

out. I think on these facts it may fairly be said that the money certainly, and probably also the letters, were "received" at Paisley.

I think the illustration suggested by your Lordship in the chair of a firm having a box at a post office for the reception of letters not addressed to the post office but addressed to their own office is a perfectly fair analogy. In such a case the letters would be "received" not at the post office but at the office of the firm. The mere fact that for the sake of convenience letters may be temporarily deposited at a particular spot from which they are removed unopened cannot have any legal effect on a question such as that which arises in this case.

LORD HUNTER—I am of the same opinion. I think, on the findings of the Sheriff properly interpreted, that John M'Lauchlan junior, against whom the offence is alleged of keeping open premises at 14 High Street, Paisley, for betting purposes, received money there "as the consideration for an undertaking, promise, or agreement" to pay money "on events or contingencies of or relating to horse races." If I had been of a different opinion, and if I had thought that the finding did not justify that conclusion, but that the money had in fact been received by John M'Lauchlan junior at 54 Gordon Street, Glasgow, I should still have doubted whether we, sitting as the High Court, could have interfered with the present conviction.

If the complaint is looked at, it is perfectly apparent that the essence of the offence consists in keeping open premises at 14 High Street, Paisley, and on the decisions to which we were referred—both English and Scots—it has been decided that it is not necessary, in order to obtain a conviction under the Act of 1853, that it should be proved that the money was received in the premises where the betting business is in fact carried on. I cannot think that the mere circumstance that the procurator-fiscal introduced in the complaint the unnecessary word "there" would have invalidated a conviction where it is perfectly manifest that the accused suffered no prejudice by the circumstance of the word "there" being present, and where the word "there" could be taken out without affecting the substance of the offence.

The Court answered the first question in the negative and the second and third in the affirmative.

Counsel for the Appellant—Sandeman, K.C. — Maconochie. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.)—M. P. Fraser, A.-D. Agent—Sir W. S. Haldane, W.S.

## COURT OF SESSION.

Wednesday, February 23.

### FIRST DIVISION.

[Sheriff Court at Stirling.

PEARSON v. ARCHIBALD RUSSELL, LIMITED.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I, (1) (b) and (3)—Partial Incapacity—Workman Unable to Walk Three Miles from His Residence to Locus of Light Work and Refusing to Remove to a Residence there.*

The Workmen's Compensation Act 1906, enacts:—Schedule I, (1)—"The amount of compensation under this Act shall be . . . (b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months . . . such weekly payment not to exceed one pound. (3) . . . In the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

A workman's average weekly earnings before an accident were 39s. 6d., and from the date of the accident till 30th July 1915 his employers paid him 19s. 9d. a-week as for total incapacity, but without any express agreement. In September 1915 he applied for light work with the employers, who offered him 39s. a-week, though they did not require him to do the full work at the job. The work offered was 3¼ miles from where he resided, and he was not fit to walk but could get a residence there. The arbitrator found that he was fit for light work of at least two classes, and at such light work could earn 18s. 10d. or 20s. 6d. a-week. He fixed the compensation at 15s. a-week as from 30th July 1915. *Held* that the arbitrator was, on the facts, entitled so to determine.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in the Sheriff Court at Stirling between John Pearson, haulageman, Stirling, *appellant*, and Archibald Russell, Limited, *respondents*, the Sheriff-Substitute (DEAN LESLIE) awarded compensation at 15s. a-week as from 30th July 1915 and stated a Case for appeal.

The Case stated—"The following facts were proved or admitted:—The appellant is a haulageman and bottomer. On 6th May 1914 he received injury to his back

