

The Court adhered.

Counsel for Pursuer—Constable, K.C.—Black. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defenders—Solicitor-General (Morison, K.C.)—Pitman. Agent—John S. Pitman, W.S.

Tuesday, March 17.

## FIRST DIVISION.

[Sheriff Court at Glasgow.]

KEEVANS v. MUNDY.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—Memorandum of Agreement—Recording though Workman offered Same Wages as before Accident.*

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—Compensation—Wage-Earning Capacity—Workman Refusing Light Work at Same Wages.*

A workman who had sustained injuries which totally incapacitated him from work agreed with his employer to accept compensation at 9s. 6d. a-week during his incapacity for work. He was paid compensation at that rate from 3rd December 1912 to 20th March 1913, when—though he had not completely recovered—his employer offered him light work, for which he was then fit, at the same wages as he was earning before the accident. This offer the workman refused. In an application at his (the workman's) instance to have a memorandum of the agreement recorded, the arbiter found that in respect of the employer's offer the workman was not entitled to have the memorandum recorded, and ended compensation as at 20th March 1913—the date of the employer's offer.

*Held* that as the workman had not completely recovered as at the date of the employer's offer the arbiter's proper course was to have ordered the memorandum to be recorded, but in respect of the employer's offer of light work at the same wages as the workman was earning before the accident, *hoc statu* to have suspended further procedure.

*Held further* that the workman was not entitled to refuse the employer's offer of light work, for which he was then fit, and for which he would have received the same wage as he had been earning before the accident, and that accordingly he was not entitled to compensation during the period embraced by the offer.

James Keevans, labourer, Kelvinhaugh, Glasgow, *claimant and appellant*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from his employer, John Mundy, engineer, Glasgow, *respondent*, in respect of personal injuries sustained by him on 19th November

1912 by accident arising out of and in the course of his employment, which had totally incapacitated him. The amount of compensation was determined by agreement made on 3rd December 1912, which, *inter alia*, provided—"That the respondent should pay compensation to the claimant from the date of the accident at the rate of nine shillings and sixpence sterling per week, to continue during the claimant's incapacity for work or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act."

The claimant having made application to the Sheriff-Clerk to have a memorandum recorded, the respondent lodged a minute of objections in which he craved the Court "To find that the said James Keevans . . . has now recovered from his incapacity for work, and is able to resume work and to earn the same wages as he did before the accident to which the said memorandum of agreement relates, and was so able to resume work as at the 20th day of March 1913, and that the compensation should be ended as at that date; and that the said memorandum is accordingly unnecessary and ought not to be recorded; and to direct the Sheriff-Clerk accordingly."

The Sheriff-Substitute (FYFE) having refused to order the memorandum to be recorded, and having ended compensation as at 20th March 1913, the claimant appealed.

The facts proved were as follows:—(1) That the appellant was employed as a general labourer with the respondent, and was earning an average weekly wage of 19s. (2) That on 19th November 1912, in the course of his employment, appellant was engaged at the roofing of buildings within Harland & Wolff's yard at Govan. (3) That on said date he fell a distance of about 20 feet, and thereby sustained injury, which then incapacitated him for work. (4) That the respondent paid the appellant agreed compensation at the rate of 9s. 6d. a-week from 3rd December 1912 up to 20th March 1913. (5) That on or about 20th March 1913 the respondent offered to give the appellant employment at the same wage as he had been earning before the accident, commencing him with light work. (6) That the appellant was then fit for the employment so offered. (7) That he refused it."

The Case further stated—"I found in law that in respect the appellant had been paid compensation up to 20th March 1913, and was then offered employment which he was fit for at the same wages as he had had before the accident, recording the memorandum was unnecessary. I therefore refused to order it to be recorded, and ended the compensation as at 20th March 1913, and found no expenses due to or by either party."

The question of law was—"On the facts found proved was I entitled to refuse to order the memorandum to be recorded, and to end the compensation payable to the appellant as at 20th March 1913?"

On 15th November 1913 the Court *hoc statu* recalled the determination of the Sheriff-Substitute as arbitrator and re-

mitted to him to consider and decide, *inter alia*, whether the wage-earning capacity of the appellant was at 20th March 1913 as good as before the accident.

