

at the picking-tables, and could not have obtained employment in that capacity in the open market." So far as that part goes it does not favour the view that the workman's capacity was at any time completely restored. The second part of the finding is to the effect that the workman "was fit for the work to which he was put [by the employers] in the woodyard, and performed this work sufficiently for some months until" the sight of his remaining eye failed on account of natural causes unconnected with the accident. It must be remembered that in the circumstances of the case it is the employers who are pursuers in the issue whether or not capacity was completely restored. The burden of proving that it was rested on them at the proof in the arbitration. Can it be said that this finding is inconsistent with the continuance of incapacity in a partial degree? The contrast between the second part of the finding and the first is obvious. The second part has no express relation to the man's general capacity in the market, and affirms that he was able efficiently to do the work which his employers gave him in the woodyard, and would have continued so but for the increasing natural blindness which supervened, and prevented him doing that work after September 1919. That work was supplementary to the work at the picking-tables, for which he was undoubtedly never fit after the accident. But I cannot extract from this part of the finding any affirmation of the proposition that the workman was at any time so restored as to be able to earn his former wage in the labour market as a woodyard worker—or even that he would have been so restored but for the supervening natural blindness. I think the learned arbitrator was entitled in these circumstances to award compensation as for partial incapacity, because the findings clearly show that the employers had failed to discharge the onus resting upon them of establishing restoration to full wage-earning capacity. Accordingly I am for answering the first question in the affirmative, and the second question in the negative.

LORD SKERRINGTON—I concur.

LORD CULLEN—I am of the same opinion. The arbitrator has found in fact that the workman was not fit to resume his work at the picking-tables, and could not have obtained employment at his job in the open market. It is for the employers to show that, notwithstanding that, the workman's wage-earning capacity has not suffered. I agree with your Lordships in thinking that it is not sufficient that the employers offered him a job in the woodyard at as high a rate of wages as he had before the accident, because it is quite possible, if not probable, that in the open market he could not have got from any other employer work of that kind so highly paid.

LORD MACKENZIE did not hear the case.

The Court answered the first question of law in the affirmative and the second in negative, and found it unnecessary to answer the third.

Counsel for Appellants—M'Robert, K.C.—Wallace. Agents—Wallace, Begg, & Company, W.S.

Counsel for Respondent—Wark, K.C.—Scott. Agents—Alexander Macbeth & Company, S.S.C.

Saturday, December 3.

## FIRST DIVISION.

BOYLAN v. HUNTER.

*Process — Judicial Factor — Factor Loco Tutoris — Appointment de plano — Competency — Administration of Sum Awarded in an Action of Damages.*

In an action of damages at the instance of a widow and two pupil children of a man who lost his life in a motor accident, the jury awarded the widow £300 and the children £200 each. At the trial circumstances were disclosed which established the unfitness of the widow to administer the money awarded to the children, and the jury recommended "that the money for the children be put in trust for them if possible." On the motion to apply the verdict the consent of the widow to the appointment by the Court of a factor to administer the children's money was vouched by minute, and the Court was asked verbally to make the appointment *de plano*. The Court (after consultation with the Second Division) granted the motion, and appointed as factor *loco tutoris* the person suggested in the minute.

*Observations (per the Lord President) on the incompetency of superseding legal guardians by the appointment of a trustee, and as to the circumstances in which the appointment of a factor loco tutoris may be made de plano.*

Mrs Rose Ann Watson or Boylan, Craigneuk, near Wishaw, as an individual and as tutrix and administratrix-in-law for her pupil children Thomas and Sarah Boylan, brought an action against Thomas Hunter, carriage hirer, Wishaw, concluding for payment of £1000 to herself and £300 to each of the children as damages for the death of her husband John Boylan.

The action was tried before the Lord President and a jury, and a verdict returned as follows—"The jury . . . unanimously find for the pursuer, and assess the damages to the pursuer as an individual at (£300) Three hundred pounds, for Thomas Boylan at (£200) Two hundred pounds, and for Sarah Boylan at (£200) Two hundred pounds; and they recommend that the money for the children be put in trust for them if possible."

The pursuer thereafter lodged a minute in which it was stated that she "as tutrix and administrator-in-law foresaid, in view of the recommendation of the jury in their finding dated 22nd July 1921 in this action, that the damages assessed by them to the

said Thomas Boylan at £200 and to the said Sarah Boylan at £200 should be put in trust for them, hereby consents to the said sums, less their proportion of the extra-judicial expenses of said action, being so put in trust for them; and she further consents to the Court appointing John M'Callum, writer, Glasgow, or such other person as the Court may appoint to be judicial factor upon said fund, with power to administer the same for behoof of said children."