and spine by a fall of stone from the roof at the pit bottom of the respondents' Fallin Colliery, near Stirling. The injury was caused by accident arising out of and in the course of his employment with the respondents. After the accident, though he was stunned at the time, he was able to go to his home in a horse brake which plies for hire between Fallin and Stirling. The accident caused spinal concussion and severe bruising of the muscles of the back. He has weakness in his legs, tremors in both arms and legs, more particularly the latter, and he has difficulty in walking, being unable to walk more than a short distance. By the accident he was totally incapacitated for work. By 18th June 1915 he had improved in health somewhat and was offered light work by the respondents, which he at first agreed to try, but on the advice of his doctor he declined it. On 11th September 1915 he applied to the respondents for light work, which was allocated to him. He worked at motor haulage in the respondents' pit at Fallin, and on 13th and 14th September he was able to work during the shifts, but he was not required to do the full work of a haulageman. Though fit for work he found that he could not walk to his work from his home in Stirling and back again, a distance of  $3\frac{1}{2}$  miles. The appellant is anxious to have his working capacity restored. Light work would be beneficial to him, and he is fit for working the lever at picking tables or for lamp cabin duties. At the former he could earn 3s. 5d. per shift for eleven shifts per fortnight or 18s. 10d. per week, at the latter 3s. 5d. for twelve shifts per fortnight or 20s. 6d. per week. The respondents recognise the appellant as a very intelligent workman, and are prepared to pay him 6s. 6d. a shift for haulage work, or 39s. a-week. He could not be expected to earn so much as 6s. 6d. a shift in the open market. The appellant's average weekly earnings before the accident amounted to 39s. 6d. per week, and the respondents paid him compensation as for total incapacity at the rate of 19s. 9d. per week to 30th July 1915. The appellant can be provided with a house at Fallin, quite close to the work offered to him. The appellant was residing in Stirling at the time of the accident. He declines to remove from Stirling. On these facts I fixed the compensation payable to the appellant at 15s. a-week as from 30th July 1915 on the basis of his working capacity, if he resided near to work, and awarded expenses to the respondents."

The questions of law for the opinion of the Court were—(1) Whether the fact of the appellant declining to reside elsewhere than in Stirling justified me in assessing compensation at the amount to which the appellant would be entitled if he resided near to his work? (2) Whether on the facts proved or admitted I was justified in awarding 15s. a-week as the amount of compensation due to the appellant."

The Sheriff-Substitute appended the following note to his award:—

Note.—"From the pursuer's own evidence, and that of his fellow-workman Lyon, there is no doubt of his being capable of doing the motor haulage work to the extent to which that was set him on 13th and 14th September 1915. His difficulty was in getting to and from his work, and it was on this ground that the medical evidence on his behalf based the opinion as to his total incapacity. That difficulty can be overcome by his residing at Fallin, near his work. He has an objection to living there, but what that is he did not clearly state. At any rate that objection does not affect his capacity for work, which is the only question between him and the defenders. In fixing the date for reduction of compensation at 30th July 1915, I have taken into consideration the readiness of the pursuer himself to try work on 18th June 1915, and the evidence of Dr Laidlaw and Dr Porter that there is very little difference in his condition during the past three months before the proof. If he is partially fit now he was therefore partially fit at the earlier date."

Argued for the appellant—When light work was offered and refused the *onus* was on the workman to justify his refusal. If in refusing he had done nothing unreasonable his compensation was not affected. Here there was no finding that the appellant could get light work where he resided, and the offer of light work elsewhere made it necessary for the appellant either to walk daily to the place of employment or to remove to the *locus* of the work. He could not walk to his work, and in the circumstances there was nothing unreasonable in his refusal to remove. The general rule that a fit man must follow the work was subject to exceptions of which this case was one—Elliott on the Workmen's Compensation Act 1906, at p. 307; *Beddard v. Stanton Ironworks Company, Limited*, 1913, 6 B. W. C. C. 627.

Argued for the respondents—This was an original application for compensation, not an application for review, and the *onus* was on the workman to show that he was unable to obtain work of a character suitable to his condition—*Williams v. Ruabon Coal and Coke Company*, 1914, Stone's Workmen's Compensation and Insurance Reports, 32. Even in an application for review when the workman was fit for light work, it was for him to show he could not get light work—*Gray, Dawes, & Company v. Reed*, 1913, 6 B. W. C. C. 43—and if he did not prove he could not get suitable work in the district his compensation must be reduced—*Silcock & Sons v. Golightly*, [1915] 1 K. B. 748. The appellant had not shown that he could not get suitable work.

At advising—

LORD JOHNSTON—The real question in this case seems to be whether the workman is justified in saying not only that he will continue to live in Stirling but that his claim to compensation must be judged of on the footing that he continues to reside in Stirling.

The appellant was injured in May 1914.

He received compensation under the statute, but apparently without any express agreement, for thirteen months. At the end of that time he improved in health, and was offered light work, but was recommended by his doctor not to take it, and his employers continued to pay on the old footing for another three months—until September 1915.

