Saturday, January 27.

SECOND DIVISION.

WOODILEE COAL AND COKE COMPANY, LIMITED *v.* M'NEILL.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, sec.* 3—*Partial Incapacity—Review of Amount of Compensation—General Rise in Wages since Accident.*

A miner employed at a colliery was, through contracting an industrial disease arising out of and in the course of his employment, totally incapacitated for work, compensation being by agreement paid him by his employers. He subsequently so far recovered from the disease as to be fit for labouring work on the surface. In an arbitration under the Workmen's Compensation Act 1906 the employers craved the arbitrator to diminish the weekly amount payable by them in respect that the miner's incapacity for work had greatly lessened. The miner contended that the compensation payable to him ought to be increased, the general rise in wages which had meantime taken place being one of "the circumstances" mentioned in section 3 of the First Schedule to the Act. *Held* that, subject to the statutory limitations on the amount, the general rise in wages was a factor which the arbitrator was entitled to consider in assessing the compensation payable in respect of partial incapacity.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, sec. 3, enacts—". . . 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."

An arbitration was held in the Sheriff Court at Dumbarton, under the Workmen's Compensation Act 1906, between the Woodilee Coal and Coke Company, Limited, Lenzie, *appellants*, and John M'Neill, miner, 50 Queen Street, Kirkintilloch, *respondent*, to fix the amount of compensation payable by the appellants to the respondent in respect of partial incapacity for work incurred by the latter, who contracted the industrial disease known as miners' nystagmus whilst in the employment of the former. The appellants being dissatisfied with the decision the Sheriff-Substitute (MACDIARMID) brought a Case for the opinion of the Second Division of the Court of Session.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which the appellants, by minute of review lodged on 14th August 1916, craved the Court to review the weekly payment of 20s. (reduced by unrecorded agreement between the parties to 15s. at 18th May 1915), which under an award of this Court dated 10th July 1914 was payable by them to the respondent, and to diminish as at 7th June 1916 the said weekly payment by such amount as to the Court might seem proper in respect that the incapacity for work of the respondent had become greatly lessened.

"On 2nd October 1916 proof was led before me. A joint-minute of admissions in the following terms was lodged on 28th September 1916:—'With a view to shortening the evidence to be led at the proof the parties admit that the pursuer (respondent) is recovering from the disease of miners' nystagmus, for which he has been paid compensation by the defenders (appellants), and that at and from 7th June 1916 his condition was improved and he has been fit for labouring work on the surface.'

"At the proof the following additional *facts* were either admitted or proved:—1. That the respondent, who was a miner to trade, contracted nystagmus, the date of disablement being 25th March 1914. 2. That at said date his average weekly earnings were 40s. 3. That at labouring work on the surface the respondent was as at said 7th June 1916 able to earn 27s. 6d. per week. 4. That had it not been for his disablement the respondent would in all probability have continued to work as a miner at the face. 5. That since the said date of disablement there had been a general rise in the rate of miners' wages, and that the minimum wage of a miner at the face to-day was 10s. per shift. 6. That had the respondent continued to work as a miner at the face he would now have been earning a weekly wage of considerably more than 55s. per week.

"In these circumstances the appellants *contended* that the compensation payable should be reduced to 6s. 3d., being 50 per cent. of the difference between 40s. and 27s. 6d., the amounts earned before and after the accident respectively. On the other hand, the respondent contended that in fixing the amount of compensation for partial incapacity the amount he would in all probability have been earning had he not contracted nystagmus should be taken into account, and that the rate of 15s. per week should be continued.

"After hearing proof and the arguments of parties I was of opinion, for the reasons set forth in the note appended hereto, that I ought to follow the case of *Bevan* v. *Energlyn Colliery Company*, [1912] 1 K.B. 63, and accordingly I diminished the agreed-on sum of 15s. by the sum of 2s. 6d., and found appellants liable to respondent in compensation at the rate of 12s. 6d. from said 7th June 1916 until further order of Court. I awarded expenses to the respondent, as in my judgment he had been successful in the only material point which was the subject of dispute between the parties at the aforesaid proof."

The *question of law* for the opinion of the Court, *inter alia*, was—"1. Is the general rise in miners' wages a factor which I was entitled to consider in assessing the compensation payable to respondent in respect of partial incapacity?