When the case appeared in the Single Bills on the motion to apply the verdict counsel for the pursuer also moved the Court to appoint a factor *loco tutoris* to the pupil children. Counsel referred to the unsuitability of the pursuer as disclosed in the evidence to administer the money awarded to the children, to the recommendation of the jury, to the minute lodged by the pursuer, and to the following cases:—*Collins v. Eglinton Iron Company*, 1882, 9 R. 500, 19 S.L.R. 440; *M'Avoy v. Young's Paraffin Light and Mineral Oil Company*, 1882, 19 S.L.R. 441; *Anderson v. Muirhead*, 1884, 11 R. 870, 21 S.L.R. 597; *Sharp v. Pathhead Spinning Company, Limited*, 1885, 12 R. 574, 22 S.L.R. 368.

At advising—

LORD PRESIDENT—The action was by the widow and pupil children of a man who lost his life in a motor accident, against the employer of the motor driver. The jury awarded the widow £300 and the pupil children £200 each, and were so far impressed by the unsuitability of the widow (owing to circumstances personal to herself, which were disclosed in evidence) to administer the money awarded to the children, that they recommended the money to be administered by other hands than hers. As the Judge who presided at the trial, I thought the widow's unfitness clearly established, and the jury's recommendation well justified. On the motion to apply the verdict, the consent of the widow to the appointment by the Court of a factor to administer the children's money was vouched by minute, and the Court was asked to make such an appointment.

In circumstances more or less similar to those of the present case, a factor *loco tutoris* was appointed *de plano* in *Collins*, (1882) 9 R. 500, and in *M'Avoy*, (1882) 16 S. L. R. 441 (both in the Second Division). But this course seems never to have been taken since the decision (in the First Division) of *Anderson*, (1884) 11 R. 870. In one later reported case, however—that namely of *Sharp*, (1885) 12 R. 574—the Second Division made a *de plano* appointment of a "trustee" for the pupils' money. I have consulted the Accountant of Court and it appears that there have been no appointments of factors such as we are now asked to make since 1882. But I understand that occasionally trusts have been set up in the Outer House in circumstances more or less similar to the present on application of the verdict. The trustees appointed in this way are under no supervision, find no caution, and are not officers of Court. As it appears to be desirable to regulate the practice in this matter

for the future, we have consulted with our brethren of the Second Division.

Supersession of the natural guardian, (either generally or *quoad* a particular fund belonging to the ward) by the appointment of a trustee is not competent even with the consent of the legal guardian. The right which the law accords to the father or mother to the guardianship of their children is exclusive of any right on their part to transfer their powers as guardian, either in whole or in part, to others; and the appointment of a trustee by the Court, unless competent in itself, is in no way fortified by the legal guardian's consent. The Court can remove any guardian, including a legal guardian, on certain grounds, but this power does not make it competent for the Court to supersede (in relation to the whole or any part of the ward's property) the person entitled by law to the guardianship, by the appointment of a trustee. The alternative and competent course is the appointment of a judicial factor *loco tutoris*. Where the adoption of this course is called for by circumstances affecting the capacity or suitability of the legal guardian, the ordinary procedure is by petition in this Court or in the Sheriff Court; and the propriety of adherence to that procedure in the general case is strongly emphasised by the judgment delivered in *Anderson*, (*supra*). The question, therefore, is whether in such cases as the present a departure from the ordinary procedure—open as that procedure always is to the parties for their adoption—is expedient and permissible. I think it is on certain conditions. A *de plano* appointment on application of the verdict has the great advantage of economy, and in this case it is supported by the established unfitness of the legal guardian, and her duly vouched consent to the appointment—two conditions which must anyhow concur before an application for a *de plano* appointment could be entertained. A recommendation by the jury is not essential, provided the unfitness of the legal guardian is disclosed at the trial so as to satisfy the presiding Judge that it exists. If, however, these two conditions concur, as they do here, there is no doubt that the powers of the Court of Session warrant a *de plano* appointment. The factor when appointed will have to find caution in the usual way, and his administration will be under the supervision of the Accountant of Court in the same way as if he had been appointed on petition either in this Court or in the Sheriff Court. When the ordinary procedure is followed, the general practice is to make intimation to the next of kin on both sides of the house. It will be for the discretion of the Court in each case in which a *de plano* appointment is moved for to decide whether such intimation should or should not be ordered. There appears to be no reason for ordering it in the present case.

LORD CULLEN—I concur.

The LORD PRESIDENT stated that LORD SKERRINGTON concurred.

LORD MACKENZIE was not present.

