums are accepted as the amounts payable under the Workmen's Compensation Acts 1897 and 1900, during the period of total incapacity for work as the result of the accident on the above date—

Oct. 12	£0 10 1	Oct. 19	Lavotere ^{his} Valente mark.	Allan Hague. Neil Douglas.
19	0 10 1	19	Lavotere ^{his} Valente mark.	Allan Hague. Neil Douglas.
26	0 10 1	26	Lavotere ^{his} Valente mark.	Neil Douglas. Allan Hague.
Total,	£1 10 3			

The pursuer's evidence was to the effect that until after receiving payment of the sums mentioned in the receipts he knew nothing about the Workmen's Compensation Act, or the Employers' Liability Act, or his rights at common law, but that knowing that Dominic Pettiglio, another Italian, had met with a similar accident and had received half pay he knew that he could get it.

On 31st May 1906 the Sheriff-Substitute (BOYD) pronounced this interlocutor:—

"Finds that on 19th October 1905 the defenders paid to the pursuer £1, 0s. 2d., being two weeks' compensation, and on 26th October 1905 a further sum of 10s. 1d., being the weekly payment due on said date, in respect of an injury to the pursuer's right hand, sustained by him while in the employment of the defenders as a pit-head worker: Finds that the pursuer agreed to accept compensation under the Workmen's Compensation Act 1897. Therefore sustains the first plea-in-law for the defenders and dismisses the action, and decerns."

Note.—"The question which I have to try is whether the defenders have succeeded in proving their statements in answer 7 of the defences, as to the pursuer having agreed to accept compensation under the Workmen's Compensation Act 1897. I think the balance of proof is largely in favour of the defenders. The evidence of the witnesses Allan Hague, Archibald Barr, and Neil Douglas satisfied me that the pursuer knew that when he asked a payment of money he was asking for and receiving compensation in respect of the injury to his hand. I think it is clear that he knew of the right of injured workmen to compensation, and that such was common knowledge in this employment. He came voluntarily to the defenders and made this request, and was repeatedly asked if it was compensation he was claiming."

The pursuer appealed to the Court of Session, and argued—The pursuer was an Italian with a very limited knowledge of English which he could not read or write. The terms of the receipt were not read over nor explained to him, and there was nothing to show that he knew of his rights under the Workmen's Compensation Act, or his rights under the Employers' Liability Act or at common law. In these circumstances he was not barred from pursuing the present action. To exclude such an action it was necessary to satisfy the Court that the workman had consciously exercised an option, that he had known both what he was getting and what he was giving up—*Fowler v. Hughes*, January 23, 1903, 5 F. 394, 40 S.L.R. 321; *Little v. P. & W. MacLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287; *Campbell v. Caledonian Railway Company*, June 6, 1889, 1 F. 887, 36 S.L.R. 699.

Argued for the respondents—The pursuer knew of his rights through Dominic Pettiglio; at any rate he must be held to have known of them, and could not plead ignorance of them—*Ersk. i, 1, 37*; *Hardcastle on Statutes*, p. 319. The pursuer having accepted payments under the Workmen's Compensation Act was barred from insisting in the present action—*Little v. P. & W. MacLellan, Limited (cit. sup.)* There was here no averment of fraud or concealment as in *Fowler (cit. sup.)*, and *Campbell (cit. sup.)*

LORD STORMONTH DARLING—This appeal has been taken in the course of an action raised in the Sheriff Court of Lanarkshire for alternative sums said to be due to the pursuer at common law and under the

Employers' Liability Act. In consequence of the defence which was stated in answer seven of the record, the Sheriff-Substitute pronounced an interlocutor allowing proof of the defenders' averment that the pursuer had agreed to accept compensation under the Workmen's Compensation Act 1897 as well as of the pursuer's counter statements. Proof was taken, and Sheriff Boyd decided the case on 31st May last. He finds "that on 19th October 1905 the defenders paid to the pursuer £1, 0s. 2d., being two weeks' compensation, and on 26th October 1905 a further sum of 10s. 1d., being the weekly payment due on said date, in respect of an injury to the pursuer's right hand sustained by him while in the employment of the defenders as a pit-head worker: Finds that the pursuer agreed to accept compensation under the Workmen's Compensation Act 1897: Therefore sustains the first plea-in-law for the defenders and dismisses the action, and decerns."