The arbitrator appended the following *note* to his judgment:—"The workman in this case, who is a miner, contracted in 1914 the industrial disease known as miners' nystagmus. The date of disablement was 25th March 1914, and from that date till 18th May 1915 the defenders paid him compensation at the rate of 20s. per week conform to an award issued by me on 10th July 1914. At 18th May 1915 it was agreed between parties that the compensation should be reduced to 15s. A minute of admissions has been lodged in the present process, from which it appears that parties are agreed that as from 7th June 1916 the workman's condition has been and is such that he is able to undertake labouring work on the surface. The employers accordingly ask that the compensation which they have been paying him since 18th May 1915 should, as at 7th June 1916, be further reduced. It is proved that at labouring work on the surface the workman can earn a wage of 27s. 6d. per week. The employers contend that the compensation should be reduced to 6s. 3d., that is, 50 per cent. of the difference between 40s. and 27s. 6d. The workman on the other hand maintains that when the undisputed fact of the advance in the rate of miners' wages is taken into account no reduction should be made in the sum of 15s. The proof discloses that the minimum wage earned by miners at present is 10s. per shift —that is to say, that by a week's work a miner can earn at least 55s. It is not disputed that had the workman here not contracted miners' nystagmus he would in all probability have to-day been working as a miner at the face, and would have been earning a considerably greater sum than 55s. per week.

"The question therefore is whether or not this undisputed rise in the rate of miners' wages since the date of disablement is one of 'the circumstances of the case' to be taken into account in estimating the amount of the weekly payment to be awarded in respect of the partial incapacity of the workman. There is, so far as I know, no decision on this point by the Court of Session. At any rate no case in point was cited. *Malcolm* v. *Spowart & Company, Limited*, 1913 S.C. 1024, was the case of a minor under Schedule I (16), and does not appear to me to be an authority relative to a case under Schedule I (3). The phraseology of the sections is quite different.

"The workman of course relies on the decision in *Bevan* v. *Energlyn Colliery Company*, [1912] 1 K.B. 63, which, although no doubt not actually binding on me, is a decision of high authority and one therefore which I should be inclined to follow unless strong reason were shown to the contrary. I do not think that has been done in this case. At the same time, without the help of *Bevan* I should have had considerable doubt as to the relevance of a change in the general rate of wages to the consideration of the amount to be awarded as partial compensation under Schedule I (3). There can, as it seems to me, looking to the words of that section and to the decision in *Bevan's* case, be no doubt that an arbiter may not, in awarding partial compensation, go beyond the sum which is the difference between the wage earned before and after the accident. It would also appear that the wage earned before the accident is a fixed and definite sum not subject to variation (what the Master of the Rolls in *Bevan's* case called 'a constant and ascertained fact'); and yet after reading the judgments of the learned judges in *Bevan's* case it does humbly appear to me that that decision came perilously near to substituting for 'the amount of the average weekly earnings of the workman before the accident' of section 3 of the schedule, something else, viz., the amount of the average weekly earnings which the workman would probably have been earning had he not met with an accident. Obviously, however, it is possible to give some effect to the consideration of a rise or fall of wages within the limits of section 3 of the schedule—in other words, without exceeding the difference between the earnings before and after the accident—however disproportionate the sum awarded may be to the difference between the amount the workman is able to earn after the accident and the amount he would have been earning had the accident not occurred.

"It seems clear, indeed is not contradicted, that had the workman here been working as a miner to-day he would, as I have said, have been earning considerably more than 55s. per week, and had it been possible I should, following the decision in *Bevan's* case, have allowed the 15s. at present being paid him to stand. But that may not be, for 12s. 6d., the difference between the wage at the date of accident and the wage he can earn now, is the utmost, as I understand the matter, that he may have. In my opinion he is entitled to that.

"It may be well to add that there was a point raised concerning the amount being made by the pursuer as an insurance agent, but the evidence on the matter was not satisfactory and the defenders did not prove that the pursuer is able to work at this or any other work in artificial light, which of course he would have to do when he commences at labouring work on the surface—that is to say, if he proposes to continue as an insurance agent. The matter was further complicated by the fact that he had been working as a part-time insurance agent at the date of the accident, and that this fact had been inadvertently omitted when the original compensation was fixed. On the proof as it at present stands my view is that it is not proved that the pursuer's condition has so far improved as to enable him to work by artificial light, and that consequently he will have to abandon his work as an insurance agent.

"I think the pursuer has been substantially successful, and that he should have expenses."

