HOUSE OF LORDS.

Monday, February 19, 1912.

(Before the Lord Chancellor (Earl Loreburn), Lords Atkinson, Shaw, and Mersey.)

TAYLOR *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58) *— Ending of Compensation — Order to Terminate Agreement — Jurisdiction of Arbiter.*

A registered agreement between employer and employed, under which the employed accepts a certain weekly payment in discharge of the employer's liability under the Workmen's Compensation Act 1906 "until ended, diminished, increased, or redeemed" by an order of the arbiter, is legal. Technically such an agreement cannot be terminated by the arbiter, though he may end permanently, and not merely temporarily, the payments.

Observations upon *Nicholson* v. *Piper*, [1907] A.C. 215.

The appellant in this case was in the employment of the respondents, and as the result of an accident received injuries which entitled him to compensation, the amount of which was settled in an agreement in accordance with the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). On an application by the respondents to the County Court Judge to review the agreement, evidence being forthcoming that the appellant had completely recovered, the latter granted an order terminating the agreement. This appeal was brought on the grounds that the County Court Judge exceeded his jurisdiction in terminating the agreement, or alternatively that the agreement was an attempt to contract out of the Act, and therefore void.

The Court of Appeal (COZENS-HARDY, M.R., FLETCHER-MOULTON, and FARWELL, L.JJ.) affirmed.

Their Lordships, after consideration, gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—I have had the advantage of reading the judgment of Lord Atkinson, and I agree with him that in this case the order made by the County Court Judge is technically erroneous, because his jurisdiction was merely to say that the weekly payments should be "ended, diminished, or increased," whereas he has ordered that the agreement be terminated. It is obvious, however, that according to the decision of this House in *Nicholson* v. *Piper* (1907, A.C. 215) the County Court Judge might have in effect terminated the agreement finally by making an order that the weekly payments should be ended. He meant to end the payments but he put the judgment in the wrong form. We are bound by the decision in *Nicholson* v. *Piper*.

It is thus settled that when a County Court Judge is satisfied that the incapacity resulting from an injury has finally disappeared he can so adjudge and thereby finally end the weekly payments beyond revival. This may be attended with hardship if in any case the incapacity should in fact return, contrary to his anticipation. Under section 1 (*b*) of the 1st schedule to the Act the weekly payment is to be "during the incapacity," and it might possibly happen that a man entitled under the Act might find himself barred by an order ending the weekly payment, made under an erroneous expectation. I do not think that there is anything in the decision of *Nicholson* v. *Piper* which prevents the County Court Judge from adjudging that the weekly payments be ended until further order. The same result is, as we are told, attained by a practice of ordering a merely nominal payment in order to keep the question alive. In my view either of these methods may lawfully be adopted; an ending of payments may be either temporary or permanent. It seems to be hardly worth while to refer this case back to the County Court Judge in order that he may put his decision in strict form, because there is no doubt about the substance of it. But if the appellant desires it, I think that this ought to be done. It ought not, however, to affect the costs, being merely a formal point.

LORD ATKINSON—The main proposition for which the appellant in this case contends is, as I understand it, this—that when, in exercise of the jurisdiction conferred by rule 16 of Sched. I attached to the Workmen's Compensation Act 1906, the County Court Judge, or arbitrator, orders that the weekly sums payable to a workman, whether under an award or registered agreement, by way of compensation for incapacity caused by accidental injury, should be ended, he is bound to make this order merely suspensory, no matter how completely convinced he may be that the incapacity will never recur, or how overwhelming may be the evidence leading him to that conclusion.

