tion 4, sub-section (4), of the Act of Sederunt of 5th January 1909. I mention this because counsel for the appellants founded his argument to a great extent on that sub-section, and on the relative provisions of the Act of Sederunt of 10th March 1870.

LORD DUNDAS concurred.

The Court allowed the appellant to abandon his appeal on payment of five guineas of modified expenses.

Counsel for Appellant—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondents — Macmillan. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

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*Saturday, January* 23.

## FIRST DIVISION.

[Sheriff Court at Edinburgh.

## GILROY *v.* MACKIE AND OTHERS (LEITH DISTRESS COMMITTEE).

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, c.* 58), *sec.* 13 *—Employer—Distress Committee—Workman Injured while Engaged in Temporary Work Provided by Distress Committee—Unemployed Workmen Act* 1905 (5 *Edw. VII, c.* 18), *sec.* 1, *sub-secs.* (1), (3), (5), *and sec.* 2.

A distress committee under the Unemployed Workmen Act 1905 provided temporary work for an applicant, in the course of which he was injured.

*Held* that the distress committee were employers within the meaning of the Workmen's Compensation Act 1906, and were therefore liable in compensation.

*Porton* v. *The Central Unemployed Body for London*, (1908) 25 T.L.R. 102, *followed.*

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, c.* 58), *First Schedule, sec.* (3)*—Amount of Compensation—Set off—Compensation from Distress Committee—Relief Received from Poor Law Authorities during Incapacity.*

A workman who was engaged by a distress committee under the Unemployed Workmen Act 1905, received injuries which totally incapacitated him from work. During his incapacity he received poor relief at the rate of 10s. per week.

*Held* that the amount received by him in poor-law relief did not fall to be computed in discharge of the compensation to which he was found entitled under the Workmen's Compensation Act 1906 from the distress committee.

The Unemployed Workmen Act 1905 (5 Edw. VII, c. 18), sec. 1, enacts—"*Organisation for London*—(1) For the purposes of this Act there shall be established by order of the Local Government Board under this Act a distress committee of the council of every metropolitan borough in London, . . . and a central body for the whole of the administrative county of London. . . . (3) If the distress committee are satisfied that any such applicant is honestly desirous of obtaining work, but is temporarily unable to do so from exceptional causes over which he has no control, . . . they may endeavour to obtain work for the applicant, . . . but the distress committee shall have no power to provide or contribute towards the provision of work for any unemployed person. (5) The central body may . . . in the case of an unemployed person referred to them by a distress committee, assist that person by . . . providing or contributing towards the provision of temporary work in such manner as they think best calculated to put him in a position to obtain regular work or other means of supporting himself."

Section 2 (as applied to Scotland by section 5 of the Act) enacts—"*Organisation Outside London*—(1) There shall be established by order of the Local Government Board [for Scotland] for each [royal, parliamentary, or police burgh] with a population . . . of not less than fifty thousand . . . a distress committee of the council for the purposes of this Act, with a similar constitution to that of a distress committee in London, and the distress committee so established shall, as regards their [burgh], have the same duties and powers, so far as applicable, as are given by this Act to the distress committees and central body in London."

Section 4 (as applied to Scotland by section 5) enacts—"*Local Government Board Orders and Regulations.* . . . (3) The Local Government Board for Scotland may make regulations for carrying into effect this Act, and may by those regulations . . . provide—(*a*) for regulating, subject to the provisions of this Act, the conditions under which any application may be entertained by a distress committee under this Act. . . ."

[For the regulations issued by the Local Government Board for Scotland for carrying into effect the provisions of the Act, see Statutory Rules and Orders for 1905, p. 1401, *et seq.*]

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—First Schedule, sec. (3)—"In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

John Gilroy, 4A St Andrew's Wynd, Leith, claimed compensation under the Workmen's Compensation Act 1906 from the Distress Committee of the Burgh of

Leith in respect of injuries sustained by him while engaged on work provided by them.

The Sheriff-Substitute (GUY) having assoilzied the defenders, a case for appeal was stated.

The case stated—"This is an arbitration in which John Gilroy, the appellant, claimed compensation in terms of the Workmen's Compensation Act 1906 to the amount of one-half his weekly wage of seventeen shillings in respect of an injury sustained to his right eye while engaged in the employment of the respondents at Seafield, at breaking stones, on Thursday, the 2nd day of April 1908, and he therefore craved the Court to grant a decree against the respondents, ordaining them, as the Distress Committee 1907-1908, representing the Corporation of the Burgh of Leith and community thereof, to pay to him the sum of eight shillings and sixpence weekly commencing on the 9th day of April 1908 for the week preceding, and so forth weekly thereafter, with interest as craved.

