

and gains form part of the officer's income for income tax purposes. It follows that this appeal must be dismissed with costs.

LORD CARSON.—I concur.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Graham Robertson, K.C.—Hon. Geoffrey Lawrence. Agents—James Watson, S.S.C., Edinburgh—Lewin, Gregory, & Anderson, Westminster.

Counsel for Respondents—Attorney-General (Sir Ernest Pollock, K.C.)—Lord Advocate (Murray, K.C.)—Hills—Skelton. Agents—Stair A. Gillon, Solicitor for Scotland of the Board of Inland Revenue—J. H. Shaw, Solicitor for England of the Board of Inland Revenue.

COURT OF SESSION.

Wednesday, November 1.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

MURRAY v. PORTLAND COLLIERY COMPANY, LIMITED.

Workmen's Compensation—Revival of Compensation as for Partial Incapacity—Strike Causing Unemployment—Failure to Obtain Employment on Termination of Strike—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (1) (b) and (3).

A miner who had been injured by an accident arising out of and in the course of his employment was awarded compensation in respect of partial incapacity, and thereafter obtained light work. His wages in this capacity subsequently rose till they exceeded the maximum he could claim under the statute, and the compensation was consequently suspended. A strike having ensued which resulted in the pit being flooded the man lost his work. After work in the pit had again been started, but before his turn came to be taken back, he applied for renewal of compensation. The arbitrator, on the ground that the man's loss of wages was due to economic causes and not to physical incapacity, refused an award *in hoc statu*, but awarded compensation as from the date when his previous light work should be resumed. *Held* that in respect that the incapacity of the workman caused by the accident still continued, the man's right to compensation was not terminated by the supervening of a period of unemployment in his normal trade.

Observed per Lord Hunter and Lord Constable that the state of the labour market was a circumstance that the arbitrator was entitled to take into consideration in assessing the amount of compensation.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Kilmarnock between John Murray, miner, Kilmarnock, *pursuer and appellant*, and the Portland Colliery Company, Limited, coalmasters, Hurlford, *defenders and appellants*, the Sheriff-Substitute (DUNBAR) at the request of both parties stated a Case for appeal, which at the joint request of the parties his successor in office (W. J. ROBERTSON) finally adjusted and signed.

The Case stated—"1. On 23rd February 1917 the pursuer, who was a miner in the employment of the defenders, when at work underground in the defenders' nursery pit, Kilmarnock, sustained a compound fracture of both bones of his right leg, and in consequence was a patient in the hospital for twelve weeks, when his leg was operated upon. As a result of the accident the pursuer has now only a limited use of his right ankle joint. There is shortening of the leg and he walks with the aid of a stick. No further improvement of the leg can be expected, and he has been permanently incapacitated for his former work as a miner. 2. The pursuer's average weekly earnings prior to his accident were £2, 7s., and compensation at the rate of £1 per week, with the additions under the Workmen's Compensation War Additions Act, was paid by the defenders from said 23rd February 1917 until the 25th May 1918, after which date, the defenders having given him light work on the surface, paid him partial compensation until 15th May 1920. 3. Thereafter in consequence of increases in wages granted to all mine workers the pursuer's weekly earnings equalled or exceeded what he made before the accident, and as a result the defenders ceased paying him any compensation. This state of matters, in which the workman acquiesced, continued till 31st March 1921. 4. On 1st April all the defenders' employees ceased work by reason of the national strike, which lasted till 3rd July. As a result of the strike the pit became flooded, and has to be restored to working order before mining can be resumed. 5. The work of restoration is still proceeding and the men are being taken back gradually, but the pursuer's job is not yet open. 6. The defenders have offered to reinstate the pursuer in his former light employment as soon as it matures, but it is not known when this may be. It was agreed that the weekly wage at present attached to that grade of employment is £1, 8s. 7. Prior to his accident the pursuer had on three different occasions during periods of dulness in the mining industry worked as a mason's labourer to various builders in Kilmarnock, and for such labour there has been since 1st April 1921 a reasonable demand. For this class of work the pursuer was totally incapacitated as a result of his accident. A fellow surface worker at the same pit as pursuer found employment as a plasterer at a weekly wage of £4, 8s. The pursuer was classified as unfit in the list of unemployed made up for the Kilmarnock Unemployment Bureau, at which and other places he had been seeking employ-

ment. Sheriff-Substitute Dunbar found that the pursuer's failure at present to obtain outside employment is due, not to his injury but to the state of the labour market. There is much unemployment in nearly all trades, and the evidence discloses that an able-bodied miner's chance of outside employment is very small. Had the workman been uninjured the great probability is that he would have been now unemployed. 8. The pursuer has been unemployed since 1st April 1921, but at the present time there are large numbers of able-bodied miners at present unemployed, and the pursuer's search for work might have been equally unsuccessful had he been uninjured. Owing to his partial incapacity due to the accident, however, the pursuer's chances of obtaining employment are materially narrowed.

