Counsel for the Reclaimers—Ure, K.C.—Chree. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Lees, K.C.—Berry. Agents—Hagart & Burn Murdoch, W.S.

Saturday, December 17.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

HUNTER *v.* BAIRD & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule, sec.* 1 (*b*)—*Amount of Compensation — "Employment of the Same Employer"—Employment by Contractors in a Mine—Subsequent Employment in the Same Mine by Mineowners who Employed the Contractors.*

The Workmen's Compensation Act 1897, First Schedule, 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 fifty 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."

A workman was employed in a coal-pit belonging to a firm of coalmasters, by a series of contractors between 12th October 1902 and 7th October 1903 at a daily wage. The contractors were employed by the coalmasters at a contract price per ton of coal brought up by them to the pit-head. On 7th October 1903 the workman was dismissed by the contractor in whose employment he then was. On 8th October he was out of employment. On 9th October he entered the employment of the coalmasters, his earnings being dependent upon his output of coal. On 12th October he was injured in the course of his employment.

Held (*diss.* Lord Young) that in assessing the compensation to which the workman was entitled under the Workmen's Compensation Act 1897, no portion of his earnings prior to 7th October fell to be considered.

In an arbitration under the Workmen's Compensation Act 1897, in the Sheriff Court of Lanarkshire at Glasgow, between William Hunter, miner, 50 Newton Street, Kilsyth, and William Baird & Company, Limited, iron and coal masters, West George Street, Glasgow, the Sheriff-Substitute (DAVIDSON) awarded compensation at the rate of 2s. 10½d. per week.

The claimant appealed.

The case set forth—"(1) That the appellant was employed as a miner in respondents' Dumbreck Pit, Kilsyth, under four different contractors, between 12th October 1902 and 7th October 1903. (2) That the said contractors were employed by the respondents at a contract price per ton for the amount of coal brought by them to the pit-head. (3) That said contractors employed workmen to assist them at a daily wage. (4) A fixed weekly sum was deducted from their wages for the general medical fund at the pit. (5) That on the last-mentioned date the appellant was discharged by Reid, one of said contractors, in whose immediate employment he then was. (6) That he was out of employment on 8th October 1903. (7) That on 9th October 1903 he entered respondents' employment as a miner, his earnings being dependent upon his output of coal. (8) That 10th October 1903 was a Saturday, being the conclusion of the trade week in the works of the respondents; that the appellant worked again on 12th October; that on that date, while in the course of his employment a stone fell upon his right leg, whereby he was injured, and that in consequence of said accident he has been unable to earn wages since. (9) That his total earnings during the period from 9th to 12th October 1903 were 11s. 6d., and that respondents offered appellant compensation at the rate of 2s. 10½d. per week."

"On these facts I held—(1) That the appellant received injury by accident arising out of and in the course of his employment in a mine of which the respondents were undertakers within the meaning of the Workmen's Compensation Act 1897. (2) That the average weekly earnings of the appellant while in the employment of the respondents were 5s. 9d."

"I therefore found the appellant entitled to compensation from the respondents at the rate of 2s. 10½d. per week from 26th October 1902 till the further orders of Court.

"I found the appellant liable to the respondents in expenses."

The questions-of-law for the opinion of the Court were—"(1) Whether the appellant was in the employment of the respondents prior to 7th October 1903? (2) Whether, in assessing the compensation to which the appellant is entitled, any portion of his earnings prior to 7th October 1903 fall to be considered?"

Argued for the appellant—He was continuously in the employment of the respondents from 12th October 1902 until the date of the accident, and his earnings during the whole of that period fell to be taken into account in estimating the amount of compensation under the Act. Employment by the contractors was equivalent to employment by the respondents — *Morrison* v. *Baird & Company*, December 2, 1882, 10 R. 271, 20 S.L.R. 185.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—In this case the statement of facts is to this effect, that this man was employed for a certain period named in the case by a series of contractors. Then the statement proceeds to say

that he came to be out of employment on 8th October 1903, and that on 9th October of that year he entered the respondents' employment as a miner, his wages being dependent upon his output of coal. Now, the respondents' contention is that the period of employment by them was that beginning on 9th October, and that therefore the Court ought to find that he is only entitled to compensation on his earnings subsequent to that date. In my opinion that contention is sound, and the decision of the Sheriff to that effect is right.

