

Friday, November 25.

FIRST DIVISION.

WEMYSS COAL COMPANY, LIMITED
v. KILPATRICK.

Workmen's Compensation — Partial Incapacity — Workman Unfit for Former Work Receiving Similar Wages in Suitable Work—Subsequent Total Incapacity Due to Causes Unconnected with Accident — Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (1) b and (3).

A workman employed as a supervisor of picking tables at a colliery was totally incapacitated through an accident by which he lost the sight of his right eye and received compensation. After a time he resumed his work at the picking tables, and also worked in a woodyard at the colliery, though he was not in fact fit for his previous work, and could not have obtained employment as a supervisor in the open market. His incapacity to resume his previous work was certified by the medical referee to be due to the accident inasmuch as it had deprived him of the use of his right eye and caused him to depend on his left eye, which was defective, and appeared to have been so prior to the accident. After resuming work he was for some time paid compensation as for partial incapacity, but subsequently received wages equal to those he had earned prior to the accident, and continued to do so until the sight of his left eye became so defective owing to causes unconnected with the accident that he was unfit for any employment and ceased work. The arbitrator found that when the workman resumed work he was in a condition of partial incapacity, from which he at no time recovered, due to the accident, and awarded partial compensation from the time the workman ceased work. *Held* that on the facts stated the arbitrator was entitled to award partial compensation.

The Wemyss Coal Company, Limited, appellants, being dissatisfied with a decision of the Sheriff-Substitute at Kirkcaldy (STUART) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between the appellants and James Kilpatrick, respondent, appealed by Stated Case.

The Case stated—“This is an arbitration under the Workmen's Compensation Act 1906, in which the employers, by minute in the process in proceedings between the workman as applicant and themselves as respondents, craved an award finding that the workman's right to compensation in respect of an injury to his right eye, sustained by him in consequence of accident arising out of and in the course of his employment with the employers, came to an end for the time being at or prior to 24th December 1919, and ending his right to compensation for the time being at or prior

to that date. The workman averred in answer (1) that although he had resumed his former work on 8th April 1919, and was paid full wages by the employers, he was unfit to perform his duties, and had no earning capacity in the open market; and (2) that but for the incapacity of the right eye caused by the accident, the supervening condition of the left eye hereinafter referred to would not have incapacitated him for work, and that, accordingly, his total incapacity was due to the injury to his right eye, and he craved the Court to award him full compensation in respect of total incapacity from 1st May 1920.”

Proof was led before me on 19th January 1921, when the following facts were admitted or proved:—“1. On 14th December 1917 the workman who was at that time in charge of the picking tables at Michael Colliery, Wemyss Castle, belonging to the employers, sustained an injury to his right eye through being struck thereon by a splinter of coal. He was totally incapacitated thereby, and was paid compensation in respect of said injury. 2. In or about December 1918 a dispute arose between the workman and employers as to whether or not the workman was fit for work. The dispute was referred to Dr George Mackay, Edinburgh, as medical referee in ophthalmic cases, in terms of section 15 of the First Schedule to the Workmen's Compensation Act 1906. On 9th January 1919 Dr Mackay reported that the workman's right eye had no working capacity, and the direct vision of the left eye was somewhat impaired (probably as the result of some older injury), and that in his opinion the workman was fit to resume his work as supervisor of the women at the picking tables. 3. The workman was dissatisfied with this report, which he thought had been given by the referee owing to his not having the full facts in regard to the nature of the work explained to him, and after certain negotiations the parties again agreed to remit the question of the workman's fitness for work to the said Dr George Mackay as medical referee. 4. On 5th March 1919 the said Dr George Mackay again examined the workman. On 6th March 1919 Dr Mackay certified that the workman's condition was such that he was not fit to resume his work as a supervisor at the picking tables, but would be more suitably employed in the woodyard where he could load and unload or stack props or saw wood, and that his incapacity to resume his previous work was due to the accident inasmuch as it had deprived him of the use of his right eye and caused him to depend on his left eye which was defective and appeared to have been so prior to the accident. 5. The workman thereafter applied to the employers for work. At the time of the application there was available (1) his former job as a supervisor, and (2) a job in the woodyard such as he had been certified fit for by the medical referee, the shift wage for both jobs being the same, viz., 10s. 6d. per shift, including war wage and bonus. 6. The workman did not ask for a job in the woodyard (at which six shifts a week were available) as he was quite ready to try his old job as supervisor

