

Thursday, July 15.

SECOND DIVISION.

BOND v. DALMENY OIL COMPANY,
LIMITED.*Expenses—Sheriff Court—Jury Trial—
Appeal—New Trial—Expenses of Appeal.*

A pursuer in a jury trial in the Sheriff Court having obtained a verdict, the defenders appealed to the Court of Session, which set aside the verdict as being contrary to the evidence and ordered a new trial. The defenders having moved for the expenses of the appeal, the Court found the pursuer liable in such expenses.

Robert Bond, residing at Fann Cottage, Dalmeny, brought an action in the Sheriff Court of the Lothians and Peebles at Linlithgow against the Dalmeny Oil Company, Limited, Dalmeny Oil Works, in which he sued for £250 of damages at common law, and, alternatively, for £117 under the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), in respect of the death of his child, the late Robert Bond junior. The cause having been subsequently tried before a jury the pursuer obtained a verdict in which the damages were assessed at £50. The defenders appealed to the Court of Session for a new trial, and the Court set aside the verdict as being contrary to the evidence and ordered a new trial, the Lord Justice-Clerk pointing out in his opinion that there were no fewer than nine questions put to the jury to all of which the jury returned answers in favour of the pursuer and that the evidence was against such answers save in the case of one which was doubtful but had no material effect on the result.

The defenders thereupon moved for the expenses of the appeal, and argued—The defenders were entitled to the expenses of the appeal. *Quoad ultra* expenses should be reserved. The case of *M'Coll v. The Alloa Coal Company, Limited*, 46 S.L.R. 465, where neither party was found entitled to the expenses of the appeal, was very special. In that case the Lord Justice-Clerk (p. 468) said that both parties were to blame.

Argued for the pursuer—Expenses should be reserved. There was no case where the Court in allowing a new trial mulcted the pursuer in the expenses incidental to the new trial. The expenses of the appeal were very large, and an allowance of these to the defenders practically prohibited the pursuer going forward to a new trial.

The Court pronounced this interlocutor—

“Sustain the appeal; recal the said interlocutor appealed against; set aside the verdict, and remit the cause to the Sheriff to allow the parties a new trial; find the pursuer liable in expenses in this Court, and remit the same to the Auditor to tax and to report to the Sheriff, with power to him to decern

for the taxed amount of the expenses hereby found due, and the expenses of the first trial to be expenses in the cause and to be disposed of by the Sheriff.”

Counsel for Pursuer (Respondent) — G. Watt, K.C. — MacRobert. Agents — J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders (Appellants) — Hunter, K.C. — Carmont. Agents — W. & J. Burness, W.S.

Friday, July 16.

FIRST DIVISION.

(Before Seven Judges.)

[Sheriff Court at Glasgow.]

[Lord Skerrington, Ordinary.]

DONALDSON BROTHERS v. COWAN.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), Sched. I, sec. 16—Review of Weekly Payment—Date from which Payment may be Varied.

Where an application to review a weekly payment under the Workmen's Compensation Act 1906 is brought before an arbitrator, and the workman has recovered prior to the date of the application, the arbitrator is not bound to treat the agreement for, or award of, the weekly payment as enforceable up to the date of his decision, but is entitled to vary the payment as from the date of the application, though not from any earlier date.

Steel v. Oakbank Oil Company, Limited, December 18, 1902, 5 F. 244, 40 S.L.R. 205; and *Pumpherson Oil Company, Limited v. Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, overruled. *Morton & Company, Limited v. Woodward*, [1902] 2 K.B. 276, approved.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) — Weekly Payment—Suspension of Charge Relating to Period Subsequent to Recording of Memorandum—Competency.

A workman whose employers had agreed to pay him compensation recorded a memorandum of the agreement. Thereafter his employers terminated the weekly payments at their own hand on the ground that the workman had recovered. The workman having charged for payment, his employers brought a suspension.

Held that as the suspension related to a period subsequent to the recording of the memorandum, it was not the appropriate remedy, and must be refused *simpliciter*.

The Lochgelly Iron and Coal Company, Limited v. Sinclair, March 19, 1909, 46 S.L.R. 665, followed.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), enacts—Schedule I (16)—“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, . . . and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

On 30th December 1908 Donaldson Brothers, steamship owners, 58 Bothwell Street, Glasgow, presented an application in the Sheriff Court at Glasgow in which they asked for review of the compensation payable by them to David Cowan, coal trimmer, 28 Cook Street, Glasgow. The Sheriff-Substitute (DAVIDSON) having terminated the compensation as from the date of his judgment a case for appeal was stated.

