

Tuesday, May 14.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

JAMES NIMMO & COMPANY, LIMITED
v. FISHER.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict., cap. 37), Sched. 1 (12)—Payment under Agreement during Total Incapacity—Return of Workman to Work—Charge by Workman for Full Compensation from after his Return to Work up to Date of Award Varying Compensation—Suspension by Employers after Offering to Pay any Deficiency during such Period between Earnings and Average Wage Prior to Accident.

A workman was injured, and under registered agreement received compensation as for total incapacity. He returned to work on 12th January, and on 26th April applied, under the Workmen's Compensation Act 1897, Schedule I (12), to the Sheriff to vary his compensation. The Sheriff reduced it to one shilling per week by an award dated 18th October. The workman charged for his full compensation from 10th January, the date from which it had ceased to be paid, to 18th October. The employers offered to pay any deficiency, whenever such had occurred, between his actual earnings during the period and his average wage prior to the accident, and, this offer being refused, raised a suspension.

Held (1) that the workman had by returning to work admitted that total incapacity, the basis of the agreement, had ceased; (2) that he could not therefore claim compensation as in respect of such incapacity; (3) that the Sheriff's award of 18th October, not affecting the compensation due prior to its date, did not foreclose the question at issue; and (4) that in respect of the employers' offer suspension should be granted.

Beath & Keay v. Ness, November 28, 1903, 6 F. 168, 41 S.L.R. 113, approved and followed.

James Nimmo & Company, Limited, coalmasters, Holytown, presented a note of suspension in which they sought to suspend a charge at the instance of Alexander Fisher, miner, Holytown, for payment of £26, 10s., alleged to be due him as forty weeks' compensation, viz., from 10th January to 18th October 1906, under the Workmen's Compensation Act 1897, conform to an extract registered memorandum of agreement dated 14th, recorded in the register kept under the Workmen's Compensation Act 18th December 1905, and registered in the Sheriff Court Books of the county of Lanark 7th November 1906.

The complainers, *inter alia*, pleaded—“(4) The respondent having by receipt of wages from the complainers, as descended 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. (5) There being an implied agreement between the complainers and the respondent that no part of the compensation charged for should be payable by the complainers to the respondent beyond the compensation now tendered by the complainers, the respondent cannot now insist in his claim for compensation to any further extent, and the charge ought to be suspended. (6) The respondent having returned to work with, and accepted wages from, the complainers as aforesaid, is barred from insisting in his claim for compensation for said period.”

The respondent pleaded—“(1) In respect that the sum charged for is payable under a duly recorded memorandum of agreement reviewed by an interlocutor pronounced in the Sheriff Court of Lanarkshire at Hamilton, dated the said interlocutor the 18th October 1906, which interlocutor has become final, the present note of suspension is incompetent. (2) The averments of the complainers are irrelevant and insufficient to support the prayer of the note. (3) The prayer of the note should be refused in respect (a) that the averments of the complainers so far as material are unfounded in fact, and (b) that compensation at the rate of 13s. 3d. per week was payable by the complainers in terms of the said registered memorandum of agreement until the said agreement was competently reviewed by decree of the Sheriff-Substitute.”

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 28th February 1907 pronounced this interlocutor:—“Sustains the reasons of suspension: Suspends the charge, warrants, and whole grounds thereof *simpliciter*, and decerns: Finds the complainers entitled to expenses.”

Opinion.—“This is a suspension of a charge to implement an agreement, dated 14th and recorded in the register kept under the Workmen's Compensation Act 1897, 18th December 1905, and in the Sheriff-Court Books at Hamilton, 7th November 1906, and to pay compensation in terms thereof.

“The respondent is a miner, who on 29th August 1905 was injured whilst in the employment of the complainers, who are coalmasters. The respondent claimed compensation under the Workmen's Compensation Act 1897 in respect of his total incapacity for work, and the parties agreed, on 19th September 1905, that the weekly amount of compensation to be paid to the respondent under the Act in respect of his total incapacity was 13s. 3d. Compensation was paid at this rate between 12th September 1905 and 10th January 1906. The respondent's average earnings prior to the accident amounted to £1, 6s. 6d. per week. On 12th January 1906 the respondent returned to work with the complainers. From 12th January to 3rd May 1906 he earned wages at the rate of £1 per week.

