

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

action against Campbell D. Macphail, commercial traveller, Glasgow, *defender*, for payment of the sum of £110, 8s. 8d.

The pursuers averred, *inter alia*—“(Cond. 2) For a number of years prior to 1908 the defender was a commercial traveller in the pursuers’ employment. In 1908 he was sent by the pursuers on a journey to the West Indies, in the course of which he collected accounts due to the pursuers by certain of their customers to the amount of £110, 8s. 8d., and, without authority from the pursuers, retained and used the same for his own purposes, and failed to pay the amount thereof to the pursuers as he ought to have done. On account of this the pursuers proposed, in November 1908, to discharge the defender from their employment, but on his granting to the managing director of the pursuers a letter acknowledging that he had so acted, and had so appropriated to his own uses money belonging to the pursuers to the extent forecast, and on his agreeing to make repayment thereof, the pursuers retained him in their employment. The letter above referred to is in the following terms:— . . . ‘Dear Sir—I beg to acknowledge the fact that I have used the company’s money in my recent journey to the West Indies to the extent of £110, 8s. 8d., having collected the accounts enumerated hereunder on behalf of the company.’ [Then followed a list of accounts, amounting in all to £110, 8s. 8d.] ‘I beg to assure you that the foregoing names and amounts cover all the accounts collected, and that I have not pledged the company’s credit in any way, nor personally have I borrowed any sum or sums from customers or others. I now appreciate the seriousness of my conduct in collecting this money and using it for my own purposes without your authority, and I beg to express to the directors my gratitude for their kindness in not prosecuting me. I agree to pay back the sum owing as quickly as possible out of my commission account, and you are at liberty to so apply commissions to such extent as you consider proper.—Yours faithfully,
‘C. D. MACPHAIL.’

(Cond. 3) On the day following that on which the said letter was granted, namely, on 20th November 1908, the defender further granted to the pursuers a document of debt in the following terms, namely—‘London, 20th November 1908.—I promise to pay on demand to the Lamson Paragon Supply Company, Limited, or order, the sum of one hundred and ten pounds, eight shillings and eightpence value received.—C. D. MACPHAIL, Avoca, Silverdale Avenue, Westcliff-on-Sea.’”

The defender averred, *inter alia*—“(Ans. 2 and 3) Admitted that the defender was in pursuers’ employment as a traveller for seventeen years, that he went to the West Indies on pursuers’ behalf, and that he signed the alleged letter and promissory-note condensed on. *Quoad ultra* denied. Explained and averred that the journey to the West Indies proved more costly than either pursuers or defender anticipated, and that the allowances made by the pur-

suers to the defender for travelling and other expenses were totally inadequate. The expenses necessarily incurred by the defender exceeded the allowance made by the pursuers by the sum of £112, 10s., an amount in excess of the sum alleged to have been collected by the defender on pursuers’ behalf. When defender returned after a five months’ journey he advised pursuers of the extra expense incurred by him on pursuers’ behalf, and explained that no sum was due by him to them. The pursuers, however, without making any inquiries, refused to accept his explanations and declined to admit liability for his expenses, and charged the defender with embezzlement, and threatened him with a criminal prosecution and imprisonment unless he would (first) sign an agreement to remain in their service, and in the event of his leaving their service not to engage in the service of other firms in Great Britain for three years thereafter; (second) an acknowledgment that he had embezzled, and (third) a promissory-note for £110, 8s. 8d. sterling. The defender protested, but the pursuers repeated their threats of a criminal prosecution and imprisonment, and induced the defender through fear thereof to sign (1) a memorandum of agreement dated 20th November 1908, (2) the alleged letter of 19th November 1908, and (3) the alleged promissory-note. The defender was terrorised by the threat of a criminal prosecution and imprisonment, and his signature to the said documents was extorted from him by fear. No consideration was given by the pursuers for said documents, but the pursuers hoped to obtain the advantage of retaining him permanently in their service by endeavouring to exclude him, if he should leave their employment, from following the only occupation with which he was acquainted.”

The pursuers pleaded, *inter alia*—“(1) The defences being irrelevant, should be repelled.”

The defender pleaded, *inter alia*—“(6) The alleged documents of debt having been granted for an illegal consideration, or without any consideration, the defender is not liable in respect of any liability alleged to be constituted thereby.”

On 18th October the Lord Ordinary (HUNTER), having heard counsel for the parties in the procedure roll, decerned against the defender in terms of the conclusions of the summons.