of the picking tables again, and preferred that job to going to the woodyard. 7. The workman resumed work at the job of supervisor of the picking tables on 8th April 1919, and after doing so was constantly upon the back shift, on which shift he could only get work on five days per week at that job. He therefore worked in the woodyard on Saturdays in order to make up a full week's work until September 1919, when owing to the shortening days and the increasing failure of his eyesight it became too dark for him to find his way to the woodyard. 8. The workman was paid partial compensation after resuming work at various rates up to and including 24th December 1919. From and after that date he received wages equal to his average weekly earnings prior to said accident. 9. The workman was not in fact fit to resume his work as supervisor at the picking tables, and could not have obtained employment in that capacity in the open market, but he was fit for the work to which he was put in the woodyard, and performed this work efficiently for some months until his sight became worse. He gave up work on or about 1st May 1920, and claimed that at that date he again became totally incapacitated for work on account of said accident. The employers denied this, and the question between the parties was again remitted to the said Dr George Mackay as medical referee. 10. On 19th July 1920 the workman was certified by the said Dr George Mackay as medical referee to be quite unfit for employment of any kind. The said Dr George Mackay's certificate was in the following terms:—'(1) The said James Kilpatrick's right eye is practically just as described in my report of the 8th January 1919. The left eye has greatly failed in vision since I last examined him upon the 5th of March 1919. It has now developed cataract. The vision of this eye is much reduced thereby so that he can only count fingers exhibited against a black background at a distance of 2 or 3 feet. In unfamiliar places he has to be led about, and his condition is such that he is quite unfit for employment of any kind. This eye has correct perception of light, and there is a good prospect that its vision might be restored by an operation for removal of the cataract and the wearing of suitable spectacle glasses thereafter. (2) This latter development of total incapacity on the part of the said James Kilpatrick is not attributable to the accident to the right eye on or about 14th December 1917, but appears to have developed spontaneously as a result of his age and condition of health, and that accordingly this development of total incapacity is not attributable to the accident.' 11. The workman is 74 years of age, and his average weekly earnings prior to the accident amounted to 39s. 2d.

"Upon the foregoing facts I found that the workman's condition at the time when he returned to work on 8th April 1919 was a condition of partial incapacity, from which he at no time recovered, and that the said partial incapacity was due to the accident referred to. I therefore hold him entitled to compensation as for partial incapacity.

The evidence affording no data for estimating his earning capacity as a partly disabled workman, I was obliged to assess the compensation on a general view of the circumstances of the case. It appeared to me that an award of 15s. weekly was a reasonable sum, and this I accordingly awarded as from 1st May 1920. The workman was found entitled to expenses."

The *questions of law* for the opinion of the Court are—"*For the employers*—1. Was there evidence on which I was entitled to award partial compensation? 2. On the foregoing facts was I bound to grant an award ending the applicant's right to compensation for the time being? *For the workman*—3. On the foregoing facts was I bound to find that the workman was totally incapacitated as the result of the accident from 1st May 1920?"

The arbitrator's *note* appended to the award was as follows:—"This is, in the first instance, an application by the respondents craving a finding that the applicant's right to compensation came to an end for the time being at or prior to 24th December 1919, the date on which he was again receiving full wages. The applicant replies that he is still suffering from total incapacity as the result of the accident, and craves an award of compensation upon that basis. I have reached the conclusion—although neither party appeared to favour my view—that the applicant is entitled to compensation not for total but for partial incapacity. The accident which deprived the applicant of the use of his right eye rendered him totally incapable of work for at least a year, and he received compensation as for total incapacity. On a reference to Dr Mackay as medical referee, Dr Mackay certified on 6th March 1919 that 'he is not fit to resume his work as a supervisor at the picking tables but that he would be more suitably employed in the woodyard, where he could load or unload or stack props or saw wood.' Dr Mackay's certificate is conclusive as to the applicant's fitness for work. The onus, I think, is on the respondents, who allege that his incapacity has ceased, to prove the fact. The applicant returned to work on 8th April 1919, and was again employed as supervisor at the picking tables five days in each week, and on Saturdays he was employed in the woodyard sawing wood. For some months the respondents paid him partial compensation, but this ceased on 24th December, when he again received full wages. He remained in the respondents' service until May 1920, when he was obliged owing to increasing blindness to cease work altogether. Proof was allowed as to the applicant's wage-earning capacity, and evidence on both sides was adduced. In my opinion it is not proved that the applicant's fitness for work was at any period fully restored. It is true that he resumed his duties as supervisor at the picking tables. But I think the weight of evidence confirms the opinion expressed by Dr Mackay a month earlier, viz., that his eyesight was not equal to the efficient performance of such work. I am the more inclined to accept the evi-

