

Tuesday, July 1.

OUTER HOUSE.

[Lord Dewar.

MEADES v. BEARDMORE & COMPANY, LIMITED.

*Process—Jury Trial—Motion for Trial at Vacation Sittings—Motion Enrolled Prior to a Day Three Weeks before the Sittings, but not Made in Court until after that Day—Codifying Act of Sederunt, 1913, F, i, 4.*

The Codifying Act of Sederunt, 1913, F, i, 4, enacts that if the day appointed by the Lord Ordinary for the trial of a cause by jury "is later than the next ensuing vacation of the Court or Christmas recess, as the case may be, it shall be in the power of the party to the cause at any time prior to a day three weeks before the said ensuing vacation or recess to enrol the cause before the Lord Ordinary, and to give intimation to the other party that he wishes the cause tried at the sittings in the said vacation or recess. . . ."

A motion for trial of a cause at the ensuing sittings was enrolled more than three weeks before the ensuing vacation, but the motion itself was not made in Court until a day which was within three weeks thereof.

*Held (per Lord Dewar)* that the motion for trial at the sittings was not timeously made.

This was an action of damages at the instance of William Meades, tailor, against William Beardmore & Company, Limited, based upon fatal injury to the pursuer's son caused by a motor car belonging to the defenders. An issue had been approved and a date fixed in the Winter Session 1913-14 for trial of the cause by jury.

On Saturday 28th June 1913 the pursuer enrolled the case for the Lord Ordinary's motion roll of the following Tuesday, 1st July, in order to have the cause tried at the sittings which began on Monday, 21st July.

The Lord Ordinary held that the notice of motion, although lodged with the enrolling clerk prior to a day three weeks before the sittings, was too late, and that the motion to have a cause sent to the sittings must be made "prior to a day three weeks before the sittings."

Counsel for the Pursuer—A. M. Stuart. Agents—Hume, M'Gregor, & Company, S.S.C.

Counsel for the Defenders—W. Wilson. Agents—Bonar, Hunter, & Johnstone, W.S.

Saturday, October 18.

FIRST DIVISION.

SCOTTISH INSURANCE COMMISSIONERS v. PAUL AND ANOTHER.

*Insurance—National Insurance—Employment—Contract of Service—Assistants to Ministers—Lay Missionaries—Student Missionaries—National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 1 (1) and (2), and First Schedule, Part I (a).*

The National Insurance Act 1911 enacts—Part I, section 1 (1) and (2), and First Schedule, Part I (a)—that persons employed within the meaning of the Act shall include all persons who are engaged in any "employment in the United Kingdom under any contract of service. . . ."

*Held* (1) that assistants to ministers of the Church of Scotland and of the United Free Church of Scotland, and (2) student missionaries of both these Churches, were not persons employed within the meaning of the Act, in respect that they were not employed under any contract of service in the sense of the Act, but (3) that lay missionaries of both these Churches were so employed.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 1, enacts—" (1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this part of this Act shall be, and any such persons who are not so employed but who possess the qualifications hereinafter mentioned, may be insured in manner provided in this part of this Act, and all persons so insured (in this Act called 'insured persons') shall be entitled, in the manner and subject to the conditions provided in this Act, to the benefits in respect of health insurance and prevention of sickness conferred by this part of this Act. (2) The persons employed within the meaning of this part of this Act (in this Act referred to as 'employed contributors') shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I of the First Schedule to this Act, not being employments specified in Part II of that schedule." Part I (a) of the said First Schedule is as follows:—" (a) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece, or partly by time and partly by the piece, or otherwise, or except in the case of a contract of apprenticeship without any money payment." Part II of the First Schedule contains, *inter alia*, the following provision:—" *Exceptions.*—

(g) Employment otherwise than by way of manual labour and at a rate of remuneration exceeding in value One hundred and sixty pounds a-year, or in cases where such employment involves part-time service only at a rate of remuneration which in the opinion of the Insurance Commissioners is equivalent to a rate of remuneration exceeding One hundred and sixty pounds a-year for whole-time service."

