The Court in respect of the minute of consent appointed the person suggested in the minute to be factor *loco tutoris* for the pursuer's pupil children in so far as regards the sums awarded to each of them by the verdict, with the usual powers, he always finding caution before extract; decerned against the defender for payment to the said factor *loco tutoris* of the said sums; and remitted to the junior Lord Ordinary to proceed in the factory.

Counsel for the Pursuer—Duffes. Agents —J. Douglas Gardiner & Mill, S.S.C.

Saturday, December 10.

SECOND DIVISION.

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

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (3)—*Partial Incapacity*—"*Suitable Employment*"—*Watchman's Job Involving Sunday Work*—*Act* 1579, *cap.* 70.

Held that the Act 1579, cap. 70, prohibiting Sunday labour, did not apply to a watchman's job which involved Sunday work so as to render the job one which a partially disabled workman claiming compensation under the Workmen's Compensation Act 1906 was not bound to accept.

Master and Servant—*Sunday Labour*—*Act* 1579, *cap.* 70.

Question whether the Act 1579, cap. 70, is in desuetude.

Michael Smith, labourer, Baillieston, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Glasgow (BLAIR) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between him and William Beardmore & Company, Limited, Parkhead, Glasgow, *respondents*, appealed by Stated Case.

The *facts* proved were as follows:—"1. That Michael Smith, the workman in this case, aged fifty-six, a labourer, was injured in the course of his employment with the respondents on 1st October 1918 by a howitzer wheel which he was rolling falling upon his left hand and crushing it so severely that the thumb and part of the first finger were amputated in the Royal Infirmary. 2. That his average weekly wages prior to the accident were £4, 12s. 3d. 3. That he received full compensation from date of accident (1st October 1918) till 19th February 1921, when it was stopped—a period of two years and four months. 4. That for some months previous to 19th February 1921 he had sufficiently recovered to be able to earn good wages at a light job. 5. That on several occasions prior to 19th February 1921 his employers offered him a light job as watchman with a weekly wage of £4, 3s. 10d., which he refused and still refuses to accept. 6. That he is and has been able to do such a job without any difficulty. 7. That his refusal is unreasonable in respect that his attitude all along and now is one of insisting upon his claim being settled for a lump sum out of all proportion to the injury received and his present capacity to earn good wages. 8. That if he had been able to resume full work as a labourer his present wage would not have amounted to more than £3, 13s. 1d. per week. 9. That the job offered to the appellant as watchman was a seven-shift job, which involved working on Sundays, that he stated that he was willing to accept the job if it was reduced to six shifts involving no Sunday work, that it was proved that he had worked overtime at his own job before the accident on week days and also on Sundays, that there are no watchman's jobs of six shifts to offer.

"Accordingly on 30th May 1921 I issued an award reducing the compensation to appellant as and from 19th February 1921 till the further orders of Court to the sum of 4s. 3d. a-week, being 50 per cent. of the difference between his former wage and the wage he is now offered. I awarded said sum accordingly, and found it unnecessary to record the memorandum of agreement of date 17th June 1920."

Note.—"I need not say very much about this case, which is one of the most unusual I have ever known. The claimant undoubtedly met with a severe accident, and his left hand is permanently maimed. He has drawn full compensation for two years and four months, has never looked for work, and has apparently little intention of doing so. He is quite able, and has been so for some time, to do a light job at pushing or pulling. A watchman's job is ideal. He is in robust health—nothing the matter with him except this injury to his hand, which has healed, and which admittedly can never be so useful at it was. He has been offered a watchman's job by the defenders repeatedly, but he will not accept it, holding out for a settlement in cash. He began by asking £700, the defenders offered £150, and there that matter rests in the meantime. They still offer that amount, and in addition are, I understand, willing to give him the watchman's job. I think his attitude is unreasonable. At £4, 3s. 10d. he is better off than if he had completely recovered and been able to go back to a labourer's job, whose wage is now £3, 13s. 1d. He says he has conscientious objections to a seven-shift job, but there are no watchman's jobs of six shifts. It is easy, light, and healthy work, no labour. When he was making his big wage before the accident he had no scruples about working overtime and on Sundays. In fact he worked on an average 95 hours a-week, all to his advantage, as it fixes a very high wage for him in this case. Now he will not work for more than 45 hours a-week. It is facts, not conscientious objections, that are applicable in Workmen's Compensation cases. In my opinion the employers are entitled to have this compensation reduced, and the sooner he accepts the offer of a good job like this the better.

