Wednesday, May 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WATSON *v.* WILLIAM BEARDMORE & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Sched.* (1) (*b*) *and* (16)—*Review—Ending of Compensation—Suspensory Order—Permanent Injury.*

A workman whose left thumb had in consequence of an accident been partially amputated was for some time paid compensation by his employers. The arbitrator having subsequently ended the compensation on the ground that the workman was fit to resume his former occupation, and that the injury did not impair his chance of work in his former line of employment, or in any other line of employment which he might reasonably hope to follow, the workman appealed.

Held that the arbitrator was not bound to pronounce a suspensory order, but was entitled to end the compensation.

Observed per Lord Salvesen—"He (the arbitrator) has to consider in each case what kind of employment a man is fitted by his previous training and by his physical attainments to follow, and to confine his attention to such employment as the man might reasonably adopt if he lost his situation in the particular employment which he had hitherto followed."

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Hugh Watson, brakesman, Glasgow, *appellant*, and William Beardmore & Company, Limited, Parkhead Forge, Glasgow, *respondents*, the Sheriff-Substitute (THOMSON) ended compensation and stated a Case for appeal.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of the respondents, by minute of review, the first deliverance on which was dated 29th November 1913, in which the Sheriff was asked to review the weekly payment of 13s. agreed to be paid by respondents to the appellant, the incapacity of the appellant for work, in respect of which the said weekly payment was agreed to, having entirely ceased or at least become greatly lessened at 28th October 1913, and to end the said weekly payment as at 28th October 1913 or such later date as the Court should decide, or to diminish the said weekly payment as at and from the foresaid date, all in terms of section 16 of the First Schedule of said Act.

"The case was heard before me, and proof, at which one of the medical referees appointed under said Act sat with me as medical assessor, was led on this date (7th Jan. 1914), when the following *facts* were established:—(1) That the appellant, while acting as a brakesman in the respondents' employment, met with an accident on 21st December 1912, as the result of which the appellant sustained a permanent injury in respect his left thumb was amputated at the metacarpophalangeal joint; (2) that the face of the stump is not tender, and the stump is freely moveable towards the other fingers or in extension; (3) that he is now fit to undertake, and was on 28th October 1913, when examined by Dr Knox (a medical practitioner selected by the respondents), fit to resume his former occupation; (4) that the loss of the left thumb at the metacarpophalangeal joint does not impair his chance of employment in his former line of employment, or in any other line of employment which he might reasonably hope to follow.

"I therefore ended, as at 28th October 1913, the compensation payable to appellant in respect of said accident, and found him liable in expenses."

The *question of law* for the opinion of the Court was—"Whether upon the evidence the arbitrator could competently end the compensation payable to the appellant in respect of said accident?"

Argued for the appellant—The arbiter ought not to have ended the compensation. The appellant was entitled to a suspensory order or a remit. It was competent for the Court to consider whether finding 4 could be supported by the evidence—*Euman* v. *Dalziel & Co.*, 1912 S.C. 966, *per* Lord President (Dunedin) at 968, 49 S.L.R. 693, at 694. The arbiter did not state the evidence on which he arrived at the finding. The finding was necessarily and clearly pure conjecture, and was inconsistent with finding 1. The injury was patent, serious, and permanent. The test of a workman's chance of employment was the general wage-earning capacity in the widest field of employment, viz.—the open market—*Dempsey* v. *Caldwell & Co., Ltd.*, 1914 S.C. 28, *per* Lord President (Strathclyde) at 32, 51 S.L.R. 16, at 18; *Hargreave* v. *Haughhead Coal Co., Ltd.*, 1912 S.C. (H.L.) 70, 49 S.L.R. 474; *Green* v *Cammell, Laird, & Co., Ltd.*, [1913] 3 K.B. 665; *Ball* v. *William Hunt & Sons, Ltd.*, [1912] A.C. 496, 49 S.L.R. 711; *Taylor* v. *London and North-Western Railway Company*, [1912] A.C. 242; *Birmingham Cabinet Manufacturing Company* v. *Dudley*, February 9, 1910, 3 B.W.C.C. 169.

Argued for the respondents—The arbiter was right in ending the compensation instead of pronouncing a suspensory order. The injury was not serious. The test of a workman's wage-earning capacity fell to be determined according to his actual employment or an employment in which he might reasonably engage. The question was not as to whether in any possible circumstances he had been disabled—*Hargreave* v. *Haughhead Coal Co., Ltd., cit.*, governed the present case.