The reason given for the adoption of such a course was that there cannot be any certainty in such cases that the incapacity may not recur, and that unless the order be made suspensory the liability of the employer would not be kept alive, and the workman would be shut out from receiving compensation should he, unfortunately, as the result of the accident, be again incapacitated. It was further contended that the provision contained in the agreement entered into between the employer and the workman in this case, and duly registered, to the effect that the workman accepts the weekly payment therein mentioned until it shall be "ended, diminished, increased, or redeemed," in pursuance of the Workmen's Compensation Act 1906, in full discharge of the employer's liability to pay compensation under its provisions,

is prohibited by that statute, and is therefore illegal and void. It was not contended on behalf of the respondents, and could not, I think, be contended successfully, that the County Court Judge, or arbitrator, may not have jurisdiction in a case where, upon the evidence, he is of opinion that incapacity may probably recur, to keep alive the liability of the employer either by a suspensory order such as the appellant insists that he should have made in the present case or by an order to reduce the weekly payment to a nominal sum, or by some other device. What was insisted upon on their behalf on this point was that where the Judge is of opinion that the incapacity will most probably never recur, and there is ample evidence, as there admittedly was in this case, to support that conclusion, he is not bound to make an order keeping the liability alive; that it is not the law that the liability of the employer must during the whole life of the workman necessarily be kept alive; and that there may be, while he is still living, a final settlement of the workman's claim otherwise than by the redemption of his weekly payments. It was further contended on behalf of the respondents that the provision already mentioned in the agreement of the 3rd March 1909 was not illegal or void. For the purposes of this case, however, it would, but for a preliminary point hereafter dealt with, have been necessary to consider whether the first and second of these contentions only, or possibly the first alone, are sustainable. In my opinion, both the contentions of the appellant are, for reasons which I shall give presently, unsound.

I think that there was no imperative obligation on the County Court Judge, on the facts of this case, to make a suspensory order to the effect contended for, and I further think that the agreement of the 3rd March 1909 did not contravene any of the provisions of the statute of 1906, and that therefore it was neither illegal nor void.

The preliminary point is raised upon the form of the order of the County Court Judge, dated the 23rd June 1910. The portion of it dealing with the agreement runs as follows:—"It is adjudged that the agreement dated the 3rd day of March 1909, and made between the applicants of the one part and the respondent of the other part, be hereby terminated as from the 13th day of March 1909." It is contended that the County Court Judge had only jurisdiction under rule 16 of the Schedule to declare that the weekly payments which the employer by this agreement bound himself to pay should be ended, not that the agreement itself should terminate. I think that this contention is, strictly speaking, sound. The words of the rule are of general application. They apply to payments made under a valid award as well as under a binding agreement enforceable under Sched. 2, rule 9, when registered as a judgment of a County Court. It was urged that it was decided in *Nicholson* v. *Piper* that the County Court Judge had jurisdiction to decide that such an agreement as this should terminate. On an examination of the facts of that case, however, it will be found that this is not so. The order in that case was made under Rule 12 of Sched. 1 of the Workmen's Compensation Act 1897. That rule is identical in its terms with Rule 16, under which the order in the present case purports to have been made, but the order in that case differed essentially from the order made in this case in this, that it provided that the weekly payments should end as well as that the agreement should terminate. It ran thus—"I order that the agreement come to between John Francis Nicholson, the workman, and James Richard Piper, the employer, on the 1st day of February 1904, and duly recorded in this Court on the 2nd day of December 1904, be this day terminated, and that the weekly payments to the workman thereunder be ended accordingly." Collins, M.R., in the following passage of his judgment (96 L.T.R. 77) dealt with the form of this order thus: He said—"Therefore the order of the learned County Court Judge did in effect what clause 12 of the 1st Schedule authorises—it ended the payment. He in terms ordered that the weekly payments thereunder be ended. It is true that he also purported to terminate the agreement, but it does not seem to me that that makes any difference to the order. It is obvious that what he meant was that the agreement should cease to operate, and he then did what he meant throughout to do, he ordered that the payments should be ended." The other members of the Court of Appeal, Cozens-Hardy and Farwell, L.JJ., apparently concurred in that view of the meaning and sufficiency of the order, as it contained the vital direction, not contained in the order in the present case, that the weekly payments should be ended, and was therefore a judicial determination of the particular matter which the County Court Judge was expressly empowered to decide; and further, that it was not vitiated or rendered void or illegal by the unauthorised addition terminating the agreement. It is plain from the judgment of Lord Halsbury in this House that he took the same view.