On 30th January 1913 the Scottish Insurance Commissioners, established under the National Insurance Act 1911, presented a petition under section 66 (1) (iii) of the Act, craving the Court to determine whether the following classes of employment, viz.—(a) assistants to ministers of the Church of Scotland, (b) assistants to ministers of the United Free Church of Scotland, (c) lay missionaries of the Church of Scotland, (d) student missionaries of the Church of Scotland, (e) lay missionaries of the United Free Church of Scotland, and (f) student missionaries of the United Free Church of Scotland—were employments within the meaning of Part I of the Act. Answers were lodged by the Rev. David Paul, LL.D., clerk to the General Assembly of the Church of Scotland, and the Rev. Archibald Henderson, D.D., clerk to the General Assembly of the United Free Church, in which they maintained that the classes of persons mentioned were not employed under any contract of service within the meaning of the Act.

The facts relating to the employments in question were set forth in a joint-minute for the parties as follows:—

"(a) *Employment of Assistants to Ministers of the Church of Scotland.*—Assistants to ministers of the Church of Scotland must be licentiates or probationers—those terms being synonymous—of the Church, no one being eligible unless he has received a licence from a presbytery. This licence is granted by the presbytery within whose bounds a candidate for licence resides, and is conferred only after the presbytery is satisfied that the candidate has attended the prescribed course of study at a university and that he possesses qualifications suitable for the ministry, and also after he has answered the questions appointed by Acts of Assembly 1889, xvii, and 1911, viii, and subscribed the formula prescribed by Act of Assembly 1910, xiii. The said licence bears that the presbytery 'license the said \_\_\_\_\_ to preach the Gospel of Christ and exercise his gifts as a probationer for the holy ministry.' After being licensed the licentiate, if he removes his residence from the bounds of the licensing presbytery, must report himself to the presbytery to which he has changed his residence and must produce to it his certificate of licence and a certificate of conduct, and that presbytery is required to supervise his conduct while within its bounds.

"By virtue of his licence a licentiate is authorised and entitled to discharge all the duties of an ordained minister except that he cannot dispense the sacraments or solemnise marriage and cannot act as a moderator or member of a Church court.

He holds a status recognised by the Church.

"Assistants to ministers of the Church of Scotland are appointed by the kirk-session or occasionally by the minister of the parish. Their duties are to assist the minister in the work of the church and parish. That work includes the conduct of religious services, superintendence of the Sunday school and teaching of Bible classes, visitation of the sick and the poor, and general parochial work. The assistant is not subject to ecclesiastical censure or discipline in any matter at the hands of the minister or kirk-session. As regards the matter and manner of his preaching and conduct of worship, the assistant is subject to the supervision of, and answerable to, the presbytery, and is not under the control of the minister of the charge except that the minister may exclude him from the pulpit, and that he may be dismissed or his engagement may be terminated either by the minister or the kirk-session according as he has been appointed by the one or the other. In other matters the assistant receives his orders or directions from the minister of the church who is entitled to control him in the exercise of his duties. The assistant is, however, subject, like the minister, to the jurisdiction of the presbytery, who are entitled also to control him in regard to the general manner in which he discharges the duties imposed upon him by the minister.

By Act of Assembly 1888, XIV, it is required that (in addition to the licentiate reporting himself to the presbytery within whose bounds he comes) the appointment of an assistant must be formally notified by the minister of the charge to the presbytery having jurisdiction over the charge, with a view to the assistant being recognised as such and accounted part of the church agencies within the presbytery. The termination of the assistantship must be similarly notified. If the assistant's licence were temporarily or permanently withdrawn by the presbytery, his appointment as assistant would necessarily be terminated.

"The licentiates who become assistants do so in preparation for the ministry and with the view in every case of becoming ordained ministers. Their appointment is of a temporary nature.

"There are no general regulations of the Church applicable to the appointment of assistants to ministers, the term and conditions of their appointment being settled in the general case by the kirk-session and sometimes by the minister. They are required to devote their whole time to the duties of their office. Their remuneration consists of a fixed salary, and this salary is usually paid out of the congregational funds of the church to which they are attached. In the case of all the assistants to ministers to whom this petition relates their rate of remuneration does not exceed in value £160 a-year. Certain of them—assuming them to be employed in the sense of the Act—would be

entitled to obtain certificates of exemption in terms of section 2 (1). In view, however, of the provisions of section 4 (4), in those cases also it is necessary to have it determined whether an assistant to a minister is or is not employed within the meaning of Part I of the Act.

