Friday, June 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WEIR *v.* NORTH BRITISH RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Process—Findings by Arbiter Affected by Subsequent Decision in House of Lords—Remit to Arbiter to Reconsider Findings.*

In an application under the Workmen's Compensation Act 1906, the arbiter having made certain findings proceeding on a view of the law as laid down in the Court of Session which was subsequently affected by a decision of the House of Lords in an English appeal, the Court *remitted* to him to reconsider his findings in the light of the opinions expressed by the House of Lords.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (16) *— Review — Incapacity — Nominal Award—Suspensory Order.*

Observations (*per* Lord Justice-Clerk and Lord Dundas, *concurred in* by Lord Salvesen and Lord Guthrie) on the effect of *Taylor* v. *London and North-Western Railway Company*, [1912] A.C. 242, as overruling *Rosie* v. *Mackay*, 1910 S.C. 714, 47 S.L.R. 654, on the competency of a nominal award or suspensory order where incapacity may supervene at a later date.

In an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) by the North British Railway Company, *respondents*, for review of the weekly payments made by them to Frederick Weir, labourer, Springburn, Glasgow, *appellant*, in terms of a memorandum of agreement recorded at Glasgow on 7th September 1911, in respect that the appellant's incapacity for work had ceased or become greatly lessened, the Sheriff-Substitute at Glasgow (A. S. D. THOMSON), sitting as arbitrator, ended the compensation, and at the request of the appellant stated a case for appeal.

The Case stated, *inter alia*—"Said application was heard before me and proof was led on this date. At said diet of proof the appellant lodged in process a minute in the following terms—'The claimant, without prejudice to his pleas that his incapacity is not in any way diminished, respectfully craves the Court, in the event of the Court finding in fact that he is able at present to perform his ordinary work, to find further in fact and law in respect said accident has involved patent and serious physical disability to the claimant, that he is entitled to a nominal award of compensation so as to preserve his right to apply to the Court for subsequent orders in respect of the injuries sustained by said accident, or otherwise to sist further procedure or continue the present application for review, and grant leave to either party to renew the application in the event of any change of circumstances occurring.'

"The following *facts* were admitted or proved—(1) That the appellant, through an accident which occurred on 22nd June 1911, and which arose out of and in the course of his employment with the respondents, lost his right eye. (2) That by 20th November 1911, the date of the present application, he had recovered from the effects of the accident in so far as recovery was possible; that there was then no danger of the remaining eye becoming affected through the accident, and that the sight of the remaining eye was normal. (3) That at the time he met with the accident he was a 'tapper,' that he had been a tapper for three and a half years, and before that had been an ordinary labourer. (4) That his duties as a tapper were, as the parties by joint-minute have admitted, 'to bore out copper stays in fire boxes.' These boxes have holes which are fitted up with copper stays, 'and when these require renewal the tapper cuts the head off the stays on the outside with a hammer and chisel, and he then bores out the stay with a machine and inserts the new stay.' (5) That his eyesight in the remaining eye is quite sufficient for the work of a tapper, and that he is now and was at the date of this application fit to resume work. (6) That the respondents have in their employment doing the same or similar work several men who many years ago lost the sight of one eye by accident, and who are able, notwithstanding the loss of the eye, to earn and do earn full wages. (7) That the appellant's average weekly earnings were 23s. 6d., and that he has been paid compensation at the rate of 11s. 9d. per week since the accident.

"I *found* in these circumstances that the compensation fell to be ended, and I ended the same accordingly as at 20th November 1911. I refused the crave of the minute for the appellant lodged on 10th January 1912 and found the respondents entitled to expenses."

The *questions of law* for the opinion of the Court were—"1. Whether on the facts found proved, as stated in the interlocutor, the arbiter was entitled to terminate the compensation? 2. Whether, in view of the whole facts of the case, the arbiter was bound to give effect to the appellant's minute, either by making a nominal award or by sisting procedure?"

Argued for the appellant—The arbiter, following the law laid down in *Rosie* v. *Mackay*, 1910 S.C. 714, 47 S.L.R. 654, had refused to make a nominal award or to suspend compensation for a time, but this view of the law had since the date of his award been held to be erroneous by the decision of the House of Lords in *Taylor* v. *London and North-Western Railway Company*, [1912] A.C. 242. In these circumstances the appellant asked that the case be remitted to the arbiter to reconsider his decision in the light of the latter case and to exercise his discretion. Even if the physical capacity of the appellant remained

unchanged, that was not the only consideration. The arbiter was bound to consider all the results causally connected with the injury—*Ball* v. *Hunt & Sons*, May 13, 1912, 49 S.L.R. 711, 28 T.L.R. 431, *per* Lord Shaw; *Macdonald or Duris* v. *Wilsons and Clyde Coal Company*, May 13, 1912, 49 S.L.R. 708, overruling *Boag* v. *Lochwood Collieries, Limited*, 1910 S.C. 51, 47 S.L.R. 47. The arbiter's finding as to appellant's fitness to resume work left such consideration open, and in that respect the case was distinguishable from *Hargreave* v. *Haughhead Coal Company*, [1912] A.C. 319, founded on by respondents.