On 20th December 1913 the Sheriff-Substitute after further proof pronounced the following findings:—"Finds in fact . . . (5) that at 20th March 1913 the claimant was not yet fit for the work of a labourer, at which he had been engaged before the accident, but he was fit for the lighter work of a spare job man, for which he was offered the same wage of 19s. as he had been paid whilst engaged as a labourer; (6) that at 20th March the claimant refused this offer of work as a spare job man; (7) that by 20th August 1913 the claimant was fit for the work of a labourer, and obtained employment as such at a higher wage than 19s.: Finds further in response to the remit from the Court of Session of 15th November 1913, that in respect before the accident he had been earning 19s. per week, and that at 20th March 1913 he was offered employment for which he was fit, which would also have enabled him to earn 19s. per week, the wage-earning capacity of the claimant was at 20th March 1913 as good as before the accident; . . . Finds therefore in the circumstances that the claimant is not entitled to have a memorandum of agreement recorded, and refuses to order the recording thereof."

Argued for appellant—The arbiter was in error in refusing, as at 20th March 1913, to record the memorandum, for ability to perform light work was not evidence of complete recovery. The fact that the workman was offered the same remuneration as before the accident did not necessarily exclude his claim under the Act, and the arbiter ought therefore to have preserved his right of recourse by making a declaration of the employers' liability, *i.e.*, by recording the memorandum—*Freeland v. Macfarlane, Lang, & Company*, March 20, 1900, 2 F. 832, 37 S.L.R. 599; *Fraser v. Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 653; *Clelland v. Singer Manufacturing Company*, July 18, 1905, 7 F. 975, 42 S.L.R. 757; *Coakley v. Addie & Sons, Limited*, 1909 S.C. 545, 46 S.L.R. 408; *Ball v. William Hunt & Sons, Limited*, 1912 S.C. (H.L.) 77, note, 49 S.L.R. 711; *Popple v. Frockingham Iron and Steel Company*, [1912] 2 K.B. 141; *Smith v. Petrie*, May 20, 1913, 50 S.L.R. 749. Though the workman would have received, had he accepted the offer of light work, the same remuneration as before the accident, he would not have been earning the same "wages" in the sense of section 9 of the Second Schedule to the Act, for part of the remuneration would have been charity. What the arbiter had to consider was his earning capacity in the open market—*Birmingham Manufacturing Company v. Dudley*, (1910) 3 B.C.C. 169. It lay on the employer to satisfy the arbiter that the workman had completely recovered—*Cory Brothers & Company, Limited v. Hughes*, [1911] 2 K.B. 738. A workman was not bound to accept an offer of light work—he was entitled to do nothing and draw his compensation—*Clelland (cit.)*, per Lord

M'Laren at p. 983; *Malcolm v. Bowhill Coal Company, Limited*, 1910 S.C. 447, 47 S.L.R. 449.

Argued for respondent—The question was now academic, for the appellant had completely recovered. Where, as here, the employer had a good answer to the workman's demand to have the memorandum recorded, *viz.*, his offer of light work—the workman was not entitled as at that date to have it recorded *de plano*—*M'Ewan v. William Baird & Company, Limited*, 1910 S.C. 436, 47 S.L.R. 430; *Hanley v. Niddrie and Benhar Coal Company, Limited*, 1910 S.C. 875, 47 S.L.R. 726; *Popple (cit.)*; *Petrie (cit.)*. The terms of section 3 of the First Schedule to the Act clearly implied that a workman was not entitled to refuse light work for which he was fit. That being so the proper course for the arbiter was, no doubt, to have recorded the memorandum, but at the same time to have superseded extract, or, in other words, suspended payment of compensation—*Irons v. Davis & Timmins, Limited*, [1899] 2 Q.B. 330; *Chandler v. Smith*, [1899] 2 Q.B. 506; *Furness, Withy, & Company v. Bennet*, 1910, 3 B.C.C. 195; *M'Namara & Company, Limited v. Burt*, 1911, 4 B.C.C. 151; *Higgs & Hill, Limited v. Unicume*, 1913, Gordon's Workmen's Compensation Cases, 263; *Gray, Dawes, & Company v. Reed* (1913), *op. cit.* 127.

LORD PRESIDENT—The whole procedure in this case seems to me to have been deranged, and can only be put in order by revision from beginning to end. The facts, as they are now disclosed to us by the Stated Case and by the report which we have from the learned Sheriff-Substitute on a remit from us, are comparatively clear and simple. The precise chain of events was as follows:—On the 19th November 1912 the workman was the victim of an accident which arose out of and in the course of his employment. His employers acknowledged liability and made an agreement with the workman, on 3rd December 1912, by which they became bound to pay him compensation at the rate of 9s. 6d. per week, to continue during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the Act.