LORD YOUNG—The statement of facts is a peculiar one certainly—that the appellant was employed as a miner in the respondents' pit under four different contractors between 12th October 1902 and 7th October 1903; that these contractors were employed by the respondents at a contract price per ton for the amount of coal brought by them to the pithead; that on 7th October the appellant was discharged by one of the contractors, in whose immediate employment he then was; and then that he was out of employment on 8th October, and on 9th October 1903 entered the respondents' employment as a miner to do their work in their pit, his earnings being dependent on his output of coal.

The question is whether that was or was not continuous employment under the same employer. I should have thought that it was, and that if the man had been in the employment, say of a father who died in the course of his employment, and the business was taken up by his son, and he kept on the father's workmen, and the miner went on working at the same wages under the son as he had done under the father, I should have regarded that as the same employer. That is the only good sense of the thing, and therefore the meaning of the statute. When a mine-owner has the work done for him by contractors who employ workmen, I should have thought that the employment of anybody by these contractors to do the work in the mine-owner's pit was employment under the same employer, and that the real injury which the man suffered was deprivation of the work which he had continuously been employed to do for a whole year or approaching a whole year. To arrive at the other conclusion may be conforming to the literal interpretation of the statute, but is against the obvious meaning of the Act and the obvious justice of the thing to the sufferer in the very matter which the Act contemplates and provides that he shall have recompense for.

LORD TRAYNER—I think the Sheriff is right, and I cannot see how, on a sound construction of the statute (taking the Sheriff's statement of the facts), he could arrive at any other conclusion. The facts are that this man was employed not by the respondents but by an independent contractor or four independent contractors in the same pit for a period of about twelve months. But the Sheriff's statement excludes the idea that the twelve months could be employment in the service of the respondents. He says that the appellant was out of employment on the 8th of October and that he "entered" the respondents' employment—that is, he commenced to be the respondents' servant—on 9th October. If he entered the service of the respondents on the 9th October, it is quite obvious that he was not continuously in their employment prior to that date. The one statement excludes the other. But I think it is worth noticing that the terms of the employment under the contractors and the terms of the employment under the respondents were different in material respects, because the work done by the appellant under a contractor was remunerated by payment of a daily wage, whereas under his employment with the respondents his earnings depended upon his output of coal. So that the two contracts, namely, the contract of service with the contractor and that with the respondents were not only between different parties but were also different in their conditions. I do not think there is much difficulty about the construction of the statute. Schedule I, section 1, sub-section (*b*), provides that when total or partial incapacity arises from an accident such as we have here described, the workman shall be entitled to compensation not exceeding 50 per cent. of his average weekly earnings during the period of 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. You cannot take into account employment for twelve months anterior to the accident or for any period whatever unless it has been employment under the same employer, and in my opinion that means the employer in whose employment the injury has been received for which compensation is claimed. Now, in this case the Sheriff has negatived the suggestion that the appellant was under the respondents for more than the two or three days he has enumerated. I think this a very hard case for the appellant, but though hard I think the necessary outcome is that the Sheriff had no alternative but to reach the conclusion to which he gave effect.

LORD MONCREIFF—On the questions put to us by the Sheriff, and on the facts found by him, I agree with the majority of your Lordships. The appellant's claim is not made against the respondents as undertakers under the statute. The one question is whether the appellant was throughout in the employment of the respondents prior to 7th October 1903. Now the Sheriff states as a matter of fact that he was not—that prior to 7th October 1903 he was in the service of various contractors, no doubt in the defenders' pit, but in the service of the contractors, and that then a change of employment took place, and that he entered the employment of the defenders for the first time on 9th October 1903. On these facts I think we can only look at the period subsequent to 9th October 1903. Unfortunately this accident occurred on 13th October after he had only worked two days—but two days in different weeks—and on

these facts, and on these questions of law, I do not think we have any alternative but to find that the Sheriff has decided the case rightly.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the appellant on the stated case, answer the second question of law therein stated in the negative; therefore affirm the award of the arbitrator, and decern.