LORD DUNDAS—We have here a stated case upon an application by the employers to review and end a weekly payment in respect that it is alleged that incapacity entirely ceased at a given date.

The learned arbitrator heard the case with the assistance of a medical referee as assessor, and among other facts it was proved that the appellant, while acting as a brakesman in the respondents' employment, met with an accident on 21st December 1912, as a result of which the appellant sustained a permanent injury, in respect his left thumb was amputated at the metacarpophalangeal joint. Further, that he is now fit to undertake, and was on 28th October 1913, when examined by Dr Knox (a medical practitioner selected by the respondents), fit to resume his former occupation.

Then the fourth finding, which I quote in full, is "That the loss of the left thumb at the metacarpophalangeal joint does not impair his chance of employment in his former line of employment, or in any other line of employment which he might reasonably hope to follow."

On these facts the learned arbitrator ended the compensation as at 28th October 1913; and the question of law put to us is whether upon the evidence he could competently so end the compensation.

There is no question, looking to the recent decision of the House of Lords in the case of *George Gibson & Company* v. *Wishart*, (1914) 1 S.L.T. 416, as to the competency of the arbitrator ending the compensation at a date prior to the application for review, and no point was made upon that at our bar. The sole question argued was whether he was entitled to end the compensation as he has done, or whether he was not bound to pronounce a suspensory order, which is now, I apprehend, quite settled to be a competent method of procedure in cases under this Act.

It is obvious that the fourth finding presents a very serious difficulty in the way of the appellant's argument. I read it as a finding in fact on a question of fact depending on the evidence and on the circumstances of the case. It was said that it necessarily and clearly was rather a matter of conjecture; but I do not think that is so, although the finding must involve to some extent a conclusion upon the weight and character of the conflicting opinions of medical men. I think it was a finding of fact on the whole circumstances which were before the Sheriff, and doubtless received good consideration by him, as to the man's prospects of employment in the open market. The Sheriff has evidently satisfied himself upon the merits of this question.

But we are asked to say that he has in doing so acted *ultra vires*, because it is said that finding 4 is inconsistent with the first finding, which affirms the nature of the permanent injury sustained by the appellant. I do not agree with this. I do not think that the findings are contradictory, and I say so very much for the reasons which I expressed in analogous circumstances in the case of *Hargreaves*, 1912 S.C. (H.L.) 70, 49 S.L.R. 474.

Mr Robertson in his able argument urged us to accept the view that the only proper and competent award in a case of serious and patent permanent injury is a suspensory order. I think his statement is far too broad, and I decline to accept it as put. In one of the recent English cases— *Green* v. *Cammell, Laird, & Company, Limited*, [1913] 3 K.B. 665, 6 B.C.C. 735— Lord Justice Kennedy expressed the opinion "that in cases of a permanent physical injury . . . the arbitrator, if satisfied that the incapacity for work has for the time ceased, ought, as a general rule, not as a universal rule, inasmuch as in such a case an incapacity for work due to the injury may very possibly supervene at a later time, not to make an award simply terminating the weekly payments, but to make an order which keeps alive the employer's liability, either by directing the weekly payment of a nominal sum or by a suspensory order." With that opinion so stated by the learned Lord Justice I have no fault to find; but I emphasise the fact that the rule is laid down by him as a general and not as a universal rule, and I do not think that it is applicable here. It seems to me that in the present case we have in finding 4, carefully prepared by the arbitrator, a finding in fact, and intended as such. I do not think there is a finding at all like it in any of the cases to which we have been referred. It has evidently been made by the arbitrator as a finding in fact embodying the result, in his opinion, of the evidence which he had before him. I cannot say that finding was incompetent or *ultra vires;* and I am for answering the question of law in the affirmative.

LORD SALVESEN—I concur. It is, I think, always a question of fact whether a particular injury to a workman will affect his earning capacity either in his own sphere of employment or, as the arbitrator puts it, in any line of employment which he may reasonably hope to follow.

In the course of the argument I put the illustration of a man receiving an injury to his face which left a permanent scar. Undoubtedly if the man were a waiter or a butler a disfigurement of that kind might very seriously affect his chances of employment, and therefore his earning capacity, whereas a similar injury to a miner or an ordinary labourer would probably have no effect upon his following his ordinary occupation.

