

Saturday, July 19.

SECOND DIVISION.

[Sheriff Court at Duns.

MELROSE PARISH COUNCIL v.
GORDON PARISH COUNCIL.

Poor—Relief—“Able-bodied” One-armed Man—Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83), sec. 68.

The Poor Law (Scotland) Act 1845, section 68, enacts—“All assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor: Provided always that nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment.”

A parish council which had given relief to a destitute one-armed man brought an action under the Poor Law (Scotland) Act 1845 against the parish council of the parish in which the man had a settlement to recover the amount of the payments they had made. Prior to obtaining relief the man had for several years, in various occupations, earned wages sufficient to maintain himself and his family, but having become unemployed applied for and obtained the relief after the unemployment benefit he received under the Unemployment Insurance Acts had ceased. *Held (diss. Lord Hunter)* that the man was “able-bodied” within the meaning of section 68 of the Poor Law (Scotland) Act 1845, and accordingly not entitled to relief under the Act, and defenders assolizied.

Query—Is the test of a person being “able-bodied” within the meaning of the Poor Law (Scotland) Act 1845, ability to earn his own subsistence, or to earn subsistence for himself and his family?

The Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap. 83) enacts—Section 68—[*quoted in rubric*]. Section 71—“Where in any case relief shall be afforded to a poor person found destitute in a parish or combination, it shall be lawful for the parochial board of such parish or combination to recover the moneys expended in behalf of such poor person from any parish or combination within Scotland to which he may ultimately be found to belong. . . .”

The Parish Council of the Parish of Melrose, *pursuers*, brought an action in the Sheriff Court at Duns against the Parish Council of the Parish of Gordon, *defenders*, for payment of £44, 16s. 11d., with interest, being the amount of sums expended by the pursuers for the relief of George Darrie and his children, whose settlement was in the the defenders’ parish, and for relief from all further advances on behalf of George Darrie.

After a proof the Sheriff-Substitute made the following findings in fact:—“(1) That George Darrie, who was born in 1882 in Eccles parish, Berwickshire, sustained an

injury in 1910 by which he lost his left arm from a point an inch or two below the elbow; (2) that he was working then as a shepherd on his father’s farm in Eccles parish; (3) that when his injured arm had healed he returned and did odd jobs upon said farm; (4) that his father died in 1911 and bequeathed to him £1200; (5) that in May of 1913 he left said farm and took up residence within defenders’ parish at East Gordon, and there acquired a settlement; (6) that while there he was engaged in several forms of occupation such as hawking, crofting, rabbit catching—in some cases on his own account, in others under an employer; (7) that in May of 1917 the sum which he inherited, as well as other sums which he had regularly earned, was finished, and in December 1919 he changed his residence again and went to live at Langlee in pursuers’ parish; (8) that from May 1917 until October 1921 he was engaged in occupations such as stoking engines, supervising timber felling, and night watching, to which he brought a fair amount of physical capacity by which he was enabled to maintain himself and family on wages ranging from 30s. to 65s. per week; (9) that from 17th October 1921 to 12th May 1922 he, being an insured person under the Unemployment Insurance Acts, received a benefit thereunder of 26s. per week as (*ex hypothesi*) a person physically fit for work but unable to obtain a suitable employment; (10) that when this benefit had ceased in May of 1922 he applied on 22nd May to Melrose Parish Council for relief, and on their medical officer’s certificate that he was not able-bodied but could do light work received from them the sums sued for, amounting to the total sum of £44, 16s. 11d.; (11) that Darrie’s settlement was then still defenders’ parish. . . .”

The pursuers pleaded, *inter alia*—“1. The pursuers having made the said advances, and being liable to make further advances on behalf of the said George Darrie and his wife and family, and the defenders’ parish being the parish of settlement of the said George Darrie, the defenders are bound to relieve the pursuers of said advances, and decree should be granted as craved.”

The defenders pleaded, *inter alia*—“1. Darrie not being under such disability to work as to prevent him earning his subsistence, is not a fit subject for parochial relief, and the defenders should be assolizied with expenses. 2. Darrie having been afforded assistance by the pursuers as an unemployed man and under the provisions of the Poor Law Emergency Provisions (Scotland) Act 1921, they are not entitled to be reimbursed sums paid by them by any other parish, and the defenders should be assolizied with expenses.”

On 28th March 1924 the Sheriff-Substitute (MACAULAY SMITH) pronounced the following interlocutor:—[*After the findings supra*]—“Finds in fact and law that Darrie was within the period of the payment of said sums an able-bodied man and had no legal claim to payment of said sums conform to the provisions of the Poor Law Act of 1845, and that said sums could only have

been and were paid conform to the provisions of the Poor Law Emergency Provisions (Scotland) Act 1921: Finds in law that the defenders are not liable for repayment of said sums: Therefore repels pursuers' pleas-in-law, and assoilzies the defenders from the conclusions of the action. . . ."

Note.—"The mutilation of an arm or leg is of itself a simple fact and can, it seems to me, no more determine the question of a person's able-bodiedness within the meaning of the Act of 1845 than can the loss of an appendix or a tooth. The doctors' evidence for the pursuers' case forms an illustration of this point of view. Dr M'Millan says no man is able-bodied who has lost part of a limb, and Dr Somerville maintains that while a clerk who lost a foot would still be able-bodied as a clerk, he would not be *quite* able-bodied—explained by him to mean that every case is classified by him with reference to a man's capacity to work at unskilled labour.