“(b) *Employment of Assistants to Ministers of the United Free Church of Scotland.*—Assistants to ministers of the United Free Church must be licentiates, no one being eligible unless he has received a licence from a presbytery. The effect of a licence in the United Free Church is the same *quoad* that church as that of a licence in the Church of Scotland, and the operative terms of the licence granted by a presbytery of the United Free Church are as quoted in paragraph (a) *supra*. Prior to the granting of a licence the presbytery must be satisfied that the candidate has gone through the required course of study at a university and at a divinity hall, and also by trials and examinations that the candidate is a suitable person for receiving a licence; and the candidate is required to answer the questions prescribed by and sign the formula laid down in Act II of the Assembly of the United Free Church of 1900. The clerk of the presbytery furnishes the licentiate with a copy of the licence, and must send the name and address of the licentiate to the clerk of the Committee of the General Assembly on the Distribution of Probationers, or in the case of Gaelic-speaking licentiates to the Committee of the General Assembly on the Highlands and Islands. The licentiate remains under the jurisdiction of the licensing presbytery, so far as regards his character and doctrine, so long as he is resident within its bounds, and on removing to another presbytery he is required to present to it an extract of his licence and a certificate of character from his former presbytery. He then becomes subject to the jurisdiction of the presbytery to which he has removed.

“The assistants are appointed by the minister or kirk-session of the charge. The duties of an assistant, and the terms on which he holds the appointment, are the same as in the case of an assistant in the Church of Scotland; but as regards the manner in which he discharges his clerical duties he is under the direction and supervision of the minister alone. Their engagement can be terminated by the kirk-session, but in matters of discipline they are subject to the presbytery under whose jurisdiction they are. There is no definite period of engagement, but as a general rule a month's notice of termination of the employment may be given on either side. The appointment is usually made by a formal minute of the session. The appointment of an assistant in some cases is made for a definite period, with reservation of his liberty to preach in a vacancy and to accept a call to a charge if elected.

“There is no obligation on the minister, as in the case of the Church of Scotland, to notify the appointment of an assistant or the termination of the assistantship to the presbytery.

“Assistants to ministers are required to devote their whole time to the duties of their office. Their remuneration consists of a fixed salary. In the case of all assistants to ministers to whom this petition relates, their remuneration does not exceed in value £160. Their remuneration is paid either by the congregation or by the minister, with, in some cases, grants in aid from the central funds of the church.

“(c) *Employment of Lay Missionaries of the Church of Scotland.*—Lay Missionaries in the Church of Scotland are appointed by the minister or by the kirk-session of the parish. Their duties are to assist the minister in the work of the church and parish. Not being licentiates they have no authority to discharge the spiritual duties of the ministry. They cannot preach at the regular services in church, but they may conduct services in mission halls. Their work includes, besides this assistance, the superintendence of Sunday schools, the teaching of Bible classes, the visitation of the sick and poor, and general parochial work. They are not eligible for election as ministers of a parish.

“They receive their instructions from the minister of the parish, who is entitled to control them in the exercise of their duties, with reference to the time, place, and mode of performing these duties. Their appointments are not reported to the presbytery, as is the case with licentiates. They hold their appointments at the will of the minister or kirk-session. The usual arrangement is one month's notice. There are no general regulations of the Church applicable to the appointment of lay missionaries. Each kirk-session follows its own rules. Lay missionaries are required to devote their whole time to the duties of their office, and are paid a fixed salary ranging from £80 to £100 a-year. The money to pay lay missionaries is found partly by the congregation and partly by a special fund of the Church raised for the purpose.

“(d) *Employment of Student Missionaries of the Church of Scotland.*—In several parishes student missionaries are employed between the months of May and September, that is during the course of the University summer vacation. These men are appointed by the minister or kirk-session of the parish, and their duties are controlled in the same way as are those of lay missionaries. Their duties are very seldom so onerous that their whole time is required. The appointments are desired by the young men because opportunity is afforded for study and preparation for the next session's work, while experience is gained in the practical work of the ministry. The remuneration varies from 23s. to 40s. per week, and is equivalent to a rate of remuneration not exceeding £160 a year for whole-time service.”

