

Counsel for the Petitioner—Macmillan, K.C.—Graham Robertson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—Constable, K.C.—MacRobert. Agents—Pringle & Clay, W.S.

Tuesday, November 25.

SECOND DIVISION.

[Sheriff Court at Airdrie.

M'KINSTREY v. AUCHINLEA COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Amount of Compensation—“Weekly Payment not to Exceed One Pound”—Workman, Partially Incapacitated through Injury by Accident, Drawing Full Compensation in respect of Injury by Second Accident—Suspension of Compensation Payable in respect of First Accident—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) sec. 1 (1), and First Schedule, sec. 1 (b).

A workman sustained an injury by accident resulting in the loss of his left foot. He was paid compensation by his employer at the maximum rate of one pound weekly, which payment was continued in respect of partial wage-earning incapacity after he had obtained employment with a new employer. While in his new employment he met with a second accident, resulting in injury to his left hand, and became again totally incapacitated. In respect of this accident he received from his second employer compensation at the full rate of one pound weekly. *Held* that the payment by the first employer fell to be suspended in respect that the workman was receiving from the second employer the maximum compensation to which he was entitled under the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (1), enacts—“If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.”

The First Schedule, section 1, enacts—“The amount of compensation under this Act shall be—... (b) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.”

George M'Kinstrey, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Airdrie (LEE) in an arbitra-

tion under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by the Auchinlea Coal Company, Limited, *respondents*, against him, appealed by Stated Case.

The Case stated—“The case was heard before me . . . when the following facts were admitted:—(1) That on 13th August 1918 the claimant and appellant sustained an injury, resulting in the loss of his left foot, by accident arising out of and in the course of his employment with the respondents as a brusher, earning average wages of £4, 17s. 6d. weekly. (2) That as the result of said injury the claimant and appellant was totally incapacitated until 4th June 1919, and was paid compensation by the respondents in terms of the Workmen's Compensation Act 1906, at the maximum rate of £1 weekly. (3) That on said 4th June the claimant's and appellant's said total incapacity ceased, and he undertook employment with another employer at a weekly wage of £2, 4s. (4) That it was agreed by the claimant and appellant and the respondents that on 4th June 1919 the claimant and appellant was still partially incapacitated by the injury sustained on 13th August 1918, and that in respect of and during the continuance of said partial incapacity he should be paid compensation at the rate of £1 weekly by the respondents. (5) That said compensation was paid from 4th to 13th June 1919. (6) That on 13th June 1919 the claimant and appellant was totally incapacitated by an injury to his left hand. (7) That in respect of his total incapacity resulting from the said injury on 13th June 1919 the claimant and appellant has since said date received, and is presently receiving, from his last employer compensation under the Workmen's Compensation Act 1906, at the rate of £1 weekly, together with the increment of 5s. under the War Addition Act 1917; and (8) that it is not maintained by the respondents that the claimant's and appellant's partial incapacity arising from the injury of 13th August 1918 has ceased or been diminished since 4th June 1919.

“On these facts I found in law that as the claimant and appellant was presently receiving from another employer the maximum compensation provided by the Workmen's Compensation Act 1906 to be paid to a workman incapacitated for work by injury by accident, his claim under said Act to any payment of compensation by the respondents fell to be suspended. I therefore ended until further order the weekly payment by the respondents to the claimant and appellant as on 13th June 1919.”

The *questions of law* were—“(1) Was I right in holding that the weekly payments of compensation to the claimant and appellant by the respondents falls to be suspended in respect that he is presently receiving from another employer the maximum compensation provided by the Workmen's Compensation Act 1906? (2) Whether on the facts stated I was right in suspending the claimant's and appellant's compensation?”

Argued for the appellant—The statute gave a right to compensation for injury by

accident arising out of and in the course of the employment. This was not taken away by anything contained in the First Schedule. Every contract of employment entitled the workman to compensation whenever injury by accident arose. There was no limitation of the total compensation to the sum of one pound in respect of a succession of injuries in the same or different employment. This was the maximum fixed only in respect of each injury—*Harwood v. Wyken Colliery Company*, [1913] 2 K.B. 158; *M'Nally v. Furness, Withy & Company, Limited*, [1913] 3 K.B. 605; *Hodgson v. West Stanley Colliery*, [1910] A.C. 229, per L.C. Loreburn at pp. 231, 233, 47 S.L.R. 881. Provision was made in the statute for the redemption of any weekly payment in the case of partial incapacity (Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58, Sched. I, section 17). But no provision was made for the repayment of redemption money paid under this section in the event of the workman becoming subsequently totally incapacitated by another accident. Nor was there any provision for the allocation of compensation among two or more employers. The statute thus contemplated concurrent awards. *M'Callum v. Quinn*, 1909 S.C. 227, 46 S.L.R. 141, was also referred to.