"The following facts were admitted by the parties, viz.—(1) That the respondents, under the powers conferred upon them by the Unemployed Workmen Act 1905, provided temporary work for the appellant, being an unemployed person within the meaning of that Act, at stonebreaking, between 24th January and 2nd April 1908. (2) That the discharge of the respondents' duties is regulated (1st) by the Unemployed Workmen Act 1905; and (2nd) by Statutory Rules, Orders, and Regulations issued by the Local Government Board under the power conferred on them by the said Act, dated respectively 17th October and 14th November 1905. (3) That on 2nd April 1908 the appellant received an injury to his right eye by a piece of stone flying off his hammer and striking his eye while he was engaged in breaking stones. (4) That the said injury totally incapacitated the appellant for work until 12th June 1908, when his incapacity for work ceased. (5) That the appellant's average weekly earnings from the said work were 10s. 9d. (6) That during his incapacity he received outdoor relief from the Parish Council of Leith at the rate of 10s. per week, and (7) That the said accident arose out of and in course of the said work.

"Having in view the provisions of section 1 and sub-sections 3 and 5 of the Unemployed Workmen Act 1905, and the fact that any sums paid to workmen in respect of the provision to them of temporary work are necessarily paid out of voluntary contributions and not out of the rate provided by the Act—

"I found in law that the appellant was not a workman within the meaning of the Workmen's Compensation Act 1906, as defined by sub-section 13 thereof, in respect that he had not entered into or worked under a contract of service or apprenticeship with the respondents.

"I further found in law that, assuming I was wrong in the above construction of the statutes, the amount received by the appellant subsequent to his accident by way of relief from the poor law authorities did not fall to be computed in discharge of any compensation to which he might be entitled under the Workmen's Compensation Act 1906. Therefore I assoilzied the respondents."

The *questions of law* were—"(1) Whether the appellant was a workman in the employment of the respondents within the meaning of the Workmen's Compensation Act 1906? (2) Whether the amount received by the appellant subsequent to his accident, by way of relief from the poor law authorities, falls to be computed in discharge of compensation under the Workmen's Compensation Act 1906, assuming such compensation to be payable?"

Argued for appellant—(1) The respondents were a public authority—Unemployed Workmen's Act 1905 (5 Edward VII, cap. 18), sec. 2 (1), and the exercise of its powers and duties by such an authority, was for the purposes of the Workmen's Compensation Act, to be regarded as the "trade or business" of such authority—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13. The constitution of the respondents was defined by the Burgh Distress Committees (Unemployed Workmen) (Scotland) Order 1905 — [see Statutory Rules and Orders for 1905, pp. 1367 and 1399]. Article 5 of the said regulations prescribed the conditions on which the applicants were to be "employed," and the conditions satisfied all the ordinary criteria of "employment"—*e.g.*, selection, payment, supervision, and dismissal. These were the recognised tests of employment —*Cairns* v. *Clyde Trustees*, June 17, 1898, 25 R. 1021, *per* Lord Trayner at p. 1024, 25 S.L.R. 808. The source of the funds from which compensation was payable was immaterial — *Virtue* v. *Alloa Police Commissioners*, December 12, 1873, 1 R. 285, 11 S.L.R. 140. Applicants for relief were in a different position from paupers and prisoners, who were compelled to work, and no analogy could be drawn between their case and that of the appellant, who had voluntarily applied for employment. It had been held in England that persons in the position of the respondents were liable to pay compensation under the Workmen's Compensation Act—*Porton* v. *The Central Unemployed Body of London*, 1908, 25 T.L.R. 102. (2) *Esto* that compensation was due, the relief received from the poor law authorities could not be taken into account, for neither the body paying nor the fund out of which payment was made was the same.