The case stated:—"This is an arbitration under The Workmen's Compensation Act 1906, brought before the Sheriff of Lanarkshire at Glasgow at the instance of the appellants, in which the Sheriff was asked to review the weekly payment of 12s. 7d., agreed to be paid by the appellants to the respondent in terms of memorandum of agreement between them, recorded in the Special Register kept at Glasgow, in terms of said Act, on 5th October 1908, and on such review to find that the respondent's incapacity to follow his employment had ceased as on 24th October 1908, and that the appellant's liability to pay the respondent compensation in terms of said memorandum had ceased as at that date, in terms of section 16 of the First Schedule of said Act, and to find the respondent liable in expenses should he offer any opposition to said application.

"The application was heard before me, and proof led on this date, Wednesday, 27th January 1909, and in respect that there was a conflict of medical evidence, I remitted to Sir George T. Beatson, M.D., K.C.B., one of the medical referees appointed under said Act, to examine the respondent and to report. After having considered the report of Sir George T. Beatson, I, on 23rd February 1909, found that the respondent was then, and had been on 24th October 1908, capable of doing his ordinary work as a fireman.

"Considering that I was bound by the cases of *Steel v. Oakbank Oil Company*, 1902, 5 F. 244, and *Pumpherson Oil Company v. Cavaney*, 1903, 5 F. 963, decided in the Supreme Court, I declared the compensation payable to the respondent by the appellants ended as on the date of my judgment, viz., 23rd February 1909, and found the respondent liable in expenses."

The question of law was—"Should the compensation payable to the respondent have been ended on the date of my judgment, viz., 23rd February 1909, or on the date on which the incapacity of the respondent had ceased, viz., 24th October 1908."

Prior to the application for review Donaldson Brothers had terminated the weekly payments at their own hand, on 24th October 1908, on the ground that Cowan had recovered. On 28th December 1908 Cowan charged for payment for the period from 24th October 1908 till 26th Decem-

ber 1908. On 30th December Donaldson Brothers brought a suspension in which they pleaded, *inter alia*—"(3) The respondent being entitled under the Workmen's Compensation Act to receive compensation only during his incapacity, and his incapacity having ceased, he is not now entitled to charge the complainers to pay any compensation."

The respondent pleaded, *inter alia*—"(1) The note is incompetent, in respect that the complainers have not taken the proper steps to have the said memorandum set aside or the payments reviewed."

On 20th March 1909 the Lord Ordinary (SKERRINGTON) refused the note.

Donaldson Brothers reclaimed.

On 29th May 1909 the stated case and reclaiming note were sent to a Court of Seven Judges, where they were heard and disposed of together.

Argued for Donaldson Brothers (appellants)—(1) *On the Stated Case*—The compensation ought to have been terminated as at the date when the incapacity ceased. To hold, as the arbiter had done, that it was to be ended as from the date of his judgment would operate unfairly both to the employer and to the workman, for an employer might then have to pay after incapacity had ceased, and a workman might have to lose his increased compensation. What was to be reviewed was not an award—for there might be no formal award—but the "weekly payment"—*Crossfield & Sons, Limited v. Tavian*, [1900] 2 Q.B. 629, *per Smith, L.J.*, at p. 631; *Nicholson v. Piper*, [1907] A.C. 215—and that might be varied according as, and at the date when, the incapacity increased or diminished—*Morton & Company, Limited v. Woodward*, [1902] 2 K.B. 276. The question was—When was the dispute formulated between the parties, not when was it formulated before the arbiter. In short, what was the true date of the dispute. The cases of *Steel v. Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205, and *Pumpherson Oil Company, Limited v. Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724, which the arbiter had followed, were wrongly decided, and had been disapproved in *Morton (cit. supra)*, and in the recent case of *The Lochgelly Iron and Coal Company, Limited v. Sinclair*, March 19, 1909, 46 S.L.R. 665. The date of the application was no more the true date for varying compensation than the date of the judgment, for the application might be delayed for good reasons. The true date was that at which the arbiter might find, looking to the whole circumstances of the case, that the workman's incapacity had changed—viz., in this case 24th October. (2) *On the Suspension*—The charge fell to be suspended as from 24th October, when incapacity ceased. Where incapacity had ceased suspension was competent—*James Nimmo & Company, Limited v. Fisher*, 1907 S.C. 890, 44 S.L.R. 641.

