

COURT OF SESSION.

Friday, January 17.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

WILLIAM BAIRD & COMPANY,
LIMITED v. M'WHINNIE.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, 1 (b), 2, 12—“Payment during the Incapacity” — Charge on Registered Memorandum for Payment in respect of Period when Earning Wages with Same Employer—Suspension of Charge on Memorandum.

A workman claimed compensation from his employers under the Workmen's Compensation Act 1897 for injuries sustained on 29th March 1906 and causing his total incapacity. On 12th April the parties agreed that the weekly amount of compensation payable in respect of his total incapacity was 14s. 5d., being one-half of his average weekly earnings prior to the accident, and this sum was paid until 29th May, when he returned to work at a wage of 18s. 4d. per week, which he continued to earn until 12th July. During this period he was paid 5s. 3d. a-week as partial compensation. On 13th July he again became totally incapacitated, and on 21st July an agreement was entered into (memorandum subsequently recorded) for payment of compensation at the rate of 14s. 5d. weekly, which was paid, admittedly in respect of total incapacity, until 13th September, when he again returned to and continued at work until 6th May 1907 at an average weekly wage of 23s. 2d. On 6th May he charged his employers on the registered memorandum of the agreement of 21st July for payment of compensation at the rate of 14s. 5d. weekly from 21st July 1906 till 6th May 1907, under deduction of the amount paid down to 13th September.

In a suspension brought by the employers they tendered a sum representing compensation from 13th September 1906 to 6th May 1907 at the rate of the full difference between the average of his actual weekly earnings during that period and the average of his weekly earnings prior to the accident.

The Court *suspended* the charge *simpliciter*, holding that the employers had tendered to the workman, and he had declined to accept, the fullest compensation claimable under the Act.

Beath & Keay v. Ness, November 28, 1903, 6 F. 168, 41 S.L.R. 113, and *Nimmo & Company, Limited v. Fisher*, 1907 S.C. 890, 44 S.L.R. 641, *followed*.

John M'Whinnie, miner, Kilsyth, charged William Baird & Company, Limited, coal and iron-masters, Kilsyth, to implement an extract registered memorandum of agreement recorded in the Sheriff Court Books of Stirlingshire on 24th April 1907, under

which it was agreed that William Baird & Company were to pay to M'Whinnie in respect of an accident sustained in their employment “a weekly sum of 14s. 5d., commencing the first payment on 21st July 1906, and so on weekly thereafter, until such weekly payment is varied by agreement or order of Court.” The sum charged for was £35, 5s. 6d., alleged to be forty-two weeks' compensation at the rate of 14s. 5d. per week from 21st July 1906, under deduction of the sum of £6, 9s. 9d. paid to account.

William Baird & Company, Limited, brought a suspension.

Execution having been sisted on consignment, and the note passed, a record was made up. The following summary of the facts as set forth in the parties' averments is taken from the opinion of the Lord Ordinary (MACKENZIE)—“The respondent is a miner who met with an accident to his eye on 29th March 1906 while in the employment of the complainers. He claimed compensation under the Workmen's Compensation Act 1897 in respect of his total incapacity for work. On 12th April 1906 the parties agreed that the weekly amount of compensation in respect of the respondent's total incapacity was 14s. 5d. The respondent's average weekly earnings in the complainers' employment were 28s. 9½d. The sum of 14s. 5d. was the maximum rate under the statute for total incapacity.

“The respondent was paid 14s. 5d. a week of compensation from 12th April to 29th May 1906. On 29th May he returned to work at a wage of 18s. 4d. a week, which he continued to earn till 12th July 1906. During this period he was paid 5s. 3d. a week as partial compensation. On 13th July 1906 he again became totally incapacitated, and his total incapacity continued till 13th September 1906. On 21st July 1906 an agreement was entered into between the parties, under which the respondent was again paid compensation at the maximum rate of 14s. 5d. a week. A memorandum of the agreement of 21st July 1906 was recorded in terms of the Act. The agreement, which is produced, does not refer to the respondent's total incapacity, but in answer 5 he admits that he received the payment of 14s. 5d. a week from 13th July to 13th September 1906 in respect of his total incapacity. On 13th September 1906 the respondent returned to work with the complainers. He continued to work from that date till 6th May 1907 at wages which averaged 23s. 2d. a-week.

“On 6th May 1907 the respondent charged the complainers on the memorandum of the agreement of 21st July 1906 to pay to him £35, 5s. 6d., being forty-two weeks' compensation at 14s. 5d. a-week from 21st July 1906 to 6th May 1907 under deduction of £6, 9s. 9d., being the amount received by him between 13th July and 13th September 1906.”