I think that where a set of circumstances such as these is found, although there be not an agreement in writing or even a verbal agreement in express terms come to, it must be inferred that there was an agreement, that there was an implied admission of liability, and that the payment of compensation was in satisfaction of that liability. It might be that, if the workman came forward to register a memorandum of such an implied agreement at his own hand the employers would have a *locus* to object either to its terms or to its then being recorded in changed circumstances, which, if it were to be recorded, would justify a revision of the compensation *unico contextu*. The proper method of proceeding has been discussed in previous cases. But I think that no particular heed has been given to matter of form in this case, and that the workman has, without objection on the part of the employer, gone straight to the point and applied to the Sheriff to fix his compensation now as a new departure in the circumstances disclosed. And that the real question intended to be raised is, how is the man's claim affected by his determination not to leave Stirling.

The position which the case takes when it comes before the arbitrator in that form is—here is a man whose wages prior to the accident were 39s. 6d. a-week. He is fit for light work, and his employers offer him light work, to this effect that they offer to restore him to his former work and substantially to his former wages, but on the footing that he is not to be expected to do the full work, which would be demanded of any ordinary man at that wage. Now he is found to be fit for that work on these conditions, but not fit if he should have to walk from his present home in Stirling to the pithead and back again.

Although I am not sure that there is any definite decision to that effect, I think that it is the law that where the employer offers to take back a man at wages which he is not able to earn, that is an offer which the workman may reject, in respect that it would be partly an offer of wages for work done and partly of charity, and that the acceptance might affect his future position under the statute. The case of *Cleland v. Singer Manufacturing Company*, 1905, 7 F. 975, 42 S.L.R. 757, is one which I think supports, though it does not directly decide, this, and I particularly refer to Lord M'Laren's judgment. I take it, therefore, that it was the workman's right here to say—"I cannot accept your 39s. a-week, however generous the offer, because it would put me in a false position under the statute."

The arbitrator goes on to say that light work would be beneficial to the man, that

he is fit for work at, at any rate, two classes of light work connected with his occupation of coal mining. At one of these classes of light work he can earn 18s. 10d. a-week, and at another he can earn 20s. 6d. a-week. But to obtain this work he must either live near the pithead or travel from his house to Fallin or elsewhere, where such work is to be found.

What that amounts to is a declaration by the learned arbitrator that the workman is fit for light work, and he enumerates one or two classes of work which the workman is quite fit to do. "The arbitrator does not go on to say, in so many words, that the employers have shown that such light work exists at Fallin or elsewhere in the district, or could be got by the workman if he wanted it. But I do not think it is incumbent upon the employers to do more than show that the workman is fit physically for light work, and that there are classes of light work which his previous employment enables him to take. I do not think that they are, under the decisions which we have before us, bound to show not only that the man is physically fit and to point out particular classes of work for which he is fit, but also to find him work or to show where there is work if he chooses to go for it, unless he is shown to be ineligible for the particular classes of work as a result of his accident."

Here the appellant's ineligibility for work appears to be not dependent upon his accident but upon this, that he chooses to say—"I won't move out of Stirling to seek for the work which may be waiting for me if I like to take it, and I won't go to look for it." He may have reasons, though he does not state them, for not leaving Stirling. But with his personal reasons neither his employers nor the arbitrator are concerned. I do not think that the above is a position which the workman is entitled to take. The various cases on this subject all regard the market for a man's labour as being that of his district, not limited to the precise place where his home has been, but the industrial district, in a reasonable sense, in which he has hitherto made his living. I think, therefore, that the appellant is bound to go to his work, where that work offers in his district, so that it is actually possible for him to get it within a four mile radius of the place where he was working before.

Now the course which the arbitrator took is, I think, exactly the course which was taken in the case of *Silcock & Sons v. Golithly*, [1915] 1 K.B. 748, to which Mr Carmont referred. He referred to it, indeed, for another purpose. He referred to it to show that he was shy of the various decisions which had been given on this subject, because the rubric of that case says that four of them are hard to reconcile. I agree. I think the case of *Proctor & Sons v. Robinson*, [1911] 1 K.B. 1004, is hard to reconcile with *Carlin v. Stephen & Sons*, 1911 S.C. 901, 48 S.L.R. 862; with *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009; and with the *Anglo-Australian Steam Navigation Company*, 1911, 4 Butterworth's W.C.C. 247, but I think that the authority of *Proctor's* case is now more than doubted. But

that part of the rubric is only, so to speak, an aside of the reporter. The real decision in the case thus stated—and the statement is I think justified—is—“The employers did not adduce any evidence to show what particular kind of light work he could do, nor that he could get such work, but they suggested various kinds of work which were open to him in the place where he lived. The County Court Judge, acting upon his own experience and knowledge of the locality, came to the conclusion that there was open to the man a field of employment, though a restricted one, and that he could get work if he tried. He accordingly reduced the weekly payment.”