Argued for Cowan (respondent)—(1) *On the Suspension*—Suspension was in

the circumstances here incompetent, and had been rightly refused, for the Act had provided a different and simpler remedy, viz., review—*Fife Coal Company v. Lindsay*, 1908 S.C. 431, 45 S.L.R. 317; *The Lochgelly Iron and Coal Company, Limited v. Sinclair* (cit. supra); *Finnie & Son v. Fulton*, March 19, 1909, 46 S.L.R. 665. The present case was a *fortiori* of *Finnie & Son*, for there had been no undue delay on the respondent's part in recording his memorandum, and the appellants might have at once presented their application to vary. The employer had an additional remedy under the Workmen's Compensation Act of 1906 (6 Edw. VII, cap. 58), for under section 9 of Schedule II he might oppose the recording, and if he did so the memorandum would not be recorded without a special warrant—A.S., 26th June 1907, section 11. Moreover, in granting such a warrant the Sheriff was acting in a judicial and not in a ministerial capacity, so that an appeal by stated case was competent—*Addie & Sons v. Coakley*, 1909 S.C. 545, 46 S.L.R. 408. The employer therefore not having availed himself of the proper remedies was not entitled to the suspension craved. (2) *On the Stated Case*—*Esto* that suspension had been rightly refused, the respondent was entitled to compensation down to 23rd February 1909, the date of the judgment of the Sheriff-Substitute varying the compensation. In any case it could not be ended prior to the date of the application to vary—*Steel* (cit. supra); *Pumpherson Oil Company, Limited* (cit. supra); *Baird & Company, Limited v. Stevenson*, 1907 S.C. 1259; 44 S.L.R. 864.

At advising—

LORD PRESIDENT—The facts out of which arise the suspension and the stated case which are before your Lordships are these—David Cowan, coal trimmer, was injured while working in the employment of Donaldson Brothers on board the s.s. "Cassandra" on 23rd July 1908. He claimed compensation from Donaldson Brothers, who are the other parties to these actions, under the Workmen's Compensation Act 1906, and they agreed to pay him the sum of 12s. 7d. weekly during his total incapacity. Under this agreement they paid regularly the sum of 12s. 7d. weekly till 24th October 1908. They then had Cowan examined by a doctor, and upon the report of that doctor they refused to pay any further compensation. Accordingly the compensation stopped *de facto* on 24th October 1908. The workman had a few days before this, namely, on 5th October 1908, registered the memorandum of agreement, and the employers having stopped the compensation, upon 28th December 1908 he charged for payment of nine weeks' compensation, being the nine weeks beginning 24th October and ending 26th December. On getting the charge the employers took two steps on 30th December. They raised the present suspension seeking to suspend the charge, and they

also presented an application to the Sheriff-Substitute as arbiter, in which they demanded that the compensation awarded should be ended.

Taking up now the history of the case as given in the statement of facts in the stated case, the application was heard and proof was allowed on 27th January 1909. The Sheriff-Substitute remitted the case to Sir George Beatson, one of the medical referees appointed under the Act, obtained a report from him, and upon 23rd February, in respect of that report, found as a fact that the respondent, the workman, was then and had been on 24th October 1908 capable of doing his ordinary work. In respect of that finding in fact, but conceiving rightly that he was bound by the cases of *Steel v. Oakbank Oil Company*, 5 F. 244, and *Pumpherson Oil Company v. Cavaney*, 5 F. 963, the Sheriff-Substitute declared the compensation payable to the respondent by the appellants ended "as on the date of my judgment, viz., 23rd February 1909."

The question of law which is appended to the case and submitted to your Lordships is—"Should the compensation payable to the respondent have been ended on the date of my judgment, viz., 23rd February 1909, or on the date on which the incapacity of the respondent had ceased, viz., 24th October 1908?" But the moment the question was read it was apparent that it did not exhaust all the possibilities of the case, because there is a third date which has to be considered, and that is the date of the making of the application, namely, 30th December 1908.

This case was sent to Seven Judges in order that the judgments in *Steel v. Oakbank Oil Company* and *Pumpherson Oil Company v. Cavaney* might be reconsidered. I need scarcely remind your Lordships that these two cases were both cases in which Courts of three judges pronounced judgment only by a majority of one; and it is also the fact that the Court of Appeal in England in the case of *Woodward* came to a conclusion which tallied with the conclusion of the dissentient minority here.