dence for the applicant as to his impaired efficiency when I find that no one in authority seems to have observed, even in the later months, that his eyesight had almost wholly failed. If the applicant's ability for effective supervision was thus diminished it must, I think, be inferred that his wage-earning capacity was reduced. It can hardly be supposed that he would have been able to obtain employment at full wages from another employer. He had no occasion to seek employment elsewhere, and his wage-earning capacity can be estimated only from the facts that are proved. But the inference that I draw seems reasonably plain. The applicant on the other hand maintains that in consequence of the accident he has been all along wholly incapacitated, and claims to receive compensation on that basis. I think that he also must face the situation created by Dr Mackay's report. Dr Mackay certified him on 6th March 1919 to be fit to work in the woodyard, and to be employed among other things in sawing wood. In point of fact he undertook the work indicated by Dr Mackay, and continued to perform it at all events for some months after his return. He deposes that he was not able to do it, or at least to do it without assistance. But Dr Mackay's report is against him, as also the evidence of May the foreman, who says that his output was at least as good as that of the other man who worked at the same job. I reject therefore the applicant's contention that he had no earning capacity at this period. I hold it proved that he had some, albeit a diminished capacity to earn wages. But I do not think he could have earned in the labour market the wages which he received from the respondents. The evidence accordingly leads me to the conclusion that the applicant is entitled to compensation in respect that the accident has left him with a reduced wage-earning capacity. That, I think, is the limit of the consequences that can be attributed to the accident. He is now unfortunately wholly disabled from work, but as Dr Mackay certifies in his last report (19th July 1920)—'This later development of total incapacity is not attributable to the accident to the right eye, but appears to have developed spontaneously as a result of his age and condition of health.' It was contended for the applicant that even so the total incapacity must be referred to the accident but for which he would have had one sound eye. This argument, in circumstances similar to the present, was put forward in the case of *Hargreaves v. Harghead Coal Company* (1912 A.C. 319), but was not sustained. The workman there, as here, had lost the sight of one eye by an accident, but it was found that his incapacity had ceased. There also cataract, not due to the accident, subsequently developed in the uninjured eye. It was held that the employers were entitled to a finding ending the compensation. The argument that if the workman should become totally blind this result could be causally related to the accident was rejected upon grounds which seem to be equally valid in the present case.

"If my conclusion is well founded upon

the evidence no authority is needed to justify an award as for partial incapacity. But as an example where this course was followed in circumstances which seem essentially similar to the present I may refer to the case of *Cory Bros., Limited v. Hughes* (1911, 2 K.B. 738), where such an award (reduced compensation) was held to be within the power of the arbitrator."

The employers appealed, and argued—The arbitrator was wrong in awarding compensation for partial incapacity. At most the respondent was only entitled to a suspensory award. He had recovered his wage-earning capacity as at 24th December 1919, when he received wages equal to what he earned prior to the accident, for work for which he was then fit and which he performed efficiently. This was the test of the Act—Workmen's Compensation Act 1906, First Schedule (1) *b* and (3). His subsequent incapacity was not due to the accident and could not be so regarded, on the ground that but for the loss of the right eye he would not have been incapacitated by the loss of the left one—*Hargreave v. Harghead Coal Company, Limited*, 1912 S.C. (H.L.) 70, 49 S.L.R. 474; *Hart v. Cory Brothers*, 1916, 1 K.B. 172, per Lord Cozens Hardy, M.R., at p. 175; *M'Ghee v. Summerlee Iron Company, Limited*, 1911 S.C. 870, per Lord Dundas at p. 874, 48 S.L.R. 807. Counsel also referred to *Keevans v. Mundy*, 1914 S.C. 525, 51 S.L.R. 462, on the question as to whether the workman, by resuming his former work instead of the suitable work available, had refused light work and thereby barred himself from claiming compensation.

Counsel for the respondent did not insist upon the third question of law, and was not called upon to argue the first and second questions.

LORD PRESIDENT—The only questions of law which remain to be disposed of are those stated for the employers. The first of these is whether there was evidence on which the learned arbitrator was entitled to award partial compensation. It has been contended for the employers that he was not so entitled, their contention being that it appears from two findings in fact that, at any rate as from 24th December 1919, the workman had been restored to full wage-earning capacity. The finding upon which that contention is primarily based is the eighth—"The workman was paid partial compensation after resuming work at various rates up to and including 24th December 1919. From and after that date he received wages equal to his average weekly earnings prior to said accident." But the fact that the workman received—it may have been by the goodwill of his employers—the same wage after 24th December 1919 for a number of months as he had received before the accident is not conclusive of the complete restoration of the workman's capacity. The employers accordingly refer in the next place to the ninth finding in fact. That finding consists of two parts. In the first it is found that "the workman was not in fact fit to resume his work as supervisor

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