The appellants argued—"The circumstances" mentioned in section 3 of the First Schedule to the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) were those which existed at the time when the amount of the award was first fixed. If the Sheriff-Substitute's view was the correct one, the

man might receive more than fifty per cent. of his earnings at the time of the accident, and thus a partially incapacitated man might be put in a better position than a totally disabled man, in whose case compensation was fixed at fifty per cent. of his former earnings. It was not permissible for the arbitrator to take into consideration fluctuation of wages in fixing the amount of his award—Under the 1897 Act (60 and 61 Vict. cap. 37)—*Jamieson* v. *The Fife Coal Company*, 1903, 5 F. 958, *per* Lord Adam and Lord M'Laren at p. 962, 40 S.L.R. 704; *Merry & Cuninghame* v. *Black*, 1909 S.C. 1150, *per* Lord Low, 46 S.L.R. 812; *James* v. *Ocean Coal Company*, [1904] 2 K.B. 213—Under the 1906 Act (*cit.*) —*Ball* v. *Hunt*, [1912] A.C. 496, *per* Lord Shaw at p. 508; *Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009, *per* Lord Justice Fletcher Moulton at p. 1017 and Lord Justice Buckley at 1026; *Radcliffe* v. *Pacific Steam Navigation Company*, [1910] 1 K.B 685, *per* L. J. Buckley, at p. 694. In the case of *Bevan* (*cit.*) supervenient legislation had to be considered: the Act limiting the working day of a miner to eight hours had meanwhile been passed, and that being so eight hours was considered as his normal day's work now, thus reducing his earning powers.

Counsel for the respondent was not called on.

LORD JUSTICE-CLERK—I think that the learned arbitrator has arrived at a sound conclusion, and that the grounds which he has set out for reaching that conclusion are unassailable. The employers here seek to have it declared that a general rise in wages cannot be taken into account so as to entitle the workman to get a higher rate of compensation than he would otherwise have obtained. In the case of *Bevan* v. *Energlyn Colliery Co.*, [1912] 1 K.B. 63, the employers argued strenuously that a general fall in wages ought to be taken into account in order to diminish the compensation, and they were completely successful. It appears to me that the argument which was addressed to the Court in that case is exactly contrary to the argument addressed to the Court in this case—this was, I think, unavoidable—because while in *Bevan's* case the employers desired to get the benefit of the fall in wages, in this case they desire to avoid the disadvantage of a rise in wages.

While the decision in *Bevan's* case is not binding upon us, I think it would be most unfortunate if upon the construction of the statute we were to arrive at a different result from that which the English Court reached. The Master of the Rolls (Cozens Hardy), Lord Justice Fletcher Moulton, and Lord Justice Farwell, who constituted the English Court, all came to the same conclusion with respect to the construction of the new words that had been added to section 3 of the First Schedule to the Act. These words are that the compensation to be awarded to the injured workman "shall bear such relation to the amount of that difference as under the circumstances may appear proper."

These words are, of course, open to construction, but they have never been considered or construed, so far as appears from the argument before us, except in the case of *Bevan*. In that case they were taken to be general in their signification. No doubt the particular circumstance which was there referred to was the fact that the Eight Hours Act had been passed—an Act which seems to have had the effect of reducing wages. Here the circumstance which is to be taken into account is that there has been a considerable increase in wages due in large measure to the war. I cannot find in the reasoning of any of the Judges who took part in *Bevan's* case anything which would make the different circumstance—the war in this case and legislation in the other case—a ground for arriving at a different result. Certainly the Master of the Rolls and Lord Justice Farwell express themselves in quite general terms, and I think also that the opinion of Lord Justice Fletcher Moulton is expressed in such terms as would cover the kind of case we have here.

I think the reasoning of the learned Judges in that case is, if I may respectfully say so, correct, and I think it is in terms wide enough to embrace this case. That being so, I think we ought to come to the same conclusion and answer the question in the affirmative.