On 26th April 1906 he petitioned the Sheriff-Substitute for a review of his weekly payments under Schedule I (12) of the Act. In his petition the respondent craved the Sheriff-Substitute to review his compensation as from 12th January 1906. By Interlocutor dated 18th October 1906, the Sheriff-Substitute found that the respondent had partially recovered, and since 3rd May 1906 had been earning a wage of 27s. 6d. per week as a brusher; that workers at the face are at times able to earn much higher wages than brushers; that the respondent's injury was permanent, and would prevent him ever resuming work as a miner at the face, and that in consequence he has not so wide a field of employment in his line of work as before the accident; and reduced the compensation, as from the date of the interlocutor, to 1s. per week. The cases of *Steel v. Oakbank Coal Co.*, 5 F. 244, and *Pumpherson Oil Co. v. Cavaney*, 5 F. 963, decide that the Sheriff-Substitute was bound to treat the agreement as enforceable up to the date of his decision.

"The complainers have been charged to pay under the agreement the sum of £26, 10s., being forty weeks' compensation at 13s. 3d. per week from 17th January to 18th October 1906. They point out that for the period between 12th January and 3rd May 1906 the respondent's actual earnings were £15, 9s.; and that his average earnings for a similar period prior to the accident would have amounted to £21, 4s., the difference being £5, 15s. They admit that no compensation has been paid to the respondent since 10th January 1906. They offer—[*this was the offer which Lord Stormonth Darling refers to as made in article 6 of complainers' statement of facts*]—to pay him £5, 18s. 9d., being the above sum of £5, 15s. plus 3s. 9d., representing compensation at the rate of 13s. 3d. per week for the 10th and 11th of January, when he was earning nothing. This sum of £5, 18s. 9d. represents the full difference between the respondent's average earnings prior to the accident and his actual earnings from 10th January until 3rd May. The position taken up by the complainers as to the period between 3rd May and 18th October is that, by receiving wages from the complainers at the rate of 27s. 6d. during that time the respondent has discharged his right to the compensation charged for in respect of that period.

"The complainers found upon the case of *Beath & Keay v. Ness*, 6 F. 168. In that case the workman had obtained a decree against the employers under the Workmen's Compensation Act awarding him 17s. per week of compensation until further orders of Court. He thereafter accepted employment with the same employers, and was paid 34s. per week, the same rate as before the accident, and during such employment no payments were made under the decree, and there was no application for review. The workman thereafter left the employment and charged the employers to pay him the weekly payments decreed for from the date of the decree. The charge was suspended on the ground that the

workman was not entitled to payment under the decree for the time he was earning full wages.

"In the present case it was argued for the respondent that *Beath & Keay* is distinguishable because of the application presented for review on 26th April 1906. The reasoning in the opinions, however, in that case appears to me equally applicable to the circumstances of the present case, because what in effect was there said was this—Either the workman is being paid full wages on the footing that he is capable of earning them, in which case he cannot claim compensation which is only due on the assumption of his incapacity to earn full wages; or, if he is being paid full wages, and is incapable of earning them, then what he is paid in name of wages must be applied in the first place in extinguishing the amount of compensation payable under the decree. Whether that compensation is payable under a decree, as in *Beath & Keay*, or under agreement as here, seems to me to make no difference. The fact that the respondent here had applied for review is not sufficient to distinguish the present from *Beath & Keay*, especially in view of the opinion expressed by Lord Moncreiff.

"I am of opinion that I am bound to follow the case of *Beath & Keay*, and that the complainers are entitled to have the charge suspended."

The respondent reclaimed, and argued—The agreement of 19th September 1905 subsisted until it was altered by the interlocutor of 18th October 1906—*Steel v. Oakbank Oil Company*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Pumpherson Oil Company v. Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724. Moreover, if the question was not settled by the agreement, the interlocutor of the Sheriff, which in terms altered the compensation payable by defenders as from 18th October, by implication awarded compensation at the higher rate during the period prior to that date. In *Beath & Keay v. Ness*, November 28, 1903, 6 F. 168, 41 S.L.R. 113, there was no question for arbitration to which the arbiter could direct his mind, for the workman returned to receive the identical wage he had received before. Here there had been a question for arbitration and a decision by the arbitrator in his interlocutor of 18th October. The matter, accordingly, was *res judicata*. So far as judicial interposition was competent in the matter, it should have been by way of stated case, as in *Steel, cit. sup.*, and *Pumpherson Oil Company, Limited, cit. sup.* These cases also showed that there was nothing new in full compensation continuing after incapacity had ceased to be total. In any case a suspension, which was the appropriate method for such matters as personal bar, was not here the appropriate method to bring the matter under review.

Argued for the complainers—The asking and accepting of employment from the same employers imported an agreement by the respondent that he was no longer entitled to full payment as for total incapacity

which had been the basis of the original agreement. The case was ruled by *Beath & Keay (cit. sup.)*, which recognised that the amount of compensation might be altered by implied agreement. The Sheriff's interlocutor of 18th October decided nothing as to the amount of compensation due prior to its date.