Opinion.—[After narrating the facts and dealing with certain contentions of the defender with which this report is not concerned]—“The other way the case was presented was this. Mr Jamieson said—Assume that my client embezzled the money, this letter is an agreement to compound a felony, and you cannot therefore sue upon it, because the agreement is in the nature of a *pactum illicitum*. In the course of his argument he cited certain English cases. Mr Lippe referred me to three cases which I think have a bearing upon this matter. In the first place, there is a case of *Ferrier v. Mackenzie*, where in somewhat similar circumstances a plea

that an agreement was a *pactum illicitum* was repelled and certain remarks were made with reference to what amounts to *pactum illicitum*. But in the English cases, namely, *Ward v. Lloyd*, 7 Scott, N.R. 499, and *Flower v. Sadler*, (1882) L.R., 10 Q.B.D. 572, I find statements made by the English Judges as to the circumstances in which a plea founded upon such an alleged *pactum illicitum* may be sustained, and applying what was said by the Judges there I think it is perfectly clear that there is no relevant averment of such an agreement here.

"In the case of *Flower* Lord Coleridge said this—'A creditor may use strong expressions and even threats; and it was held in *Ward v. Lloyd* that strong language is not conclusive evidence of an agreement to compound a felony or to stifle a prosecution.' He also referred to a statement made by Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber in a previous case, where he said—'We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit.' Looking to the pleadings of the defender, I do not think that there is any averment to the effect that there was an agreement not to prosecute. The letter itself does not bear to be an agreement not to prosecute, and the averments amount merely to this, that there was a threat to prosecute, and a repetition of the same threat.

"On the whole matter, I am of opinion that the averments of the defender are irrelevant, and that the pursuers are entitled to decree as concluded for."

The defender reclaimed, and argued—The defender had not embezzled the money, but assuming that he had done so, the acknowledgment of indebtedness granted by the defender could not be founded on by the pursuers. The pursuers had coerced the defender into a bargain whereby they on their part undertook to abstain from prosecuting him on condition that he on his part granted the acknowledgment of indebtedness. But a bargain of that sort was a *pactum illicitum*, and all obligations arising out of it were null and void. It made no difference whether the bargain was to suppress a prosecution or, as was the case here, to abstain from instituting proceedings—Bell's Prin., sec. 41; *Ferrier v. Mackenzie*, February 22, 1899, 1 F. 597, 36 S.L.R. 421; *Kennedy v. Cameron*, February 7, 1823, 2 S. 192. In England it was a crime to compound a felony—*Flower v. Sadler*, 1882, 9 Q.B.D. 83, *affd.* 10 Q.B.D. 572; *Williams v. Bayley*, 1866, L.R., 1 H.L. 200; *Ward v. Lloyd*, 1843, 7 Scott N.R. 499—and in Scotland the law was the same. The averments of a *pactum illicitum* need not be express—*Keir v. Leaman*, (1846) 9 Q.B. (Ad. & E.) 371—and in the present case the defenders had sufficiently averred a *pactum illicitum*, inasmuch as he averred that there was a

threat to prosecute, and that his granting the acknowledgment of indebtedness was the outcome of the threat.

Counsel for the respondents were not called upon.

LORD DUNDAS—It is not necessary to call upon the counsel for the pursuers, for we are all of one mind in thinking that the interlocutor reclaimed against is right. For my own part the grounds of the Lord Ordinary's judgment are so fully and clearly set out in his opinion that I am not disposed to add much to what he has said. [*His Lordship then considered certain pleas of the defender not dealt with in this report.*] There remains the point which was most argued before us, namely, that the letter amounts really to an agreement to compound a felony, is a *pactum illicitum*, and that the pursuers cannot sue upon it. On that point I do not think any consideration has been adduced or any authority cited that is not covered by what the Lord Ordinary has said. It is sufficient to say that I look in vain in this record for an averment that there was an agreement or bargain not to prosecute. I think the Lord Ordinary is quite right when he says—"Looking to the pleadings of the defender, I do not think there is any averment to the effect that there was an agreement not to prosecute. The letter itself does not bear to be an agreement not to prosecute, and the averments amount merely to this, that there was a threat to prosecute and a repetition of the same threat." If that is so, and I think it is, there is no need to hazard any opinion as to what would have been the position if an averment had been made which is not made; and I shall reserve my opinion on that matter until the question requires to be decided.

There is one point of a separate nature on a matter of pleading. I am surprised to notice that the pursuers' first plea-in-law in this record is that the defences are irrelevant. Now that is bad pleading. We sometimes see it in records from the Sheriff Court, but I confess I am surprised to see it in a record presumably drawn by learned counsel. The plea of relevancy may properly be put in the forefront by a defender, but it surely cannot, in logic or in substance, form the first plea or the principal ground of judgment for a pursuer. He must state or plead a *prima facie* case apart from anything that is to be said against it. I merely call attention to this because I think it is bad pleading, and hope it will not become common.