“(e) *Employment of Lay Missionaries of the United Free Church of Scotland.*—The Highlands and Islands Committee of the United Free Church of Scotland employ about forty lay missionaries, including catechists, the great majority of whom

are Gaelic-speaking. These missionaries are appointed by the Committee usually after a two years' preparatory course of training in the Bible Training Institute, Glasgow. Their duties are the same as are set forth in paragraph (c) *supra*. Their salaries are in every case under £160.

"(f) *Employment of Student Missionaries of the United Free Church of Scotland.*—The Highlands and Islands Committee, by a joint arrangement with the minister and kirk-session of certain congregations, send students for short periods in the summer to assist in the work of the district. The remuneration paid them is of the nature of an honorarium, the appointment running from three to five months, the special object in view being that the students may obtain some experience in the conduct of public services, pastoral visitation, and generally in the practical work of the ministry. They maintain their regular studies during those months, so that their full time is not devoted to those duties. They are allowed from 20s. to 25s. per week, their remuneration being equivalent to a rate of remuneration not exceeding £160 a-year for whole-time service. Students frequently make arrangements whereby the duties are divided between two of them, either by each taking several weeks in turn or in some cases living together and sharing the work and the honorarium allowed."

Argued for petitioners—(1) Assistant ministers were within the Act, for they were employed under a contract of service. The conditions of their employment satisfied the tests of such a contract, viz., power of appointment, power of dismissal, and power of control. They were appointed by the kirk-session or by the minister, they could be dismissed by the kirk-session or by the minister, and in the discharge of their clerical duties they were subject to the control of the minister. Their employer was the kirk-session, for where the appointment was made by the minister, he acted as its representative—so too in controlling their clerical duties. Further, they received a fixed salary from funds under the charge of the kirk-session—such salary not exceeding £160 a year. They had also to give their whole time to the duties of their office. Their employment therefore satisfied the criteria of a contract of service. The question whether such a contract existed or not was one of fact—*Simmons v. Heath Laundry Company*, [1910] 1 K. B. 543. The most important element in considering that question was the power of control, for a servant was defined as "a person subject to the command of his master as to the manner in which he shall do his work,"—*per* Bramwell, L.J., in *Fewens v. Noakes*, L.R., 1880, 6 Q.B.D. 530, at p. 532. The cases of *in re Employment of Church of England Curates*, [1912] 2 Ch. 563, and *in re Employment of Ministers of the United Methodist Church*, [1912] 28 T.L.R. 539, on which the respondents relied, were distinguishable, for the tenure and duties of the offices there in question were different. Reference was also made to

the *Scottish Insurance Commissioners v. Edinburgh Royal Infirmary*, 1913 S.C. 751, 50 S.L.R. 495, and to the case therein cited of *Hillyer v. Governors of St Bartholomew's Hospital* [1909] 2 K.B. 820. (2) Lay missionaries were also within the Act, for they too were employed under a contract of service. They were appointed by the minister or the kirk-session, or (in the case of the United Free Church) by a committee of the church, and could be dismissed on a month's notice by either. They too were paid a fixed salary not exceeding £160 a year, and had to devote their whole time to the duties of their office. In the performance of these duties they were subject to the control of the minister. (3) Student missionaries were also within the Act, for they were in the same position as lay missionaries, except that their employment was more limited in duration.

Argued for respondents—(1) Assistant ministers were clearly outwith the Act, for they were not employed under a contract of service. What they rendered was not service but services. *Esto* that they owed duties to the kirk-session and to the minister they were not the servants of either, for in matters of doctrine they were subject to the presbytery alone. They were persons holding an ecclesiastical office, the exercise of which required a licence from the presbytery. That being so they were not employed persons within the meaning of the Act—*in re Church of England Curates* (*cit. sup.*); *in re United Methodist Ministers* (*cit. sup.*). (2) Lay missionaries were also outwith the Act, for although they were subject to the control of the minister as regards the time, mode, and place, of performing their duties, these duties were not rendered to any particular employer. (3) Student missionaries were also exempt, for they, like assistant ministers, were persons holding an ecclesiastical office. They had recognised status, and had to produce to the presbytery a certificate as to the proper performance of the duties of their office. Moreover, their employment was of a casual nature, and on that ground also they were outwith the scope of the Act.

At advising—

LORD KINNEAR—This petition raises a question between the Scottish Insurance Commissioners and the Church of Scotland and the United Free Church on the position of certain classes of persons under the provisions of the Insurance Act.