"It is clear, I think, that both these doctors hesitated to associate the right to claim parochial relief with personal injury *per se*. And so they rather strained the question of the handicap a one-armed man would have against his two-armed fellows, and the competition he would have to face in search of work when work was scarce. Stripped of this question of an economic handicap the impression left upon my mind by the evidence of pursuers' witnesses was that Darrie was and is a more than average healthy man with an unfortunate physical defect.

"Of course it stands to reason that a two-armed man can do more kinds and heavier kinds of work than can a one-armed man, and also that in general and for more skilled work employers would prefer a two-armed man. But to argue thus is to evade the obvious meaning of the Act of 1845. That Act nowhere professes to ensure the man who is not able-bodied of a wage or even an approximation to a wage commanded in the labour market by the able-bodied man, nor does it guarantee to find him work against the competition of the able-bodied man. Instead of this the Act provides that no disabled man unfit for work shall be allowed to starve. If such a man is destitute he has a claim against the parish where he lives to be relieved from destitution.

"In this case the question therefore comes to be—Was Darrie in a state of destitution when he made his claim against pursuers' parish, and was he disabled in such a manner as to be unfit for work, *i.e.*, work of any kind which could maintain him beyond destitution? This seems, no doubt, a harsh interpretation, but so far as I can see it is the only promise which the Act holds forth.

"The destitution here is not disputed, and the only question therefore comes to be—Was Darrie when he made his claim against pursuers' parish non-able-bodied in the meaning of the Act?

"At the hearing the authorities in law were fully quoted to me by both counsel in the case, but since it seems to me a judgment here depends so much on facts I make no reference individually to the bulk of

them. It seems to me that individual reference to one of these authorities may serve. In that case, *Macpherson v. Parish Council of Kilmore and Kilbride* (1921 S.C. 300), it was stated in the nature of a definition by the Lord President that a man is not able-bodied if he is suffering physical disability preventing him from earning a living for his wife and family. I accept that definition unreservedly and I ask—Does Darrie's disability then come within it? He came to make his claim on Melrose parish straight from the stoppage of an out-of-work allowance granted to him as (*ex hypothesi*) an able-bodied man. Did his disability prevent him from earning a living for his wife and family? His own statement which is at points corroborated by other witnesses is that from May of 1917 to October 1921 he lived upon his wages and supported both his family and himself. During this period his wages ranged from 30s. to 65s. per week—an average in these years of about £2 per week or fully half more than pursuers have allowed him as relief.

"I come to the conclusion therefore that Darrie was not prevented by his disability from earning a living for himself and family, and that therefore that disability could not be called non-able-bodiedness within the meaning of the Act. The payments made to him are not therefore in the circumstances payments sanctioned by the Act of 1845 and therefore also cannot be recovered from defenders' parish. They may of course be sanctioned by the terms of the Emergency Act of 1921, but neither in that case are they recoverable from the defenders' parish.

"A question was debated between parties as to whether parochial relief was meant to cover maintenance of both an applicant and his family, but since the fact is that Darrie did maintain his family and himself the question does not call for practical solution in this case."

The pursuers appealed, and argued—Darrie was a proper object of relief under the Poor Law (Scotland) Act 1845 (8 and 9 Vict. cap 83), and the pursuers were entitled to recover from the defenders the moneys which they had expended on his behalf—Poor Law (Scotland) Act 1845, sections 32, 33, 68, 69, and 71. A mentally and physically handicapped man was not "able-bodied" within the meaning of the proviso of section 68. Although a man might not be "able-bodied," nevertheless he ought to perform his legal obligation of supporting himself and his family, and it was competent to prove that he was fit to do so. If that were proved, he was not a "poor person" and was not "destitute" within the meaning of section 71. Where, however, a man was not "able-bodied," there was an onus on those who alleged that he was not a "poor person" and was not "destitute," of proving what they alleged. In order to succeed in proving that he was not a "poor person" and was not "destitute" it was necessary to show that he was fit to support both himself and his family. That was the economic unit, and it was not sufficient to show merely that he was fit to support himself. The question was primarily one of

his physical and mental capacity to earn his livelihood. The question of his employability was one for proof. It depended on various considerations. The fluctuations of the labour market entered into the question—*Macpherson v. Kilmore and Kilbride Parish Council*, 1921 S.C. 300, 58 S.L.R. 273; *Old Machar Parish Council v. Aberdeen Parish Council*, 1912 S.C. 26, 49 S.L.R. 20, per Lord Dundas at 1912 S.C. 31, 49 S.L.R. 23, and Lord Salvesen at 1912 S.C. 35, 49 S.L.R. 25; *Scott v. Beattie*, 1880, 7 R. 1047, 17 S.L.R. 714, per Lord President (Inglis) at 7 R. 1048, 17 S.L.R. 715; *Beattie v. M'Culloch*, 1880, 7 R. 907, 17 S.L.R. 645, per Lord President (Inglis) at 909, 17 S.L.R. 646; *Knock v. Hevat*, 1870, 8 Macph. 397, per Lord Cowan and Lord Benholme at 400, 7 S.L.R. 230; *Jack v. Isdale*, 1866, 4 Macph. (H.L.) 1, 1 S.L.R. 156; *M'Ewan v. Beatty*, 1865, 7 Poor Law Magazine, p. 283; *Jack v. Thom*, 1860, 23 D. 173, per Lord Cowan at 178, Lord Benholme at 179, and Lord Justice-Clerk (Inglis) at 180; *Petrie v. Meek*, 1859, 21 D. 614, per Lord Justice-Clerk (Inglis) at 621; *Lindsay v. M'Tear*, 1852, 1 Macq. 155, per Lord Truro at 159; *M'William v. Adams*, 1852, 1 Macq. 120; Graham, Poor Law, (ed. of 1922) pp. 3 and 266; Guthrie Smith, Poor Law (3rd ed.), pp. 195-7; Poor Law Magazine, vol. xxxiii, p. 236. The facts proved in the present case showed that Darrie was not "able-bodied" and that he was a "poor person" and was "destitute." Reference was also made to *Glasgow Parish Council v. Cromdale Parish Council and Dundee Combination Parish Council*, 1923 S.L.T. 557, per Lord Murray (Ordinary) at 562; Unemployment Insurance Act 1921 (11 Geo. V, cap. 1); Act 1698, cap. 21; Act 1696, cap. 29; Act 1695, cap. 43; Act 1672, cap. 18; Act 1600, cap. 19; Act 1597, cap. 292; Act 1592, cap. 149; Act 1579, cap. 24; Privy Council Proclamations of 3rd March 1698, 31st July 1694, 29th August 1693, and 11th August 1692.