I move your Lordships that the Lord Ordinary's interlocutor be adhered to.

LORD SALVESEN—I am of the same opinion. The claim in this action is for a sum of £110, 8s. 8d., with interest from the date of citation. This claim is vouched by an acknowledgment admitted to be under the hand of the defender, and unless there is some reason for setting aside that acknowledgment the pursuers are entitled to get decree in terms of it. Now I look in vain for any pointed defence to the effect that that sum was never due. The

pursuers say that it represents the amount of certain accounts belonging to them which the defender uplifted and applied to his own purposes. The defence on the merits is to the effect that the defender was obliged to expend that sum—and I see no question is raised as to the amount—because he had incurred expenses in travelling on behalf of the pursuers in excess of the amount which he had in hand. But then he does not go on to say that these expenses were payable by the pursuers, and there is a probative agreement produced which shows that he was to pay his own expenses of the journeys, and that the employers were only to advance £50 to account of these expenses, the assumption being that he would be able to earn so much commission that he would have enough to meet his expenses and a reasonable remuneration to himself. There is thus no substantial defence to the effect that this amount which the pursuers claim, and which admittedly consists of certain specified accounts which the defender collected in their behalf, was not due to them at the time the acknowledgment was given.

But then it is said—and this also involves an admission of the collection of these accounts—that in consequence of what the defender had done in appropriating these sums to his own purposes he was threatened with a criminal prosecution for embezzlement, and through fear of a criminal prosecution was induced to sign this acknowledgment. It is further said that the acknowledgment is accordingly tainted, and being the result of a *pactum illicitum* cannot be founded upon. Speaking for myself, I doubt very much whether it is a crime by the law of Scotland for an employer to say to an employee who has embezzled his money, "If you will make up the amount which you have taken from me I will not prosecute you." I do not think it is reasonable to suggest that that constitutes a crime, whether you give it the name of compounding a felony or whatever name you give it. It seems to me that an employer who takes that line acts humanely and is not acting wrongly, far less criminally. The crime that has been committed has injured the employer only, and there is no duty laid upon him in the public interest to give information to the police. But it is not necessary to decide that in this case. It may be a different matter if the employer, using his knowledge that a crime has been committed, gets some benefit to himself—extorts something from the employee to which he is not entitled. That would present an entirely different case to my mind. But that is not the allegation here, and such a defence, as your Lordship in the chair has pointed out, can only arise if there is a relevant averment of an agreement on the part of the employer in respect of certain pecuniary considerations not to prosecute at all. Now I fail to find any proper averment of such an agreement. It may be that in the present case it was the expectation of the employee and the intention of the em-

ployer that there would be no prosecution, but in order to make a *pactum illicitum* there must have been a definite bargain to that effect, and I do not find that there is any proper averment of such a bargain. The circumstances here averred, indeed, seem to me to fall short of what was proved in the case of *Ferrier v. Mackenzie*, where it was held that a bargain had not been established so as to bring into operation the law which exists in England—whether it exists in Scotland or not is still an open question—with regard to compounding a felony. It is certainly a remarkable circumstance that a prosecution for the crime of compounding a felony has never, so far as we know, taken place in Scotland, and there are excellent reasons why, in a country where the conduct of the prosecution of crimes is entrusted to a public prosecutor, it should not be necessary to create a more or less artificial crime the purpose of which in England seems to be to stimulate the activities of private prosecutors. But I say nothing further on this subject.

I agree generally with the grounds upon which the Lord Ordinary has decided the case, and with these additional observations which your Lordship in the chair has made.

LORD GUTHRIE — I am of the same opinion, and I concur in thinking that the important general question which Mr Macquisten raised does not arise on the pleadings for decision. That question, as I understand it, is this—whether an agreement to refrain from criminal prosecution in return for payment of money due amounts to a *pactum illicitum* by the law of Scotland. At first sight it would look as if in *Ferrier's* case the affirmative of that proposition was assumed by the judges who decided it. I do not think this is so. Certainly the Sheriff-Substitute and the Sheriff, holding the averments relevant—that does not seem to have been questioned—seem to have proceeded on that assumption, but when one examines the opinions in the Inner House three of the Judges quite distinctly say they reserve their view on that question. Lord Young says—"If we came to the conclusion that a criminal offence had been committed by Alexander, I think that it may be according to the rule of our law—although no instance of it as far as I know has occurred in practice—that this promissory-note cannot be a ground of action in a court of law." Lord Trayner says—"I abstain from saying anything on the question as to whether an engagement to refrain from criminal prosecution in return for payment for the loss incurred through the alleged crime would amount to a *pactum illicitum*." And Lord Moncreiff says—"I think it is sufficient for the judgment to hold that the defender has not proved that the bill was obtained in return for an agreement to abstain from a criminal prosecution against his brother." Lord Moncreiff adds a striking sentence showing how far the proof in that case went, and yet it fell short of proving an

agreement. He says—"I even think that the defender signed the bill in order to ensure his brother not being prosecuted, but, as I have said, there is no proof of any bargain."