Now the Sheriff explains in his note that he thinks the balance of proof is largely in favour of the defenders, and then he says that the evidence of certain witnesses satisfied him that the pursuer knew that when he asked a payment of money on these two occasions he was asking for and receiving compensation in respect of the injury to his hand. "I think," says the Sheriff-Substitute, "it is clear that he knew of the right of injured workmen to compensation, and such was common knowledge in this employment. He came voluntarily to the defenders and made this request, and was repeatedly asked if it was compensation he was claiming." Now that last remark is perfectly true—he did come voluntarily to his employers and was told that it was compensation he was claiming and receiving; but I hardly think the Sheriff has stated the question for decision quite accurately when he says that the pursuer knew that when he asked a payment of money he was asking for and receiving compensation in respect of the injuries to his hand. That may be admitted. Undoubtedly he did know that the payments were in respect of the accident which he had sustained on 20th September. And how did he know it? Simply because he knew that another Italian had received half wages in consequence of an injury which he had received in the pit. But I confess that I cannot agree with the result of the judgment of the Sheriff, because I think that the question really is, whether this man, in going to his employers and receiving these two payments was exercising a final and irrevocable option—an option, namely, either to claim compensation under the Act or take some proceedings such as were open to him before the commencement of the Act but would be open to him no longer after his exercise of the option. That of course implies in my view that he knew of the option which he had. Now, if this had been a Scotsman or an Englishman I should have had, I shall not say no difficulty, but I should have had much greater difficulty in differing from the Sheriff, because then I think that the

observation he makes as to its being in the knowledge of every workman that he is entitled to the benefits of the Workmen's Compensation Act would have been very forcible; and also it would have been brought home to a British workman, by the nature of the receipt which he was called upon to sign, and which this man signed only by affixing his mark, that he was claiming and receiving the money under the provisions of the Workmen's Compensation Act.

But then I think all that loses its force almost entirely when you come to know that you are dealing with an Italian with very little knowledge of English—probably only enough to enable him to get through his daily work and have his daily wants supplied—and who may be described, as he is described by a countryman of his own who was examined, as not only knowing very little English, but as not being able to read English at all. When you are dealing with a man of that kind I think the case really assumes a totally different complexion.

There has been reference made on both sides of the Bar to two cases, one in which an election was held not to have been made by the receipt of one payment under the Workmen's Compensation Act—the case of *Fowler v. Hughes*, in 5 F., p. 394—and another in which an election was held to have been made by the receipt of six monthly payments—the case of *Little v. P. & W. MacLellan*, in 2 F., p. 387. Now, I personally do not think that former decisions are of much help to us in a case of this kind, because every case must be decided upon its own evidence, and I only refer to these because I certainly agree with one observation with which the Lord Justice-Clerk opened his opinion in the case of *Fowler*, when he said—"I certainly should be sorry to throw any doubt on the decisions that have been pronounced to the effect that a series of receipts extending for a long period and headed in such a way as to indicate that they are receipts given under the Workmen's Compensation Act may amount to sufficient evidence that there was an agreement to accept compensation under that Act." With that I entirely agree, but of course the importance of the long series of receipts derives almost its whole weight from the fact that, as in the case of *Fowler*, you are dealing with a natural born inhabitant of this country, reading and speaking our language with ease. But where you are dealing with an Italian, with all the disabilities to which I have referred in point of knowledge of the language, and of our Acts of Parliament, I think the conditions are entirely different. Therefore I decide this case purely on its own facts, and if your Lordships agree with me, the judgment will be to recall the interlocutor of the Sheriff-Substitute of 31st May last, and to remit to him to proceed as shall be just.