Argued for the respondents—The statute gave compensation not for the injury but for the consequences of the injury. The consequences were total or partial loss of wage-earning capacity, and this might be caused by a number of injuries—*Harwood v. Wyken Colliery Company, Limited* (cit. sup.), per L. J. Buckley, p. 164. The compensation payable in respect of loss of wage-earning capacity could never be assessed at more than £1 altogether. The statute gave no right not prescribed by the schedule. The arbitrator's award here was merely suspensory, and did not preclude the workman from having recourse against the first employer in altered circumstances. But in the circumstances the workman must have recourse in the first place against his last employer—*Noden v. Galloways Limited*, [1912] 1 K.B. 46, per Cozens-Hardy, M.R., at p. 49, and Fletcher Moulton, L.J., at pp. 51 and 52. In the Sheriff Court the question here raised had been decided by the arbitrator adversely to the appellant in at least three previous cases. *M'Neill v. Woodilee Coal and Coke Company, Limited*, 1918 S.C. (H.L.) 1, 55 S.L.R. 15, was also referred to.

LORD DUNDAS—On the 13th August 1918 the appellant, while in the respondents' employment, sustained an injury resulting in the loss of his left foot by an accident admittedly arising out of and in the course of that employment. His wages at that time were £4, 17s. 6d. He was totally incapacitated until the 4th June, and until then he was paid compensation by the respondents at the maximum rate of £1 per week. On the 4th June the total incapacity ceased, and the man got employment with another employer, a Mr King, at a weekly wage of £2, 4s. The appellant and the respondents agreed that as at the 4th June 1919 the

appellant was still partially incapacitated by his accident on 13th August 1918, and that in respect of and during the continuance of that partial incapacity he should be paid compensation at the rate of £1 weekly by the respondents. Accordingly that compensation was paid for the next nine days or so. It did not go on longer, because the unfortunate man on the 13th June met with another accident in his new employment with Mr King, whereby he was totally incapacitated by an injury to his left hand. In respect of that total incapacity resulting from the injury of 13th June he has been ever since that date and is now receiving from Mr King compensation under the Act at the rate of £1 per week, and also, we are told, the increment of 5s. under the recent War Addition Act 1917. The last finding is—"That it is not maintained by the respondents that the claimant's and appellant's partial incapacity arising from the injury of 13th August 1918 has ceased or been diminished since 4th June 1919."

On these facts the learned arbitrator "found in law that as the claimant and appellant was presently receiving from another employer the maximum compensation provided by the Workmen's Compensation Act 1906 to be paid to a workman incapacitated for work by injury by accident, his claim under said Act to any payment of compensation by the respondents fell to be suspended," and he accordingly suspended it. I think the learned arbitrator was quite right. The matter turns upon the First Schedule of the Act. The amount of compensation under the Act is prescribed by sub-section 1 (b)—[*His Lordship read the sub-section, which is quoted supra, down to the words "such weekly payment not to exceed £1"*]. Now the appellant here is not satisfied with £1 a week and claims that he is to get £2; that he is to be paid, first of all, £1 in respect of the agreement between himself and the respondents on the 4th June, and also £1 in respect of the second accident, payable by Mr King. The difficulty, however, and I think the unsurmountable difficulty in the appellant's way, exists in the concluding words of the sub-section, namely, "such weekly payment not to exceed £1." We had authority quoted to us to the effect that under suitable circumstances a man may quite well have a claim against employer A for so much a-week in respect of injury by accident, and concurrently a claim against employer B in respect of a different accident. But it has never been decided that that is so where the two claims go above the total of £1. That question has never been decided, nor even raised, so far as we are informed, in the High Court either in this country or in England. That is a rather significant fact looking to the years that have gone by during which this Act has been in operation and, as the learned arbitrator says, "after the ingenuity of counsel and agents has been exercised on very many thousands of cases."