"In these circumstances Sheriff-Substitute Dunbar held that at the present time the pursuer's unemployment not being due to his physical incapacity he was not *in hoc statu* entitled to compensation and refused it; but as the pursuer's job at light work will mature in the near future either by the reappointment of the workman or by the appointment of someone else, the Sheriff-Substitute thought it desirable to fix the compensation to which in his opinion the pursuer will then be entitled, and thus avoid the necessity of another arbitration. The Sheriff-Substitute therefore awarded the pursuer compensation at the rate of 12s. 6d. per week to begin when his former employment becomes available, and to continue until altered by agreement or by order of Court, and found neither party entitled to expenses."

The questions of law for the opinion of the Court were—"1. On the foregoing facts was the Sheriff-Substitute entitled to refuse compensation to the pursuer *in hoc statu*? 2. Was he entitled to award compensation as from the future date when the pursuer's former job becomes available? 3. Was he entitled to find no expenses due to or by either party?"

Argued for the pursuer and appellant—The present case was ruled by the decision in *John Watson, Limited v. Quinn*, 1922, 60 S.L.R. 1, where in similar circumstances a workman was held entitled to revival of compensation in respect of his original incapacity notwithstanding a fall of wages due to economic causes. Economic causes might be a factor in determining the amount of compensation—*Bevan v. Energylyn Colliery Company*, [1912] 1 K.B. 63; *McNeill v. Woodilee Coal and Coke Company*, 1918 S.C. (H.L.) 1, 55 S.L.R. 15; *Mulligan v. Corporation of Glasgow*, 1917 S.C. 450, 54 S.L.R. 352; *Ball v. William Hunt & Sons, Limited*, [1912] A.C. 496, 49 S.L.R. 711, *per* Lord Shaw at p. 509; *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009—but they did not terminate compensation, because compensation was given for incapacity to work. Once compensation was awarded any supervenient cause depriving him of work could not be founded on as a reason for terminating compensation unless it could be shown that the workman's injuries no longer prevented him

from working—*Harwood v. Wyken Colliery Company*, [1913] 2 K.B. 158. *Dingwall v. Fife Coal Company*, 1918 S.C. 203, 55 S.L.R. 226, was also referred to.

Argued for the defenders and appellants—The Workmen's Compensation Act did not guarantee the workman against the general conditions of the labour market. In the present case the sole cause of the workman's incapacity to earn wages was the state of the labour market—*Ball v. William Hunt & Sons, Limited*, [1912] A.C. 496, 49 S.L.R. 711, *cit. sup.*; *Quilter v. Kepplehill Coal Company*, 1921 S.C. 905, 58 S.L.R. 588; *McCallum v. Quinn*, 1909 S.C. 227, 46 S.L.R. 141. The workman's power to earn wages remained the same as it was prior to the strike.

LORD JUSTICE-CLERK—The claimant in this case was injured on 23rd February 1917 by an explosion in a mine. It is not disputed that the accident arose out of and in the course of his employment. The learned arbitrator finds that the claimant was permanently incapacitated by his accident from engaging in his former work as a miner. The claimant in point of fact received compensation at the rate of £1 a week, on the footing of total incapacity, until 25th May 1918. Thereafter compensation as for partial incapacity was paid to him until 15th May 1920, the claimant having meantime got light work on the surface. Then a period of inflation of wages supervened, and compensation, with the assent of the claimant, ceased to be paid. The statutory bar was subsequently removed, but the state of matters to which I have referred continued until 31st March 1921. On 1st April the national strike of miners occurred. This pit, like many others, was flooded and it is now in the course of being repaired. The claimant—so the arbitrator has found—is now able to earn only £1, 8s. per week as for light work, which is the only work for which he is fitted; but at the moment no such work is open to him.