Now, as I pointed out in the course of the discussion, it is obvious that this agreement was made with reference to the provisions of the statute, and that the expression "during the claimant's incapacity for work" is elliptical, and the ellipsis must, I think, be supplied thus—"total or partial, due to the result of his injury." By the 20th March 1913 apparently his employers had come to the conclusion that he was completely restored from the effect of his injury, and was not only in a position to receive 19s., but was able to earn it—was worth the money. But on that date, as the Stated Case expressly bears, the employer offered to give the workman employment at the same wage as he had been earning before the accident, commencing him with light work. Now that offer was not clogged, so far as we see, with any condition of any

kind. If the workman accepted the employment and found later that the result of his injury had not ceased and that he was not fit really to earn 19s. a-week, or if the employer had ceased to pay him 19s. a-week on having discovered that he was not able to earn that money, the workman would of course have been entitled to go to the arbitrator and ask that his agreement should be registered, and that the compensation should be resumed which had been fixed in the agreement. But, as the Stated Case expressly bears, that offer of full wages with work, for which it was found that the workman was quite fit physically, was refused, and on the following day, the 21st March, the memorandum which we have before us was apparently framed, and application was made on the 22nd to the Sheriff-Clerk to record it.

Now when the case was called in Court on 7th April 1913 the employer gave in a minute craving the Court to refuse to register the memorandum on the ground that the workman had recovered from his incapacity for work, and that he was, as at 20th March 1913, quite able to resume his former employment and to earn the same wage as he had before the accident, and he accordingly craved the arbitrator to end the compensation as at that date, namely, 20th March 1913.

It is apparent from the way in which the minute is framed that the employer on 7th April retained the view which he had formed on the 20th March—that the workman had completely recovered from the effects of his accident, that there was no partial incapacity remaining, and that he was able to earn his full wages.

In these circumstances the Sheriff-Substitute took the view that if the workman was receiving the 19s. a-week—the same wage as he had received before the accident—that proved finally and conclusively that his incapacity had ceased, and accordingly he refused to order the agreement to be recorded and ended the compensation. Thereupon the workman brought an appeal to this Court, and invited us to send back the case to the Sheriff-Substitute in order that he might investigate the facts and find out upon the evidence whether or no the employer's contention was well-founded—that the results of the injury had ceased altogether. We acceded to that request. We sent back the case to the Sheriff-Substitute, and we now have before us his findings and conclusions upon that all-important fact. They are clear and decisive. At 20th March 1913 the workman was not completely restored from the effects of the injury due to his accident. Whereas prior to his accident he had been employed as a general labourer, earning 19s. a-week, on the 20th March, in consequence of his accident, he was not fit for the work of a labourer, and was only fit for the lighter work of a spare-job man.

Now if the Sheriff-Substitute had undertaken that investigation at the prior stage of the case, there can be no doubt what the proper order for him to pronounce was. If he had come to the conclusion which he has reached on the evidence led, he ought to have

ordered the memorandum to be recorded, but in respect of the offer made by the employer to give the man full wages, superseded consideration of the employer's minute—refused, in short, to consider the question of compensation or the continuance or the reverse of the agreement which he had ordered to be recorded. The course which the learned arbitrator thought proper to take was, I am of opinion, entirely wrong. He ought not to have ended the compensation; he ought not to have refused to order the memorandum to be recorded; and accordingly I come, without hesitation, to the conclusion that, upon the question of law which is submitted to us, namely, whether on the facts proved the arbitrator was entitled to refuse to order the memorandum to be recorded, and to end the compensation payable to the appellant as at 20th March 1913, our answer ought to be in the negative.

But we have still to consider what is the position of a workman who is offered by his employer full wages for light work, and whether or no he is entitled absolutely to refuse that offer and to demand that compensation should continue to be paid in terms of the agreement. I am of opinion that a workman is not entitled to refuse such an offer as that; and the way in which I look at the question is this—when the arbitrator comes to consider the question of the amount of compensation to be paid under the statute for partial incapacity, he is enjoined by the 16th section of the First Schedule to strike a balance, as it were, between the amount of the wage which the workman was able to earn, and did earn, prior to the accident, and the amount of wage which he is able to earn subsequent to the accident. By "able to earn" I mean not merely that he is fit for and worth the amount that is offered to him, but that that amount is offered to him for the work which he is able to perform, and having struck that balance the arbitrator is enjoined to have the difference in view in awarding compensation. In this case the amount of the wage which the man was able to earn before the accident was precisely equal to the amount of the wage he was able to earn after the accident by his employer's offer; and therefore the arbitrator was not entitled, in my opinion, having in view the provisions of the 16th section, to award any compensation in the meantime.