It seems to me that the Lord Ordinary has come to the right conclusion when, without finding it necessary to decide the general question, he has held that, supposing such an agreement would have the effect contended for by Mr Macquisten, no such agreement has been relevantly averred.

The LORD JUSTICE-CLERK was absent, being engaged in the High Court of Justiciary.

The Court adhered.

Counsel for the Reclaimer (Defender)—Macgregor—Macquisten. Agents—Hume, Macgregor, & Company, S.S.C.

Counsel for the Respondents (Pursuers)—Horne, K.C. — Lippe. Agents—W. & J. Burness, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, September 11.

(Before Lord Johnston and a Jury.)

H. M. ADVOCATE *v.* HIGGINS.

Justiciary Cases — Murder — Insanity — Insanity at Time when Crime Committed — Impaired Mental Condition of Panel not Amounting to Insanity — Mental Condition as an Extenuating Circumstance Reducing Offence to Culpable Homicide.

At the trial of a person charged on indictment with murder, *direction* (per Lord Johnston in charging the jury) that impaired mental condition of a panel at the time of the offence which did not amount to insanity was not an extenuating circumstance which would entitle the jury to return a verdict of culpable homicide instead of murder.

Dicta of Lord Deas in *H. M. Advocate v. Dingwall*, September 19, 1867, 5 Irv. 466, commented on.

Patrick Higgins was charged on indictment with the murder of his two sons. The indictment bore that the crime was committed between 25th October 1911 and 1st January 1912.

The panel pleaded not guilty, but a special defence was stated to the effect that he was insane at the time when it was alleged that the crime was committed.

The panel was tried before Lord Johnston and a jury on 11th September 1913.

LORD JOHNSTON—[*After reviewing the evidence on the question as to whether the Crown had succeeded in proving that the crime charged had been committed on a date within the limits of time taken in the indictment*].—If the panel does not succeed in this incidental defence, the ques-

tion for you to determine is whether he is guilty or not guilty of the crime charged. . . . On considering the whole evidence you will make up your minds whether the boys' deaths were caused by their father, the panel now under trial. If so, it is for you to say whether he is guilty as libelled—that is to say, guilty of murder. But it is my duty at the same time to tell you that if there are no extenuating circumstances proved in evidence the crime is one of murder in the eye of the law, unless you are satisfied that in the condition of the panel's mind he was at the date of the act insane, and therefore not responsible for his actions. Now I would tell you at once that there is not a single circumstance in the case which could conceivably be regarded as of an extenuating or exculpatory character, unless there is any force in the concluding argument advanced by panel's counsel. But by the line which counsel took considerable difficulty has been thrown in the way of the simple disposal of the case. A special defence of insanity at the date of the crime charged was lodged, but it was not persisted in by counsel, and the evidence led by him and the burden of his speech to you all went to support something less than insanity, and which is represented as an extenuating though not an exculpatory circumstance.

Panel's counsel did not, however, withdraw the plea of insanity, and I am by no means clear that it was within his mandate to do so, or that once such plea is tabled it can be disposed of except by the jury; and I think that, if not necessary, it is at least safer that it be so disposed of by you.

Now with regard to the question of the sanity of an accused person, I have to tell you that if a panel is found by the jury to be insane at the date of trial, the trial cannot proceed further. The jury find to that effect, and the panel is then detained in custody during His Majesty's pleasure.

On the other hand, if the jury are satisfied that the panel is sane at the time of the trial, and therefore can plead, but that he was insane at the date of the crime alleged, then even though he did the deed he cannot be convicted of the crime by reason of his insanity, and therefore irresponsibility for his actions. In that case the jury in acquitting him are bound to declare that they acquit him on account of his insanity, and he is then in the same way detained during His Majesty's pleasure. All this is statutory.

You are not called upon directly by the panel to consider whether he is sane at the date of the trial—that is, at the present moment—and I do not wish to suggest to you that there is any real question on that point. I only tell you that it is within your competency to consider it. But you are, as I have said, called upon to consider whether he was sane at the date of the act charged in respect of the special defence of insanity lodged by him, and I must therefore ask you, when you return your verdict, to inform me whether in your opinion this special defence, though