The petition is presented by the Insurance Commissioners, who must, of course, maintain that the persons whom they have specified in their application do fall within the provisions of the statute; but it has been explained to us that the position which the Commissioners desire to assume in this case is not by any means that of litigants pressing a claim against recalcitrant debtors, but is merely that of persons who, having a public duty to discharge, come to this Court for advice, as they are entitled to do under the provisions of the

Act of Parliament. That being the professed intention of the Commissioners, I only add that I think the case they have raised was one which they were clearly entitled to raise, and that it was argued with great fairness and moderation on both sides.

Although I think the question was quite a right one to raise, I cannot say that as regards the most important of the three classes to which it relates I myself have seen any sufficient reason to suppose that they are within the Act.

The statement is that the question has arisen as to the employment of assistant ministers of the Church of Scotland and of the United Free Church of Scotland, of lay missionaries of these two Churches, and of student missionaries of these two Churches—whether the employments of these ecclesiastical persons respectively are or are not within the Insurance Act.

I begin by saying that I see no difference in relation to this question between the position of the Established Church and that of the United Free Church. The status of the classes of persons in question seems to me to depend upon the same considerations in both Churches, and I do not think that from either side of the Bar it was suggested that any sound distinction could be taken between them.

The question therefore is—to begin with the first of the three classes of persons—whether assistants to ministers of these two Churches are within the Act or not, and that depends upon whether they satisfy the conditions of Part I of the First Schedule of the Act, by which it is provided that employment in the United Kingdom, under any contract of service or apprenticeship, whether the employed person is paid by the employer or some one else, and whether under one or more employers, shall be one of the cases included in the operative part of the Act, which refers to all persons who are to be brought within its operations as persons who are engaged in any of the employments specified in the schedule, and in particular in the part of the schedule I have read.

Now that raises the question whether assistants to ministers of these two Churches are employed under a contract of service or not. That, I think, must be determined with reference to the ordinary and popular use of the term "servant." As that word is used in the ordinary affairs of life it means the kind of relationship which subsists between a master and a domestic servant. It is certainly not to be read in the metaphorical sense in which it may be said that public officers and ministers of state are servants of the Crown or servants of the country.

Now what constitutes a contract of service, if the word is used in the ordinary and popular sense, is a question which has been frequently discussed in the Courts both of this country and of England, and I apprehend that the general rule is quite clearly established. It has been chiefly discussed in cases where it was indispensable to determine whether particular persons were

servants of those by whom they were employed or not in order to decide whether an employer was liable for the acts or defaults of a person in his employment or not, and the general rule is stated very clearly by a distinguished writer, Sir Frederick Pollock, when he says (Law of Torts, p. 81)—"The relation of master and servant exists only between persons of whom one has the order and control of the work done by the other." In the series of cases to which the learned author refers in support of that definition, I think it will be found that the true force and meaning of the words "order and control of the work" is just what is said by Bramwell, L.J., in one of the cases (*Yewens v. Noakes*, 1880, 6 Q.B.D. 530, at p. 532)—"A servant is a person subject to the command of his master as to the manner in which he shall do his work." In a contract by which one undertakes to produce a given result, but so that in the actual execution of the work he is not under the direction of the person for whom it is done, but may use his own discretion in things which are not specifically fixed by the contract itself, the relation of master and servant does not exist. The employer in cases of that kind is not liable for the acts and defaults of the person employed, just because, although he may take benefit from the work and pay for it, he is not in the position of an employer of a servant, entitled to interfere in the direction and control of his work.

If that is the meaning of a contract of service, we have to see whether there is any such contract between the assistant ministers in question and the minister or the kirk-session or anybody else, and I confess to thinking very clearly that there is not. I think the position of an assistant minister in these Churches is not that of a person who undertakes work defined by contract, but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the Church to which he belongs, and not subject to the control and direction of any particular master. We are told that these gentlemen are probationers, and we know that a probationer, in the ordinary sense of the word, is a person who is so placed that he may give proof of his qualifications for a certain status or place. The probationers who are appointed to the position of assistant ministers are students of divinity who have obtained a licence to preach from the presbytery, and that is a licence which is only given to them on the production of certificates from professors of theology in the universities of their good morals and qualifications, and upon their showing that they have gone through a certain course of theological study, and thereafter upon their passing certain trials to the satisfaction of the presbytery. When these things are done, then the presbytery issues its licence.