Argued for respondents—It would not be readily presumed that the provision of temporary work was to create a contract of ordinary employment. There was no contract of service or apprenticeship in the sense of section 13 of the Workmen's Compensation Act 1906. The regulations (*supra*) carefully avoided using the term "employment," and spoke of the provision of "temporary work." The usual incidents of employment were absent, for the service was temporary, and could be left at any

time; no proper wages were paid, and the committee had control over the sums paid even after payment. The relationship was not contractual but statutory, and the relief given was not payment for work, but charity in return for work done. There were no *data* for calculating compensation, for there were no "earnings" in the sense of the Act, for *ex hypothesi* the appellant was not earning anything. The only fund out of which the respondents could provide relief were moneys subscribed by the charitable. The case of *Porton* (*supra*) relied on by the appellant was not binding, and in any event was wrongly decided. No compensation was payable by poor law or prison authorities—*Tozeland* v. *West Ham Union*, [1906] 1 K.B. 538, *rev.* [1907] 1 K.B. 920, *per* Farwell, L.J., at p. 932. Reference was also made to *Dunbar* v. *Ardee Guardians*, [1895] 2 I.R. 76. (2) *Esto* that compensation was due, the Sheriff-Substitute should have had regard to the payments which the appellant received from the poor law authorities—Workmen's Compensation Act 1906, Schedule I, sec. 3; *Bryson* v. *Dunn & Stephen, Limited*, December 14, 1905, 8 F. 226, *per* Lord President at p. 230, 43 S.L.R. 236. If that were not done, the appellant would get more as compensation than he was getting before the accident.

LORD PRESIDENT—In this case the appellant was employed by one of the Distress Committees in the work of stonebreaking, and on 2nd April 1908 received an injury to his right eye by a piece of stone flying off his hammer and striking his eye. He was totally incapacitated for work until 9th June 1908, when his incapacity for work ceased. He has made an application for compensation before the learned Sheriff-Substitute as arbiter, and the learned Sheriff-Substitute refuses compensation upon the ground that he was not a workman within the meaning of the Workmen's Compensation Act 1906. I am afraid I cannot see my way to agree with the result to which the learned Sheriff-Substitute has come. I think the decision of the Court of Appeal in England in the case of *Porton* v. *The Central Unemployed Body for London* (1908, 25 T.L.R. 102), which was decided in last November, was rightly decided, and that we ought to follow that decision in this case. We had a very able argument addressed to us, in which the learned counsel sought to show that really here there was no employment in the proper sense of the word—that there was merely a providing of work. He sought to assimilate the relation of the Distress Committee to the workman, to the relation which exists between poor law authorities and a pauper, or between prison authorities and a prisoner, and certain cases were cited to show that when work was done by a prisoner or done by a pauper there was not employment in the ordinary sense of the word. I have no doubt there is not. A pauper may be compelled to work in a poorhouse, or a prisoner in prison, by force of statute. There is therefore entirely wanting that freedom of contract on both sides which is of the essence of employment as we are using the term "employment" in the sense of the Act before us. But I am afraid that the difference here is that there is just the question of freedom. The unemployed need not go and ask for work unless he likes, and he need not take the work offered unless the terms suit him. If he does take the work I think he becomes employed. Indeed, I do not think that there is anything more cogent than to say this, that one would find it very difficult to express in ordinary language what is going on without using the word "employment," and the framers of the rules—the Government Department which had to frame rules dealing with the duties and the rights of distress committees—have evidently found the same difficulty, because they use the word "employment" more than once. Accordingly I am of opinion here that the learned Sheriff-Substitute was wrong.

During the time that this man was incapacitated he received ten shillings a week, of poor law relief, and a second question is put to your Lordships upon that matter, but the learned Sheriff indicates that if he was wrong in his first view, he considers that the amount received by way of relief would not fall to be computed in discharge of any compensation. Nevertheless a question is asked upon that point. There I am of opinion that the learned Sheriff-Substitute is right, for the simple reason that the statute does provide for certain things being computed in discharge, viz., payments made by the employers, but here I do not think there was any payment which can be said to have been made by the employer, because there is no identity between the poor law authority and the Distress Committee. Accordingly I think the questions ought to be answered in the way I have indicated—that is to say, the first in the affirmative, and the second in the negative. But I think that then the case must go back to the Sheriff, because although there is a finding that the average weekly earnings for said work were ten and ninepence, that does not, I think, conclude the matter. That is a finding only of the average weekly earnings of this workman while he was being employed by the Distress Committee. I think the case must go back to the Sheriff for him to consider the whole circumstances, and the learned Sheriff-Substitute will doubtless keep in view, when he is considering the whole circumstances, the rules that were laid down by this Court recently in the case of *Carter* v. *Lang* (1908 S.C. 1198), which case as a whole, including its criticism upon a certain English case, has been since approved of by the Court of Appeal in England (*Anslow* v. *Carnock Chase Colliery Co.*, 1908, 25 T.L.R. 167).