Upon the general question I have myself really nothing to add to what I said very recently in the case of *Lochgelly*, which is reported in 46 Scottish Law Reporter, p. 665; and I do not think it necessary to repeat the general history of the question which I there gave, but merely refer to my opinion. I must, however, add a few words, because in this case an argument was addressed to us which had no place in the *Lochgelly* case. That argument was in favour of answering the second alternative of the question put in the affirmative; that is to say, it was urged to us that the Sheriff-Substitute had a right to end the compensation not only as at the date of the application, but as at a date anterior to the application, if in fact it was proved—as the Sheriff-Substitute has held it proved in this case—that incapacity had ceased at that earlier date. There is, to say the least of it, some countenance for this view

in certain observations of the learned judges in England, although it is not covered by any English decision.

Since this case was heard there has been another case in the Court of Appeal in England—*Charing Cross, Euston, and Hampstead Railway v. Boots*—which was decided as lately as June 28th and which has now been reported in the Times Law Reports, vol. 25, 683. That case again gives some countenance to the view. Unfortunately it does not really assist us very much, because the point is not really decided, but is put off to a future stage; and also, unfortunately, we have not yet the benefit of the considered judgments of the learned Lord Justices of Appeal who took part in that decision, and particularly of Lord Justices Buckley and Kennedy. The case itself needs a little looking into from our point of view, because it accentuates the difference in procedure in English and Scottish law. The common law procedure in England—I am not using the word common law as contra-distinguished from equity, but as meaning the ordinary procedure in England—is different in this matter from ours. In other words, using our own law language, where we proceed in this country by suspension they proceed by a stay of execution, and the stay of execution seems, according to their practice, to be granted by the judge who ordains the registering of the memorandum. I need scarcely say we have nothing of that sort. The memorandum must be either registered or not registered, but if registered there can be no rider attached to the registration, any defence that there might be to the charge thereto ensuing being raised in a suspension.

Accordingly, I do not find that this recent case really advances the matter so far as we are concerned; and the only sentence that I need to quote is from the judgment of the Master of the Rolls, in which he points out that there has been a serious difference of opinion between the Court of Appeal in England and the Court of Session in Scotland. I may say in passing that his judgment is obviously given upon a citation of the cases of *Steel v. Oakbank Oil Company* and *Pumpherson Oil Company v. Cavaney*, and I think it is equally obvious that the learned Master of the Rolls had not before him the more recent case of *Lochgelly*. He says—“This Court”—that is, the Court of Appeal in England—“in *Morton v. Woodward* held that it is competent to the arbitrator to terminate a payment from a date antecedent to the date on which his award is made. In that case the only relevant date was the date of application.” He then goes on to mention the case of *Thomas* and says—“In the case of *Thomas* I expressly abstained from deciding whether if the application to review asks a declaration from a definite antecedent date the same principle would apply, but I intimated the opinion, to which I still adhere, that if there is a formulated dispute as to a workman’s incapacity at a particular date it is

competent to the arbitrator to decide that dispute.”

Now, I am not quite sure that I feel upon very secure ground in using the words “a formulated dispute.” If “a formulated dispute” means a dispute formulated in some process, then I suppose you never could have a formulated dispute in this matter until there had been an application for review. If, on the other hand, a formulated dispute means simply that the parties take a different view of the circumstances, then, although I cannot think that “formulated” is a very good epithet to use, there can be no greater proof that they take a different view than that the employer *de facto* stops paying compensation. But in *de facto* stopping compensation, when *ex hypothesi* he is under legal obligation to pay it at the moment, he seems to me to be taking the law into his own hands; and I retain the opinion, which I think will be found in a part of my opinion in *Lochgelly*, that the contemplation of the statute was that once there was settled a scale of payment (arrived at either through the medium of an agreement, or by arbitration if there was no agreement) the proper way of bringing that to an end was to make an application under the statute for review.

There is only one change, it seems to me, as regards the law as laid down in the *Lochgelly* case. The *Lochgelly* case arose under the Act of 1897, and I pointed out in my judgment that I was bound by prior decisions which had laid it down, first of all, that it was possible to register a memorandum no matter how long after the agreement, of which that memorandum was a record, had been entered into; and, secondly, that, as an answer to the demand to register the memorandum, it was irrelevant for the employer to say that the workman had in the meantime *de facto* recovered. That had been decided, and was binding upon me in *Lochgelly*. I am not concerned to inquire whether that last proposition was rightly decided or not, because, whether rightly decided or not, it is certainly not the law under the later Act. In the Workmen’s Compensation Act 1906 there is a new provision—(b) of section 9 of the Second Schedule—which provides—“Where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act, and the employer, in accordance with rules of Court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the County Court, under the circumstances, may think just.”