The situation therefore now is, that we have to consider the practical question whether or no the workman is to have his compensation from the 20th March till the 20th August, when, it is conceded, his capacity was fully restored, and that he suffered no further from the injury he had received. I think he ought not to have any compensation during that period. He might, if he had chosen, have been earning full wages at light work, for which he was physically quite fit. At 20th August, as I have said, the incapacity totally ceased, and therefore it is wholly unnecessary to record the memorandum. But the conclusion at which I arrive is, that although we do not direct the memorandum now to be recorded, we

find that as at 20th March 1913 the proper procedure for the arbitrator was to ordain it to be recorded, and, for the reasons I have given, to sist further procedure in the case meanwhile.

LORD JOHNSTON—I concur in the judgment which your Lordship proposes. The question before us is really, when it is reduced to its practical form, whether from 20th March to a certain date in August this workman is to be entitled to his compensation as if the agreement which he had made with his employer was then in force. That question it seems to me can only be determined in favour of the workman upon charitable considerations, and I regret to say that I do not think such considerations are applicable in construing this statute. There was a time when the matter of compensation for injury was in very many cases settled in an amicable and friendly way between employer and workman. The Legislature stepped in with this Act, or its predecessor, and made all that statutory. And the statute unfortunately places master and workman now in hostile camps at arm's length. As such we find them, and on that footing we have to reach a conclusion.

The workman here, who was *in petitorio* in the matter, made at first a decided error, and for that I think he cannot throw responsibility upon his employer. He was offered employment at a wage equal to his former wage. It was open to him to accept that offer on condition—on condition, namely, that his right to raise the matter of his compensation under altered circumstances was not to be foreclosed. He did not take that course. He gave the offer an absolute refusal. He thus put his claim off the rails, and he cannot throw responsibility for that upon either his opponent or the Sheriff-Substitute, although both of them I think have gone wrong at different points. It was open to the workman to take the proper course at any period of the proceedings, but not having done so I do not think he can complain if he has to take the consequences.

I agree with your Lordship that we must proceed upon the statute alone, and that we cannot therefore take a course which would give the workman his compensation just as if he had adopted the right course from the beginning.

LORD MACKENZIE—I am of the same opinion. There were two matters before the Sheriff-Substitute in this case—one, the application to have the memorandum of agreement recorded. That was presented on the 22nd March 1913. The other was raised by the minute of objection to the recording of the memorandum, which was lodged by the employer on 7th April 1913.

Upon the question whether the workman was entitled to have the memorandum recorded or not, I am clearly of opinion that he was, and that for the grounds stated by the Sheriff-Substitute in his interlocutor of 20th December 1913, from which it appears that at 20th March he had not recovered his earning capacity. Before the accident he had been fit for the work of a labourer.

As at 20th March he was unfit for the work of a labourer; he was only fit for work as a "spare-job" man. That being so, it was the duty of the Sheriff-Substitute to record the memorandum. I consider it of great importance, in the interests of the workman, that this rule should be clearly kept in view—a rule which has been established in more than one case—because thereby the liability of the employer is fixed and continued, whatever the effect of that liability may subsequently be as regards payment in cash.

It is no longer matter of dispute that by 20th August the workman had completely recovered his earning capacity. That is established by the terms of the minute lodged for the appellant, in which the fact is admitted. I do not think that in these circumstances the provisions of section 16 of Schedule I give any additional right to the workman in this case, who we are told is a minor, although that is not stated in the proceedings. I do not think that a workman who is a minor has any other rights under the provisions of that section in consequence of his being a minor than those of an ordinary workman if he has completely recovered.