In these circumstances the appellant claims that compensation as for partial incapacity should be paid to him. He refers, in the first place, to the finding of the learned arbitrator that "no further improvement of the leg can be expected, and he has been permanently incapacitated for his former work as a miner." He also refers to the finding that "owing to his partial incapacity due to the accident, however, the pursuer's chances of obtaining employment are materially narrowed." Having referred to these findings, he then founds upon section 1 (1) of the Act of 1906, which provides that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation in accordance with the First Schedule to this Act." He further founds upon the terms of the First Schedule, and, in particular, upon the terms of section 1 (b), where it is provided that where total or partial incapacity for work results from the injury a weekly payment during the

incapacity after the second week not exceeding 50 per cent. of his average weekly earnings shall be made. He also refers to sub-section (3) of that schedule. He maintains that in virtue of these statutory provisions he is entitled to compensation during incapacity, that his incapacity still continues, and that the statutory bar, which alone interrupted his right to payment, has now been removed. His right, says he, is based upon incapacity—not upon the state of the labour market and not upon employment. The respondents say in reply that the claimant is entitled to no compensation at all. They refer to and found particularly upon the statement in the case that “*Sheriff-Substitute Dunbar found that the pursuer’s failure at present to obtain outside employment is due not to his injury but to the state of the labour market.*” That finding, however, seems to me to be inconsistent with practically all the other findings in fact of the learned arbitrator, and, in particular—as one of your Lordships pointed out—with the finding to the effect that prior to his accident the pursuer had on three occasions worked as a mason’s labourer to various builders in Kilmarnock, that for such labour there has been since 1st April 1921 a reasonable demand, and that from engaging in that work the claimant is now totally incapacitated.

The respondents, while they admit that before the accident the appellant was able to earn £2, 7s. per week and that now he is unable to earn more than £1, 8s. per week, nevertheless contend that at the present moment he is not entitled to receive any compensation at all. But although they maintain that in the meantime no compensation is due to the claimant, they nevertheless concede that directly he is employed again and earns 28s. a-week he will be entitled to compensation at the rate of 12s. 6d. a-week. These conclusions, it seems to me, affront and frustrate common sense, and it does not seem to me to be in the least degree necessary to reach them if the view which I suggest to your Lordships be adopted. That view is a perfectly simple one. I am of opinion that the incapacity of the claimant caused by the accident still continues. I am of opinion, therefore, that he is entitled to compensation under the statute; and I am further of opinion that that right is not terminated by the mere supervening of a period of unemployment in the trade in which he is normally engaged. The amount of the compensation is a matter with which the arbitrator—not this Court—should deal.

Therefore I suggest, in these circumstances, that our answer to the first question should be in the negative. In that event the second question does not arise, and as I regard the third question as raising no question of law at all, I suggest that it is unnecessary to give any answer to it.

LORD HUNTER—I also think that this case ought to go back to the learned arbitrator in order that he may deal with it as the case of a partially incapacitated workman under the Statute of 1906, the main

provision of which is that if an injury is sustained by a workman he shall be entitled to compensation as provided in the schedule. When you refer to the terms of the schedule you find that there is a provision to the effect that during the period of partial incapacity the workman shall be entitled to a sum not exceeding 50 per cent. of the wages which he was earning at the time of the accident. There are, in addition, certain statutory bars to his receiving an amount in excess of what he was getting before the accident, but it is not necessary to consider these.

In the present case, at the time when the application to have compensation was made, the situation was this—the applicant had been injured in a mining accident; the result of that was that he was totally incapacitated for ever after from doing the work of a miner. During a short period of time, it is true, he engaged in light work, and owing to exceptional economic causes he earned greater wages than he did prior to the accident. During that time he had, of course, no claim to actual compensation, as although the right to compensation is based upon incapacity, the measure of compensation payable in respect of the incapacity is always determined in the terms of wages. But when the application came to be made the arbitrator found certain facts. The first important fact he has found is that the appellant is earning nothing at all, and that he cannot earn anything at all, because of the state of the labour market. The second finding of importance is that if the state of the labour market were normal he would be able to earn £1, 8s. a-week instead of £2, 7s. a-week, which he earned before the accident.

The contention was put forward by the respondents that in reality the arbitrator had found as a fact that the man’s present incapacity to earn wages was entirely due to the state of the labour market. I do not think that the arbitrator so found. If he had done so, I think a conclusion so ridiculous as that could not possibly have been sustained, and we should have been quite entitled to set it aside on the ground that there was no material on which that conclusion could be reached. You have only to state what I have stated to see that such a conclusion is an illogical conclusion from the findings in fact to which I have already referred. What I think has operated confusion in the mind of the arbitrator, and, if I may say so with respect, I think largely in the minds of those who have conducted the argument for the respondents, is that they have considered only that there was difficulty in getting employment. Now, although it is perfectly clear that if the appellant could get employment he could not get employment where he would earn the same wages as prior to the accident because of his incapacity, using the term “incapacity” in the statutory sense, it is also plain that his incapacity to earn these wages is not entirely due to the state of the labour market.

