Friday, July 4.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

MALCOLM *v.* THOMAS SPOWART & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *First Schedule* (3) *and* (16)—*Minor Workman—Application for Increase of Compensation Based on Rise in General Rate of Wages.*

The Workmen's Compensation Act 1906, First Schedule, section (3), enacts that the amount of compensation shall not exceed the difference between the amount of the workman's average weekly earnings before the accident and the amount "he is earning or is able to earn" after the accident. Section (16) provides that "where the workman was at the date of the accident under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

The compensation paid to a minor workman was by agreement raised to 12s. 6d. a-week on the assumption that if he had remained uninjured he would probably have been earning 25s. a-week. In an application at his instance to have the sum increased to 17s. 6d on the assumption that but for the accident he would have been able to earn 35s. a-week, *held* that the arbitrator was not bound to grant an increase on account, *per se*, of a general rise in the rate of wages, but that he was entitled to take into account the rise in the rate of wages as an element in considering what the workman would probably have earned had he remained uninjured.

Andrew Malcolm junior, miner, Dunfermline, *claimant and appellant*, with consent of his father Andrew Malcolm, residing there, as his curator and administrator-in-law, applied in the Sheriff Court at Dunfermline, in virtue of section 16 of Schedule I of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 85), for an increase of the compensation which was being paid him by Thomas Spowart & Company, Limited, Lassodie Colliery, Dunfermline, *respondents.*

The Sheriff-Substitute (UMPHERSTON) refused to increase the compensation, and at the claimant's request stated a Case for appeal.

The Case stated—"The appellant, who was born on 13th January 1893, received injury by accident arising out of and in the course of his employment with the respondents on 2nd September 1907, since which date he was totally incapacitated for work up to the date of the application to review.

"The appellant, whose average weekly earnings prior to his accident were 13s., was paid compensation at the rate of 10s. per week from the date of his accident to 19th January 1912, when the rate was by agreement increased to 12s. 6d. per week on the ground that if he had remained uninjured the appellant would probably have been earning 25s. per week.

"The present application, which was presented on 23rd September 1912, is to have said compensation of 12s. 6d. increased to 17s. 6d. per week on the ground that but for his accident the appellant would have been able to earn at least 35s. per week. The appellant averred that he would have been fit to do any work in connection with the pit which a young man of his age and intelligence, and with the experience and skill he would have possessed but for the accident, could have got. In particular, he contended that he would in all probability have been employed at the face, earning from 6s. 6d. to 8s. a-shift, and that he could also have been working as a brusher earning 7s to 8s. a-shift, or as a fireman or repairer earning an average of 6s. 6d. a-shift.

"The case was heard before me on 14th November 1912 and 13th January 1913, and on 22nd January 1913 I found as follows:—(1) That the appellant is at present in receipt of compensation from the respondents by agreement dated 19th January 1912 at the rate of 12s. 6d. per week. (2) That said compensation is based on an earning power of 25s. per week as the weekly sum which the appellant would probably have been earning at the date of the agreement if he had remained uninjured. (3) That it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. per week, and that there was nothing in the evidence which made me think that the appellant would have earned more than other lads of his own age. (4) That the appellant has failed to prove that his earning capacity at the date of the application to review would probably have increased since said 19th January 1912 if he had remained uninjured.

"It was maintained in argument that I was bound to increase the claimant's compensation because there had been a general increase in miners' wages in the district of 9d. per shift between the date of the agreement and the date of the arbitration. I held this increase in miners' wages to be proved as a fact in the case, but refused to give effect to the argument for these reasons, viz.—(*a*) Although in the case of a workman who has been injured while under the age of twenty-one mere lapse of time apart from any change in his actual physical capacity may be considered as such a change of circumstances as to entitle him to have the rate of compensation reviewed, yet a rise or fall

in the rate of wages being dependent on the conditions of the labour market was to be regarded exactly in the same way in the case of a minor workman as in that of one of full age, and I held that it could not be considered as a change of circumstances which entitled either party to have the compensation reviewed. (*b*) Apart from the agreement of 19th January 1912, I found that it was not proved that the claimant's earning capacity would probably but for the accident have exceeded 25s. at the date of the arbitration.