That, I think, is exactly what the arbitrator here has done, subject to this, that the words “in the place where he lived” must be read with a reasonable latitude, and that it is not reading it with an unreasonable latitude to hold that if there is work in the industrial district in which the workman has lived and worked, though not necessarily at his door, if he is not fit to walk to that work it is open to him to change his place of abode. If he does not choose to do so then he takes the consequences.

I think that the arbitrator has further followed the statute exactly in arriving at the conclusion which he does. We are not concerned with the amount of his award. We are concerned with whether he has gone the right way about fixing it. Now the last three lines of the First Schedule to the Act dictate to him his course—(first) he has to ascertain what were the workman's average wages at the time of his accident; (second) what is the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident; and (third) what is the difference between these two. He is then called on to award him an amount of compensation which shall bear such relation to the amount of that difference as under the circumstances of the case may appear appropriate. Well, the learned arbitrator was apparently of opinion that the workman could earn about £1: his former wage was 39s.; the difference is 19s.; and that the proper proportion of that difference to award him was 15s. The amount is entirely a matter for him, and one with which we cannot interfere.

I think, therefore, that the first question should be answered in the affirmative, and that the second question is one with which the Court has no concern and ought not to answer.

**LORD MACKENZIE**—We are here in an original application to fix compensation. That is quite clear from the opening words of the case. It is not an application to review compensation which has been already fixed. The fact that from 6th March 1914 down to 30th July 1915 the employers paid the workman 19s. 9d. a week does not affect the question.

The arbitrator has found that the workman has been offered 39s. a-week—6s. 6d. a shift for haulage work. But that does not represent a *quid pro quo*, because his

earning capacity is not 39s. a-week; to a certain extent it is an *ex gratia* payment which his employers have offered him. I am of opinion that in dealing with the question of compensation it is not incumbent upon the workman to accept that offer. The arbitrator takes the same view, because he goes on to deal with the earning capacity of the appellant, and he says he fixes the compensation payable to the appellant at 15s. a-week as from 30th July 1915 on the basis of his working capacity if he resided near the work. In either view the workman must move from Stirling and go to the place where the employment is available. In the case of the work which is offered with Archibald Russell, Limited, he would require to reside at Fallin, where he could get a house; if he did that he would then be in a position to do his work, because the difficulty is that he is not able to walk a distance of  $3\frac{1}{2}$  miles from Stirling to his work and back. Therefore the case is quite different from the case of *Beddard*. In *Beddard's* case there was no suggestion that there was any house to be got near the works which were some distance from the place where the workman lived.

The obligation of a workman to follow his work must to a certain extent be a question of circumstances. In this case there is no suggestion of any reason why the man should not go and reside near the place where he can get work. If the facts were sufficiently strong a workman might be able to show that in a particular case he was not under an obligation to shift his quarters.

I think it may not unfairly be said that the arbitrator has not only found that theoretically the man is fit to “earn 3s. 5d. per shift of eleven shifts per fortnight, or 18s. 10d. per week” on one class of light work, or 3s. 5d. for “twelve shifts per fortnight, or 20s. 6d. per week” on another class of work, but that he has found, in point of fact, that he could earn that money. That is what he says—“Light work would be beneficial to him, and he is fit for working the lever at picking tables or for lamp-cabin duties. At the former he could earn,” &c. That seems to me not unreasonably to involve this, not only that his earning capacity is so and so, but that he could earn that sum in point of fact. But if that is putting too much into the language of the arbitrator, I am of opinion that there is not an obligation on the employer in a case of this kind, in an original application to fix compensation, to do more than he has done here. And therefore I think the arbitrator is plainly right in regard to the first question.