LORD DUNDAS—I am of the same opinion. The question raised seems to be novel in Scotland, but it has been decided quite recently by the English Court of Appeal in the case of *Bevan*, [1912] 1 K.B. 63. One would naturally be disposed to follow that case—although of course it is not binding upon us—unless good reason could be shown for coming to the conclusion that it was wrong. I agree with your Lordship in thinking that no such reason has been shown. On the contrary, what is said by the learned judges in *Bevan's* case appeals to my mind as quite sound. The 3rd section of the First Schedule of the Act of 1906 contains words which did not appear in the corresponding section of the Act of 1897, First Schedule, section 2. I think the words must be construed as importing a new meaning and effect of some sort, and I am not prepared to agree with Mr Watson's suggestion that the new words merely express what was implied in the former Act. The words were construed, and I think rightly, in the case of *Bevan*. *Bevan's* case appears to have been decided at a time when wages had fallen, and the masters' argument succeeded. Now at a time when it so happens that wages have risen it would suit the masters very well to have a different judgment. I think we ought to preserve uniformity in the matter, so that whether a rise or a fall takes place it makes no difference in principle. Accordingly I think, in conformity with the case of *Bevan*, we should answer the question in the affirmative as your Lordship proposes.

LORD HUNTER—I concur. In determining the amount of compensation that ought to be paid to a workman in respect of partial

incapacity a discretion is given to the arbitrator under the Workmen's Compensation Act 1906, but he has to exercise that discretion within certain limitations. These limitations take the form of maximum amounts beyond which he cannot go. He cannot, for instance, give a partially incapacitated workman more than fifty per cent. of what he was earning at the time of the accident, nor can he give him a larger sum than £1 per week. Then in considering the amount which is to be given under section 3 of Schedule I he is further limited by this, that he cannot give more than the difference between the amount of the workman's average weekly earnings 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. Subject to that, however, he is entitled to take the circumstances into consideration. That appears very clearly by the introduction of the new words at the end of this section which are that the amount "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

These words were made the subject of specific consideration in the English Court, and the Judges there were quite clearly of opinion that the rise and fall in wages was one of the circumstances that the arbitrator might take into account. In the case of *Bevan*, [1912] 1 K.B. 63, the Master of the Rolls said this—"If wages are going up, that is a provision which may tend very much to the benefit of the workman; if wages are going down it may be for the benefit of the employer, but whichever way it happens I think it is not competent to the learned County Court judge to say 'I have nothing to do with that.'"

In this case had the Sheriff-Substitute taken a different course from that adopted he would, I take it, have been going contrary to the view of the Master of the Rolls of what was the duty of the arbitrator. I therefore concur in holding that this case is entirely covered by the decision in *Bevan's* case, and that *Bevan's* case was rightly decided.

The Court answered the question in the affirmative.

Counsel for the Appellants—Hon. W. Watson, K.C.—W. T. Watson. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncreiff, K.C. — D. R. Scott. Agents — Weir & M'Gregor, S.S.C.

Thursday, October 26.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

MONAGHAN *v.* UNITED CO-OPERATIVE BAKING SOCIETY LIMITED.

Process — Sheriff — Reparation — Remit to Court of Session for Jury Trial—Damages over £50*—Averment—Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

"It is not too much to expect that a pursuer who wishes to have his case tried by jury should set forth the special circumstances upon which he intends to rely as showing that a sum of more than £50 would not be an unreasonable award. If he does not choose to do this it seems only fair as regards this mere question of procedure to apply the maxim *de non apparentibus et non existentibus eadem est ratio*"—*per* Lord Skerrington in *Greer* v. *Glasgow Corporation*, 1915 S.C. 171, at p. 174-5, 52 S.L.R. 109, at p. 111.

Application of this test to an action, raised a year after the alleged accident, to recover damages for personal injuries to the pursuer's pupil child through being run down by a motor car, assessed at £200.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, enacts—"In cases originating in the Sheriff Court . . . where the claim is in amount or value above £50, and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties, who may conceive that the case ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, when it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff. . . ."

Joseph Monaghan, steel dresser, Glasgow, *pursuer*, on behalf of his pupil son Robert Wyllie Monaghan, aged eight years, brought on 27th June 1916 an action in the Sheriff Court of Glasgow against the United Co-operative Baking Society Ltd., Glasgow, *defenders*, for payment of £200 as damages in respect of injuries sustained by his son through having been knocked down and run over by a motor van belonging to the defenders on 16th July 1915.

The pursuer *averred*—"(Cond. 3) On the afternoon of Friday 16th July 1915, and as the said Robert Wyllie Monaghan was crossing from the north-east to the south-west side of London Road, Glasgow, at an angle and at a point opposite Belvidere Hospital there, he was knocked down and run over by a motor car belonging to the defenders, which was proceeding in a south-easterly direction along London Road aforesaid, and which was being driven by Michael Hanlon, a motor-man in the defenders' employment, for whom they are, and were at the time of the accident