Therefore there is now in certain circumstances a power in the employer to resist the registering of a memorandum; but at the same time it is a very limited power, because it is to apply only when the employer proves that the workman has

returned to work and is earning the same wages as before. That obviously does not refer to cases where the employer may perfectly rightly apply for either a variation or a stopping of the compensation. A man may be entirely recovered and yet not have returned to his work and may be doing nothing; that section then would not apply, but at the same time the employer would be entitled to have the compensation ended. Therefore, although that makes a difference, it does not, I think, really touch the observation which I made in *Lochgelly*, namely, that the scheme of the statute is that when compensation is once fixed the only way to alter it is that provided by the statute—an application to vary. For this reason I cannot go the length that is suggested to me in this question; and I humbly differ from the suggestion—I will not call it more—of the learned Master of the Rolls who seems to point to the possibility of an arbiter, in an application to the County Court to vary, taking a date antecedent to the date of application.

As regards the question whether the compensation is to be ended as at the date of the application or at the date of the actual decision, I entirely agree with what was said by my brother the Lord Justice-Clerk in *Steel v. Oakbank Oil Company*. The argument upon the other side, which is well represented by the judgment of Lord Adam in one of these two cases, lays too much stress upon the idea that there must always be payment after payment is once fixed. Payment is fixed, but the payment, whether fixed by agreement or by arbitration, is a payment that is to be made only during incapacity. I agree that the employer cannot at his own hand determine when incapacity ceases; but when he comes to the proper tribunal and says—"I now make application to have this payment varied because I say the incapacity has ceased," it seems to me that the workman, if that be true, has no right to resist the application. If he does resist and is then found to be wrong, that is just the state of affairs that seems to me to arise in circumstances wherever relief is given as at the date of a summons and not as at the date on which the judge actually pronounces his judgment. Accordingly, I think that the proper answer to the stated case is to take neither the one date nor the other, but to take the date of the application; and I propose that your Lordships should answer the question accordingly.

So far as the suspension is concerned, it creates no difficulty, if I am right in what I have said, because the only charge that has been made is for a period antecedent to the date of the application. Therefore, there being no grounds such as I indicated in the *Lochgelly* case, as the only grounds on which suspension could be granted, the suspension must be refused. This is not a case of the workman having lured the employer into the belief that he did not mean to assert his right by acquiescing in the stopping of the payment. On the contrary, the moment the payment was stopped, he, having already registered the

memorandum, proceeded to charge. Accordingly, I think the suspension falls to be refused *simpliciter*.

LORD JUSTICE-CLERK—The question as to the date at which compensation was to be ended was considered in *Steel v. Oakbank Oil Company*. In that case I sat with two very learned Judges much senior to myself, and it was with considerable diffidence that I felt myself compelled to differ from the judgment which they proposed. But I was quite unable to see how any person, who was held on a certain date, say the 1st of January, to have no right to compensation because he was well, should nevertheless be held entitled to receive compensation from that date onwards for several months during the time that the case was awaiting decision, he being in perfect health during the whole of that time. Such a thing seemed to me to be contrary to the ordinary principles of justice. Accordingly, I have no difficulty in concurring with the opinion which your Lordship has expressed.

LORD KINNEAR—I have no difficulty in agreeing with the judgment which your Lordship proposes so far as regards the suspension, because I think that judgment is entirely consistent with the decision in the *Lochgelly* case, and in no way inconsistent with what was decided in *Steel v. Oakbank Oil Company*. As regards the wider question which it is necessary to decide in order to dispose of the stated case, I am not satisfied that the reasoning of Lord Adam in *Steel v. Oakbank Oil Company* has been effectively displaced. But I must recognise that taking into account not only the opinions of this Court, but also the opinions of the learned Judges in England, the great weight of authority is against Lord Adam's view, and for that reason I assent to the judgment your Lordship proposes.

LORD PEARSON — I agree with your Lordship.

LORD LOW—I am of the same opinion.

LORD ARDWALL—I also concur.

LORD DUNDAS—I also agree.

The Court (1), in the stated case, pronounced this interlocutor—"The Lords having along with three Judges of the Second Division considered the stated case . . . Find in answer to the question of law in the case that the compensation payable to the respondent should have been ended on 30th December 1908: Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to proceed as accords;" and (2), in the suspension, adhered.

Counsel for Appellants and Reclaimers—Morison, K.C.—M. P. Fraser. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondent—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.