

experience of parish work as part of their education. They are, as it were, given the opportunity of seeing what I may call clinical work. And their position is therefore clearly distinguished from that of the lay missionaries, whose employment is regular and permanent and a means of livelihood. They are therefore not employed persons in the sense of Part I of the Act.

LORD MACKENZIE—I am of the same opinion, and for the reasons which have been already explained. As regards the assistants, I think insurance is not obligatory, because they are under no contract of service. The joint-minute which has been adjusted by the parties defines so far as possible the relation of the assistant to the minister and kirk-session. I think that the fact that the definition is left in very general terms shows how much liberty there must necessarily be to the assistant in the execution of his duties. To a certain extent there may be control as regards the objects of the work, but, as it appears to me, there is no definite control as regards the method in which the work is to be done. The case of the assistant is really the case of one who is discharging the duties of an office, and whatever authority is exercised over him is in virtue of an ecclesiastical jurisdiction, and is not in virtue of rights which arise out of a contract of service. That, I think, is sufficient to show that the case of the assistants is outside the scope of the Act.

As regards the student missionaries, there, I think, the contract may be described as one for services. The students take up this work for the purpose of better fitting them when their education is completed for discharging the duties appertaining to an office in the Church.

As regards lay missionaries I agree that their position is different, but I desire distinctly for myself to say that my opinion in regard to lay missionaries is confined to those to whom the adjusted statement of facts is applicable, because it is impossible to shut one's eyes to the fact that there may be lay missionaries to whom these statements are not applicable, and who therefore would not come within the scope of the Act.

LORD KINNEAR—I should like to add that I quite agree with what Lord Mackenzie has last said, but I conceive that our answer, which may be framed simply in terms of the concluding question, must necessarily in all cases be applicable to the persons who are described in the minute of admissions. What we answer is that the classes of employment specified under the letters (a), (b), (d), and (f) are not employments within the meaning of the Act, but that the classes of employment described under the letters (c) and (e) are within the Act.

The LORD PRESIDENT did not hear the case.

The Court decided that the classes of employment designated in the prayer of the petition by the letters (a), (b), (d), and

(f) were not employments within the meaning of Part I of the National Insurance Act 1911: Further decided that the classes of employment designated in said prayer by the letters (c) and (e) were employments within the meaning of Part I of said Act, and decerned.

Counsel for Petitioners—Sol.-Gen. Anderson, K.C.—A. R. Brown. Agent—James Watt, W.S.

Counsel for Respondents—C. N. Johnston, K.C.—Cowan. Agents—Menzies & Thomson, W.S.—John Cowan, W.S.

Tuesday, October 21.

FIRST DIVISION.

[Sheriff Court at Dunfermline.]

DEMPSEY v. CALDWELL & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (1) (b) and (10)—Possibility of Supervening Incapacity—Suspensory Order—Competency.

A workman who had sustained permanent injuries, but who had subsequently been able to resume work, applied for warrant to record a memorandum of agreement under which it was alleged that the respondents had agreed to pay him a weekly sum during incapacity. The Sheriff-Substitute, holding that the workman was no longer incapacitated, refused the warrant craved and ended the payment of compensation.

In an appeal at the instance of the workman, the Court, *hoc statu*, remitted the case to the arbiter to consider and decide whether the ending of the payment of compensation should be permanent or temporary.

Opinion (per the Lord President) that a suspensory order was a competent form of process.

Taylor v. London and North-Western Railway, [1912] A.C. 242, followed.

In an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), at the instance of James Dempsey, Rosyth Huts, Inverkeithing, claimant, against Caldwell & Company, Limited, papermakers, Inverkeithing, respondents, for warrant to record a memorandum of agreement the Sheriff-Substitute (UMPHERSTON) refused warrant, ended the applicant's right to compensation, and stated a Case for appeal.

The Case stated—"This is an arbitration in which the claimant, who is eighteen years of age, claimed compensation from the respondents for injuries sustained by him while in their employment on 21st August 1912. The claimant's right hand was severely crushed and burned between the hot steam rollers of a papermaking machine. Parts of the third and fourth