It has been perfectly well settled in case after case—I do not need to refer to them—

that the mere fluctuation of wages affords no ground for altering a workman's compensation. But in this present case the state of the labour market has done only one thing—it has prevented the man earning what would not be anything like as great a wage as he earned before the accident. And the extraordinary admission is made by the respondents that if in fact this man was earning the maximum amount he could earn at the present moment—that is to say, assuming there was a market for his labour, he would get only £1, 8s. a-week—he would be entitled to receive compensation; but in respect that he is earning nothing, he is to be totally deprived of compensation. That is reasoning which, personally, I cannot follow at all, and I find no justification for it in the statute.

I think with your Lordship that when the case goes back to the arbitrator it is not necessary for us to give any special directions to him. But I may express this opinion, that when the arbitrator is assessing the compensation he is entitled to take into account that it is the state of the labour market that makes this man a totally incapacitated man at this present moment, but that it is not the state of the labour market that makes him a partially incapacitated man. That, I think, is the effect of the case to which Mr Morton referred us—the case of *Gaffney v. Chorley Colliery Company* (15 B.W.C.C. 158), where at p. 164 the Master of the Rolls says—“The judge must be careful to see that any loss of earnings is due to the physical condition of the man and not to the state of the labour market. That will be difficult, for, of course, no injured man competes on the same terms as an uninjured one, but it is quite clear that the whole loss cannot be put down to the injury.” What the arbitrator has got to do is to consider to what extent his inability to earn £1, 8s. is due to the state of the labour market, and to what extent it is due to his physical condition. In so far as it is due to his physical condition, that is a reason for the arbitrator being more generous in the award he makes. But in all cases the arbitrator has complete discretion as to the amount of his award so long as it does not exceed 50 per cent. of the average weekly earnings as ascertained in terms of the First Schedule and is not in excess of what the man earned before. Apparently that is a sufficient margin to work upon. At all events it is a margin which will enable the arbitrator to make the award which was previously made hypothetically on the footing that it should come into operation when the man got work.

Although the third question is not a question of law, I have no doubt that the arbitrator will consider that as the application was properly made the result will follow that the claimant ought to get his expenses, but that is a matter for the arbitrator and not for us.

LORD CONSTABLE—I agree with the conclusions at which your Lordships have arrived. On the main question, which has

been the subject of argument in this case, one is faced at the outset with a certain contradiction in the findings before us. I desire to say that in the circumstances I think no reflection can be cast upon the arbitrator, because, as his successor tells us in his note, Sheriff-Substitute Dunbar, to our great regret, died suddenly while in the very act of revising the case. But we are bound to scrutinise the case all the same, and so doing, I am unable to reconcile the finding which is mainly founded on by the respondents to the effect that the pursuer's failure at present to obtain outside employment is due not to his injury but to the state of the labour market, with the finding contained in the previous part of the same paragraph of the case, in which the arbitrator set forth that the appellant is now incapacitated for a kind of outside work which he used to pursue, and for which since April 1921 there has been a reasonable demand. It appears to me that that contradiction alone would necessitate the case being sent back, because, as one of your Lordships has observed, it results in this, that the finding that the pursuer's failure was due not to his injury but to the state of the labour market was a conclusion to which the arbitrator on his own showing was not reasonably entitled to come.

Even if the finding to the effect that the pursuer's failure to obtain employment was due to the state of the labour market had stood alone and unqualified, I am of opinion that it would not be a relevant or sufficient ground for refusing compensation *de plano* as the arbitrator did. In consequence of his partially disabled condition the appellant even if he could obtain employment would receive materially less than he would with his powers unimpaired. Suppose, for example, that in full possession of his powers the appellant could in normal times obtain x remuneration; suppose that, subject to his partially disabled condition he could obtain remuneration y ; the finding in question would warrant the loss of y being attributed to labour market conditions but would not warrant the refusal of compensation for $x - y$. The assumption which I think underlies the arbitrator's note is that even if the appellant had been in possession of his full powers he could not have obtained employment, but there is no finding precisely to that effect. The finding on that point is in these terms—“Had the workman been uninjured, the great probability is that he would have been now unemployed.” Probability is not an ascertained fact, and on this ground also I think it would also be necessary to send the case back.