We are informed, what the learned arbitrator apparently was not aware of, that there has been some practice in the inferior courts of this country, whatever

may have been the case in England. We are told that there have been at least three decisions, two of them pronounced by a very able and experienced arbitrator in the years 1910 and 1917, and a later one in the Sheriff Court at Stirling, probably following the two decisions to which I have referred. In one of these decisions by Sheriff Shennan, in a portion of his opinion which was read to us, he points out that in his view compensation under the Act is not for a man's injury but for his incapacity, that that incapacity is one and indivisible, and that it can never be more than total incapacity however many injuries by accident the man may have suffered from. I think that is the key to the whole problem. I agree with Sheriff Shennan's view and also with the view which is expressed by the Sheriff in this case. I therefore think that we must answer the first question put to us in the affirmative, and if that is done the parties were agreed that we need not answer the second question.

LORD SALVESEN—I agree with your Lordship in the chair and for the same reasons.

LORD GUTHRIE—So do I.

The LORD JUSTICE-CLERK was absent.

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

Counsel for the Appellant—Brown, K.C.—Crawford. Agents—W. & W. Finlay, W.S.

Counsel for the Respondent—Hon. Wm. Watson, K.C.—Marshall. Agents—W. & J. Burness, W.S.

COURT OF TEINDS.

Friday, November 28.

TRUSTEES OF PATHHEAD CHURCH, MINUTERS.

Church—Church Lands—Sale—Investment of Proceeds—Government Annuities.

Lands were held by trustees as part of the endowment of a church and parish *quoad sacra*. During the whole of the period they had been held by the trustees they had produced a rent of £50. The trustees proposed to sell the land at a price of £2000, and to invest the proceeds in the purchase of $2\frac{1}{2}$ per cent. Government annuities, which they alleged were gilt-edged securities of a permanent character, and would produce a return of about £100 a-year. The Court approved of the sale and sanctioned the change of security.

The Hon. William Watson, K.C., Procurator for the Church of Scotland, and others, the trustees acting under the Deed of Constitution of the Church of Pathhead, granted by the General Assembly of the Church of Scotland on 1st June 1857,

lodge a minute in a petition by Daniel Fraser and others for disjunction and erection of the church and parish *quoad sacra* of Pathhead, in which petition decree of erection had been granted on 16th March 1859. The minute craved the approval of the Court to the sale of lands which formed part of the endowment of the church and the investment of the proceeds in the purchase of Government annuities.

The minute set forth—"In the course of the proceedings in connection with the petition the Clerk of Teinds lodged a report, *inter alia*, as follows:—'*Second.—Endowment and maintenance of fabrics.* (1st) in the year 1849 a portion of the lands of Easter Smeiton was acquired by Dr Brewster, minister of Scoonie, and others, for the purpose of holding the same in trust for behoof of the minister of the church in Sinclairtown, in aid of his stipend, he remaining always in connection with the Church of Scotland. The subjects are at present under lease for fifteen years from 1st January 1856, at a rent of £50 sterling, and they have now been conveyed to the trustees for the proposed parish in the customary manner. The feu-duty and composition are illusory. There is a certified valuation of these subjects to the effect that at the expiry of the present lease they will be worth £60 of annual rent.' He further summarised a state of the proposed endowment as follows:—

'Rent payable for ground under lease,	£ 50 0 0
Stipend to minister,	120 0 0

Balance of stipend to be provided, £70 0 0	
Ground annual of £86, 4s. 4d., applicable first to stipend, thereafter to support of fabrics to the extent of	80 0 0

Balance applicable to fabrics, ...	£10 0 0
Estimated sum for support of them,	5 0 0

Surplus £5 0 0

Independent of church revenues.'

"The portion of the lands of Easter Smeiton conveyed to the trustees for the parish and church of Pathhead has continued to be, and still is, held by the said trustees; the rent has remained throughout at the original figure of £50 per annum; and the lands are at present under lease at that rent to Messrs D. S. Honeyman & Son, yarn merchants and bleachers, Denburn Bleachfield, Kirkcaldy.

"Having in view the present favourable condition of the market for lands situated in the neighbourhood, the minuters took under consideration the question whether notwithstanding the said lease it might not be possible to effect a sale of the said lands under advantageous terms. Informal negotiations were thereupon opened up with Messrs D. S. Honeyman & Son, and it was ascertained that they were prepared to pay a price for the said land considerably in excess of the capital sum required to produce a return of £50 per annum. As a result of these negotiations the minuters have now sold the said lands to Messrs D. S. Honeyman & Son, with entry at Martinmas