fingers and the end of the second finger were amputated. The injuries are permanent. The claimant's average weekly earnings prior to the accident were 14s. per week. The claimant was paid 14s. per week by the respondents from the date of the accident to 23rd November 1912. On 14th December the claimant was offered light work, which he was willing to try, but did not in fact try on account of a dispute about signing receipts for compensation, the claimant thinking that the respondents wanted him to sign off, while the respondents say they only wanted him to sign receipts for the money he had received up to 23rd November, the claimant not having given any receipts for such money. On 24th December 1912 the claimant applied for a warrant to record a memorandum of agreement, under which it was alleged the respondents agreed to pay him 14s. a week during incapacity. On 4th April 1913 a minute of objections was lodged by the respondents, in which they disputed the genuineness of said agreement, but admitted liability for the accident to claimant which happened on 21st August 1912. They narrated the said offer of work and claimant's earnings since 14th January 1913, and asked me to terminate the claimant's right to compensation as at 23rd November 1912, or at such other date as I might determine. After evidence was led the respondents' agent, without prejudice to his contention that claimant's right to compensation ceased on 23rd November 1912, consented to an award of compensation at the rate of 10s. per week from 23rd November 1912 to 14th January 1913. On 14th January 1913 the claimant obtained employment with the contractors for Rosyth Naval Base as a drill carrier, being paid at the rate of 4d. per hour. Between said date and 28th January 1913 he earned the sum of £1, 4s. 10d. On three days he did not work full time, and on four days he did not work at all, but his absence from work was not due to his injuries or to any stoppage of the works. From 5th February 1913 to 20th March 1913 the claimant was employed by Messrs William Arrol & Company, North Queensferry. His earnings for this period amounted to £6. On 23rd March the claimant was employed by the Rosyth Naval Base contractors. His work was to stand on the top of a monolith and give the signal to a crane-driver when to raise and lower the crane. About midnight on 29th April 1913 the claimant was injured in the employment of Messrs Easton, Gibb, & Son, and for the injuries he thus sustained claimant received compensation at the rate of 13s. per week, being half his average weekly wages since 23rd March. Claimant has since been employed at similar work at the rate of 4s. 2d. per day. Owing to the construction of the naval base and the Dunfermline main sewer and other works, there is at present a large demand for labour, including boy labour, in the district. The demand for labour in Inverkeithing and district is likely to remain good for many years.

"In these circumstances I found (1) that at said 14th January 1913 the claimant was no longer incapacitated owing to the accident from earning his former wages, and that incapacity from said cause has not recurred; (2) that claimant is no longer incapacitated from said cause from earning his former wages; (3) that the claimant has failed to prove an agreement to pay compensation in the terms contained in his application. I therefore refused the application to record the memorandum of agreement, but found the respondents liable to the claimant in compensation at the rate of 10s. per week from 23rd November 1912 to 14th January 1913, and I ended his right to compensation at 14th January 1913."

The question of law was—"Was I entitled, in the circumstances above stated, to end the claimant's right to compensation?"

Argued for appellant—*Esto* that the arbiter had power to decide the question as he had done, he ought in equity to have suspended payment and not ended it. The test of a workman's right to compensation was diminished earning capacity—*Freeland v. Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599—and included inability to get work, though his ability to work remained as it was before—*Ball v. William Hunt & Sons, Limited*, [1912] A.C. 496, 49 S.L.R. 711. Where, as here, the appellant was permanently injured his right to compensation should have been kept open. That course was clearly competent, for the ending of payment might be either temporary or permanent—*Taylor v. London and North-Western Railway*, [1912] A.C. 242, *per* Loreburn, L.C., at p. 245; *Weir v. North British Railway Company*, 1912 S.C. 1073, 49 S.L.R. 772. The arbiter did not seem to have considered the expediency of suspending payment, and that being so the case should go back for further consideration.

Argued for respondents—Where, as here, there was no recorded agreement, the arbiter had competently ended compensation as from the date when incapacity ceased—*Southhook Fire Clay Company, Limited v. Loughland*, 1908 S.C. 831, 45 S.L.R. 664; *Malcolm v. Bowhill Coal Company, Limited*, 1909 S.C. 426, 46 S.L.R. 354; *Nelson v. Summerlee Iron Company, Limited*, 1910 S.C. 360, 47 S.L.R. 344. No motion to suspend compensation was made before the arbiter, and that being so the payments had been rightly ended. *Esto* that it would have been competent to suspend compensation—*Taylor (cit. sup.)*—it must be assumed that the arbiter had considered the expediency of doing so, and had concluded that the workman had recovered. The question of recovery was one of fact, on which the arbiter was final—*Anderson v. Darnagvil Coal Company, Limited*, 1910 S.C. 456, 47 S.L.R. 342; *Cunningham v. M'Naughton & Sinclair*, 1910 S.C. 980, 47 S.L.R. 781. Without prejudice, however, the respondents were willing to consent to a remit.