"There is not a scrap of justification for Mr Leechman's suggestion that the defenders have been harsh to this man, and that

their methods in bringing about this review are not straightforward. On the contrary, they have treated the claimant very generously, and the procedure of stopping payment when they thought he had been off work long enough, his presenting the memorandum for recording, their objections thereto, and alternative crave for review, is the ordinary and proper method of raising the issue between the parties."

The *question of law* was—"On the facts stated was the Sheriff-Substitute justified in assessing compensation at the rate of 4s. 3d. per week?"

Argued for the appellant, *inter alia*—The job offered to the appellant was not one which he could be expected or was bound to accept—Act 1579, cap. 70. The Act was not in desuetude and it was immaterial whether or not prosecutions could be brought under it—*Middleton* v. *Paterson*, (1904) 6 F. (J.) 27, 41 S.L.R. 256; *Macrorie* v. *Forman*, (1905) 8 F. (J.) 23, 43 S.L.R. 63, were referred to.

Argued for the respondents, *inter alia*—The Act did not strike at the Sunday work of a watchman. Such work was a "work of necessity," since it was for the preservation of property.

LORD JUSTICE-CLERK—The only question submitted to us in this case is—"On the facts stated was the Sheriff-Substitute justified in assessing compensation at the rate of 4s. 3d. per week?" The proceedings began by the appellant presenting an application to record a memorandum of agreement dated 18th November 1918. The respondents objected to the recording in respect, *inter alia*, that the agreement was only to pay compensation during the appellant's total incapacity, and that he was no longer totally incapacitated. The respondents, who had paid compensation as for total incapacity up to 19th February 1921, maintained that the appellant should only be compensated as from that date or such other date as the Court might fix as for partial incapacity.

[*His Lordship dealt with a matter of procedure.*]

One special point was raised by the appellant in argument, founded on the old Scots Acts as to Sabbath observance, and indeed this was the only point argued on what I may call the merits of the case. It seems still unsettled whether these old statutes are not in desuetude, but I do not think they would apply to such employment as that of a watchman. To hold otherwise would seem to imply that modern legislation as to factories was in several respects unnecessary so far as Scotland is concerned, *e.g.*, The Factory and Workshop Act 1901 (1 Edw. VII, c. 22), sec. 34.

In my opinion the question put to us should be answered in the affirmative.

LORD SALVESEN—The only question submitted for the opinion of the Court is thus expressed—"On the facts stated was the Sheriff-Substitute justified in assessing compensation at the rate of 4s. 3d. per week?" Now if it had been contended that there were no facts on which the arbitrator could reasonably proceed in assessing compensation, I could understand that a question of law arose for decision, but taking the facts as the arbitrator has found them I cannot doubt that he was entitled to award compensation at a reduced rate, for it was conceded that we are not entitled to review the rate of compensation which he has fixed unless he has fallen into some error of law.

The main facts, which are narrated under nine separate heads, are—that the appellant met with an accident which resulted in the thumb and part of the first finger of his left hand requiring to be amputated; that for several months prior to 19th February 1921 he had sufficiently recovered to be able to earn good wages at a light job and had been offered employment as a watchman with a weekly wage of £4, 3s. 10d., and that he was quite fit to do such a job without any difficulty. If there were nothing else in the findings, it appears to me perfectly plain that the workman was no longer entitled to receive compensation as for complete incapacity, and that as he was being offered a wage within 8s. 6d. weekly of the average wages which he received before the accident, the arbitrator was entitled to award compensation at a weekly rate within that figure, and unless he acted entirely unreasonably that his award on the subject was final.

The appellant, however, maintained that as it appears from the subsequent findings that the job he was offered involved working on Sundays, he was not bound to accept a job of that kind on the ground that there are still on the statute book certain old Acts of Parliament which make Sunday work illegal. It is true that these Acts have been held for some purposes not to be in desuetude, but it is certain that they have been to a large extent disregarded in actual practice, and there are many forms of occupation to which they never had any application, as, for instance, domestic service, and also such work on a farm as is required in the care of animals. We know also that in other forms of service, such as railway and tramway services, the Acts are not capable of being enforced, as it would be against the public interest to do so. And I think that the same may be said of such occupations as that of a watchman, for it is part of the arbitrator's finding that there are no watchmen's jobs which do not involve Sunday labour. In this particular case the arbitrator has found that the appellant used to work overtime at his own job before the accident on Sundays, and, further, that his refusal to accept a watchman's job is unreasonable in respect that his attitude has all along been one of insisting upon his claim being settled for a lump sum out of all proportion to the injury received. In these circumstances I think the arbitrator was well warranted in coming to the conclusion which he did, although our primary function is not to consider whether we should have reached the same conclusion, but only whether there were facts before him on which he could reasonably reach it. Incidentally I may say that I should be very

slow to hold that when a man has been so disabled that he can accept no other employment than that of a watchman the employer should be under statutory obligation to pay him as for total incapacity when he is offered a job as a watchman at wages not materially different from those which he earned before the accident occurred. [*His Lordship dealt with a matter of procedure.*]

On the whole matter I am satisfied that the appellant has no valid ground to complain of what has been done by the arbitrator, and that we ought to answer the only question of law that is formally presented for our opinion in the affirmative.