The complainers pleaded, *inter alia*—“(1) The complainers having paid or satisfied the greater portion of the sum charged for, the charge should be suspended as craved. (2) The complainers having tendered payment of the only portion of the sum charged for remaining due by them, the

charge complained of should be suspended as craved. (3) The respondent having by receipt of the said sum of £8, 9s. 9d., and of wages from the complainers as condescended on, discharged his right to the greater part of the compensation charged for, and *quoad ultra*, the complainers having tendered payment of all sums due by them, the charge should be suspended."

The respondent pleaded, *inter alia*—“(2) The averments of the complainers being irrelevant and insufficient to support the prayer of the note, it should be refused. (3) The complainers not having taken the appropriate and competent means of reviewing the memorandum of agreement referred to by applying to the Sheriff for reduction of the compensation thereby determined, are barred from proceeding by way of suspension. . . . (6) The respondent's incapacity not having ceased, the prayer of the note should be refused.”

The Lord Ordinary on 5th November 1907 pronounced the following interlocutor—“Finds that the compensation due to the respondent was payable only during his total incapacity; and further, in respect of his refusal to accept the complainers' offer of £9, 10s. 3d., sustains the reasons of suspension, suspends the charge, warrants, and whole grounds thereof *simpliciter*, and decerns.”

Opinion.—“. . . [After narrative set forth above] . . . —If the complainers pay the sum charged for, the respondent would receive, in respect of the period between 13th September 1906 and 6th May 1907, a sum considerably exceeding (the complainers say about 9s. a-week) his average weekly earnings prior to the accident.

“The complainers maintain that the respondent is only entitled to compensation from 13th September 1906 to 6th May 1907 at the rate of the full difference between the average of his actual weekly earnings during that period and the average of his weekly earnings prior to the accident. This for the period between 13th September 1906 and 6th May 1907 amounts to £9, 10s. 3d., which complainers tender in the present suspension of the charge.

“The complainers argued that the present case was ruled by the principles laid down in *Beath & Keay v. Ness*, 6 F. 168, followed in *Nimmo & Company, Limited v. Fisher*, S.C. 1907, 890, and I am of opinion that this argument is well founded. The respondent maintained that this was not so, because under the Workmen's Compensation Act, Schedule I, sec. (1) (b) compensation at the rate of 14s. 5d. a-week might be awarded in respect not only of total but also of partial incapacity. He accordingly maintained that an application must be made to have the agreement reviewed. I am unable, looking to what I consider to have been decided by these cases, to hold that the respondent can found upon the agreement of 21st July 1906 so as to enable him to recover a sum in excess of his average weekly earnings prior to the date of the accident. In the present case either the respondent got wages on the implied agreement between him and the

complainers that compensation at the rate of 14s. 5d. per week, the amount which had been fixed in respect of his total incapacity, was no longer due or claimable, because the total incapacity in respect of which this sum of compensation was due had ceased, and therefore the right to get or obligation to pay compensation at that rate had come to an end, or the payment of wages at the average rate of 23s. 2d. a-week was in the first place to be held to the extent of 14s. 5d. of that sum as payment of the compensation, and the balance as the remuneration given for such service as the respondent in his partially disabled condition was able to render. In *Nimmo's* case the complainers tendered a sum which represented the full difference between the respondent's average earnings prior to the accident and his actual earnings for the period in question. The Court in respect of his refusal to accept this offer sustained the reasons of suspension and suspended the charge *simpliciter*.

“Accordingly I am of opinion in the present case that there should be a finding that the compensation due to the respondent was payable only during his total incapacity, and further, in respect of his refusal to accept the complainers' offer of £9, 10s. 3d., that the reasons of suspension should be sustained and the charge suspended *simpliciter*, the complainers being found entitled to expenses.”

M'Whinnie reclaimed, and argued—The agreement provided for a weekly payment of 14s. 5d. “until such weekly payment is varied by agreement or order of the Court.” Neither of these, the only available methods for variation, had been adopted by the employers, and if the ultimate result was that they had to pay more than they otherwise might have had to do they had only themselves to blame. A written agreement could not be varied by mere implication—*Williams*, 23 T.L.R. 591. It was true that the result was that the wages earned plus the compensation exceeded the average weekly earnings prior to the accident, but (1) the Act contained no express provision against such a result; (2) such a result, if anomalous, had incidentally been sanctioned in other circumstances—see *Steel v. Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumphreton Oil Company, Limited v. Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; *Baird & Company, Limited v. Stevenson*, 1907 S.C. 1259, 44 S.L.R. 864—(3) it was the wage-earning capacity of the workman rather than the wages actually earned that had to be looked at—*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. The employers relied on *Beath & Keay v. Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113, and *Nimmo & Company, Limited v. Fisher*, 1907 S.C. 890, 44 S.L.R. 641. But *Beath & Keay* was distinguishable. Here the workman was still partially incapacitated; there he admitted complete recovery, and as the Act only gave a right