At advising—

LORD PRESIDENT [STRATHCLYDE]—The only question which we are asked here to consider and decide is whether or no the arbiter in a case under the Workmen's Compensation Act ought or ought not to have pronounced a finding by which he permanently terminated the payment of compensation to a workman for injuries sustained by him in the course of his employment. There were two subsidiary questions mentioned to us by Mr Chisholm for the appellant, but quite properly not pressed upon our attention.

It is conceded that if the finding of the arbiter stands, then it will be impossible in the future for the workman to revive his claim even although a material change of circumstances take place.

The circumstances of the case are these—the accident which befel the workman occurred on the 21st August 1912. His right hand was severely injured, parts of three of his fingers had to be amputated, and the finding of the arbiter is that the injuries are permanent. He is a labouring man, therefore, with a permanently maimed right hand. The employers admitted liability to pay compensation, and did pay compensation at the full rate down to 23rd November 1912, and they consented to make a payment at a reduced rate down to 14th January 1913, but they maintained that the workman's incapacity for work had ceased at 23rd November 1912, and craved the arbiter to make a finding permanently terminating his right to compensation. The arbiter having considered the claim thus urged, found that at the 14th January 1913 "the claimant was no longer incapacitated owing to the accident from earning his former wages, and that incapacity from said cause has not recurred; that claimant is no longer incapacitated from said cause from earning his former wages." And accordingly he says "I ended his right to compensation at 14th January 1913."

Now it is certain that during the months of February and March 1913, and I think subsequently, the appellant was able to engage in employment for which he was quite fit, and to earn a substantial wage—a wage indeed which I observe was greater than the wage he was earning prior to the date of the accident. That, it is explained by the arbiter, was due to the fact that there is a large demand for labour of the kind for which he was fit in the district where he lived and worked, and the arbiter adds—not a finding in fact but an expression of anticipation—that these good times will continue for many years.

In these circumstances it is conceded that the arbiter did right to terminate the payment of compensation, but it is urged that although payment of compensation was quite properly discontinued the arbiter ought not to have gone on to find, as he did, that the right to compensation ended at the 14th January 1913—that he ought not, in short, to have closed the door against the workman's application for a reconsideration of his case and a reviving of his claim in the event of a change of

circumstances taking place. He was then a damaged man, permanently injured in his right hand, and would, of course, be compelled to seek for employment in a narrower and more circumscribed area than was formerly open to him, and inside that circumscribed area he would be handicapped, more or less severely, by competitors for similar work who were absolutely sound in wind and limb. Naturally employers prefer, unless the demand for labour is great and the supply limited, to employ men who are physically intact rather than men who are physically damaged. And in judging of wage-earning capacity—that is really the inquiry to be prosecuted—in judging of wage-earning capacity or incapacity, physical fitness to work is not of itself decisive, nor are the conditions of the labour market to be taken in isolation. Both must be had in view in judging of the wage-earning capacity of the workman.

In saying so I am announcing no novel doctrine, for after some judicial fluctuation, both in opinion and in decision, it was finally decided in the House of Lords in two cases—one of them, I think, referred to in the debate—*Duris v. Wilsons & Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708, and *Ball v. Hunt & Sons*, [1912] A.C. 496, 49 S.L.R. 711, and footnote 1912 S.C. at p. 77, that wage-earning capacity must be judged of not merely by the physical condition of the man, but also by the condition of the labour market at the time. In short, when the labour market is buoyant, the injured man may be able to find full employment at full wages; but, on the other hand, when the labour market becomes stagnant, the injured man, in consequence of the injuries sustained in the course of his employment, might find his labour absolutely unsaleable or saleable only at a reduced figure, and, accordingly, that these two elements must be taken into consideration.

When I turn to the stated case here, I cannot find any indication that the arbiter considered the possibility of there being a change of circumstances, or considered the possibility of this damaged man being under different economic conditions either unable to earn his living at all or else compelled to accept a diminished wage for his work. Nor can I find any indication in the stated case that the arbiter considered and had present to his mind any other than the two courses which he indicates were open to him either to continue the payment or else to terminate absolutely, as he did, the workman's right to compensation.