"I accordingly refused the crave of the minute for review."

The *question of law* was—"Was I right in refusing to consider the general increase of 9d. a day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review, as entitling the claimant to increase in compensation?"

Argued for appellant—Where, as here, the appellant was under twenty-one at the date of the accident the arbiter was entitled to increase the compensation to an amount not exceeding fifty per cent. of the weekly sum the appellant would have been earning at the date of the review had he remained uninjured—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, sec. (16). The Sheriff had erred in not taking into account the rise in the rate of wages—*Malcolm* v. *Bowhill Coal Company, Limited*, 1910 S.C. 447, 47 S.L.R. 449; *Edwards* v. *The Alyn Steel Tinplate Company, Limited*, (1910) 3 B.W.C.C. 141; *Bevan* v. *Energlyn Colliery Company*, [1912] 1 K.B. 63. The cases of *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704, and *Black* v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, 46 S.L.R. 812, in which it was held that it was incompetent for an arbiter to take into account a rise or fall in the rate of wages, were not in point, for they were decisions under the Act of 1897. The case ought therefore to be remitted to the arbitrator for further consideration.

Argued for respondents—The question was one of fact, for the Sheriff had found that the appellant would not, at the date of review, be earning more than twenty-five shillings a-week. He had therefore taken into account the general rate of wages at the time. That being so, this case did not raise the general question whether a change in the rate of wages was a proper element for consideration. *Esto* that in the case of a workman of full age the arbitrator had to compare the wages he was earning before with those he was earning after the accident, it was otherwise in the case of a minor, for there what had to be considered was his "probable" earnings, and in ascertaining these the arbitrator was not limited to what the minor would have been earning in his actual employment under the same employer, but might consider what he could have got in other possible employments—*Vickers, Sons, & Maxim, Limited* v. *Evans*, [1910] A.C. 444. A rise or fall in the rate of wages due to economic causes and not connected with the workman's earning capacity was not *per se* a relevant consideration—*Jamieson* (*cit.*), *Black* (*cit*).

At advising—

LORD KINNEAR—The question in this case depends upon the construction of Rule 16 of the First Schedule of the Workmen's Compensation Act 1906.

The facts are that the appellant, the workman, who was born on 13th January 1893, received injury by an accident arising out of and in the course of his employment on 2nd September 1907, when he was still a boy, since which date he was totally incapacitated from work up to the date of the application to review. Therefore it is a case of the total incapacity of a minor arising from an injury in the course of and arising out of his employment.

The appellant, whose average earnings before the accident were 13s. a-week, was paid compensation at the rate of 10s. per week from the date of the accident to 19th January 1912, and then the rate was increased by agreement to 12s. 6d. per week, and the Sheriff says that that alteration was made because the parties were agreed that if he had remained uninjured the probable amount of his earnings at the date when the increase was made would have been 25s. a-week.

Now so matters stood until the present application was presented on the 23rd September 1912. It is an application by the workman to have the compensation of 12s. 6d. increased to 17s. 6d. per week on the ground that but for his accident the appellant would have been able to have earned at least 35s. per week. Then the Sheriff-Substitute goes on to say that the appellant averred in support of his application that he would have been fit to do any work in connection with the pit which a young man of his age and intelligence, and with the experience and skill which he would have possessed but for the accident, could have got. And then he gives some particulars as to the exact amount of wages that he might earn at certain employments.

Now that was a perfectly relevant claim for the consideration of the Sheriff-Substitute, because it is exactly within the rule of paragraph 16. That is the paragraph which allows weekly payments to be reviewed and ended, diminished, or increased at the request either of the employer or the workman. And to that general allowance it adds this proviso, that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of review if he had remained uninjured.