What was decided therefore unanimously by the Court of Appeal and by this House in *Nicholson* v. *Piper* was not that an agreement such as that entered into in the present case could be terminated by an order of a County Court judge made under sec. 12 of the Schedule to the Act of 1897, but that such an order as was made in that case was a final adjudication on the claim of the workman for compensation which could not be re-opened or reviewed. Collins, M.R., said—"It seems to me perfectly clear what the Act of Parliament meant to do—namely, to allow the measure of compensation to be ascertained if possible by agreement, subject to certain limitations imposed by the Act itself—and that, failing agreement, the County Court Judge was to ascertain the amount, and also,

upon a proper application made to him, to determine whether in the altered condition of things the weekly payment should be ended, diminished, or increased. Therefore it was within the jurisdiction of the County Court Judge to deal with these matters, and the workman is in the same position as if the amount of compensation had in the first instance been left to be determined by the County Court Judge himself." Farwell, L.J., expressed himself thus—"When clause 12 of Sched. 1 speaks of 'ended,' it means ended, particularly when it is contrasted with 'diminished' or 'increased,' and it means a final end, so that the whole matter may be terminated. If the appellant is right, there could be no end, however much the learned County Court Judge desired to put an end to the compensation. If the parties arrive at the amount of compensation by agreement, then clause 12 of Sched. 1 brings in the County Court Judge as arbitrator whether the weekly payment is to be increased, diminished, or ended, just as much as when he has awarded the amount as arbitrator in default of agreement; and when he has proceeded under clause 12 and has ended the matter, his functions are ended also, and he has no longer any jurisdiction." This was the decision appealed against. It clearly amounted, in my view, to a decision that the ending of the weekly payments which the County Court Judge was empowered to order was not an ending *pro hac vice* but a final ending, terminating at once and for ever the liability of the employer to pay compensation, and terminating similarly the correlative right of the workman to receive it.

It was contended on behalf of the appellant, on the hearing of that appeal, as it has been contended on behalf of the appellant on the hearing of this appeal, that there was no finality except death; that the workman having established the liability of the employer, the right to compensation survived; that though the payments may cease on the apparent ending of the incapacity under such an order, the liability on the recurrence of incapacity is not brought to an end, that the order of the County Court Judge terminating the agreement was void, as being in excess of jurisdiction; but the point decided was not that an order merely terminating the agreement was valid, nor that the County Court Judge had merely jurisdiction under rule 12 to order that the weekly payments should be temporarily suspended, but the substantial point was that he had jurisdiction to declare that these payments should be ended finally for all time, and that, as I have already said, the liability of the employer to pay and the correlative right of the workman to receive these payments should both cease altogether. It is, I think, only necessary to read the judgments to see that this was so. I was a party to that decision, though I did not deliver a separate judgment. It was in this sense that I understood it; and so understanding it, I was of opinion then, as I am now, that it was absolutely right. But whether right or wrong, it is, being a decision of this House, binding, and must be taken to have settled the law. If it be the law, then the first contention of the appellant in this case is necessarily unsound and erroneous, because that contention is founded upon the supposition that the County Court Judge has no jurisdiction under section 16 to decide that the weekly payments should finally cease.