Now in my opinion there is a *via media*, and that *via media* is very clearly indicated in the opinion delivered by Lord Low in the Seven Judges case of *Rosie v. Mackay*, 1910 S.C. 714, 47 S.L.R. 654, where his Lordship said that in order to leave questions such as this open in the event of a change of circumstances taking place, it is a competent course to sist procedure or to continue the case with leave to either party to renew

the application in the event of a change of circumstances occurring, with, of course, a finding that the injury had taken place, but that weekly payments must in the meantime be discontinued. With that opinion Lord Skerrington agreed. It may be said—and it is true—that Lord Low and Lord Skerrington were in a minority in that case; but there was subsequently a decision pronounced in the House of Lords in *Taylor v. London and North-Western Railway Company*, [1912] A.C. 242, to which we were referred in the debate, in which all the noble and learned Lords who took part in the judgment clearly indicated that a suspensory order—such as Lord Low and Lord Skerrington suggested in *Rosie v. Mackay*—was a proper course of procedure to adopt in circumstances such as the present.

It has been said that the case of *Rosie v. Mackay* was not cited to their Lordships in the House of Lords in *Taylor v. London and North-Western Railway Company*, and that we are not entitled to assume that they deliberately overruled that case, and that the law may still be regarded as in doubt. I cannot think so. It may be, and no doubt is the fact, that *Rosie v. Mackay* was not cited in the House of Lords, but I cannot read their judgments otherwise than as coming in direct conflict with the opinions of the majority in the case of *Rosie v. Mackay*; and, wittingly or unwittingly, I think their Lordships adopted the reasoning of Lord Low and Lord Skerrington in that case. When I examine Lord Low's opinion I find, I must say, no ground upon which it can be assailed. It would, indeed, be a sorry thing if our forms of process were not adequate to enable us to continue consideration of a case where a change of circumstances might occur which might alter the whole situation. The penny-a-week device (or subterfuge as my brother Lord Johnston has not inaptly called it) has been resorted to in England; it may also have been resorted to in Scotland. But in my opinion that device was not only unnecessary but was erroneous. If no compensation ought to be paid, then no order for a payment should be made, however small that payment may be, and if there are forms of process which enable us to suspend judgment until it is seen whether a change of circumstances take place or no, then I think that is the proper course to follow.

The course which I suggest to your Lordships that we should take in this case is substantially the same as was taken by the Second Division in the case of *Weir v. North British Railway Company*. I propose to your Lordships that we should remit to the learned arbiter to reconsider his opinion, having in view the fact, as he himself has found, that permanent injury has been suffered by this man in consequence of the accident which befell him, and to consider whether or no, in view of that finding, he should pronounce a suspensory order, as I have called it, or if he thinks proper, repeat the finding which he has already given.

Speaking for myself and for myself alone, I cannot doubt, in the first place, that a suspensory order is a competent form of process, and that, in the next place, it is the proper judgment to pronounce in this case, where no one can at the present moment foretell what the condition of the labour market may be in the near future. If the learned arbiter's anticipations are fulfilled, no doubt some time may elapse before reconsideration of his judgment would be called for. But, on the other hand, stagnation may come, and will come sooner or later. When that period arrives, then it seems to me it is not open to doubt that a labouring man with a permanently damaged right hand will find himself confronted with this situation: either he will be unable in competition with sound men to obtain employment, or else will be compelled to accept employment at a reduced rate of remuneration.

It is only right that I should add that the counsel for the respondents in this case very frankly and very properly announced to us his willingness that the course which I now propose to your Lordships should be adopted.

LORD KINNEAR—I agree.

LORD JOHNSTON — I have had much greater difficulty than, I think, your Lordships have had in disposing of this case, and I regret that I cannot, as at present advised, accept without a certain hesitation the views which have been expressed by your Lordship in the chair as to the effect, in a case of this sort, of changes in the labour market at a period distant I do not know how far.

There has certainly, up to this point, been a difference of practice in workmen's compensation cases, where there is recovery but the permanency of recovery is disputed, between the Courts of England and Scotland. That is now, I fully admit, brought to an end by the dicta of their Lordships in the House of Lords in the case of *Taylor*. But we are placed in this unfortunate position, that the practice, as it arose and exists in England, has never been explained with any detailed reasons as to how it was adopted, and within what limits it applies. On the other hand, in the case of *Clelland* (7 F. 975, 42 S.L.R. 757) a very reasoned opinion was given by the late Lord President, founding the practice which has since that date ruled in Scotland. That opinion was repeated in the case of *Rosie*, and adopted by the majority of the Court; for I am bound to say that although in my opinion the case should not have been sent to Seven Judges—because I did not think it raised the question which it was supposed to raise—I did not in any way dissent from the views expressed by Lord Dunedin.