Now the facts which the Sheriff-Substitute says were alleged by the workman brings his case exactly within that provision. He says that if he had remained

uninjured he would, at the date when he asked for review, have been able to earn a sum which he estimated at, at least, 35s. a week. That laid upon the Sheriff-Substitute the duty of taking evidence and of determining as a question of fact whether the applicant's case was made out or not, and that was the course which he took. He says the case was heard before him and that he found certain facts. In the first place, that the appellant is in receipt of compensation from the respondents at the rate of 12s. 6d. per week. That is upon the agreement. Secondly, that that compensation is based on an earning power of 25s. per week as the weekly sum which the appellant would probably have been earning at the date of the agreement if he had remained uninjured. I pause simply to point out that that is not the sum which he was earning at the date of the accident, but a considerably larger sum which both parties had agreed should be taken as the sum that he would probably have been earning at the date when the agreement was made. Thirdly, that it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. a-week, and that there was nothing in the evidence which made the Sheriff-Substitute think that the appellant would have earned more than the other lads of his own age. Fourthly, that the appellant has failed to prove that his earning capacity at the date of the application for review would probably have increased since 19th January 1912, that is, since the date of the agreement, if he had remained uninjured.

Now these are perfectly clear and distinct findings in fact. As a matter of fact, the Sheriff says the earning capacity of other lads of his age does not exceed 25s. a-week. There is nothing in the evidence to show that he could have earned more than other lads of his age. He has failed to prove that his earning capacity would have increased at the date of review if he had remained uninjured. I think that is a plain question of fact that the Sheriff-Substitute has had to determine, and he has decided it in the way I have read. Nothing could be clearer to my mind than that that was a question for the Sheriff-Substitute, and that we have no grounds for reviewing or interfering with the Sheriff-Substitute's finding.

He then goes on to say that a case was made before him which raises a question of law, and it was made in this Court. I confess it seems to me that the contention of the appellant upon the point which the learned Sheriff-Substitute now goes on to consider is somewhat singular. But still it was seriously maintained. It was maintained in argument that the Sheriff-Substitute was bound to increase the claimant's compensation because there has been a general increase in miners' wages in the district of 9d. per shift between the date of the agreement and the date of the arbitration. That is to say, the appellant says, not that the fact of the wage at the date of the arbitration being at a certain rate is to be taken, nor that the fact of that rate being higher than it had previously been is to be taken into account, but that the Sheriff-Substitute is bound, upon that consideration alone, to increase the amount of the claimant's compensation.

I entirely agree with the Sheriff-Substitute that that is an extravagant claim. What the Sheriff-Substitute has to do is to ascertain what as a matter of fact, so far as it is ascertainable, is the sum which the minor workman would probably have been earning at the particular date. That is what he has considered and determined. And it is not, so far as I can see, of the slightest consequence whether the sum which is thus shown the man might have earned is greater or less than the weekly wages which he might have earned at some previous time.

I think that a great deal of confusion was introduced into the appellant's argument by dragging into the discussion a number of decisions upon a totally different question, and they are decisions which are quite irrelevant to the question which we have to determine, because the learned counsel cited to us all the cases—and there are several—in which the Court in considering the comparison which is to be made under rule 3 between the average weekly earnings of a workman, who notwithstanding his injury is still able to work, before the accident, and the average weekly amount which he is able to earn after the accident, had occasion to consider what circumstances ought to be taken into account by the arbitrator in determining that question.

But that is not the provision under which the arbitrator in this case was required to act at all, and he has nothing to do with the problem that rule 3 raises. That arises only in the case of partial incapacity. It is expressly so put, and the obvious meaning of it is that in fixing the amount of the weekly payment to be made to the man who, although he has been injured, has still a partial capacity for work, you are to take, and the arbitrator is to take, into account the amount of wages which in his injured condition he can still earn, and that he is to fix the compensation at a sum which shall not exceed the difference between the average earnings of the workman before the accident and that amount.