Argued for the respondents—The arbiter had followed the proper course. *Rosie* v. *Mackay* (*cit. sup.*) was not overruled by *Taylor* v. *London and North-Western Railway Company* (*cit. sup.*). The dicta in the latter case founded on by the appellant were *obiter*. The case of *Rosie* v. *Mackay* (*cit. sup.*) was not referred to in the argument nor considered in the opinions. Further, the present case was different from *Rosie* v. *Mackay* (*cit. sup.*), because in that case there was a possibility of recurrence of the injury which did not exist here. To bring the present case within that rule there must be a finding that the injury was liable to recur. It did not therefore matter whether *Taylor* v. *London and North-Western Railway Company* (*cit. sup.*) overruled *Rosie* v. *Mackay* (*cit. sup.*) or not. The effect of the arbiter's findings was that the appellant's wage-earning capacity was not diminished, and the present case therefore resembled *Hargreaves* v. *Haughhead Coal Company* (*cit. sup.*), and was distinguishable from the cases of *Ball* v. *Hunt & Sons* (*cit. sup.*) and *Macdonald or Duris* v. *Wilsons and Clyde Coal Company* (*cit. sup.*).

LORD JUSTICE-CLERK—This case stands in a very peculiar position indeed. I do not think I have ever seen a case in such a peculiar position. The Sheriff-Substitute when he came to decide this case was in this position, that he presumably had before him decisions which had been pronounced in the Court of Session, and in particular the decision in the case of *Rosie* v. *Mackay*, and having considered the case with these decisions before him, he decided it in the way he did.

Now we are in this position, that since he decided the case there have been expressions of opinion in the Supreme Court of Review, in the House of Lords, which tend very much to show that we in this Court in deciding the case of *Rosie* were under a mistake, that is to say, that the view taken by the majority was wrong, and that therefore the law is different from what in that case it was declared to be.

Against that it is argued that the decision of the House of Lords in the case of *Taylor* v. *London and North-Western Railway Company* was a decision on a different point from that involved in the case of *Rosie*; that all the observations which affect the case of *Rosie* were only *obiter dicta* of the learned Lords who decided that case, and that indeed the case of *Rosie* was not even cited to them. That may be quite true, and I am inclined to accept it as true, but although, looking to the decision they gave in that case, they did not need to express those opinions, still we must assume that in the Supreme Court of Review definite opinions upon particular matters are not expressed without consideration, and we must assume, and are bound to assume, that what they said was properly corrective of the decision which had been erroneously arrived at in this Court.

In these circumstances the position is a very peculiar one. It seems to me that the right course for us to adopt is, without answering at present these questions which are before us, to let the case go back to the Sheriff-Substitute in order that he may consider whether what has happened since his judgment in the way of review of the law would lead him to any different conclusion from the conclusion at which he arrived. He may see no reason to change and may again come to the same conclusion, or he may see ground to modify his opinion and to adopt the course now open to him in view of these *obiter dicta* in the House of Lords, and so, instead of ending the compensation finally, as he has done by his present decision, to pronounce an order keeping alive the liability of the employers. I do not say that he ought to do that; I express no opinion upon that whatever; it is a matter entirely for his individual judgment.

I think that is all we ought to do. I do not think I need say anything more, because I am very anxious not to express any opinion which might lead the Sheriff-Substitute to think that we have expressed any view on the merits of the question whether or not the compensation should be ended finally. Therefore if your Lordships approve of the course I have proposed, that will be the course taken.