Argued for the respondents—Darrie was not a proper object of relief under the Poor Law (Scotland) Act 1845, and the pursuers were not entitled to recover from the defenders the moneys which they had expended on his behalf. In considering the question as to whether or not a man was "able-bodied" it was irrelevant to take into account fluctuations of the labour market or the man's fitness to support his family. A man might be "able-bodied" although he might not be so strong as some other man. The question as to whether or not a man was "able-bodied" was a comparative question, and the best test was experience—Had the man been able to keep himself? If a man was disabled by infirmity he was entitled to relief under the Act, but not so if he was merely unable to find work—*Macpherson v. Kilmore and Kilbride Parish Council*, cit., per Lord President (Clyde) at 1921 S.C. 302, 58 S.L.R. 274; *Old Machar Parish Council v. Aberdeen Parish Council*, cit.; *Scott v. Beattie*, cit.; *Beattie v. M'Culloch*, cit.; *Jack v. Isdale*, cit., 1864, 2 Macph. 978, 1866, 4 Macph. (H.L.) 1; *Jack v. Thom*, cit.; *Petrie v. Meek*, cit.; *Lindsay v. M'Tear*, cit., per Lord Brougham at 158;

M'William v. Adams, cit., per Lord Brougham at 123, 132, and 133, and Lord Truro at 142; *Pollock v. Darling*, 17 January, 1804 F.C., M. 10,591; Act 1672, cap 18; Green's Encyclopædia (2nd ed.), vol. ix, p. 334. The facts in the present case showed that Darrie was fit to support not only himself but also his family, although in order to establish his "able-bodiedness" it was not necessary to show that he could support his family. Accordingly Darrie was "able-bodied" within the meaning of section 68 of the Act and therefore was not eligible for relief under the Act.

At advising—

LORD JUSTICE-CLERK (ALNESS)—In this action the pursuers, the Parish Council of Melrose, seek to attach liability to the defenders, the Parish Council of Gordon, for certain payments which they made in the past to a one-armed man named Darrie, and also to escape liability from making any payments to him in the future. The defenders admit that when the payments were made Darrie was destitute, but they deny that he was not able-bodied. The controversy in the case really centres round the question, Was Darrie able-bodied when the pursuers made him these payments? If he was not, then, as he admittedly had a settlement at the time in the defenders' parish, they are liable to relieve the pursuers of the *cumulo* amount of the payments which they made to him. If, on the other hand, Darrie was able-bodied at the time when the pursuers made the payments in question to him, then their right of relief is cut off by section 68 of the Poor Law Act 1845. I may add, though it does not affect the problem which we have to solve, that Darrie's claim against the pursuers was not destroyed by the mere fact, if it be a fact, that he was able-bodied, for even on that hypothesis, under the Emergency Act of 1921 (11 and 12 Geo. V, cap. 64), section 1, he was entitled to relief if he was in a destitute state. But the difference is that payments made by a parish council under the latter statute cannot, as they can under the former Act, be recovered by them by way of relief from the parish in which the person relieved had at the time a settlement.

It may be convenient first to ascertain, with what precision one can, the meaning of the word "able-bodied," and then to see whether the definition covers the position of Darrie as it is revealed by the evidence in this case. Now it is clear that the word "able-bodied" under the Poor Law Act has acquired a more or less artificial significance. It has certainly not been regarded by the Court as having the meaning which is often popularly ascribed to it. The physical condition of the person alleged to be able-bodied is not considered so much as what his physical condition enables him to do. In the case of *Petrie v. Meek* (21 D. 614) the Lord Justice-Clerk (Inglis) said at p. 621—"The Court are of opinion that the decision of this case depends on principles which were authoritatively and finally settled in the cases of *Adams v. M'William*

11 D. 719, *affd.* 1 Macq. 120, and *Thomson v. M'Tear*, 11 D. 719, *affd.* 1 Macq. 155. It is there conclusively and directly determined (1) that an able-bodied man has under no circumstances whatever a legal right to parochial relief, either for himself or his family, and (2) that by an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work." The Lord Justice-Clerk, in the subsequent case of *Jack v. Thom* (23 D. 173, at p. 180), amplified that definition as follows—"What the statute means by an able-bodied man is a man not labouring under any disability (bodily or mental) to work so as to earn his subsistence." Again, in *Macpherson* (1921 S.C. 300), the Lord President, accepting the views expressed by the Lord Justice-Clerk in *Petrie* and in *Thom* upon the question of "able-bodiedness," puts the matter negatively instead of affirmatively thus (at p. 303)—"Unless and until a stage is reached at which it can reasonably be affirmed that disability results in making it impossible for a man so to work as to earn his subsistence he remains able-bodied." In short, if a man can make a livelihood, then he is in the statutory sense able-bodied.