His problem, therefore, is to compare these two amounts and take care that in fixing the compensation he does not exceed the difference between them. But under the 16th section we have nothing to do with any such process at all. When the application is made by a workman suffering from total incapacity in consequence of the injury, you have nothing to do with that comparison, because the workman is earning nothing. The condition of the case is that he has been totally incapacitated from work, and the only reason of any difference being made between his case and that of other workmen is that which is very clearly brought out in the section, that because he was a boy at the time of the injury, and had not yet attained his full earning capacity, the arbitrator in reviewing the compensation after the lapse

the agreement. This I understand to mean that even if there had been, as the Sheriff holds proved, a rise of 9d. after 19th January 1912, still the workman was as well or better off with the agreed-on 12s. 6d. a-week than he would have been had the Sheriff been called upon to fix his compensation *de novo* at the date of the arbitration. In these circumstances it is not a little difficult to understand the true bearing of the question stated, which is, "Was the Sheriff right in refusing to consider the general increase of 9d. a-day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review as entitling the claimant to an increase in compensation?"

If this means, was the Sheriff right in refusing to consider the rise of wages in determining the potential wage-earning capacity of the injured man at the date of the proof, then I should answer the query in the negative. But if it means, was the Sheriff right in refusing to consider the rise of wages since the last fixing of the compensation, as *per se* a reason for increasing the compensation without regard to the potential earning capacity of the claimant, then I should answer the query in the affirmative.

Though the Sheriff might have more clearly stated the point which he intended to present to the Court, I think that the second alternative view of the meaning of the question is the correct one, and that the Sheriff came to a right conclusion in holding that he was not entitled or bound to take the agreed-on figure of 19th January 1912 as a fixed starting-point and automatically to add 50 per cent. of the rise of wages as from the date of the present application. I think that he was right in considering the earning capacity of lads of the same age in the same employment at the date of the inquiry, and that if, as he says, he was satisfied that that did not exceed 25s., even allowing for a market rise in wages, it followed that there was no call for an increase in the compensation at the date of the application to him.

I would therefore propose to your Lordships that the question should not be answered as it stands, because I think the result of the question so answered would be misleading, but that it should be answered to this effect, that the Sheriff was right in refusing to consider the general increase of 9d. a-day in miners' wages between the two dates specified as *per se* entitling the claimant to an increase in compensation.

LORD MACKENZIE—This is an appeal from an award of the Sheriff-Substitute refusing, on an application for review, to increase the workman's compensation in respect of total incapacity.

The workman was under twenty-one at the date of the accident. The review took place more than twelve months after the accident. The provisions of the First Schedule of the Act of 1906 (16) therefore applied to the case under which "the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound." What the Sheriff-Substitute had to do was to ascertain what was the weekly sum that the workman would probably have been earning. No comparison is needed, as would be the case under (3), where during partial incapacity the weekly payment is not to exceed the difference between the average weekly earnings before and after the accident.

The Sheriff-Substitute has made a finding directly applicable to (16). He finds—"(3) That it was not proved that the earning capacity of lads of nineteen years of age exceeds 25s. per week, and that there was nothing in the evidence which made me think that the appellant would have earned more than other lads of his own age;" and (4) that would appear to end the case, but the appellant contends that the Sheriff-Substitute was bound to have proceeded thus—first, to take the rate of compensation fixed by agreement on 19th January 1912 at 12s. 6d. (50 per cent. of 25s.) as fixing a standard, then to add to that in consequence of a general increase of 9d. a-day in miners' wages between the date of the agreement and the application for review on 23rd September 1912, and by a purely mathematical process bring out an increase as due to the appellant. Accordingly he asked the Sheriff to state a case in which this is the question of law put—"Was I right in refusing to consider the general increase of 9d. a-day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review, as entitling the claimant to increase in compensation?" The question is not so clearly put as it might be, but I read it as meaning whether the increase of 9d. a-day in the wages *per se* entitled the appellant to an increase in compensation. This is the reading consistent with the appellant's argument, which was that the Sheriff-Substitute was bound to increase the compensation because there had been a general increase in wages.

I can find no warrant in the statute for the appellant's contention. Nor can I see that any question of general principle is raised by this case. The point is not whether the Sheriff-Substitute was entitled to shut his eyes to the fact that at the date of review wages had gone up by 9d. It is not to be supposed that he would do so, and it must be taken that in fixing under (16) what the workman would probably have been earning as at 23rd September 1912 he took the rate of wages then being paid. The observations that the Sheriff-Substitute makes in paragraph (*a*) bear solely on his view as to what is sufficient to constitute a change of circumstances. If the Sheriff-Substitute had dismissed the application for review on the ground that there had been no change of circumstances it might have been necessary to consider the question so raised. But he did not.