LORD STORMONTH DARLING—The Lord Ordinary has sustained the reasons of suspension, and has suspended the charge on the ground, as explained in his opinion, that the principle of *Beath & Keay v. Ness* (6 F. 168), decided in this Division, applies to and rules this case. In that I agree with him. I think it impossible to read that judgment without seeing that the principle upon which it proceeds is that compensation is only payable during incapacity and in respect of incapacity. If there is a practical admission on the part of the workman that incapacity has ceased, then he cannot claim compensation in respect of incapacity. It is not necessary to say more. But I think it would be desirable to vary the interlocutor reclaimed against by laying our judgment partly on the offer of the employers referred to in article 6 of the complainers' statement of facts and the workman's refusal of that offer. With that alteration I am in favour of adhering to the Lord Ordinary's interlocutor.

LORD LOW—I am of the same opinion. I think this case is ruled by the judgment in *Beath & Keay v. Ness* (6 F. 168), which I may be allowed to say seems to me to have been a very well-considered and sound judgment. The only difference which was suggested was that here there had been an application to the Sheriff for review. I do not think that is any real distinction, for all that the Sheriff did was to find that the workman's incapacity had partially ceased, and to reduce his compensation to 1s. per week. The reduction only took effect as from the date of the Sheriff's judgment, and the question as to what was due prior to that date was not affected by the judgment. I therefore think that, with the alterations suggested by Lord Stormonth Darling, the judgment of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK—I agree. I think that the present case is ruled by the decision in *Beath & Keay v. Ness* (6 F. 168), with which I entirely concur.

LORD ARDWALL was absent.

The Court found that the compensation due to the respondent was payable only during his incapacity, and further, in respect of his refusal to accept the complainers' offer of £5, 18s. 9d., adhered to the interlocutor reclaimed against, and decerned.

Counsel for Complainers (Respondents)—R. S. Horne—Strain. Agents—W. & J. Burness, W.S.

Counsel for Respondent (Reclaimer)—R. L. Orr, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Thursday, May 16.

FIRST DIVISION.

ACCOUNTANT OF COURT (PENNEY), REPORTER.

Judicial Factor—Accountant of Court—Sheriff—Factors Appointed by Sheriffs to Confirm to Estates of Intestate Persons without Representatives or with Representatives in Minority—Supervision of Accountant—Judicial Factors (Scotland) Act 1880 (43 and 44 Vict. cap. 4), sec. 4 (7)—Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. cap. 39), sec. 6.

The Accountant of Court having reported under the Judicial Factors (Scotland) Act 1880, sec. 4 (7) that a diversity of practice existed in the Sheriff Courts on the point whether factors appointed by Sheriff or Sheriff-Substitutes for the purpose of confirming to the estates of persons dying intestate without representatives, or with representatives who are in minority or pupilarity, are subject to the Accountant's supervision, the Court directed that such factors should fall under his supervision, and subject to the provisions of the Judicial Factors (Scotland) Act 1889, section 6.

The Judicial Factors (Scotland) Act 1889, sec. 6, enacts—"In addition to the factors specified in the recited Act of 1849, the Accountant shall superintend the conduct of all other factors and persons already appointed or to be appointed by the Court of Session, or any of the Lords Ordinary in the said Court, or by any of the Sheriffs or Sheriff-Substitutes in the several Sheriff Courts in Scotland, to hold, administer, or protect any property or funds belonging to persons or estates in Scotland; and all such factors and others shall be and hereby are made subject to the provisions affecting judicial factors of the said recited Act of 1849, and of any Acts amending the same, or in terms of the Judicial Factors (Scotland) Act 1880, and of any Acts of Sederunt made in terms of said Acts; and the Accountant shall see that they duly observe all rules and regulations affecting them for the time: Provided that nothing in this section contained shall be held to apply to executors-dative. . . ."

On March 16, 1907, J. Campbell Penney, chartered accountant, Edinburgh, the Accountant of Court, made report to their Lordships of the First Division of the Court of Session, in terms of the Judicial Factors (Scotland) Act 1880, sec. 4, sub-sec. 7, as follows:—"The Accountant of Court begs to report that in 1896 he first became aware, through a special remit by Sheriff Thoms, that throughout the sheriffdoms appointments of judicial factors were made which were not reported to him and had not therefore come under his supervision. "These were appointments made in the Commissary Courts for the purpose of confirming to the estates of intestate persons who had left no representatives, or whose children were in minority.