The defenders suggested that the criterion of "able-bodiedness" is not the inability of a man to support himself, but his inability to support his wife and family as well. If it were necessary for the purposes of this case to decide between these two criteria, I should have no hesitation in preferring the former. The latter was expressly disapproved, as I read the reports, both in the case of *Old Machar Parish Council v. Aberdeen Parish Council* (1912 S.C. 26) and also in *Macpherson, cit. sup.* The question whether an applicant for relief can support his wife and family is no doubt important from the point of view of the measure of the relief to be afforded, but it is irrelevant to the determination of the question whether a right to relief exists—in other words, whether the applicant is or is not able-bodied. As, however, Darrie had in point of fact, for four years prior to obtaining relief from the pursuers, earned wages sufficient to support not only himself but his family, and as at the date when he was relieved he could support neither himself nor his family, the distinction would appear to be for the purposes of this case immaterial. The defenders further suggested that in determining the question of able-bodiedness the state of the labour market is important. I cannot accept that view. It is inconsistent with what was said in the case of *Adams*. The test of able-bodiedness is not whether a man can get work but whether he can do work. He may be destitute and quite unable to find work, yet if he is able-bodied he has no claim to relief under the Act of 1845. The test, in my view, is inability to earn a livelihood, not inability to find work. The defenders admitted in argument that one cannot affirm or deny that a man is able-bodied by reason of the fact that he has lost an arm. The matter is comparative, and no doubt the loss of an arm is an element which may be material. It is not, however,

conclusive. The question appears to be one of circumstances. I can conceive certain types of one-armed men who are more likely to earn a livelihood than certain types of two-armed men, and I can equally conceive the converse case. Apart from physical disability "there are," as the Lord President said (at pp. 302, 303) in *Macpherson*, "some men whose capacity for work, physical fitness, and earning power far exceed the same qualities in the case of others." Age, rheumatism, indigestion, intemperance, ill-health may affect the earning capacity of any man, but they do not necessarily, any more than the loss of a limb, affect his "able-bodiedness" in the statutory sense. The test is not, Has a man lost an arm or a leg? It is rather, Can he earn a living? That is a test which can be easily and conclusively applied. If one drifts from these safe moorings one is at once submerged in a sea of perplexities and difficulties.

Now it is manifest that in solving the question whether a man can earn a livelihood the test of experience may be useful, if not even conclusive. I come then to the facts of the present case. What light do they shed on the problem which presents itself for solution? So far as material these facts are as follows:—Darrie is the son of a farmer, and as a youth worked on his father's farm. At a comparatively early age he had the misfortune to lose his left arm just below the elbow. His father died in 1911 and left Darrie £1200. After his father's death he was a rolling stone. The money which he inherited melted away, and by 1917 none of it remained. Darrie's vicissitudes and activities were many and varied. He was a crofter, a coal agent, a trapper, a pedlar, an engineman, a night-watchman, and a timber foreman, in turn. The important point, however, is that from 1917, when his inherited wealth disappeared, till October 1921 he earned such wages as enabled him to support not only himself but his large family as well. Being out of employment at the latter date, and having been certified under the Unemployment Insurance Act 1920, section 7 (2) as "capable and physically fit for work," he became a recipient of the "dole." In May 1922, however, a "gap" of five weeks supervened during which he received no unemployment benefit, and he turned to the pursuers for assistance to tide him over the crisis with which he was confronted. He himself says that he did not intend to apply for relief as a pauper; indeed, he wrote a somewhat indignant letter to a local newspaper protesting against the stigma of pauperism which was thought to attach to him. His idea was that there was a fund from which he could obtain temporary relief; and it may well be that, as he himself says, he had the Emergency Act 1921 in mind when he made his application to the pursuers for assistance. They, however, claim to have assisted him under the Act of 1845, and this action is brought, as I have already said, to work out their relief against the defenders. In the state of the facts as I have rehearsed them, and in the state of

the law as I have endeavoured to recapitulate it, is it possible to affirm that Darrie was at the date when he was relieved by the pursuers other than an able-bodied man? It seems to me difficult to withhold that description either in its statutory or indeed its popular significance from a man with such a varied record of activity as was Darrie's, who for over four years had supported not only himself but a wife and a family of seven children as well. An attempt was made by the pursuers to suggest that his employment in some instances was eleemosynary rather than economic, and it may be that on occasion that was so. But it is clear that he continued to earn good wages at a time when men had returned from military service and when it is common knowledge that multitudes of two-armed men were unemployed. Moreover, it must not be forgotten that he was employed by one M'Callum from March 1919 to October 1921, and that in 1923 after he had been relieved by the pursuers Darrie obtained employment with Stewart Brothers, who were cable laying contractors, and left that employment voluntarily. Whether therefore his past or his present history be regarded I am unable to predicate that he is in the statutory sense a non-able-bodied man. The truth is that Darrie's destitution was due not to his infirmity but to the "gap." There is no evidence to show that his destitution was in any way associated with or caused by his disability. The pursuers have averred distinctly that it was, but they have wholly failed to prove the averment. It would have been a very different case had the pursuers been able to show a record of rebuffs experienced by Darrie at the hands of employers because of his maimed condition. There is not a tittle of evidence to that effect. Indeed the evidence is consistent with the view that his position as a one-armed man did not differ a whit from the position of two-armed men at the crucial period. Both were unemployed. That, however, was due to the economic conditions which then prevailed. If all that be so, then I am unable to see how Darrie can be deemed to be other than an able-bodied man in the sense of the Poor Law Act 1845 when the pursuers relieved his needs.

