SUMMER SESSION, 1899.

COURT OF SESSION.

Friday, May 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

GEARY *v.* WILLIAM DIXON, LIMITED.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1, *sub-secs.* (1) (*b*), *and* (2).—*Amount of Compensation.*

Held (1) that under Schedule 1, sub-section (2), of the Workmen's Compensation Act 1897, an injured workman is not entitled as a matter of right to a weekly payment representing the whole of the difference between his average wage before and his average wage after the accident, such difference being merely one of the elements which the arbitrator is to take into account in fixing the amount of compensation; but (2) that such difference is not subject to the limitation of 50 per cent. imposed by Schedule 1, sub-section (1) (*b*), and may therefore be competently awarded *in toto* by the arbitrator as compensation.

This was a case stated by the Sheriff-Substitute of Lanarkshire at Glasgow (SPENS) in an arbitration under the Workmen's Compensation Act 1897, in which John Geary sought to recover compensation from William Dixon, Limited, in respect of the loss of his right eye in consequence of an accident sustained by him while in their employment.

After setting forth the nature of the pursuer's and respondent's claim, the case proceeded:—"The application was heard before me of this date, February 7, 1899, when the following facts were admitted:—1. That the respondent on the date libelled, August 10, 1898, while in the employment of the appellant, met with an accident which resulted in the loss of the sight of one of his eyes. 2. That at and prior to the date of the accident he was earning 30s. 8d. per week. 3. That he is now earning 21s. 6d. per week. In these circumstances, and being of opinion that under the sections of the Act, viz., sub-section 1 (*b*) of the first schedule of the Act, and the 2nd sub-section of said schedule, the respondent was entitled to have made good to him the difference between the wages he is now earning and those he was earning at and prior to the date of the accident, I awarded to the respondent the sum of 9s. 2d. per week till the future orders of Court, and found him entitled to £2, 2s. of expenses.

"The following are the questions of law which the appellants submit for the opinion of the Court:—(1) Under the 'Workmen's Compensation Act 1897' is the respondent, while he remains partially incapacitated for work, entitled as a right, and as has been held by the Sheriff-Substitute, to the whole difference (not exceeding 20s.) between the wages the respondent earned before and what he is able to earn after the accident, which difference in the present case is 9s. 2d. per week? (2) If not, is the contention of the appellants correct, that under the said Act the respondent cannot recover more than 50 per cent. of such difference (not exceeding 20s.), and that in the circumstances of this case the sum he can recover ought not to exceed 4s. 7d. per week?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), Schedule 1, sub-section (1), enacts—"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 after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

Sub-section (2)—"In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment, not being wages, which he may receive from the employer in respect of his injury during the period of his incapacity."

Argued for the appellants—The Sheriff had taken a wrong view. (1) In estimating the amount which a master was to pay to an injured workman, the amount of the workman's pecuniary loss was the thing to be considered, and the statute said that the workman was only to get half of that. The statute was really an insurance statute, and its theory was that where an accident was not due to the fault of the employer, the loss resulting from the accident should be borne half by the employer and half by the employee. In the case of total incapacity the limit of the master's liability was unquestionably half of the workman's wages. The 50 per cent. limit applied equally to cases of partial incapacity to the effect of rendering it incompetent for the arbitrator to award more than half the difference between the former and the present rate of wages. The effect of the Sheriff's view was that compensation might be identical in a case of total and in one of partial incapacity. (2) In any event, the workman was not entitled to the whole difference between the two rates of wages as matter of right. The Act prescribed a maximum, not a minimum, and the fact that the Sheriff had treated that difference as a minimum showed that he had applied his mind to the case under a misapprehension in law. The case should go back to the Sheriff for reconsideration.

Argued for the respondents—(1) There was nothing in the statute to support the idea that only 50 per cent. of the difference in the rates of wages could be awarded by an arbitrator. (2) The Sheriff had not decided the abstract question whether a workman was entitled to the whole difference as a matter of right. He had merely decided this particular case, and his decision should stand. The appellants had urged nothing to show that the Sheriff's award had been given without due consideration of the facts. On the contrary, his award and the facts admitted in the case were in perfect harmony.

Lord President—It seems to me that any difficulty which arises in this case arises not on the construction of the statute but on the construction of this stated case. The provisions of the statute with which we are concerned are perfectly coherent and simple. First of all, says the statute, under no circumstances shall more be given as a weekly payment than 50 per cent. of the average weekly earnings at the time of the accident. Secondly, it says, cutting and carving on the 50 per cent., which is the most you can give, you shall have regard to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident. Now, I pause to observe that there is nothing novel in this provision, because in a common law claim there is no doubt that it would be the duty of the judge or the jury to have regard to the difference between the workman's weekly earnings before the accident and what he is able to earn after the accident in order to ascertain what was the amount of diminution, so to speak, of his working capital of strength and ability.

Now, if that be the true view of the matter, there is nothing at all in the statute or in reason to justify our applying the 50 per cent. limitation to this difference between the old wages and the new. That limitation is satisfied and done with before you start to consider what the workman is to get. But within that limit you are to have regard to the difference between the old wages and the new.