Now we are told in this case what the terms of the licence are. The licence bears that the presbytery licences the person named to preach the Gospel of Christ and to exercise his gifts as a probationer for

the holy ministry. When a person so licensed is appointed to be assistant to the minister, I think that his authority to perform the duties that belong to that office does not arise from any contract between himself and the minister or himself and the kirk-session or anybody else, but arises from the licence given to him by the presbytery to exercise these gifts. He is therefore, in my opinion, a person who is in no sense performing duties fixed and defined by a contract of service.

I should have come to that conclusion, I confess, without much hesitation, apart altogether from authority. But it is very satisfactory to find that a question which, if not exactly the same as the present is at all events substantially the same, has been decided in the Chancery Division of the Court in England by a very eminent Judge. I refer to the case of the Church of England curates, *in re National Insurance Act*, [1911] 2 Ch. 563. The question that was raised there was whether curates of the Church of England were or were not within the terms of the Act as being persons employed in the sense of the statute. The learned Judge, who was Mr Justice Parker (now Lord Parker), says at p. 568—“It appears quite clear on the construction of the Act that in order to make insurance obligatory under Part I there must be something in the nature of a contract of service, and in the particular case before me, unless I can say that there exists between a curate and some one else some contract which can properly be called a contract of service, the curate can in no sense be a person on whom insurance is obligatory, though he may possibly come in as a voluntary contributor. I have come to the conclusion that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract at all.” And then he goes on to say that there is no pretence in reality, in his opinion, for arguing that the relation between a curate and his vicar or between the curate and the bishop is the relation of employer and servant. I do not think it necessary to read or follow out the argument in all its details upon that particular question. Although the relation between an assistant minister and the parish minister more or less resembles that between a vicar and his curate, there are many points of detail in which they differ. But I think that in substance the reasoning of the learned Judge in that case applies directly to the case which we have to consider; and so far as these gentlemen are concerned, therefore, I have come to the opinion that they are not within the obligatory provisions of the statute.

I only add that I think the learned counsel who maintained the contrary had some difficulty in explaining exactly who was to be held to be the employer if assistant ministers were servants employed in terms of the Act at all. Whether it was the minister or whether it was the kirk-session, I think, seemed to him to be a question

of considerable difficulty; but ultimately, as I understood the argument, the position assumed was that the kirk-session was the master and the assistant minister the employee. I think that position is completely excluded by the state of facts contained in the admission before us, from which I infer that the kirk-session has no power at all to control or direct the assistant minister either in his preaching of the Gospel or in his visitation of the sick and poor or in his general parochial work. These are duties which he has undertaken in accepting the charge, and his authority for performing them is that of a licentiate of the Church, derived from the presbytery, and not derived from a contract with the kirk-session or the minister either. It is manifest that the kirk-session can have no pretension to control a minister in the exercise of his religious office, and if he is in some sense subject to the control or superintendence of the minister of the parish, it is by reason of the duty which a junior owes to a superior clergyman, and not by force of the contractual obligations of a servant to a master.

The other classes of persons with regard to whom the question has arisen are in a somewhat different position, and I think it may be convenient to deal with the third class first, because that resembles the first more nearly than the second. The third class is described as being that of student missionaries who are employed between the months of May and September—that is, of course, during the university summer vacation. The appointments are desired by young men who are studying for the Church, because they get opportunity for study and preparation and also for gaining experience in the practical work of the ministry. It is said in the statement with reference to the United Free Church student missionaries that the special object in view is that students may obtain experience in the conduct of public service, pastoral visitation, and generally in the practical work of the ministry. They maintain their regular studies during the months in which they are acting as student missionaries, and must return to the ordinary course of theological study when the university opens again, which they can do under the supervision of the presbytery.

Now I think there is a distinction between students and persons who are licensed to preach. There is a very obvious ecclesiastical distinction, but I do not think it is enough to differentiate the one class from the other with reference to this particular question. As I understand the statement, the student missionaries are really engaged in this work as work incidental to their studies and probation for the office of the ministry, and I think they are no more subjects of a contract of service between them and any other person than the assistant ministers are.