LORD ORMIDALE—On 1st October 1918 the appellant sustained an injury arising out of and in the course of his employment with the respondents, in respect of which he claimed compensation. His average weekly wages prior to the accident were £4, 12s. 3d., and by agreement with his employers he received full compensation down to 19th February 1921. On 17th June 1920 the appellant lodged with the Sheriff-Clerk a memorandum of agreement with a request that it be recorded. The agreement as set out by the appellant provided that the agreed-on compensation was "to continue during the appellant's incapacity for work." The respondents lodged a minute in which they objected to the memorandum being recorded, in respect, *inter alia*, "that the agreement as to the time during which compensation was to be paid related to the period of the appellant's total incapacity." They further maintained that if it should be held that the appellant was still partially incapacitated the compensation should be fixed, suspended, or reviewed from 19th February 1921. [*His Lordship then dealt with a matter of procedure*].

The matters I have referred to are not mentioned in the Stated Case as matter of appeal, the only question submitted for our opinion being—"On the facts stated was the Sheriff-Substitute justified in assessing compensation at the rate of 4s. 3d. per week?" The facts stated amply warrant an answer in the affirmative. I refer to only one of the points made for the appellant. The job offered to the workman is that of a watchman. The job is a seven-shift job and involves working on Sundays. Founding on the old Scots Acts as to Sunday observance it was maintained that such a job was not one which a workman could be expected or was at any rate bound to accept. Assuming that these ancient statutes are not in desuetude I agree with your Lordship that whatever of vital and operative force may be left in them has no application to work of the nature offered to the appellant.

The Court answered the question in the affirmative.

Counsel for the Appellant—Mackay, K.C. — Gentles, K.C. — Aitchison. Agents — W. G. Leechman & Company, Solicitors.

Counsel for the Respondents—Dean of Faculty (Constable, K.C.)—Graham Robertson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, November 15.

(Before the Lord Justice-Clerk, Lord Salvesen, and Lord Ormidale.)

COSTELLO *v.* MACPHERSON.

Justiciary Cases — Procedure — Proof — Admissibility of Evidence — Voluntary Admission by Accused to Police without Warning after being Asked to go to Police Office.

In a summary prosecution for theft the prosecutor led evidence to the effect that the accused was met by two constables in the early morning carrying a parcel in circumstances which excited their suspicion; that in answer to their inquiries he stated that the parcel contained old paper; that on examination it was found to contain coal, which he then stated had been given to him by a miner; that at this point a sergeant of police came up and requested the others to accompany him to the police station in order that the accused's statement might be verified; and that on the way to the police station the accused voluntarily stated that he had taken the coal from a bunker belonging to a railway company. The accused had not been warned that anything he might say might be used in evidence against him. *Held* that the accused's admission was competent evidence against him, and conviction *upheld.*

Justiciary Cases — Procedure — Proof of Felonious Intent—Charge of Theft.

Held that the fact that an accused was found in suspicious circumstances in possession of coal, which he falsely stated had been given to him by a miner, and then admitted he had taken from a bunker belonging to a railway company, but gave no explanation to show that he was rightfully in possession of it, was sufficient to justify a conviction for theft, and that it was not further necessary to prove to whom the coal belonged.

Thomas Costello, *appellant*, was charged in the Police Court at Portobello, at the instance of Charles Angus Macpherson, Public Prosecutor, *respondent*, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that on 3rd May 1921 from a coal-bunker at the Gashouse, Portobello Railway Station, Edinburgh, you did steal nine pounds of coal."

The appellant pleaded not guilty.

On 23rd May 1921, after evidence had been led, the accused was found guilty as libelled and fined 5s, with the alternative of five days' imprisonment. On the application of the accused a Case was stated for appeal.

The *facts* proved were as follows:—"In respect of numerous complaints received by the North British Railway police of thefts of coal having taken place antecedent to the date libelled from a bunker in a hut