

been timeously brought: Of new appoint the respondents to produce in process . . . a detailed account with relative vouchers of the item of their abstract of accounts, . . . which is the subject of complaint: Find the reclaimers liable in expenses," &c.

Counsel for Petitioners (Respondents)—Scott Dickson, K.C. — Hon. W. Watson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents (Reclaimers)—Hunter, K.C. — Macmillan. Agents—Campbell & Smith, S.S.C.

Counsel for Minuters—Hon. Huntly Gordon. Agents—Calder, Marshall, & Walker, W.S.

Thursday, November 21.

FIRST DIVISION.

[Lord Johnston, Ordinary.

MACKAY v. ROSIE.

Reparation—Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (2) (b) — Election to Take Compensation—Bar.

A workman at the end of the week in which he was injured was paid an allowance of wages, and was told—"That is to cover anything that is due to you at present, you will get nothing for the next two weeks, and after that you will get half wages." He subsequently received from his employer, for a period of about six months, weekly payments, which amounted to slightly more than half his average weekly wages. These payments were at first made to him at his house, but afterwards he called for them at the employer's office. No receipts were given.

Held that the pursuer's actings inferred an election to accept compensation under the Workmen's Compensation Act 1897, and that he was barred under section 2 (b) thereof from now claiming damages at common law.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, which imposed a liability on certain employers to workmen for injuries, contains (2) the following proviso:—"Provided that (a) the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed; (b) 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 compensa-

tion 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. . . ."

On 18th May 1907 Alexander Mackay, mason, 64 Dumbiedykes Road, Edinburgh, raised an action against George Rosie, builder, 52 East Crosscauseway, Edinburgh, in which he sued for £500 damages at common law in respect of personal injuries sustained by him on 20th November 1906 when working in the defender's employment.

The defender pleaded, *inter alia*—" (2) The pursuer having elected to accept, and having accepted, compensation under the Workmen's Compensation Act, is barred from raising the present action."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 18th October 1907, after a proof, pronounced the following interlocutor—" Finds that the actings of parties between the date of the accident and 4th May 1907 infer an agreement between them whereby the pursuer elected to take compensation under the Workmen's Compensation Act on the footing of his average wage being taken at 36s. a-week: Therefore sustains the second plea-in-law for the defender, dismisses the action, finds neither party entitled to expenses, and decerns."

Opinion.—" I do not think that it is necessary to delay giving judgment in this case. The pursuer is not a foreigner; he is not even what I may call an illiterate workman. He is a Scotsman, he is a member of one of the skilled trades of this country, and from his appearance I am justified in saying that he is one of the best representatives of that trade. On the other hand the defender is a man of really much the same station as the pursuer. He is now an employer, but he began as a workman—so much so that the present pursuer actually worked under him when he was merely a foreman in the employment of others. I regard them in point of education and in point of intelligence—and I say so not merely as matter of inference but from their appearance in the witness-box—I must regard them, though one is workman and the other employer, very much as equals.

" Now the pursuer's counsel's contention practically comes to this—that there is a duty imposed upon the employer to take charge of the interests of his workmen. I cannot conceive a case in which such a rule would operate greater injustice than the present, where I find that the employer and the workman are men of similar origin, similar upbringing, similar education, and, as far as I can judge, of similar capacity, only that the one, being about eighteen years older than the other, has developed into a small employer, which there is no reason the other should not also do in his turn. But there is no such rule. The employer must not take advantage of the position of his workman, must not take advantage of his ignorance and want of education, must not take advantage of the physical condition to which a serious

accident has for the time reduced him. But when they meet on equal terms and at arm's length, I hold that there is no more obligation on the employer to take charge of the interests of his workman in the matter of compensation for accident than there is on any other contracting party to charge himself with the interests of the party with whom he is contracting.