The next point which I observe upon is this. The statute does not say that the man is to be entitled as of right to get that difference whatever the circumstances of the case may be. The words of the second sub-section are quite conclusive against that. It says, "regard shall be had" to the difference. That shall be one of the relevant considerations before the arbitrator. If the arbitrator is asked to have regard to other circumstances tending in an opposite direction, he is not precluded from giving regard to these if they are relevant. Therefore it seems to me perfectly clear that the second sub-section does not support the idea that the difference between the old wage and the new is a final and conclusive criterion of what the man is to get. He is entitled to have that considered, but his opponents are entitled to show that that would be an unfair or illegitimate conclusion in the circumstances of the case.

That being the law on this subject, I turn to consider what has been done here. If I thought or could discover from this case that the Sheriff had been offered evidence tending in an opposite direction from this criterion which he is invited to have regard to, I say that this decision could not stand. And unfortunately the Sheriff has used words in stating the question which rather tend to the view that some absolute rule of this kind may have been in his mind. But when I consider the case more closely that idea is dispelled. First of all, when he says that the following facts were admitted, and proceeds to set them forth, I assume that he is taking into account all the facts offered for his consideration. And he goes on—"In these circumstances . . . I awarded" the sum stated. In the question he says—"Is the respondent entitled as a right and as has been held by the Sheriff-Substitute?" I take that as meaning as a right in the circumstances stated. I take the Sheriff as stating all the evidence offered to him on the amount of compensation, and he says, "That being all the material I had, I find the man entitled to the whole of the difference." Accordingly, that being my construction of

this case, which I grant is somewhat complicated, I am prepared to affirm this first query. Treating it merely as a right arising out of the evidence in this particular case, I think the man is entitled to the compensation awarded. The second query I distinctly negative.

I desire, in parting with the case, to make additionally clear, if that be requisite, that my decision gives no countenance whatever to the idea that the difference between the two rates of wages is conclusive on this subject, or that the proof of that necessarily gives the workman a right to the same. It will do so if there is no other evidence tending to displace the presumption to which these facts give rise. He will have no right if evidence is offered—and it ought to be received—tending in an opposite direction.

Lord Adam—I concur entirely in your Lordship's reading of this Act, but in doing so, think that it tends to the answer to the first question being in the negative. The question as put by the Sheriff is — Is a workman entitled as a right to the whole difference between past and present earnings? Now, assuming that the whole facts are as stated to the Sheriff in the admissions of parties, still I think that it would be wrong to say that these gave the workman a right in law under the Act to the full difference, although it might be quite right in the circumstances to give him the whole amount. Therefore, as a matter of form—but only as a matter of form, for I do not differ in substance—I would have preferred to answer the first question in the negative.

Lord M'Laren — The principle of the Workmen's Compensation Act is, I think, plainly compensation subject to limitations, and not insurance. The compensation is not provided out of any contributions made by the workman, and therefore the suggestion that we are to apply the principles of insurance to the interpretation of the statute, and to run the limitation of fifty per cent. into the award of damages, is, I think, unsound and not warranted by anything in the words of the statute, or its schedule. What the schedule does provide under sub-section 1 (*b*) is, that the amount of damages to be awarded in the case of total or partial incapacity shall in no case exceed twenty shillings a-week, and shall in no case exceed fifty per cent. of the average weekly earnings of the workman previous to the accident. But, subject to that limitation, I venture to think that, under the second sub-section, the general direction offered for the guidance of the arbitrator is that he is to proceed according to the principles of the common law. If that be the true reading of the statute, the chief point which the arbitrator is to have in view—the only point to which his attention is specially directed by the statute—is that the loss sustained will *prima facie* be the difference between the wage which the man was earning in the past, and the wage which he will be able to earn in the future. Of course there are other circumstances which it may be necessary to take into account, and therefore the direction in the second sub-section is not to be taken as an absolute direction, but only as an element which the arbitrator is always to take into account. I was somewhat influenced by the argument maintained to us on the first question, that it would be difficult to affirm, as a matter of unqualified right, that the respondent in such a case was entitled to the full difference between his past and his present earnings. But then, on further consideration, I agree with your Lordship in the chair that this question must be taken as a question put with reference to the special circumstances of the present case—a case in which no evidence was adduced on either side, but in which admissions were made upon which the Sheriff was to determine a right to compensation in accordance with law. These admissions appear to me to put the case very much in the position of a special verdict returned by a jury with consent of the parties, and the construction of a special verdict is always matter of law. The question of the right to compensation arising on these three admissions is this — Whether in the absence of all elements tending to lessen the damage, the arbitrator is entitled to take anything into account except the difference between the past and present earnings of the disabled man. I am prepared to say that he was entitled to take nothing but this into account in estimating the damage, because it is the only element of fact which the parties had placed before him. While agreeing that it was never intended by the statute to give, in the general case, an unqualified right to the full difference of earnings, yet in this particular case, where there were no facts which ought to influence the mind of the Sheriff as arbitrator, except the facts set forth in the case agreed on by the parties, the legal right of the workman is to recover full compensation according to common law and the statute.

I am for answering the first question in the affirmative, and the second in the negative.

Lord Kinnear—I agree with your Lordship in the chair.

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

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