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I was impressed by the argument for the respondents that the intention and effect of the Act of 1905 was to establish a statutory relationship between the Distress Committee and those for whom

they provided work, which was not a contract of service, but something more like the giving and receiving of charity. And it was pointed out that under the Act no public money raised by assessment can be expended on the providing of work, but only voluntary contributions raised for the purpose. But an examination of the statute has satisfied me that, although the wording of it is unusual, the provisions really do result in contracts of service between the committee and the unemployed. It is true that in a certain sense the relief given (for it is relief) is charitable. But the very purpose of the scheme of distress committees is to take off the appearance of charity by substituting the providing of work to be paid for, exactly as work under an ordinary contract is paid for. The stated case before us shows how readily the claim adapts itself to the forms of the Workmen's Compensation Act, and in my opinion the relationship set up by the Statute of 1905 is really a contract of service falling within that Act, and nothing more or less.

I agree that there is no foundation for the plea dealt with in the second question of law. The fact that the workman received poor relief from the poor law authorities cannot, as I think, operate to give the Distress Committee a right of retaining what (by the assumption) was compensation due to him in lieu of wages.

LORD M'LAREN was absent.

The Court answered the first question in the affirmative, and the second question in the negative.

Counsel for Appellant—Anderson, K.C.—J. A. Christie. Agents—Weir & Macgregor, S.S.C.

Counsel for Respondents—Hunter, K.C. Macmillan. Agents—R. H. Miller & Company, S.S.C.

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*Saturday, January* 23.

## FIRST DIVISION.

[Sheriff Court at Dunfermline.

## COE *v.* THE FIFE COAL COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, c.* 58), *sec.* 1, *sub-sec.* (1)—*Injury by Accident—Accident—Cardiac Breakdown Due to Overwork.*

A miner while engaged in letting full hutches down a steep gradient by hand felt a sudden pain in his chest and sat down saying he thought he had jerked himself. A few days afterwards he became totally incapacitated. In an application under the Act the arbiter found in fact that the cause of the incapacity was cardiac breakdown due to the fact that the work in which he had for some days been engaged was too heavy for him; that he was not injured by any sudden jerk, but that the repeated excessive exertion strained his heart until finally it was overstrained.

*Held* that the injury was not an accident within the meaning of the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1, sub-sec. (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 the employer shall . . . be liable to pay compensation. . . ."

James Coe, miner, Kelty, claimed compensation under the Workmen's Compensation Act 1906 from the Fife Coal Company, Limited, Leven, in respect of injuries sustained by him while at work in their employment.

The Sheriff-Substitute (HAY SHENNAN) having refused compensation, a case for appeal was stated.

The facts found proved as stated in the case were as follows—"(1) The appellant was on Friday, 1st May 1908, along with other two men, Robert Richardson and George Sneddon, employed in respondents' said No. 1 pit, Blairadam, in driving a heading off the main level up a gradient of 1 in 3½. The heading had been driven about 60 feet up. Rails had been laid but no wheel had been put up, and the men had to let the full hutches down the steep gradient by hand. At the upper portion of the heading the sleepers of the rails were 4 feet apart and at the lower end 2 feet apart. (2) In letting down a full hutch the men put snibbles in the wheels. The man George Sneddon kept at the side of the hutch to hold it against the rails, while the appellant and the man Robert Richardson held on at the end. This was the method by which the hutches were let down. This work on so steep a gradient involved great strain, as the men went from one sleeper down to another while holding the hutch back. (3) The appellant and the said Robert Richardson and George Sneddon had worked in this way for some days. They usually let down twenty-one hutches in a shift. The appellant had repeatedly complained to the oversman about the want of a wheel for letting the hutches down, and on said 1st May 1908 he at first refused on this ground to go to work, but he did go on the manager's promise that the matter would be attended to. (4) On 1st May, as the men were letting down the ninth or tenth hutch, the pursuer felt a sudden pain in his chest when the hutch was about 8 feet from the bottom of the heading. He let go when he felt the pain and sat down saying that he thought he had jerked himself. He worked to the end of that shift, but was not able to do very much. Only fifteen hutches were let down that day instead of twenty-one. (5) The following day, Saturday, was an idle day at the pit. The appellant went out on Monday, 4th May, but his place was not in condition for working. He was unfit to work on Tuesday, but he worked on the Wednesday, Thursday, and Friday, and on the following Monday till nine o'clock. He was thereafter totally incapacitated until 10th August