In regard to the next question, which is numbered 3—I do not know whether that is because some question has dropped out—that is a question upon which, I think, we must return an answer, and therefore I do not take the same view as your Lordship in the chair. The question is, “Whether on the facts proved or admitted I was justified in awarding 15s. a-week as the amount of compensation due to the appellant.” It appears to me that the answer to that is

yes. We cannot, of course, review the amount. We have nothing to do with that. In all these cases it is for the Court to say whether there was evidence before the arbitrator entitling him to make the award he does make, and that is what the arbitrator here means by saying "Whether . . . I was justified in awarding 15s. a-week." It is not a question of shillings or pence at all. The matter was entirely in the hands of the arbitrator, and there is no reason for this Court interfering with the award that he has made. Section 3 of Schedule I is not limited by Schedule I (1) (b). Even if it was, the arbitrator would not be outside the limits of Schedule I (1) (b) here, because it is not more than fifty per cent. of the average weekly earnings during the previous twelvemonths. But that section does not limit Schedule I (3). What the arbitrator has to do is to strike an average of the weekly earnings of the workman before the accident, the average weekly amount after the accident which he is able to earn or earning at some suitable employment or business, and then what he fixes has to bear such a relation to the amount of that difference as may in the circumstances appear proper. There is no reason for supposing that the arbitrator did not apply his mind to the true question. The facts which he holds proved warrant him in arriving at the conclusion which he did if he thought it was a just conclusion, and therefore the third question—the second question in the case—should be answered in the affirmative.

LORD SKERRINGTON—I prefer not to answer the first question, because, although I can guess its meaning, it is badly framed. On the other hand the second question fairly raises the point which alone was argued before us, viz., whether in view of the facts which he held to be proved the arbitrator was entitled to reduce the compensation to 15s. a-week, or whether he was bound to treat the appellant as a man who was still totally incapacitated. Two salient facts were proved which decide the case in favour of the respondents. In the first place, the appellant is not in fact totally incapacitated, and his services as a light worker are worth 20s. 6d. a-week. In the second place, if the appellant chooses to go from Stirling, where he now resides, to Fallin, which is a few miles off, he would receive not merely 20s. 6d. a week, but a considerably larger wage which the respondents are willing *ex gratia* to pay him. It was suggested at the debate that there existed some good reason why he should decline to leave Stirling and to take up his residence at Fallin, but no facts supporting this suggestion are to be found in the Stated Case. If the appellant's counsel had informed us that some such facts had been established at the proof, but that the arbitrator, though asked to do so, had refused to state them in the case, we should have considered the propriety of remitting the case for amendment, but no such statement and no motion for a remit were made to us.

The LORD PRESIDENT, who had not heard the case, delivered no opinion.

The decision of the Court was intimated by

LORD JOHNSTON—The precise meaning of the queries is a matter of impression, and as the general opinion of the Court is that we should decline to answer the first, and with regard to the second simply say that on the facts proved or admitted the arbitrator was entitled to award 15s. a-week as the amount of compensation, the Court's determination will be accordingly.

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

Counsel for the Respondents—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, February 24.

## FIRST DIVISION.

[Lord Anderson, Ordinary.]

### M'VICAR v. BARBOUR.

*Proof—Evidence—Slander—Innuendo—Two Occasions with One Witness only to Prove each, the Expressions used being Different though the same Innuendo was Attributed to them.*

In an action of damages for slander the pursuer founded upon certain statements made concerning her by the defender on two different and unconnected occasions. The words used were different on each occasion, but were innuendoed to bear the same meaning. At the trial one witness spoke to the use of the words founded on the one occasion, and one witness to the use of the words on the other occasion. Both witnesses attributed to the words the meaning specified in the innuendo. A separate issue was taken for each of the occasions, and the jury found for the pursuer on both issues. *Held* that the verdict of the jury was supported by sufficient evidence.

Juliet Stewart M'Vicar, *pursuer*, brought an action against John Barbour, *defender*, concluding for £1000 damages for slander.

It was admitted that there was a *fama* in the district to the effect that the pursuer had improper and immoral relations with a Mr M'Douall. The pursuer averred that on three occasions the defender made certain statements of and concerning her which she innuendoed to mean that she had had immoral relations with M'Douall. Different words were used on the different occasions, and the occasions themselves were unconnected. The defender denied having made any such statements.

On 2nd November 1915 the Lord Ordinary (ANDERSON) approved of the following issues—"1. Whether, in or about the month of September 1908, on or near the Eldrick Road, on the Logan estate, Wigtownshire, and in the presence and hearing of James M'Garva, forester, Logan, the defender did falsely and calumniously say of and concerning the pursuer 'You (M'Garva) have