The question, however, in this case is, what is the position of matters between the 20th March and the 20th August. The workman's contention was that he was entitled to refuse the work offered to him at the wage of 19s., which was as much as he was making before the accident, inasmuch as, according to his contention, part of that was not being earned, part being of the nature of charity and part only of wages which he was able to earn, and that accordingly he was entitled to take up the position that he would do nothing, but that he was entitled to receive the 9s. 6d. per week during this period. I am of opinion that the workman was not entitled to take up that position. Whatever be the relevancy of the question whether the wages are being earned or are merely being paid without being earned, in considering whether the payment is to be terminated or whether it is merely to be suspended, I do not think it admits of doubt that the employer's offer is a relevant consideration for the arbitrator to have in view in discharging his duty under the 1st Schedule, the 3rd section of which says this, that "in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." Such an offer is a relevant element to be considered, and if it be the case that the workman is in point of fact in a position to earn as good wages after the accident as before, then I think the consequence that necessarily follows is that it is the duty of the arbitrator to end the compensation *hoc statu*, or, to use another phrase, to suspend it. By that

means the workman is completely safeguarded. He runs no risk by accepting employment, even if he is not actually earning all the wages that are being paid, because if he loses his job from any cause, either by action of the employer or any other reason whatever, if it be the case that in consequence of the accident he is still suffering from the injuries and is thereby unable to earn as good wages as he was before, then the liability of the employer having been established by the memorandum having been recorded, the workman's right to exact payment of compensation under that ascertained liability is merely suspended.

It appears to me that if the workman is a loser in this case, it may have been from the fact that the law about the time when these applications were made was, perhaps, not so well cleared up as it has been by the recent judgments of the House of Lords, and although the judgments were pronounced prior to the actual dates in question, the result of the decisions may not have been so fully reported as to bring them before the legal profession. We cannot consider any questions of equity if the provisions of the statute are clear and distinct. I think, therefore, that the result reached by your Lordships is the only one which is open to us on the facts of this case, on the terms of the statute, and as the result of the authorities which have been referred to.

LORD SKERRINGTON—I agree.

The Court pronounced this interlocutor—

“Find in answer to the question of law in the case, that as at 20th March 1913 the proper procedure in the cause was for the arbitrator to have ordered the memorandum to be recorded, but in respect of the employer's offer of light employment at 19s. a-week, *hoc statu* to have sisted further procedure: Further find that in respect it is admitted that the appellant has completely recovered from the results of the accident, it is unnecessary that there should be any further proceedings in the arbitration process: Find no expenses due to or by either party, and decern.”

Counsel for Appellant—Fenton. Agent—T. M. Pole, Solicitor.

Counsel for Respondent—D. P. Fleming. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, March 20.

## FIRST DIVISION.

(SINGLE BILLS.)

### MACARTHUR v. MACKAY.

*Process—Company—Reclaiming Note—Competency—Winding-up of Company—Note not Timeously Presented—Companies Consolidation Act 1908 (8 Edw. VII, c. 69), sec. 181 (3).*

The Companies (Consolidation) Act 1908, sec. 181, provides with regard to appeals from orders made in the winding-up of a company—“(3) Provided also, in regard to orders or judgments pronounced in Scotland by a permanent Lord Ordinary to whom a winding-up has been remitted, that any such order or judgment shall be subject to review only by reclaiming note in common form, presented within fourteen days from the date of the order or judgment. . . .”

*Held* (after consultation with the Second Division) that sub-section (3) was imperative and not directory, and that accordingly a reclaiming note which had not been presented until after the expiry of the fourteen days was incompetent.

On 24th May 1913 J. R. Mackay, C.A., Glasgow, liquidator of the Motor Brougham and Cab Company, Limited, presented a note to the Lord Ordinary in the liquidation for approval of the “A” list of contributories, in which the name of the respondent A. J. MacArthur was entered as a shareholder. The respondent having lodged answers, in which he submitted that his name had been wrongfully included, the Lord Ordinary (CULLEN) on 12th February 1914 sanctioned the list. MacArthur reclaimed, the note being boxed on 5th March 1914.

On the note appearing in the Single Bills of 6th March 1914, counsel for the liquidator objected to its competency on the ground that it had not been presented within fourteen days as required by section 181 (3) of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69).

Argued for reclaimer—The provisions of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 181 (3), were directory and not imperative, and the Court therefore had power to dispense with the regulation. The Court had construed section 18 of the Judicature Act 1825 (6 Geo. IV, cap. 120), which was in equally imperative terms, as merely directory—*Burroughes & Watts, Limited v. Watson*, 1910 S.C. 727, 47 S.L.R. 638. The liquidator had suffered no prejudice, and the note therefore should be received.

The LORD PRESIDENT intimated that the Court would consult with the Second Division before disposing of the reclaiming note.

The note was advised on 20th March 1914, the opinion of the Court being delivered by

LORD PRESIDENT—We have consulted with our brethren of the Second Division