Here we are dealing with a man who was above the rank of an ordinary labourer. He was a brakesman—a class of employment that is usually entrusted only to a man who in addition to manual ability has also certain reliability in the discharge of somewhat responsible duties. Now the learned arbitrator has addressed his mind to the facts bearing upon the case, and it seems to me that he has correctly interpreted the decisions of the House of Lords as to the scope of the inquiry. He has not to consider whether the man's chances of employment would be affected if he were a workman of a totally different class from that which he followed. He has not to consider, say, in the case of a clerk whether a slight injury to the left hand might if he were thrown out of employment and had to turn to ordinary manual labour, affect his chances

of employment as a manual labourer. He has to consider in each case what kind of employment a man is fitted by his previous training and by his physical attainments to follow, and to confine his attention to such employment as the man might reasonably adopt if he lost his situation in the particular employment which he had hitherto followed. He has held as matter of fact that this man's chance of employment in his former line of work and in any other line of employment which he might reasonably hope to follow has not been impaired.

That being his conclusion in fact, which we cannot review, I do not see how he could do anything else but end the compensation. Had he found otherwise it might have been proper to have pronounced a suspensory order even although the man was earning as high or higher wages in some form of employment than he had earned before, but in view of the facts which the arbitrator has found, and which I think were just the facts it was his duty to consider, he arrived at a right result in law when he terminated the compensation.

LORD GUTHRIE — I am of the same opinion. Mr Robertson argued alternatively either for a suspensory order or for a remit. I agree with your Lordships that he is not entitled to either. In regard to his crave for a suspensory order, one keeps in view that the injury here was to the left hand. I think the right hand cases which were mentioned to us involved very different considerations. One also keeps in view that so far as the present position is concerned there has been complete recovery, because the face of the stump, for what it is worth, is not tender, and the stump is freely moveable towards the other fingers or in extension.

Coming to the arbitrator's findings, Mr Robertson admitted that when the arbitrator found that the loss of the left thumb at the metacarpophalangeal joint did not impair his chance of employment in his former line of employment, he must have had before him direct evidence on that particular point. But he said that the other limb of the finding, namely, "or in any other line of employment which he might reasonably hope to follow," necessarily involves a purely conjectural element. That depends on what is meant by any other line of employment. I take it that the Sheriff must have proceeded on the view which Mr Horne maintained, namely, that he was bound to consider such work as a brakesman's work or any analogous work, and certainly was not bound to consider such work as Lord Salvesen referred to, such as the work of a clerk. If you take it in that limited sense in relation to his chances in the open market or labour market, then the conjectural element is reduced to a minimum, and the Sheriff must have had before him evidence which enabled him, without entering into the sphere of conjecture at all, to come to the conclusion at which he has arrived.

Mr Robertson maintained the proposition which I think Mr Horne was correct in saying was not a universal one, namely, that wherever an injury was not only permanent—using the expression of the arbitrator—but also patent and serious, then a suspensory order was the proper course to follow. I think Mr Horne was well founded in distinguishing between these three words. "Patent injury" and "permanent injury" are absolute terms; "serious injury" is a relative term, and the Sheriff has found in this particular case that although the injury was permanent and patent, it was not serious *quoad* the chance of this man getting employment in the open market in the limited sense in which I have defined it.

I agree with your Lordship that the way in which it is proposed to use the case of *Green* v. *Cammel, Laird, & Company*, [1913] 3 K.B. 665, 6 B.C.C. 735, and Lord Justice Kennedy's opinion, is not justifiable, because that opinion while stating a general rule, in terms excludes the notion that it was meant to be universal.

As to the other point — the proposal to remit—it seems to me that there is nothing to remit. The Sheriff was not entitled to narrate the evidence of opinion, he was bound to state the facts, and he has done so. His duty was to state what the result, in his view, was of that evidence of opinion taken along with the facts, and he has done so and is final.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Crabb Watt, K.C. — Graham Robertson. Agent — E. Rolland M'Nab, S.S.C.

Counsel for the Respondents — Horne, K.C.—Hossell Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, May 28.

FIRST DIVISION.

[Junior Lord Ordinary.

BLYTHSWOOD *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Expenses — Railway — Compulsory Purchase of Land—Application of Purchase Money—Entail—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *sec.* 79.

In a petition by an heir of entail, part of whose estate had been taken by a railway company under compulsory powers, to uplift the money consigned as the price of the lands and to apply it in payment of certain fee-simple lands which he had acquired, and which he proposed to settle as part of the entailed estate, the petitioner was found entitled to expenses against the railway company.

Held that the company was liable for the expense of a remit to a man of skill