"What then are the circumstances here? The pursuer meets with, I assume, a serious accident. His employer acts with perfect consideration to him. I cannot conceive of any more appropriate or more considerate action on the part of an employer. He sends his son at once to see him, and at the end of the week in which the accident occurs sends him again to make payment of, not the precise amount of wages which were due, but a liberal allowance in lieu of the balance of wages. The actual sum paid is a matter with which I have no concern, but I have a concern with this, that on the day on which it was paid the defender's son said to him, 'That is to cover anything that is due to you at present, you will get nothing for the next two weeks, and after that you will get half wages.' Now, I am prepared to hold it as proved by irresistible implication that both parties were perfectly aware what the meaning of this was. I am not going to take it off the pursuer's hands that a Scottish workman of his position and his capacity at this time of day knows nothing about the Workmen's Compensation Act. If there be an idea abroad among workmen that they may pose as in ignorance of the statutes which have been passed to provide for their protection, it is high time that that idea was dissipated. I am prepared to hold that a British workman is bound not merely to know something about his rights, but to take proper steps to ascertain what his rights are, and that, as I have already said, when he deals with his employer on even terms and at arm's length, there is no more obligation upon the employer to take charge of his interests than there is on any other contracting party to take charge of the interest of the party with whom he is contracting.

"Now, it is clear that the pursuer knew perfectly well that, in the first place, he was entitled by a statute, even if he did not know by what precise statute, to nothing for the first fortnight and to half wages during the subsequent time of his disablement. He knew perfectly well that his employer was under obligation, imposed upon him by a statute, to make that payment, and for the space of nearly six months he accepted and allowed his employer to continue paying him half wages, or what was understood to be half wages, although it turned out on an accurate calculation to be somewhat more. For a period of nearly six months half wages were paid as matter of obligation and of statutory obligation, and accepted as matter of right and of statutory right, and there being no question of advantage taken, I think it is impossible to do otherwise than infer an agreement to make and accept compensation in this statutory form, I

cannot accept the pursuer's contention that he is now entitled to come here and say 'I knew it was under some statute, but I did not know under what statute it was that this payment was being made; moreover, I did not take the trouble to ascertain what was the statutory condition of my accepting this payment.' He is not a child, he is not a foreigner, he is not an illiterate, he is an educated workman. He was not during those six months on a bed of sickness or otherwise incapacitated. He was not in any sense in a position in which it could be said that the parties were not meeting on equal terms, and were not acting at arm's length. To sustain the pursuer's contention would be to write out of the law of Scotland the principle that *ignorantia juris neminem excusat* in favour of the workman, but of the workman only, where he transacts with his employer in the matter of compensation for personal injury.

"In the case of *Valenti*, 1907, S.C., 695, referred to, the parties were not on equal terms. There you had the employer a large company acting through its officials, and the workman an Italian, knowing little or nothing of English. Even under these circumstances, had there been anything like the facts which you have got here, an agreement would I think have been implied. But there there was only one interview and two receipts, which, *ex hypothesi*, the man could not read, which he only authenticated by his mark, and about which no practical explanation was given to him. Again in the case of *Fowler*, 5 Fr. 394, also referred to, you have the parties also not on equal terms through another cause. The workman there met with an injury which so affected one of his eyes that it ultimately had to be removed. While he was lying suffering acutely from the inflammation in the eye, before the operation, he was asked to sign one single receipt. Quite unable to read, and in a bodily condition in which it is not to be presumed that he was capable of applying his mind to what he was doing, he signed the receipt at a place which was pointed out to him, and without explanation. In neither of these cases were the two parties dealing on equal terms, and their circumstances were quite different from those of the present case. But I think there is another point which differentiates them. In *Fowler's* case there was one receipt, and one receipt only. In *Valenti's* case there were two. But here there were about five-and-twenty payments, spread weekly over a period of nearly six months, made and accepted. It is quite true that the master, through his son, came to the workman and openly told him what he was bound to pay and the workman entitled to receive. The master did, in a certain sense, volunteer the payments at the start, and continued to forward them for a month or six weeks; but for the next three or four months the pursuer, quite content with the situation, regularly went and applied for the payment. Mr Anderson contended that he made no claim. It seems to me that there

is quite ample claim to satisfy the statute if a man comes to the office to ask and receive the payments which had been made to him for a month or six weeks at his own house, and continues to do so from about the beginning of January until May. It seems to me that that distinguishes the case from *Fowler's* and *Valenti's* cases, and brings it very much more nearly on all fours with the case of *Little*, 2 Fr. 387, where receipts were signed for six months.