LORD DUNDAS—I agree. It is, I think, very unfortunate that the decision by Seven Judges of this Court in the case of *Rosie* v. *Mackay* was not brought under the notice of the House of Lords when they heard and decided the case of *Taylor* v. *The London and North-Western Railway Company*. In *Rosie's* case the existing decisions, Scotch and English, were considered and collated, and it was apparent that there was a grave divergence of judicial opinion upon the question whether or not it was competent for an arbiter under the Act of 1897, in a case where he considered that capacity had been restored, but that there was a danger, more or less great, of incapacity recurring and supervening, to keep matters open, either by what is sometimes called the device of the penny, or in some other way, or whether he was bound to end the compensation then and there. The point had been touched upon, but not decided, by the House of Lords in *Nicolson* v. *Piper* ([1907] A.C. 215), Lord Halsbury and Lord Robertson in that case expressly reserving their opinions upon it. The

majority of the Seven Judges in *Rosie* v. *Mackay* held that the whole matter was one of statute; that the statute did not give any warrant for resorting either to the device of the penny or to any other equivalent course, and that therefore the arbiter was bound in such cases to end the compensation. It was attempted to appeal *Rosie* v. *Mackay* to the House of Lords (1912 S.C. (H.L.) 7), but the attempt failed, as it was bound to do, because that case arose under the Act of 1897, which did not allow appeals from Scotland —though it did allow English appeals— in cases of this sort to the House of Lords.

If the important case of *Rosie* v. *Mackay* had been brought under the notice of the noble and learned Lords in *Taylor's* case, I do not doubt that their Lordships, if they were to arrive at a conclusion adverse to the opinion of the majority of the Scottish Judges, would have expressed in reasoned language and with some measure of argument their grounds for differing from and overruling those opinions, and we should have stood in a more definite and satisfactory state of knowledge than we are in at present. *Rosie's* case has not been formally overruled, but whether or not it is to be treated as impliedly overruled, we have, at all events, in *Taylor's* case, opinions pronounced (*obiter*, it may be) by the noble and learned Lords to the effect that a resort to some means of keeping matters open is competent, and I think, with your Lordship, that we ought to respect and give effect to those opinions, whether they are *obiter* or whether they are not.

Now we must, I apprehend, assume that the learned arbiter in this case, when he decided the question, took *Rosie* v. *Mackay* to be law, as it certainly then was, and therefore felt that he had no alternative except to end the compensation, whatever view he might have been inclined otherwise to entertain. In that state of matters I agree that the proper course for us is to remit the matter to the learned arbiter in order that he may have an opportunity of reconsidering the question in the light of the opinions subsequently pronounced by the House of Lords in *Taylor's* case. It is possible—it may be more than possible—that he will arrive at the same conclusion as he did before, but the point that is important is that he should have an opportunity of exercising the discretion which he must have thought he had not, but which it appears that in law he had. Other topics were touched on during the debate, but I think the one with which I have dealt is the only one which arises effectually upon the case as stated and upon which there is any necessity to pronounce an opinion. I agree, therefore, that without answering the questions as they are put—and I think they are badly stated—we should remit to the learned arbiter for the purpose that your Lordship has indicated and in which I agree.

LORD SALVESEN and LORD GUTHRIE concurred.

The Court found it unnecessary to answer the questions, remitted to the arbitrator to consider the opinions expressed by the House of Lords in the case of *Taylor* v. *London and North-Western Railway Company*, [1912] A.C. 242, and thereafter to pronounce such findings as might to him seem just.

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Counsel for the Respondents — Cooper, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Friday, June 21.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

THE GRAND LODGE OF ANCIENT, FREE, AND ACCEPTED MASONS OF SCOTLAND *v.* INLAND REVENUE.

Revenue—Corporation Duty—Exemptions —Charitable Purpose—Customs and Inland Revenue Act 1885 (48 *and* 49 *Vict. cap.* 51), *sec.* 11, *sub-sec.* (3).

By sec. 11 of the Customs and Inland Revenue Act 1885 a duty is imposed upon the annual value, income, or profits of property belonging to any body, corporate or unincorporate, subject to an exemption in favour of "(3) Property which, or the income or profits whereof, shall be legally appropriated and applied for . . . any charitable purpose. . . ."

A masonic Grand Lodge held and administered certain funds known as the Fund of Scottish Masonic Benevolence, the Annuity Fund, and the Metropolitan District Benevolent Fund. The funds, which were directed to be kept separate from the other funds of the Lodge, were mainly derived from the annual contributions of office-bearers and members, registration fees of entrants, collections made in the daughter lodges, and voluntary donations and subscriptions. The first of the three funds mentioned was by the constitution and laws of the lodge solely devoted to purposes of benevolence, the principal beneficiaries being such poor brethren as were registered members of Grand Lodge, and the widows, parents, and children of such members. In the case of the Annuity Fund the beneficiaries were such master masons as were registered in the books of Grand Lodge, and the parents, widows, and children of such. The revenue of the remaining fund was devoted solely to the relief of poor and distressed brethren who were members of the lodge in the district, and the widows, parents, and children of such brethren, or of such others as might be deemed by the Committee to have been dependent on them. The