

construing this statute I decline to attribute such an intention to the Legislature. Suppose that these defenders had contracted with a tradesman to put this hall into good order so that they might let it, Is the corporation exempt by Act of Parliament from paying the contract price if the tradesman does not render his account for six months after the completion of the work? If they do not pay, why should they not be liable in damages for the breach of their contract to pay? I am very clearly of opinion that the Lord Ordinary was right in repelling the first plea-in-law for the defenders, and that we should adhere to his judgment.

LORD TRAYNER—The only question raised in this reclaiming-note is whether the first plea-in-law for the defenders should be repelled or sustained. The Lord Ordinary has repelled it and allowed a proof, and I think he has acted rightly. The plea is that this action is barred by section 1 of the Public Authorities Act 1893. What is here complained of is that the defenders failed to implement the contract with the pursuer by which they let to him the Town Hall of Greenock. But the defenders were under no obligation to let the hall, and if they did so they acted, not under any public authority conferred on them, or public duty laid upon them, but merely as the persons having charge of the building. They had the hall in their hands to let or not as they pleased.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—G. Watt, K.C.—R. S. Brown. Agents—Patrick & James, S.S.C.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—M'Lennan. Agents—Cumming & Duff, S.S.C.

Tuesday, December 13.

## FIRST DIVISION.

[Sheriff Court at Kilmarnock.]

ARCHIBALD FINNIE & SON v.  
DUNCAN.

*Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule (11) and (12)—Review of Weekly Payment—Injured Workman who had left United Kingdom—Obstructing Examination.*

In an application by an employer, under section 12 of the First Schedule of the Workmen's Compensation Act 1897, for review of a weekly payment to an injured workman, it appeared that the workman had gone to Australia without intimation to the employer that he was going or what his address there would be.

The Court *suspended in hoc statu* the workman's right to the weekly payment, holding that the workman was obstructing examination in the sense of section 11 of the First Schedule of the Act.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Sched. I, enacts, sec. 11—"Any workman receiving weekly payments under this Act shall, if so required by the employer . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer . . . but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act . . . and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." Section 12—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased."

This was an appeal by Archibald Finnie & Son, coalmasters, Kilmarnock, petitioners and appellants, from a judgment of the Sheriff-Substitute (MACKENZIE) in an arbitration under the Workmen's Compensation Act 1897 between them and Robert Duncan, miner, 39 Kirkland Rows, Springside, Kilmarnock, respondent.

The case stated—"The respondent was injured on 6th July 1903 by accident arising out of and in the course of his employment as a miner in the service of the petitioners, and in December 1903 he underwent an operation in the Western Infirmary, Glasgow, by which the semi-lunar cartilage of his right knee was removed, that cartilage having been injured by the accident which he suffered. The petitioners paid the respondent compensation regularly at the rate of 10s. 1d. per week, being the full amount to which he was entitled under the said Act from the date of the accident to 11th April 1904. On 23rd June 1904 the petitioners presented a petition craving the Court, under paragraph 12 of the First Schedule appended to said Act, to review said weekly payments, in respect that respondent's incapacity for work terminated on or before 11th April 1904. After proof, I, on 27th July 1904, pronounced an interlocutor repelling the respondent's preliminary pleas as to the incompetency of the petition, and finding that the respondent was then able for light labouring work, at which he might be capable of earning 15s. per week, and I accordingly diminished said weekly payments from 10s. 1d. to 5s. per week until the further orders of the Court, without

expenses to either party. From this award no appeal was taken. On 21st October 1904 the petitioners lodged a minute in process again craving the Court, under paragraph 12 of the First Schedule appended to said Act, to review the weekly payments of 5s. per week awarded to the respondent by my said interlocutor of 27th July 1904, in respect that the respondent had left this country and gone to Australia, and that the petitioners had no opportunity of having him medically examined or of ascertaining his bodily condition. Immediately on the lodging of this minute I ordered service of the minute on the respondent at his last known address, and at the Edictal Citation Office, and also intimation to his known agent in Kilmarnock. No proof was led, but on 9th November 1904 I heard party's agents, when it was admitted that the respondent had left this country for Australia in the beginning of August 1904, leaving his wife at home, without intimation to the petitioners that he was going, or what his address would be. Respondent's agent stated that the respondent had gone to Australia for the benefit of his health, his passage having been paid by a relative. The petitioners' agent stated that he had no information on this subject."