I therefore think that the learned Sheriff-Substitute has reached a right conclusion, and whilst I must not be taken as adopting all the views expressed by him in his note, I respectfully advise your Lordships to affirm his interlocutor.

LORD ORMIDALE—In this action the Parish of Melrose seeks to recover from the Parish of Gordon certain sums advanced in relief of a one-armed man named George Darrie and his family. In October 1921 Darrie was thrown out of employment, and being unable to get other employment was paid unemployment benefit at the rate of 26s. a week down to 12th May 1922. A statutory gap of "five weeks" having supervened during which, in accordance with the provisions of the Unemployment Insurance Acts 1920 to 1922, his unemployment benefit

ceased he applied for and obtained assistance from the inspector of Melrose. The contention of the pursuers is that the relief thus afforded was parochial relief under the Poor Law Statutes. The defenders' contention is that Darrie being able-bodied and destitute only because he could not find employment was not a proper object of relief as a pauper, and that any assistance he got was under the Poor Law Emergency Provisions Act 1921. If the pursuers were justified in treating Darrie as a pauper, then they are entitled to be reimbursed the advances made by them. The question for decision comes to be—Was Darrie "able-bodied" as that term is construed in the poor law of Scotland?

In a material sense it is of no consequence to Darrie how that question is decided, as he will in any event be supported under one or other of the statutes mentioned, but his personal attitude may be noted. He resents being called a pauper, and asserts that when he applied for assistance to the inspector of Melrose, he did so under the Emergency Act of 1921 (11 and 12 Geo. V, cap. 64), section 1, that is, as a destitute but able-bodied person.

The earliest mode of getting relief was by begging, and the earlier statutes on the subject are concerned with making it clear what persons are to be recognised as legitimate beggars and what persons are not, the latter if found begging being subjected to severe and savage penalties. Running through all the early legislation the distinction variously phrased is taken between the strong and vigorous and the impotent. It was so in the Act of 1579, cap. 74. That Act was passed for the punishment of strong and idle beggars and for the relief of the poor and impotent, and for the first time introduced a system of poor laws into Scotland. The old statutes were examined with great minuteness in the Court of Session and House of Lords in *Adams v. M'Williams* and *Lindsay v. Thomson*, 11 D. 719, 1 Macq. 120 and 155. From these cases it is clear that "able-bodied" and its synonyms as used in the Acts were held to mean "able to work," while impotent was held to refer to those who from any personal infirmity, either of body or mind, were disabled from working. It seems to me that precisely the same test has been applied since the passing of the Poor Law Act of 1845. The word able-bodied occurs only once in that Act, in section 68, which deals with the relief of occasional poor, and contains this proviso—"Provided always that nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment." The word "impotent" also occurs in section 60 of the Act, which refers to the wants of "the aged" and other friendless "impotent" poor. In *Petrie v. Meek* (21 D. 614) the Lord Justice-Clerk (Inglis) defined an able-bodied man to mean "one who suffers under no personal inability, bodily or mental, to work," and again in *Jack v. Thom* (23 D. 173, at p. 180)—"A man not labouring under any disability, bodily or mental, to work so as to earn his subsistence." Accord-

ingly it appears to me that merely because Darrie has lost his left arm below the elbow joint one is not entitled, much less compelled, to design him a man suffering under a personal bodily disability to work. It may be that an inspector of poor is warranted if a one-armed man applies for relief in assuming that he is unable to earn a wage sufficient to support himself and in giving him relief until further inquiries are made. That is quite a good working rule, but the physical defect, merely because it is visible, is not any more than a delicacy of constitution which is not patent to the eye can be a final or conclusive test. As the Lord Justice-Clerk said in *Jack v. Thom*—"The expression 'able-bodied' is a comparative term," and again "the matter therefore resolves itself into a mere question of fact." Lord Benholme in the same case says this—"An able-bodied man is not entitled to relief, but the converse is not necessarily true, as there are many stages between being able-bodied and entire disability in which a man may be more or less disabled and yet not be a proper object of parochial relief." The most recent case on the subject is *Macpherson v. Kilmore and Kilbride Parish Council* in which it was decided—I read from the rubric—"That for the purposes of the poor law a man is 'able-bodied' provided he does not labour under any disability from working so as to earn wages sufficient for his subsistence." Now if Darrie, even though minus an arm, was "able-bodied" in the sense of the Poor Law Statutes in respect of his ability to earn wages sufficient for his subsistence, the fact that he like many other admittedly "able-bodied" workers was for economic reasons unable to find employment does not make him any the less "able-bodied" or a proper object of parochial relief. I think that to hold otherwise would necessitate the substitution of what might be called the popular meaning of "able-bodied" for the poor law meaning of that expression. It may be, and I do not myself doubt, that Darrie must to some extent be handicapped in the labour market; but the logic of the poor law, if nothing but want of employment, if there is no evidence that there was any increase of his disability or of any other relevant circumstance such as a general breakdown of health, bodily or mental, which contributed to his being thrown out of work, compels one to the conclusion to which I have come. It is, I think, a not unimportant fact in this connection that even after getting relief from the pursuers Darrie was able to find a job with a sufficient wage which he voluntarily surrendered, and was offered yet another which failed to materialise, in part at least, because of his disinclination to accept it. On the other hand there is no evidence at all that he was refused any employment because he had only one arm.