"I venture to say that there is no distinction in the principle here to be deduced from the fact that no receipts were actually signed. If the pursuer is justified in his contention here, I do not think he would have been foreclosed even had he signed receipts. He is paid and he receives half his wages admittedly as a matter of statutory right and obligation. Would it have made it any stronger if he had signed a receipt in which it was stated—'I accept the sum which you are paying me as statutory compensation, or even as compensation under the Workmen's Compensation Act.' I think not, because in the knowledge of both parties the sum was paid and was received under statute, if not specifically under the Workmen's Compensation Act. If that is so, can it be admitted that a man should come and claim and accept a payment which is due to him under statute and not be held to take it with all the statutory conditions? Is the master, because the transaction happens to be between a master and servant—is the master bound to say, 'Oh I cannot pay you this until I am quite sure that you know what the statute is under which we are transacting, and that you know everything that is in the statute, not merely that you are entitled to this payment, not merely that you are receiving this payment under the statute, but that you know all the conditions which will follow your receipt?' I know no law which makes such a difference between contracts between employers and workmen and contracts between other people. If the one party does not choose to know his rights, I am prepared to say that the same law must be meted out to him, though he is a workman, as would be meted out to anybody else were the contract other than a contract between master and workman.

"What concludes the matter to my mind is this, if the one party is bound, both parties are. It seems to me that it would have been futile for the master, in the circumstances of this case, to have turned round and said, 'No, I am not going to continue these payments.' If the master is bound, so must the employee.

"I shall therefore sustain the second plea-in-law for the defender and dismiss the action. But in respect that both parties fell into error in May 1907, after the payments had been going on for nearly six months, the one proposing to go back on the basis of wages, on which the agreement had been made, at his own hand and not by application under the statute to have the amount of compensation varied, and the other repudiating the agreement altogether,

and are therefore both mutually responsible for the litigation which has ensued, I shall find no expenses due to or by either party."

The pursuer reclaimed, and argued—The Lord Ordinary was in error in holding that the payments were accepted as compensation under the Workmen's Compensation Act; they were payments to account of damages. The pursuer never claimed compensation under that Act, nor did he ever sign any receipt therefor. It was not enough for the defender to prove that the pursuer accepted sums of money; he must show that he accepted them as compensation under the Act. To be the basis of arbitration under the Act a claim had to be in writing, and unless a claim were so made it would not bar the claimant from subsequently electing to claim at common law. The evidence moreover showed that the pursuer had not elected to claim under the Act. The Lord Ordinary had omitted to notice (1) that the weekly payments made were not half the average weekly wages but more, half the full time wages; (2) that the pursuer was endeavouring, at the time he accepted these payments, to ascertain his legal rights; (3) that when he subsequently indicated an intention to claim compensation under the Act he was not told he had already done so; and (4) that when a receipt was tendered to him for signature on 11th May 1907 it ran "I elect to claim," &c., thus admitting there had been no previous election. The *onus* lay on the defender to show that the pursuer had finally and irrevocably elected to claim under the Act, and he had failed to discharge it. The acceptance of any number of indeterminate payments was no bar to a claim at common law provided, as here, there had been no final election. Reference was made to *Little v. P. & W. MacLellan, Limited*, January 16, 1900, 2 F. 387, 37 S.L.R. 287; *Fowler v. Hughes*, January 23, 1903, 5 F. 394, 40 S.L.R. 321; and *Valenti v. William Dixon, Limited*, 1907, S.C. 695, 44 S.L.R. 532.

Argued for respondent—The Lord Ordinary was right. The question was one of fact, and on the evidence it was clear that the pursuer had elected to take compensation under the Workmen's Compensation Act. It was not necessary in order to infer election that a formal claim should be made. Election would be inferred from a claim for a specified sum though made informally—*Powell v. Main Colliery Company*, [1900] A.C. 366; *Kilpatrick v. Wemyss Coal Company Limited*, 1907, S.C. 320, 44 S.L.R. 255. *Esto* that a claim under the Act which was made in error would not bar a subsequent claim at common law.—*Donald v. James Dunlop & Company Limited*, February 25, 1905, 7 F. 533, 42 S.L.R. 394; *Rouse v. Dixon*, [1904] 2 K.B. 628—the present claim was not so made. Election might be inferred *rebus et factis*, e.g., by acceptance of weekly payments—*Wright v. John Baginall & Sons, Limited*, [1900] 2 Q.B. 240. It was irrelevant to say, as the claimer did, that he had not "knowingly" elected. If he did not know, then *sibi imputet*, for the maxim *ignorantia juris*

would then apply. The cases of *Little, Fowler, and Valenti* (*cit. supra*) were in the respondent's favour, for they established that an agreement which operated as a bar might be inferred from such facts as were here proved.