On 16th November 1904 the Sheriff-Substitute pronounced an interlocutor refusing *in hoc statu* the crave of the minute of 21st October 1904, in respect (1) that it was not stated in said minute that the respondent had permanently left this country, or that any steps had been taken by the petitioners to have him medically examined, and (2) that no change in the state of his incapacity was averred to have taken place since the award of 27th July 1904.

The question of law for the opinion of the Court was—" (1) In the circumstances stated does the compensation awarded to the respondent on 27th July 1904 fall to be ended or diminished by reason of the respondent having left Scotland for Australia without notice to the appellants; and, assuming the question to be answered in the affirmative, should the compensation be ended or diminished (a) from the date of his departure or (b) from the date of judgment in this application."

Argued for the appellants—The workman by going away to Australia without leaving an address had made it impossible to put in operation the machinery provided by the Act for ascertaining his condition. There were no practitioners appointed for the purposes of the Act in Australia. His conduct in the whole circumstances amounted to "obstruction" of examination in the sense of section 11 of the First Schedule of the Act.

Argued for the respondent—The fact that the respondent had found it necessary to go to Australia for his health did not put him in the position of obstructing examination in the sense of the Act. The term "obstruct" connoted some active step preventing examination. "Such" examination, in section 11, meant either of the two modes of examination therein set out, and it was quite feasible for the appellants to instruct a

medical man in Australia to examine the respondent. The provisions of the Act should be interpreted liberally, and, admitting that the present was a *casus improvisus*, the subsisting right of the respondent to the weekly payment should not be suspended merely by reason of his having had to leave the country.

LORD ADAM—The respondent Robert Duncan, who was in the employment of the appellants, was injured on 6th July 1903 by an accident in the course of his employment. The injury involved an operation, described in the stated case as the removal of the semi-lunar cartilage of his right knee. The appellants paid compensation under the Workmen's Compensation Act for some time from the date of the accident at the rate of 10s. per week. After a time it appeared to the appellants that this weekly payment should be modified, and they petitioned the Sheriff to review the weekly payment, with the result that the Sheriff on 27th July 1904 diminished the payment to 5s. per week. On 21st October 1904 the appellants applied again to the Sheriff to review the weekly payment. The Sheriff ordered the application to be served at the last known address of the respondent and also edictally, and caused intimation to be made to his last known agent. When the case came up there was no proof led, but it was admitted that the respondent had gone to Australia for the benefit of his health, and the respondent's agent stated that he had no further information about him. In these circumstances the Sheriff pronounced this interlocutor—[*His Lordship quoted the Sheriff's interlocutor.*]

The effect of this interlocutor if adhered to is that 5s. per week will be continued until further evidence of the respondent's condition is brought forward, and this cannot be done as long as Duncan remains abroad. By section 3 of the First Schedule an injured workman may, before compensation is fixed, be required to submit himself to examination by a medical practitioner selected by the employer, and if he refuses or obstructs the examination his right to compensation is suspended. After the weekly payment is fixed, it may, under section 12, be reviewed at the request of either party, and ended, diminished, or increased, the amount being settled by arbitration. Now here the appellants thought that this was a case in which the payment to the respondent should be diminished or ended. The machinery provided by the Act and the obligations of the workman are set out in section 11 of the First Schedule—[*His Lordship read this section.*] The words are "shall . . . from time to time submit himself for examination" by a medical man employed by the employer. These words are imperative. But the respondent has by his own act made it impossible to put that machinery in force. He has left the country. The Act does not contemplate in terms the workman leaving the country. But after prescribing the machinery by which the state of the workman is to be ascertained, it enacts (section 11)—"If the