LORD LOW—This a narrow case but I have come to be of the same opinion as that expressed by your Lordship. If the work-

man in this case had been a British workman and not a foreigner I should have been of the same opinion as the Sheriff-Substitute. This is a case in which the workman went to the employer to ask compensation, and not a case such as occurred in *Fowler v. Hughes*, where the employer came to the workman and tendered a payment. In the next place, I think there is no doubt whatever that what the pursuer wanted when he spoke to his foreman Mr Barr, and was taken by the latter to the office, was in fact compensation under the Workmen's Compensation Act, because he says in his evidence that he had been told that he was entitled to half pay and that what he expected to get was a weekly payment of half pay until his hand was better, which, of course is just in fact, whether he knew it or not, compensation under the Workmen's Compensation Act.

Now if a British workman had gone to his employers in similar circumstances and said that he wanted compensation, had accepted weekly payments of half of his wages, and had given receipts in terms of the receipts here, which refer to the Workmen's Compensation Act, I am certainly of opinion that he could not after that have tendered back the payments which he had received and betaken himself to a claim which he might otherwise have had either at common law or under the Employers' Liability Act, upon the ground that when he demanded payment under the Workmen's Compensation Act he was not fully alive to his rights at common law or under the Employers' Liability Act. I think that a British workman must be presumed to know something about his rights, and that if he goes to his employers and asks for compensation under the Workmen's Compensation Act, they have no duty whatever to inquire whether he is or is not fully aware that he might, if he liked, adopt some different course. But then I think that when you are dealing with a foreigner the position of matters is different. This man had been some years in the country, but it is plain from the evidence that his knowledge of English is extremely limited—so limited, indeed, that if an explanation had been given to him in English of the different courses that were open to him, I do not believe that he would have understood what was said to him at all.

As I have said, he had been told, and knew, that he might ask half wages until his hand was better, but it does not appear that he knew how that claim arose, or that he knew that he had any other course open to him. Accordingly, it is apparent that he was not in a position to exercise the option which he had in any proper sense. He knew that he might claim a certain thing, but he knew nothing more. I think that to throw out the action which he has brought, upon the ground that he had deliberately elected to take his compensation under the Workmen's Compensation Act, would be to run the risk of doing very serious injustice. I therefore agree with the course proposed by your Lordship in the chair.

LORD ARDWALL—I agree with the course your Lordships propose. I also agree with Lord Low in thinking that if the pursuer in this case had been a British workman I should have been prepared to affirm the Sheriff-Substitute's interlocutor, but that upon the case as it stands, this being an Italian workman with almost no knowledge of English, there would be great risk of injustice in affirming the interlocutor the Sheriff-Substitute has pronounced. I have only to add that if coalmasters for their own advantage choose to employ foreigners who do not understand the English language, and whose ignorance of that language may introduce considerable peril to other workmen employed in the same pit, they must accept the disabilities of such employment, and one of these, as appears in this case, is that the same presumptions will not apply to negotiations between them and such foreign workmen as would apply to negotiations and agreements with British workmen.

The LORD JUSTICE-CLERK was absent.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff to proceed.

Counsel for the Pursuer (Appellant)—M'Clure, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

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

Thursday, March 14.

FIRST DIVISION.

[Lord Johnston, Ordinary.]

SEARCY'S TRUSTEES *v.* SEARCY AND OTHERS.

Succession—Vesting—Vesting subject to Defeasance—Destination to A in Liferent and Children Nascituri in Fee with Destination-over to Families of B and C—Effect of Destination-over being in Separate Clause.

By the *fifth* purpose of his trust-disposition and settlement a testator directed his trustees to hold the residue of his estate for his daughter in life-rent and her children *nascituri* equally among them in fee, the issue of any deceasing children taking *per stirpes* their parent's share. He then directed his trustees to dispense to his daughter absolutely his dwelling-house, together with its whole plenishing. He then proceeded—"And (*Sixthly*) in the event of my said daughter predeceasing or dying without leaving lawful issue, I hereby authorise and direct my said trustees to realise the whole residue of my said means and estate . . . and to divide the same in equal proportions amongst the families of B and C. The daughter survived her father for many years but died without issue.