I do not propose to examine the evidence as to the many occupations in which Darrie engaged between 1917 and May 1922. Your Lordship has already done so. I shall only say that I reach the same conclusion as your Lordship, though perhaps with more

difficulty. It seemed to me that there was some justification for Mr Mackay's criticism and comment, that the work done by Darrie was not only occasional but special and exceptional. It covered, however, a period of several years, and was a pretty severe test of Darrie's capacity. He earned good wages, and he was able by his earnings to support not only himself but his large family. In drawing unemployment benefit, moreover, he must have done so on the representation that he was capable of and physically fit for work—Unemployment Insurance Act 1920, section 7 (2).

It is not necessary to decide whether the test of being "able-bodied" is a man's ability to work so as to earn wages to support himself or to support himself and his family. My impression has always been that the former is the true test, and I have not yet lost that impression. Indeed, the latest case in which the question came up—*Macpherson v. Kilmore Parish Council*—is strongly confirmatory of it, and in *Old Machar Parish Council v. Aberdeen Parish Council* (1912 S.C. 26) Lord Dundas (at p. 30) says—"Even if it be assumed that Taylor could not or cannot support his children, it is clear that he could and can support himself, as in fact he has done. And that is, according to the authorities, a sufficient basis for the proposition that he was and is able-bodied within the meaning of the poor law." The earliest authority is *M. William v. Adams*, to which we were referred by Mr Patrick. The case of *Hay v. Paterson* (19 D. 332) may also be mentioned, where Lord Ivory (at p. 337) says—"It is said that the father, being an able-bodied man, and the child being presumed to live in family with him, the law will presume that he is able to support his children, and in his own right therefore he cannot be regarded as a pauper, as long as he is not reduced to a state of disability, even though unable to support his family;" and that law his Lordship would have applied but for the very special circumstances of the case. Other cases might be cited to the like effect. As at present advised therefore I should have difficulty in holding that the test has reference to a man's disability to support both himself and his family.

On the whole matter I agree with your Lordship that the appeal should be refused.

LORD HUNTER—The question involved in this case is whether George Darrie, a one-armed man who received relief from the pursuers when in a state of destitution, was a proper object of parochial relief under the Poor Law Act 1845. If he was, the pursuers, who are the relieving parish, are entitled to recover from the defenders, who in that view are the parish of his settlement. If, however, he was not a proper object of parochial relief, the pursuers have no such claim, although they would then be entitled to justify the grant of relief under the provisions of the Emergency Act of 1921.

George Darrie is aged forty-two. After leaving school he worked on a small farm tenanted by his father. While working on the farm in 1910 he lost part of his left arm

by an accident, the arm being amputated about one inch from the elbow. After the accident he was unable to do the work about the farm which he had previously done. He was engaged on odd jobs. In 1911 his father died, George Darrie receiving as his share of his father's inheritance a sum of about £1200. He continued on the farm until 1913, when he took a croft in the parish of Gordon and went to reside there. The croft was not a success, and after about two years he went to reside at Gordon, took out a broker's licence, and travelled over the country selling drapery goods with a horse and trap. He had to give this business up, and started dealing in coals in which he says he lost a good deal of money. About 1917 practically all the money he had received from his father's estate had been spent or lost. In 1918 he was employed looking after a stationary engine. When this work terminated he got a job as a rabbit catcher. After that he was employed from early in 1918 to 1921 with a firm of timber merchants. This employment he lost owing to the failure of the firm. Thereafter he was registered at the Labour Exchange for light work and received unemployment benefit. This was stopped in the beginning of May 1922, and on the 12th of that month he applied to the inspector of poor for the pursuers' parish for relief. He received relief from 16th May till September 1922, and then again from April 1923 until September 1923. In September 1922 he says relief was stopped because payment of unemployment benefit was resumed. For five weeks in the beginning of 1923 he was employed as a night-watchman with a firm of cable contractors.

Under the provisions of the Poor Law Act 1845 a parish council are entitled to levy assessments for the benefit of the poor, and to grant relief both to the occasional and to the permanent poor, provided always that nothing in the Act is to be held to confer a right to demand relief on able-bodied persons out of employment. It has been authoritatively settled in the House of Lords—*M'William*, 1 Macq. 120; *Lindsay v. M'Tier*, 1 Macq. 155; and *Jack v. Isdail*, 4 Macph. (H.L.) 1—that it is outwith the power of a parish council to grant relief to able-bodied persons out of employment because of dulness of trade, a strike, or similar cause. The Act of Parliament provides no definition of who are to be considered as able-bodied within the meaning of the provisions for the relief of the poor. The matter, however, has been discussed in more than one case. In *Petrie v. Meek* (21 D. 614) Lord President Inglis (then Lord Justice-Clerk) said that by "an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work." In *Jack v. Thom* (23 D. 173) the same learned Judge says (at p. 180)—"A man may be able-bodied although not so strong as some other men are. The expression 'able-bodied' is a comparative term. What the statute means by an able-bodied man is a man not labouring under any disability (bodily or mental) to work so as to earn his subsistence." No

case was cited to us in which it has been held that an unskilled workman, after the loss of an arm, continues to be able-bodied. I think that such a man suffers from a personal bodily inability to work, and if destitute, is a proper object of parochial relief. It is, no doubt, true that in spite of the disability under which he labours a one-armed man may get work that may enable him to maintain himself, or if married, to maintain himself and family; but when he is out of employment and it is not suggested that suitable work is available to him, I think he satisfies the requirements of the Poor Law Act for becoming a proper object of parochial relief. In *Beattie v. M'Culloch* (7 R. 907) it was held that a lad sixteen years of age who had for a period of three months been employed in a bottle-work and in receipt of 6s. a-week of wages, but who had lost this situation owing to a strike among the bottle-blowers, and had been six months without obtaining any other employment, and whose only surviving parent, his mother, was a pauper in receipt of relief, was in the circumstances and for the time entitled to relief.