In the case of *Taylor*, again, we get no explanation of the reasons for subverting our practice, and, as I conceive, some explanation of the reasons is required in order that we may understand, not merely that we must adopt a different practice, but the limit and scope of the practice which we

must now adopt. We must now accept that it is competent to suspend the payment of compensation and not merely either to continue, to vary, or to end it. But it is evident that discrimination in application is required, and did we know the reasons against our practice, as we know the reasons for it, we would the better know how to make that discrimination. I accept, therefore, that while it is open to the Sheriff-Substitute here to end the compensation, it is also open to him to suspend it. Reading his statement of the case, I should have been inclined to gather that he had, with full intention, ended it; but I agree with your Lordship that it is desirable that there should be no dubiety about the Sheriff-Substitute's meaning, and therefore that such a remit should be made as your Lordship proposes.

But I desire at the same time to reserve entirely my opinion as to the effect which will have to be given to the dicta of their Lordships in *Taylor's* case, and they must now have the effect of more than mere dicta, having regard to the explanation given by the late Lord Chancellor in the case of *Hargreave v. Haughhead Coal Company, Limited* (1912 S.C. (H.L.) 70, at p. 72, 49 S.L.R. 474).

Where I have difficulty in following your Lordship is that I am by no means clear that, given a case such as we have here—a case where the injury is a definite injury which has developed a permanent result, and which has no ulterior potentialities about it, as many injuries have—possibilities of recrudescence, possibilities of subsequent effects which do not at present appear—where it is a definite injury which has run its course and done its worst, and where, notwithstanding, the injured man is in the position of earning as good wages as he has earned before—we are to suspend his claim in order that he may have the opportunity to come back upon his employer at some future time, not because he is again suffering actively from the consequences of his injury, but because, from economic circumstances, there may not be so much work as there is just now, and therefore not so much opportunity for a man who has once been injured getting work. It seems to me that the result of your Lordship's view will be that in every case in which a man has received an injury of the permanent class to which I have referred, you must suspend, and cannot possibly end, his compensation, whatever his present wage-earning capacity may be. Now I do not think that that was the intention of the statute at all; and, in consequence, I desire to dissociate myself, as at present advised—for we have not had the matter fully argued yet—from the views which your Lordship has expressed. Had there not been room for discrimination I do not think that *Hargreave's* case (*supra*) could have resulted as it did. I do not desire to add more at present, because I feel satisfied that the question will have to be subsequently further argued either in this or in some other case.

LORD MACKENZIE—In view of the find-

ings of fact in this case, and of the judgment in the House of Lords in the case of *Taylor v. London and North-Western Railway Company*, I am of opinion that the case should be remitted back to the Sheriff-Substitute in the terms proposed.

The Court pronounced this interlocutor—

“*Hoc statu* recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit to him, in view of the finding that the claimant has sustained permanent injuries to his right hand, to consider and decide whether the ending of the payment of compensation should be permanent or temporary: Find no expenses due to or by either party in respect of the Stated Case on appeal.”

Counsel for Appellant—Chisholm, K.C.—
A. A. Fraser. Agent—Sterling Craig, S.S.C.
Counsel for Respondents—Wilton.
Agents—Davidson & Syme, W.S.

Wednesday, October 29.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

MACPHAIL v. LAMSON PARAGON SUPPLY COMPANY.

Contract—Pactum illicitum—Agreement to Refrain from Prosecution—Relevancy—Form of Pleadings.

A manufacturing company sued a commercial traveller for the amount of certain moneys which the company alleged the traveller had failed to account for, and founded on a letter under the hand of the traveller acknowledging his indebtedness for the sum sued for, and expressing gratitude for the kindness of the company in not prosecuting him. The defender pleaded *pactum illicitum*, averring that the pursuers had threatened him with a criminal prosecution unless he signed the acknowledgment.

The Court granted decree for the sum sued for, holding that the defender had not relevantly averred an agreement to refrain from prosecution.

Opinion reserved (per Lords Dundas and Guthrie) as to whether an agreement to refrain from prosecution amounts to a *pactum illicitum*.

Opinion (per Lord Salvesen) that where an employer makes a bargain with an employee not to prosecute him for embezzling money provided only he returns it, such a bargain is not a *pactum illicitum*.

Ferrier v. Mackenzie, February 22, 1899, 1 F. 597, 36 S.L.R. 421, commented on.

Observations (per Lord Dundas) on the plea of irrelevancy by a pursuer in an action.

The Lamson Paragon Supply Company, Limited, London, *pursuers*, brought an