The Court in respect of the minute of consent appointed the person suggested in the minute to be factor *loco tutoris* for the pursuer's pupil children in so far as regards the sums awarded to each of them by the verdict, with the usual powers, he always finding caution before extract; decerned against the defender for payment to the said factor *loco tutoris* of the said sums; and remitted to the junior Lord Ordinary to proceed in the factory.

Counsel for the Pursuer—Duffes. Agents—J. Douglas Gardiner & Mill, S.S.C.

Saturday, December 10.

## SECOND DIVISION.

### SMITH v. WILLIAM BEARDMORE & COMPANY, LIMITED.

*Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (3)—Partial Incapacity—“Suitable Employment”—Watchman's Job Involving Sunday Work—Act 1579, cap. 70.*

Held that the Act 1579, cap. 70, prohibiting Sunday labour, did not apply to a watchman's job which involved Sunday work so as to render the job one which a partially disabled workman claiming compensation under the Workmen's Compensation Act 1906 was not bound to accept.

*Master and Servant—Sunday Labour—Act 1579, cap. 70.*

Question whether the Act 1579, cap. 70, is in desuetude.

Michael Smith, labourer, Baillieston, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Glasgow (BLAIR) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between him and William Beardmore & Company, Limited, Parkhead, Glasgow, *respondents*, appealed by Stated Case.

The facts proved were as follows:—“1. That Michael Smith, the workman in this case, aged fifty-six, a labourer, was injured in the course of his employment with the respondents on 1st October 1918 by a howitzer wheel which he was rolling falling upon his left hand and crushing it so severely that the thumb and part of the first finger were amputated in the Royal Infirmary. 2. That his average weekly wages prior to the accident were £4, 12s. 3d. 3. That he received full compensation from date of accident (1st October 1918) till 19th February 1921, when it was stopped—a period of two years and four months. 4. That for some months previous to 19th February 1921 he had sufficiently recovered to be able to earn good wages at a light job. 5. That on several occasions prior to 19th February 1921 his employers offered him a light job as watchman with a weekly wage of £4, 3s. 10d., which he refused and still refuses to accept. 6. That he is and has been able to do such a job without any difficulty. 7. That his refusal

is unreasonable in respect that his attitude all along and now is one of insisting upon his claim being settled for a lump sum out of all proportion to the injury received and his present capacity to earn good wages. 8. That if he had been able to resume full work as a labourer his present wage would not have amounted to more than £3, 13s. 1d. per week. 9. That the job offered to the appellant as watchman was a seven-shift job, which involved working on Sundays, that he stated that he was willing to accept the job if it was reduced to six shifts involving no Sunday work, that it was proved that he had worked overtime at his own job before the accident on week days and also on Sundays, that there are no watchman's jobs of six shifts to offer.

“Accordingly on 30th May 1921 I issued an award reducing the compensation to appellant as and from 19th February 1921 till the further orders of Court to the sum of 4s. 3d. a-week, being 50 per cent. of the difference between his former wage and the wage he is now offered. I awarded said sum accordingly, and found it unnecessary to record the memorandum of agreement of date 17th June 1920.”

*Note.*—“I need not say very much about this case, which is one of the most unusual I have ever known. The claimant undoubtedly met with a severe accident, and his left hand is permanently maimed. He has drawn full compensation for two years and four months, has never looked for work, and has apparently little intention of doing so. He is quite able, and has been so for some time, to do a light job at pushing or pulling. A watchman's job is ideal. He is in robust health—nothing the matter with him except this injury to his hand, which has healed, and which admittedly can never be so useful at it was. He has been offered a watchman's job by the defenders repeatedly, but he will not accept it, holding out for a settlement in cash. He began by asking £700, the defenders offered £150, and there that matter rests in the meantime. They still offer that amount, and in addition are, I understand, willing to give him the watchman's job. I think his attitude is unreasonable. At £4, 3s. 10d. he is better off than if he had completely recovered and been able to go back to a labourer's job, whose wage is now £3, 13s. 1d. He says he has conscientious objections to a seven-shift job, but there are no watchman's jobs of six shifts. It is easy, light, and healthy work, no labour. When he was making his big wage before the accident he had no scruples about working overtime and on Sundays. In fact he worked on an average 95 hours a-week, all to his advantage, as it fixes a very high wage for him in this case. Now he will not work for more than 45 hours a-week. It is facts, not conscientious objections, that are applicable in Workmen's Compensation cases. In my opinion the employers are entitled to have this compensation reduced, and the sooner he accepts the offer of a good job like this the better.

“There is not a scrap of justification for Mr Leechman's suggestion that the defenders have been harsh to this man, and that