Even although the arbitrator had found that there would have been no employment for the appellant if he had been in possession of his full powers, I venture to doubt whether that would have been a relevant or sufficient ground for refusing compensation. I do not go into the provisions of the statute and Schedule I. That has already been done by your Lordships. But I should point out that the effect upon compensation of a cause of incapacity supervening upon an accident within the meaning of the

statute, whether that supervening cause consists of another accident or illness or old age or imprisonment, has been considered repeatedly in various authoritative decisions. And it has been held that the supervening cause does not take away the right to compensation founded upon the partial disablement created by a previous accident the effects of which still subsist. The case of *Harwood* ([1913] 2 K.B. 158) cited for the appellant may be taken as an illustration of that type of decision. I am unable to see any distinction between the class of supervening cause which was discussed in these cases and the supervening cause, namely, market conditions of employment, which is said to have occurred in the present case. It may be that market conditions affecting employment are circumstances to which, within the meaning of sub-paragraph 3 of the First Schedule of the Act the arbitrator is entitled to have regard in assessing the actual compensation in any particular case. But in my opinion the mere fact that a supervening cause of this kind has come into operation does not eliminate the right of the injured workman to some compensation for the loss of working capacity due to a previous accident, which is to be assessed by the arbitrator with due regard to all the circumstances.

For these reasons I agree that the first question should be answered in the negative and that the other question should be dealt with as has been proposed.

LORD ORMDALE and LORD ANDERSON did not hear the case.

The Court answered the first question in the negative, and found it unnecessary to answer the other questions.

Counsel for the Pursuer and Appellant—Mackay, K.C.—Hunter. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders and Appellants—Morton, K.C.—Russell. Agents—W. & J. Burness, W.S.

Saturday, November 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

COOK v. M'DOUGALL.

Bankruptcy — Sequestration — Existing Sequestration — Application for Second Sequestration in Same Court — Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 16.

The Bankruptcy (Scotland) Act 1913, sec. 16, provides that "No sequestration shall be awarded by any court after production of evidence that a sequestration has already been awarded in another court and is still undischarged."

Held that this provision did not prevent the award of a second sequestration in the same Court in which the original sequestration had been awarded.

James Cook, merchant, Partick, Glasgow, a creditor of William M'Dougall, publisher of the *Western News* newspaper, Partick, Glasgow, to the extent required by law, pursuer, presented a petition in the Sheriff Court of Lanarkshire at Glasgow against the said William M'Dougall, defender, in which he craved the Court to award sequestration of the defender's estates.

The pursuer averred, *inter alia*—" (Cond. 4) The defender has for the year preceding the date of the presentation of this petition resided in Glasgow, or had a dwelling-place or carried on business in Glasgow, in the county of Lanark in Scotland, and is subject to the jurisdiction of the Sheriffdom of Lanarkshire, and his estates are liable to be sequestrated under the provisions of the Bankruptcy (Scotland) Act 1913."

The pursuer pleaded—"The defender being notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1913, the pursuer as a creditor of the defender to the extent required by law is entitled to have his estates sequestrated under the provisions of said statute."

On 13th July 1922 the Sheriff-Substitute (BOYD) refused the crave of the petition.

Note.—"The agent for the objector founded his objection on section 16 of the Bankruptcy (Scotland) Act 1913, and particularly the proviso (1) thereof, which enacts 'That no sequestration shall be awarded by any court after production of evidence that a sequestration has already been awarded in another court and is still undischarged.'

"It is admitted that the defender has already been sequestrated. The trustee has been discharged, but the bankrupt has not."

The pursuer appealed. It was stated at the bar that the previous sequestration had been awarded in the same Court on 3rd April 1900, that a first dividend was paid on 4th October 1900, and a final dividend on 4th February 1901.

Argued for the pursuer—Section 16 of the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) did not apply to prevent a new award of sequestration where the Court in which the new application was made was the same as that in which sequestration had previously been awarded—*Mellor v. Drummond*, 1919, 2 S.L.T. 68; *Abel v. Watt*, 1883, 11 R. 149, 21 S.L.R. 118, *per* Lord President Inglis at p. 151. The bankrupt had been carrying on trade since the previous sequestration, and a new sequestration was necessary to enable new creditors to make good their claims.

Argued for the defender and respondent—The case of *Mellor v. Drummond* (*cit. sup.*) was not well decided. The section in question was perfectly plain in its terms and expressly prohibited a second sequestration. An existing sequestration had always been recognised as a bar to a subsequent sequestration—*Young v. Buckel*, 1864, 2 Macph. 1077; *Goetze v. Aders*, 1874, 2 R. 150, 12 S.L.R. 121. The second sequestration could not attach anything—*Bank of Scotland v. Youde*, 1908, 15 S.L.T. 847; *Goudy* on Bankruptcy (4th ed.), p. 126. The protection afforded by the pursuer's reading of the section would be illusory, because the bankrupt while still