He disposed of the application on its merits and refused it. There appears to be no ground for holding that the Sheriff-Substitute went wrong in law, and in my opinion the question should be answered in the affirmative.

LORD KINNEAR—I quite assent to Lord Johnston's suggestion that we should find in the terms which he has proposed, introducing the words "*per se*" into the finding although it is not in the question. That is exactly in accordance with the view expressed by myself and by Lord Mackenzie as our understanding of the question, but it will certainly be more convenient and desirable that it should be clearly expressed.

I cannot see any reason why the expenses should not follow the appeal in the ordinary way.

The LORD PRESIDENT was not present.

The Court pronounced this interlocutor—

"Find in answer to the question of law in the case that the Sheriff-Substitute as arbitrator was right in refusing to consider the general increase of 9d. a-day in the miners' wages between the date of the agreement (19th January 1912) and the date of the application to review as *per se* entitling the claimant to increase in compensation: Dismiss the appeal, and decern."

Counsel for Appellant — Watt, K.C. — MacRobert. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents—Hon. W. Watson — Strain. Agents — Wallace & Begg, W.S.

Saturday, July 12.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

M'ARA *v.* EDINBURGH MAGISTRATES AND OTHERS.

Burgh — Magistrates — Powers — Power to Issue Proclamations Prohibiting the Holding of Meetings in Streets—Act 1606, *c.* 17.

In an action at the instance of a street orator against the magistrates of a burgh who had issued a proclamation proceeding upon the preamble that complaints had been made of the annoyance, disorder, and obstruction caused by meetings, and prohibiting under penalty from holding such meetings without a licence, the pursuer, who had been arrested for contravening the terms of the proclamation, craved declarator that the proclamation was illegal inasmuch as (1) the statute on which it was based, viz., the Act 1606, c. 17, entituled "An Act for staying of unlawful convocations within burgh and for assisting of the magistrates in the execution of their offices," was in desuetude, and (2) the defenders had no power at common law to prohibit the meetings in question.

Held that the magistrates had no power at common law or under any statute to issue the proclamation complained of, and that, accordingly, the pursuer was not bound to obey it.

Observed per the Lord President—The magistrates as the proper custodiers of the streets have an absolute right, if they are of opinion that what is going on in the streets is likely to interfere with the paramount right of passage, or to lead to a breach of the peace, to move on, *via facti*, by means of the police, the people who are causing the obstruction.

Per the Lord President—"I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets."

Statute — Desuetude — Act 1606, *c.* 17, *entituled an Act for Staying of Unlawful Conventions within Burgh and for Assisting of the Magistrates in the Execution of their Offices.*

Held that the Act 1606, c. 17, is in desuetude.

Deakin v. *Milne*, October 27, 1882, 10 R. (J.) 22, 20 S.L.R. 30, *commented on.*

Observations (*per* the Lord President) as to how far a statute might be partly in desuetude.

On 21st September 1912 John M'Ara, 3 Guthrie Street, Edinburgh, *pursuer*, brought an action against the Lord Provost and Magistrates of the city of Edinburgh and others, *defenders*, in which he sought declarator (1) that the defenders had no power to issue, and that he (the pursuer) was not bound to obey, a proclamation, dated 19th July 1912, prohibiting him from holding meetings on the open space or area lying to the south and east of the Royal Scottish Academy at the Mound, within the city of Edinburgh, without a licence from the Magistrates, and intimating that all persons contravening such proclamation were liable to the penalties set forth in the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65); and (2) that the defenders were not entitled to issue such licences. There were also conclusions for interdict against the defenders issuing such proclamations or licences, and for damages for alleged illegal arrest.

The following narrative is taken from the opinion (*infra*) of the Lord Ordinary (SKERRINGTON):—"The pursuer is a cork-cutter by trade and resides in Edinburgh. He describes himself as a politician, reformer, and street preacher, and as a person who has held meetings for many years in Edinburgh with his fellow-citizens for the discussion of social, political, and religious questions. The