Counsel for the Appellant—Campbell, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Wednesday, December 21.

SECOND DIVISION.

[Lord Low, Ordinary.

MAGISTRATES OF MUSSELBURGH *v.* MUSSELBURGH REAL ESTATE COMPANY, LIMITED.

Property — Superior and Vassal — Feu-Charter—Title to Foreshore—Boundary "by the Sea-Beach."

In a feu-charter granted by the magistrates of a burgh of a portion of the burgh lands the ground feued was described as "bounded . . . on the north by the sea-beach." *Held*, on a construction of this clause in the light of other provisions in the feu-charter, that the feu did not extend beyond the line of ordinary high-water mark, and did not therefore include the foreshore.

Opinions (*per* the Lord Justice-Clerk and Lord Trayner) that in the absence of contrary indications a boundary by the "sea-beach" excludes the sea-beach and gives no right of property in the foreshore; *opinion contra per* Lord Moncreiff.

In November 1902 the Provost, Magistrates, and Councillors of the burgh of Musselburgh raised an action against the Musselburgh Real Estate Company, Limited, and John Downie, contractor, Musselburgh, in which they sought, *inter alia*, declarator that they had "the sole and exclusive right and title to and property in the foreshore *ex adverso* of that piece of waste ground or sea-green . . . lying to the north or seawards of the piece of enclosed ground belonging to the defenders the Musselburgh Real Estate Company, known as Mackinlay's Park, lying within the burgh of Musselburgh." The summons contained a similar conclusion as to a property, Rosehall, with which the present report is not concerned.

The burgh of Musselburgh in August 1670 obtained a grant of burgh lands from the Earl of Lauderdale, which was subsequently confirmed by royal charter. The boundary on the north was "the ebbing and flowing of the sea."

Of dates 18th and 19th April 1826 the Magistrates of Musselburgh, on a narrative that they had by an Act of Council granted a feu to Messrs William and James Aitchison at the rate of £6 per acre of feu-duty of a portion of the Links of Fisherrow (part of the burgh lands) to be "afterwards staked off," in implement of the Act of Council feued to William and James Aitchison a portion of the Links of Fisherrow, subsequently known as Mackinlay's Park and described in the feu-contract as follows:—"All and whole the said piece of ground lying at the east end of the Links of Fisherrow, situated to the north of the park called Chalmers' Park, measuring seven acres four falls and three-fourths of a fall . . . . of ground or thereby, and bounded as follows, viz.—on the east by the [*blank in charter*] river Esk separating the ground hereby disponed from the said river, which bank shall remain open and unfeued not only along the river but also along by the sea excepting to William and James Aitchison or their foresaids; on the west by the town of Musselburgh's common ground still unfeued; on the south by a stone dyke enclosing the ground called Chalmers' Park and partly by the town's common ground; and on the north by the sea beach; And it is hereby expressly agreed and stipulated that if at any time hereafter, either by the receding of the sea or river or otherwise, the said William and James Aitchison shall take possession of the ground so left, then and in that case the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rate of £6 sterling per acre, with free ish and entry thereto from the east and north, and partly on the south by the intended road after mentioned, together with all right, title, and interest which the said Magistrates and Treasurer for themselves and in name and behalf foresaid or their predecessors or successors in office had, have, or can claim or pretend to the said piece of ground in all time coming; with privilege and liberty to the said William and James Aitchison and their foresaids of conducting any quantity of water from any part of the said river by open cuts or otherwise, and also liberty to take water from the mill-dam or lead below the Sea Mill by a pipe not exceeding 9 inches in the bore for any purpose whatever so as not to be prejudicial to the said Sea Mill or any other waterfall that may be erected or extended on the said mill-dam or lead, upon condition always of their conveying the surplus water again into the river within the boundary of their own property, and without stagnation; as the said piece of ground was measured by authority of the said Magistrates and Council by James Hay, land surveyor, lying in the parish of Inveresk, regality of Musselburgh, and sheriffdom of Edinburgh, with the teinds, both parsonage and vicarage, of the said piece of ground, and free ish and entry thereto from the bank of the river Esk on the east and by an intended road running along the west wall of the said park, and which road is not of less breadth than 30 feet: . . . Declaring always, as it