to compensation "during incapacity" it was held that his complete recovery *ipso facto* excluded him from compensation. *Nimmo* simply followed *Beath & Keay* and was treated as being exactly similar, the difference between partial and total recovery being ignored. If necessary *Nimmo* should be reconsidered. Further, a common law remedy such as a suspension was incompetent where other procedure was supplied by the Act—see *Cochrane v. Traill & Sons*, March 16, 1900, 2 F. 794, 37 S.L.R. 662.

Argued for the respondents—The case was directly ruled by *Beath & Keay, cit. sup.*, and *Nimmo, cit. sup.* The object of the Act was to give compensation. Accordingly a workman could never be entitled to get more than he was earning prior to the accident. The cases of *Geary v. William Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; *Parker v. William Dixon, Limited*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663; *Irons v. Davis & Timmins, Limited*, [1899] 2 Q.B. 330, were also cited.

At advising—

LORD JUSTICE-CLERK—The case of the respondent involves the somewhat startling proposition that a workman who has been injured can be entitled under the Workmen's Compensation Act to receive compensation from his employer at a time when he is earning the full wages he received at the time of the accident—in other words, that he may be made better off pecuniarily from having had an accident than he could have been if no accident had happened, although it is the intention of the statute that the fullest pecuniary benefit he can take by it is one-half of his earnings.

Here the respondent was paid after the accident 14s. 5d. a-week, which was the full amount he could properly demand under the Act. When he came back to work he earned 18s. 4d. a-week, and received 5s. 3d. of compensation. He again became incapacitated, and by agreement he again received full compensation, the agreement being recorded. Later he returned to work and got 23s. 2d. a-week.

He now proposes to charge the complainers for a sum of £35, 5s. 6d. If this sum were paid to him, then it is not disputed that he will have been paid in wages and compensation for a period from 13th September 1906 till May 1907 a weekly sum much in excess of his full average wages prior to the accident.

I agree with the Lord Ordinary in holding that the contention of the charger cannot be given effect to. It seems on the face of it to be contrary to reason and justice, and I also agree in thinking that the authority of the cases of *Beath and Keay* and *Nimmo & Co. v. Fisher* is conclusive against his contention.

I am therefore of opinion that the Court must hold that the right to compensation could only subsist while the injured workman was incapacitated from earning wages up to the amount of his previous weekly earnings, and that as he has refused to ac-

cept compensation offered him which would give him his just right under the statute, the judgment suspending the charge should be adhered to.

LORD LOW concurred.

LORD ARDWALL—I am of opinion that the Lord Ordinary's interlocutor is right and ought to be affirmed. I concur with the Lord Ordinary that the present case is ruled by the principles laid down in *Beath and Keay v. Ness*, 6 F. 168, and followed in *Nimmo & Co. v. Fisher*, 1907 S.C. 890.

In the present case, as in these cases, the respondent endeavours, by making use of the machinery of the Workmen's Compensation Act, aided by certain judicial decisions and *dicta* of not unquestionable authority, to obtain for the period between 13th September 1906 and 6th May 1907 payment of a sum per week, which added to his wages would bring up his weekly emoluments to a sum considerably exceeding his average weekly earnings prior to the accident. In short, he is endeavouring, under cover of the machinery of the Act, to obtain, not compensation for his injury, but something considerably over and above the largest amount of compensation to which the general provisions of the Act entitle him. It is quite clear that this is contrary to the main purpose and object of the Act, and that accordingly the Court is entitled to interfere for the purpose of preventing an injustice to the complainer, and an abuse of the machinery of the Act.

In my opinion the Lord Ordinary has taken the proper course in suspending the charge *simpliciter*.

This case presents a complete contrast to that which immediately preceded it in today's roll—*Fife Coal Company, Limited v. Lindsay, supra*, p. 317. I think it unnecessary to go into more detail, as I think the whole case has been admirably dealt with by the Lord Ordinary in his opinion, with which I concur.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Reclaimer and Respondent Munro—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents and Complainers—Horne—Strain. Agents—W. & J. Burness, W.S.

Saturday, January 18.

FIRST DIVISION.

(Before Seven Judges.)

[Lord Guthrie, Ordinary.]

BLACK AND OTHERS v. NORTH
BRITISH RAILWAY COMPANY.

Process—Issue—Form of Issue—Reparation
—Liability Admitted.

In an action of damages against a railway company at the instance of the widow and family of a passenger,