workman refuses to submit himself to such examination, or in any way obstructs the same, his right to weekly payments shall be suspended until such examination has taken place." I do not think this is a case of the workman refusing, but I think that it amounts to a case of obstructing. It is a reasonable construction of the word "obstruct" to hold that it covers a case where a man by his own acts prevents examination, or, in other words, makes it impossible to have the examination provided for by the Act made. It prevents the operation of the machinery provided by the Act for ascertaining whether the weekly payment is to be continued.

Accordingly I think we should find that the respondent has obstructed the examination, and that his right to the weekly payment is suspended until the examination takes place.

LORD M'LAREN—This case comes before us in the course of an application by the employers of an injured workman to have the weekly payment awarded to him reviewed, in respect that the workman has gone to Australia and that the petitioners are unable to exercise their statutory right of having the respondent examined by a medical referee of their own selection. The question is as to the application of section II of the First Schedule of the Act, and that is the only point we are called upon to consider. Under section II there are, as I had occasion to point out in a previous case, three courses open to the employers with corresponding obligations upon the workman—(1) The employer may, with his consent, have the workman examined by a medical man selected by the employer himself; (2) the workman may decline an examination by the employer's doctor and claim to be examined by the official referee; or (3) the workman may agree to examination by the employer's medical referee without being bound by his decision, and if dissatisfied with it he may claim to be examined by an official medical referee. Now in this case the respondent having left the country the two latter courses are not available, because there are no official referees outside the United Kingdom, to which alone the statute applies, and it is only by putting a severe strain upon the language of the statute that the first course could be made available. I can hardly think that the section contemplates the employer sending a medical man to Australia or instructing an agent in Australia to employ a medical gentleman of whom he knows nothing to conduct such an examination. If there was any indication that the Act was intended for the benefit of a workman who goes abroad, it would be necessary to look for some way of working out the provisions of the section, but there is nothing in the principle of the statute nor in its scope to suggest that it was intended to apply to a case of this kind. There is no machinery in the statute appropriate to such a case, and therefore the only safe course is to assume that such a case is not within the statute. I should, if possible,

not wish to say that the present case falls within the category of obstruction, though at the same time I think it is clear that "obstruction" does not necessarily mean wilful obstruction. In the absence of any arrangement between the parties it suffices for the decision of the case that the respondent has made it impossible to carry out the provisions of the statute. I therefore agree with all that your Lordship has said, and concur in the judgment proposed.

LORD KINNEAR—I am not disposed to say that a workman cannot go abroad without forfeiting the benefits of the Act provided he gives notice to his employer so as to enable some reasonable arrangement to be made for a medical examination in case the employer thinks the weekly payment should be revised. I agree, however, with your Lordship in the chair that the conduct of the workman in this case has made it impossible to carry out the machinery of the statute which is provided in the employer's interest. The workman has gone to Australia without notice and without leaving any address, and the employer cannot obtain the medical examination which the 11th section entitles him to require that the workman shall submit himself to. The workman has made it impossible to carry out the statutory proceedings, and in the plain meaning of the word there has been obstruction in fact. I therefore agree that the case falls within the provisions of section II, and that in the meantime compensation must be suspended until the medical examination can take place. Whether that involves suspension until the workman comes back to this country it is not necessary to consider, but until the examination takes place compensation must be suspended. It was not possible for the Sheriff-Substitute to diminish or end the award, because he could know nothing of the condition of the workman. He was therefore right in declining to grant the motion as originally made, but I agree that the compensation should have been suspended *in hoc statu*.

The LORD PRESIDENT was absent.

The Court sustained the appeal and suspended *in hoc statu* the respondent's right to compensation.

Counsel for the Appellants—Guthrie, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Macmillan. Agents—Gardiner & Macfie, S.S.C.