LORD PRESIDENT—This is an action at the instance of a workman against his employer for damages at common law in respect of an injury which he received while working in his employment.

The preliminary answer is made that the workman has accepted compensation under the Workmen's Compensation Act, and that under the provisions of sec. 1, sub-sec. 2 (b), he cannot now claim at common law. The Lord Ordinary has given effect to that contention and dismissed the action.

The facts on which the plea is based are that for a long period a sum of 18s. a-week was admittedly paid to the pursuer and accepted. Parties however are not at one as to the footing on which these payments were made and received. The case so far differs from those of *Valenti* (1907 S.C. 695), *Fowler* (5 F. 394), and *Little* (2 F. 387), which were cited to us, in that there is here no written receipt, and indeed no writing at all, to which appeal can be made. I am of opinion, however, that the fact of there being no written receipt is by no means conclusive. After all a receipt is no more than a piece of evidence, and though a receipt bearing to be in respect of sums paid under the Workmen's Compensation Act would be very difficult to get over, it is of value as an item of evidence and nothing else.

But I think the question before us is a question of fact, and fact alone. The Lord Ordinary, who saw the witnesses and considered the whole circumstances, has found that the pursuer accepted the payments as compensation under the Workmen's Compensation Act, and I am not prepared to disagree with his determination. I do not propose to say more, because I look on this case as raising solely a question of fact. I am content to say that I agree with the Lord Ordinary's view that the payments in question were made and accepted as compensation under the Act.

LORD M'LAREN—I have come to the same conclusion. I think it must be taken as matter of common knowledge among persons in the class of life of the pursuer, that a claim of damages founded on fault is a claim for a single payment. It follows, I think, that where a person having such a claim has accepted weekly payments for many weeks—unless he has taken them as charity, and there is no suggestion of that here—he may be presumed to have accepted these as payments under the Workmen's Compensation Act, the only law which creates an obligation to make compensation by means of weekly payments. Very clear evidence would be required to displace that presumption, and I fail to see anything in the evidence here antagonistic to the plain inference that follows the acceptance of weekly payments.

LORD KINNEAR—I agree with your Lordship in the chair.

LORD PEARSON—I also agree.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—A. M. Anderson—Hendry. Agent—John S. Morton, W.S.

Counsel for the Defender (Respondent)—Solicitor-General (Ure, K.C.)—Constable. Agents—Simpson & Marwick, W.S.

Friday, November 22.

FIRST DIVISION.

KINLOSS PARISH COUNCIL v. MORGAN AND OTHERS.

Charitable Bequest—Local Government—“Poor of the Parish”—Bequest to Parish Council for the Benefit of the Poor of the Parish—Poor Law Amendment (Scotland) Act 1845 (8 and 9 Vict. cap. 83).

A bequest of a sum of money to the Parish Council of K. “for the benefit of the poor of the parish of K.,” and of a similar sum to the Town Council of F. “for the benefit of the poor of the burgh of F.,” held to be for behoof of necessitous persons, irrespective of whether they were or were not in receipt of parochial relief.

Bequests in similar terms prior to the Poor Law Amendment (Scotland) Act 1845 and to the parochial boards for administration, *distinguished*.

By his trust disposition and settlement the late Reverend J. A. Dunbar Dunbar of Seapark and Kinloss, in the parish of Kinloss and county of Elgin, *inter alia*, provided:—“(Fourthly) I leave and bequeath, in the first place, for the benefit of the poor of the parish of Kinloss the sum of two thousand pounds; and, in the second place, for the benefit of the poor of the burgh of Forres the like sum of two thousand pounds: Declaring that the legacy to the poor of Kinloss parish shall be paid over by my trustees to the Parish Council of that parish, to be administered by them for behoof of said poor, and that the legacy to the poor of the burgh of Forres shall be paid over by my trustees to the Town Council of Forres, to be administered by them for behoof of said poor. . . .”

Questions having arisen as to the administration of the bequest, a special case was presented for (1) the Parish Council of the parish of Kinloss (*first parties*); (2) Rachel Morgan and others, poor persons resident in that parish (*second parties*); and (3) Margaret Masson and others, paupers on the roll of the said parish (*third parties*).

The case stated that the testator, a clergyman in the Episcopal Church in Scotland, and proprietor of the estate of Seapark and Kinloss in the parish of Kinloss, “took a great interest in the parish