The remaining class is that of lay missionaries, and I have come to a different conclusion so far as regards these persons. Lay missionaries, we are told, are appointed by the minister or by the kirk-session,

Not being licentiates they have no authority to discharge the spiritual duties of the ministry. Their work includes assistance in regular services or in services in mission halls, the superintendence of Sunday Schools, the teaching of Bible classes, and general parochial work. It is added that they receive their instructions from the minister, who is entitled to control them in the exercise of their duties with reference to the time, place, and mode of performing these duties. Their appointments do not come before the presbytery as those of licentiates must do, and they hold their appointments at the will either of the minister or the kirk-session.

Now that appears to me to describe not the status of an ecclesiastical person but the position of a person who, under a contract, undertakes to do certain work for remuneration, and who is under the control and direction of the person by whom he is employed. It appears to me, therefore, that these gentlemen do fall within the definition of the statute. Whether in any particular case they are to be held as in the employment of the minister or in the employment of the kirk-session is a question which we, I think, are not in a position to answer. If they are employed under contract, then every contract must depend upon its own terms, but whether the kirk-session or the minister is to be regarded as employer I think there is enough before us to show that there is a contract of employment, and that is sufficient for the disposal of the only question which it is possible for this Court to determine. The application of the general doctrine to particular cases will remain for the consideration of the Insurance Commissioners.

LORD JOHNSTON — The question submitted to the Court by the Scottish Insurance Commissioners is whether the employment as (a) assistant minister, (b) lay missionary, and (c) student missionary, in the Established and United Free Churches of Scotland respectively is employment in the sense of Part I. of the National Insurance Act.

There are distinctions between those classes, but none between the Churches. I take, therefore, the case of the assistant ministers first. The statute (Schedule I (a)) says merely that the employment must be under a contract of service. A contract of service assumes an employer and a servant. It assumes the power of appointment and dismissal in the employer, the right of control over the servant in the employer, and the duty or obligation of service to the employer in the servant. I state it thus generally, because the fact that the employer's powers of appointment and dismissal and his right of control may be exercised by delegation does not affect the question.

So regarding the contract of service, the employment of an assistant minister does not appear to me to fall under the category of employment under such contract in the sense of the Act.

In the first place, the assistant must be a probationer for the ministry, and a probationer for the ministry must be a licentiate. Shortly, a probationer is a candidate for the ministry licensed to preach and exercise his gifts but not yet ordained to a charge. He receives his licence from the presbytery. So far back as 1694 the General Assembly enacted "That when such persons are first licensed to be probationers they shall oblige themselves to preach only within the bounds or by the directions of that presbytery which did license them." Subject to provision for transfer from presbytery to presbytery, this still holds, and to the jurisdiction of the presbytery of the bounds the probationer is subject as much as the minister, and therefore the presbytery have general control over him in the discharge of his duties and may withdraw his licence. If his licence is withdrawn by the presbytery his appointment as assistant necessarily falls. Accordingly, it is admitted that "he holds a status recognised by the Church." Allowing for the difference between the ecclesiastical system of the Established Church of England and that of both branches of the Presbyterian Church in Scotland, there is very substantial similarity between the assistant minister in Scotland and the curate in England, and the judgment of Parker, J., in *re Employment of Church of England Curates* ([1912] 2 Ch. 563) appears to apply, *mutatis mutandis*, to the case under consideration. In the case of the assistant minister there is no one who occupies the position of employer in the sense of a contract of service. The presbytery does not appoint; even though its licence is necessary, it is a general licence and not a licence *ad hoc*. The kirk-session generally appoints; sometimes the minister. The kirk-session has no control over the discharge of duties. That control is divided between the presbytery and the minister. The power of terminating the appointment is with the minister or kirk-session according as the appointment has been made by the minister or kirk-session, yet the appointment may be terminated by the act of the presbytery in withdrawing the licence. In fact, the contract in which the assistant minister is engaged is more a contract for services than a contract of service, as in the *Royal Infirmary* case (1913 S.C. 751). Accordingly, I agree with your Lordship that assistant ministers are not employed persons in the sense of Part I of the Act.

The lay missionaries are in a different position. They enjoy no ecclesiastical status. They are not licentiates, and have no relation to the presbytery. They are entirely under the control of the minister of the parish, and accordingly they must, I think, be held to be employed persons in the sense of the Act.