The respondents maintained that as Darrie had been able from 1917 to 1921 to earn enough to maintain himself and his family, this afforded conclusive evidence that he was and is an able-bodied man. In this I am unable to agree. An examination of the evidence satisfies me that Darrie by the loss of his arm was seriously handicapped for the undertaking of work of the character which he had been accustomed to do; that the work which he did during the period referred to was occasional work for which he had no previous training; that he procured the work owing to the great shortage of labour caused by the war and the abnormal economic conditions prevailing in consequence; and that any chance of his obtaining employment at any kind of work for which he is reasonably qualified is effectively destroyed by the circumstance that he suffers from the personal bodily incapacity of having lost the use of one arm. It is said that the present position of Darrie is no worse than that of many men in the possession of two arms, who, on account of the great amount of unemployment consequent on the depressed state of trade, are unable to maintain themselves. Their chance of obtaining employment is, at all events, much better than his, as they do not suffer from any physical incapacitating cause. So far as the present question is concerned, I think the answer to any argument founded upon general unemployment is that the statute has drawn an arbitrary distinction between those who are able-bodied and those who are not. However unreasonable it may be to draw such a distinction among those who are destitute through no fault of their own, the distinction is drawn by the statute and must be recognised by the Court.

Medical certificates have been produced in this case which indicate that though Darrie may be able to earn enough to maintain himself by light work, he is not able to maintain himself, his wife, and his family.

I should be prepared to hold this proved as a fact, and that it was not negatived by the circumstance that during a period of abnormally high wages he had in fact earned enough to cover the maintenance of those legally dependent on him. For the respondents it was maintained that in view of the decisions in *Old Machar Parish Council* (1912 S.C. 26) and *Macpherson* (1921 S.C. 300) the able-bodiedness of any man must be determined solely by the question whether he is able to earn enough for his own subsistence, it being quite immaterial whether he can also maintain his wife and family. As I understood the argument, it was contended that if a man can earn enough for his own maintenance it must be assumed, however contrary to the fact, that he is able to support those who are legally dependent on him. I am not sure that I should assent to such a proposition, though, of course, if the cases I have referred to so decide, I should be bound to follow them. In view, however, of the opinion which I have above expressed to the effect that on the evidence Darrie was a proper object of relief, I do not desire to express any concluded opinion upon this matter. I think the appeal ought to be sustained and decree granted as craved.

LORD ANDERSON—The decision of this case turns upon the determination of the question of fact whether or not Darrie is an able-bodied person in the sense of the Poor Law of Scotland. If he is, then by that law he is not entitled to claim or to receive relief as a pauper—*Petrie*, 21 D. 614. At the time when Darrie was relieved by the pursuers destitute able-bodied persons who were out of employment were entitled, under the terms of the Poor Law Emergency Provisions (Scotland) Act 1921 to claim and receive relief from the funds raised for relief of the poor. Under section 1 (2) of that Act, however, receipt of such relief does not have the effect of pauperising the recipient. Darrie is ensured against unemployment, and had received unemployment benefit from 17th October 1921 till 12th May 1922. Under the Unemployment Insurance Acts this benefit ceased for an interval or gap of five weeks. Darrie claimed and received relief from the pursuers during this gap of five weeks and again in the year 1923. The pursuers allege that the relief given was “poor” relief; the defenders maintain that it was “emergency” relief. If the relief was “poor” relief, the defenders as representing the parish of settlement are liable to the pursuers in the amount thereof. If the relief given was “emergency” relief, the pursuers have no claim in respect thereof against the defenders. The determination of the character of the relief given again depends on whether or not Darrie is able-bodied. If he is the defence will prevail.

What, then, is the meaning of the term “able-bodied” in relation to the Poor Law? Literally construed, the term obviously excludes a one-armed man. But in reference to the Poor Law the term has been construed as having a special significance.

What poor law authorities are concerned with is the ability of an individual to earn his livelihood. If he possesses this ability, it is immaterial to these authorities whether or not he has the full complement of limbs. The physical condition described as “able-bodied” is necessarily a comparative matter. No one is physically perfect—that is, everyone (save the ideally perfect individual) is to a greater or less extent physically disabled. This disablement may be the result of maiming, of disease, or of old age, but the question of fact which always emerges if poor relief is claimed is this—Is the applicant despite the presence of a certain amount of physical disability in possession of sufficient physical ability to earn his own livelihood? If he is, then in the sense of the Poor Law he is able-bodied; if not, he is not able-bodied. The test of the possession of able-bodiedness would thus seem to be ability to earn subsistence, and this in any particular case is a question of fact to be decided by proof. At one time it was a moot point whether the test of able-bodiedness in the case of an individual was ability to earn his own subsistence or to earn subsistence for himself and his family. The more prevalent, and in my opinion the better, view seems to be that the test is ability in an individual to support himself. If he is able to support himself he is presumed to be able to support those who are dependent upon him. The number of dependents may determine the quantum of relief once it has been decided that relief falls to be given, but seems to have no bearing on the question of able-bodiedness. Moreover, in the present case I am of opinion that it has been established that Darrie is able to support not only himself but his family also. It is therefore unnecessary to decide what is the proper test—see opinions of Lord Justice-Clerk Inglis in *Petrie*, 21 D. 614, and *Jack*, 23 D. 173; and the cases of *Old Machar Parish Council*, 1912 S.C. 26, and *Macpherson*, 1921 S.C. 300. As the “ability” alluded to means ability to do work, not to get work, it follows that fluctuations of the labour market have no bearing on the question of able-bodiedness—*M’William*, 1 Macq. 120.