The student missionaries, on the other hand, who merely receive vacation appointments, cannot properly be said to be employed at all. They are appointed in the course of their university career, for their own benefit rather than for that of the parish, that they may have some practical

experience of parish work as part of their education. They are, as it were, given the opportunity of seeing what I may call clinical work. And their position is therefore clearly distinguished from that of the lay missionaries, whose employment is regular and permanent and a means of livelihood. They are therefore not employed persons in the sense of Part I of the Act.

LORD MACKENZIE—I am of the same opinion, and for the reasons which have been already explained. As regards the assistants, I think insurance is not obligatory, because they are under no contract of service. The joint-minute which has been adjusted by the parties defines so far as possible the relation of the assistant to the minister and kirk-session. I think that the fact that the definition is left in very general terms shows how much liberty there must necessarily be to the assistant in the execution of his duties. To a certain extent there may be control as regards the objects of the work, but, as it appears to me, there is no definite control as regards the method in which the work is to be done. The case of the assistant is really the case of one who is discharging the duties of an office, and whatever authority is exercised over him is in virtue of an ecclesiastical jurisdiction, and is not in virtue of rights which arise out of a contract of service. That, I think, is sufficient to show that the case of the assistants is outside the scope of the Act.

As regards the student missionaries, there, I think, the contract may be described as one for services. The students take up this work for the purpose of better fitting them when their education is completed for discharging the duties appertaining to an office in the Church.

As regards lay missionaries I agree that their position is different, but I desire distinctly for myself to say that my opinion in regard to lay missionaries is confined to those to whom the adjusted statement of facts is applicable, because it is impossible to shut one's eyes to the fact that there may be lay missionaries to whom these statements are not applicable, and who therefore would not come within the scope of the Act.

LORD KINNEAR—I should like to add that I quite agree with what Lord Mackenzie has last said, but I conceive that our answer, which may be framed simply in terms of the concluding question, must necessarily in all cases be applicable to the persons who are described in the minute of admissions. What we answer is that the classes of employment specified under the letters (a), (b), (d), and (f) are not employments within the meaning of the Act, but that the classes of employment described under the letters (c) and (e) are within the Act.

The LORD PRESIDENT did not hear the case.

The Court decided that the classes of employment designated in the prayer of the petition by the letters (a), (b), (d), and

(f) were not employments within the meaning of Part I of the National Insurance Act 1911: Further decided that the classes of employment designated in said prayer by the letters (c) and (e) were employments within the meaning of Part I of said Act, and decerned.

Counsel for Petitioners—Sol.-Gen. Anderson, K.C.—A. R. Brown. Agent—James Watt, W.S.

Counsel for Respondents—C. N. Johnston, K.C.—Cowan. Agents—Menzies & Thomson, W.S.—John Cowan, W.S.

Tuesday, October 21.

## FIRST DIVISION.

[Sheriff Court at Dunfermline.

### DEMPSEY v. CALDWELL & COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (1) (b) and (10)—Possibility of Supervening Incapacity—Suspensory Order—Competency.*

A workman who had sustained permanent injuries, but who had subsequently been able to resume work, applied for warrant to record a memorandum of agreement under which it was alleged that the respondents had agreed to pay him a weekly sum during incapacity. The Sheriff-Substitute, holding that the workman was no longer incapacitated, refused the warrant craved and ended the payment of compensation.

In an appeal at the instance of the workman, the Court, *hoc statu*, remitted the case to the arbiter to consider and decide whether the ending of the payment of compensation should be permanent or temporary.

*Opinion* (per the Lord President) that a suspensory order was a competent form of process.

*Taylor v. London and North-Western Railway*, [1912] A.C. 242, followed.

In an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), at the instance of James Dempsey, Rosyth Huts, Inverkeithing, claimant, against Caldwell & Company, Limited, papermakers, Inverkeithing, respondents, for warrant to record a memorandum of agreement the Sheriff-Substitute (UMPHERSTON) refused warrant, ended the applicant's right to compensation, and stated a Case for appeal.

The Case stated—"This is an arbitration in which the claimant, who is eighteen years of age, claimed compensation from the respondents for injuries sustained by him while in their employment on 21st August 1912. The claimant's right hand was severely crushed and burned between the hot steam rollers of a papermaking machine. Parts of the third and fourth