On the facts the Sheriff-Substitute has held it proved that Darrie is able-bodied in the sense of being able to support himself and his family, and that accordingly he has never been a proper object of poor relief. I agree with this conclusion. It is proved that from 1917 till 1922 Darrie supported by his own exertions not only himself but in addition his somewhat large family. In 1923 he gave up a job as night-watchman by which he was maintaining his family. He drew unemployment benefit on the footing that he was “capable of and physically fit for work”—Unemployment Insurance Act 1920, sec. 7 (2). As Darrie being able-bodied was not entitled to claim or receive poor relief, it follows that the relief given to him by the pursuers was “emergency” relief, in respect of which they are not entitled to claim repetition from the defenders.

I am therefore for refusing the appeal

and affirming the judgment of the Sheriff-Substitute.

The Court found in fact and in law in terms of the findings in the interlocutor appealed against, dismissed the appeal, and affirmed the interlocutor appealed from.

Counsel for the Appellants (Pursuers)—Mackay, K.C. — Macdonald. Agents — Murray & Brydon, S.S.C.

Counsel for the Respondents (Defenders) — MacRobert, K.C. — Patrick. Agents — Wallace, Begg, & Company, W.S.

Wednesday, July 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SLATER v. A. & J. M'LELLAN.

Nuisance—Dangerous Nuisance on Public Road—Locomotive Drawing Inflammable Load—Damage to Property Adjoining the Road—Liability—Locomotive Act 1861 (24 and 25 Vict. cap. 70), sec. 13—Negligence.

Whilst a load of compressed cork dust was being transported along a public road in a trailer drawn by a steam waggon, which from time to time emitted sparks from its chimney, some of the sparks ignited the load and caused a fire by which damage was done to a house and garden adjoining the road. In an action of damages at the instance of the owner of the house and garden against the owners and users of the steam waggon, held that the defenders were liable, without proof of negligence on their part, upon the ground that the steam waggon and trailer carrying a load which was readily ignitable by the sparks constituted a dangerous nuisance from which the damage complained of resulted.

James Peter Slater, Paisley, *pursuer*, brought an action in the Sheriff Court at Glasgow against A. & J. M'Lellan, cartage contractors, Paisley, *defenders*, for payment of £131, 0s. 6d. in name of damages for injury to his house and garden by the burning of a vehicle loaded with compressed cork which took fire when on the public road in front of the pursuer's house.

The following narrative of the circumstances of the case is quoted from the opinion of the Lord President—"The pursuer complains of damage to his house and garden as the consequence of a conflagration which happened on the public road in front of his house. The conflagration was caused by the ignition of a load of compressed cork dust while it was being transported in a trailer drawn by a motor waggon, itself full of a similar load. The motive power of the waggon was steam, produced in a boiler heated by coal. Like other similar waggons this waggon emitted sparks from its chimney, and the pursuer's

case is that the conflagration of the load of cork was due to one of these sparks having fallen on or among the bales of cork. "The Sheriff-Substitute before whom this case was heard considered that this was not proved to have been the cause of the conflagration, because no eye-witness actually saw a spark from the chimney alight on the cork. But that is to apply a hypercritical test to a case in which *res ipsa loquitur*. It is not suggested that the cork went on fire of itself, and a spark from the chimney of the motor waggon which was towing it is the obvious and natural cause. In these circumstances we have no right to assume that the fire was caused by an unextinguished match or cigarette-end thrown by a careless passer-by on to the cork, or that a spark from some other motor waggon may have found its way on to the trailer. No other cause than the obvious and natural one—namely, that the trailer travelled just behind a motor waggon with a sparking chimney—is proved to have had anything to do with the conflagration which occurred. The inference that the obvious and natural cause was the true cause is thus not only legitimate but, in my opinion, conclusive. The conflagration was unfortunately aided by a wind blowing across the road in the direction of the pursuer's house. The flames caught the fence in front of his garden, scorched the garden itself, and produced large volumes of smoke and burning particles of cork, which were carried against the front wall of the house and reached the interior of it by door, fanlight, and window during the interval which elapsed before these could be closed, doing a good deal of damage to internal paint, paper, curtains, furniture and carpets."

The pursuer pleaded, *inter alia*—"3. The said steam lorry being liable to emit sparks, and so a nuisance within the meaning of section 13 of the Locomotive Act 1861 and also at common law, the defenders are liable for any damage caused by the use thereof, as condescended on. 4. Alternatively, the damage sustained by pursuer having been caused through the fault and negligence of the defenders' servant, for whom they are responsible, decree should be granted as craved, with expenses."

The defenders pleaded, *inter alia*—"1. The action as laid is irrelevant. 4. In respect that the said steam lorry was of the best and most recent type, and was handled in the most careful manner, and was not a nuisance within the meaning of the Act cited or at common law, the defenders should be assolized. 5. Any loss which the pursuer may have sustained not having been occasioned by the fault or negligence of the defenders, and their ownership or use of the steam waggon not involving any liability on their part to the pursuer, they are entitled to be assolized from the conclusions of the action."

The Sheriff-Substitute (FYFE) after a proof assolized the defenders, holding that the waggon and trailer did not constitute a nuisance within the meaning of section 13 of the Locomotive Act 1861, and that the