For the purposes of the decision of this appeal it is unnecessary to consider the second question raised by the appellant, namely, the question of the legality of the second provision of the agreement of the 3rd March 1909 to the effect that "the workman agrees to accept such payment in full discharge of the liability of the employer to pay compensation under the provisions of the Workmen's Compensation Act 1906"; but as the matter may be of some importance I think it well to deal with it. The argument to show that this provision is illegal appears to me to confound the imposition of liability by the statute with the discharge of it. It is quite true that by the combined operation of section 1, sub-section 1, of the statute, and section 1, subsection (*b*), of the 1st Sched., a liability is imposed upon the employer to pay, where death does not ensue, a weekly payment not exceeding the amount specified during incapacity; but, despite that provision, the amount or duration of the compensation—that is to say, the duration of the weekly payments—may be settled either by agreement or by arbitration. If the arbitrator, when convinced that recovery is complete, can order that the payments shall finally cease, and it has been decided that he can, what possible illegality can there be in the parties contracting that the payments made up to the time when he shall so decide shall be received by the workman in full satisfaction? The agreement deprives him of nothing. It only binds him to take in satisfaction the payments up to the time when the arbitrator deprives him of them. He could not get the payment longer if it had been fixed by a regular award. In addition, Sched. I, section 15, sub-section 2, shows that a workman's fitness for employment may be determined by agreement. Under section 16 the amount of the payment on review may also be settled by agreement; under section 17 the amount of the lump sum payable on redemption may be so fixed, and Schedule 2, sub-section 9, enacts that, "where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator, or by agreement," &c. In the face of these provisions, which contemplate the settlement of all these things by agreement, it seems to me impossible to contend that a clause such as that contained in this agreement is void or illegal, providing, as it merely does, that the weekly payment fixed by the agreement, if paid until the arbitrator decides that the workman is no longer entitled to receive it,

shall be accepted in discharge of the employer's liability. On the main and substantial questions raised I think, therefore, that this appeal fails.

On the narrow technical question as to the form of the order, I think that the appellant is right, unless that order can be read as if it directed that the performance of the agreement should cease—*i.e.*, that the weekly payments should be ended. I doubt if it can be so read, though I have no doubt that the County Court Judge intended in this case, as in *Nicholson* v. *Piper*, to decide that the payment under the agreement, not the agreement itself, should terminate. I presume that the County Court Judge has power, if the matter is referred back to him, to amend his order, and the appellant may possibly not care for a decision in his favour on this technical point. On the point of form, however, I think the appeal well founded. Lord Mersey desires me to say that he concurs in this judgment.

LORD SHAW—I think that when the learned County Court Judge decreed that the agreement be terminated, he meant, and it is the natural meaning of his adjudication, that the payment of compensation was ended. As, however, your Lordships think that the omission of a statement to this effect is an informality requiring to be cured, I agree that, if the appellant so wishes, the case may be remitted to have this done.

On the merits, I agree that it was competent to the Judge to end the compensation for ever. That, in my view, is settled by *Nicholson* v. *Piper*. But I am of opinion that the words "ended, diminished, or increased" include not merely ending the compensation for ever, but ending it for a time. The language and meaning of the Act are to the effect that compensation is to be made for and during incapacity. Cases may easily be figured in which the capacity for work may for a time return, and then incapacity may again recur. A careful prognosis may indicate a certain periodicity of illness with intervals of fitness for work, or it may suggest such an uncertainty of a continuance of health as to cloud the workman's whole future with peril. These are just the cases in which the County Court Judge may feel bound to end the payment, not for ever, but for a time. In the fear, apparently, of the word "ended" being more literally construed, the course has been sometimes taken of a nominal payment being adjudged so as to preserve a form of continuity, and, so to speak, to keep open the compensation account. This course is intelligible. I do not, any more than did Lord Halsbury in *Nicholson* v. *Piper*, say that it is incompetent. But in my opinion it is unnecessary. In the cases referred to, the simple course is, in my view, to make the payment end until further order. I respectfully agree in the judgment proposed.

The appellant not desiring to have the case remitted to the County Court, order appealed from should be affirmed, and appeal dismissed with costs.

Appeal dismissed.

Counsel for the Appellant—J. Sankey K.C.—E. Brown—Dawbarn Young. Agents—Pattinson & Brewer, Solicitors.

Counsel for the Respondents—Mordaunt Snagge. Agents—C. De J. Andrews, Solicitor.

PRIVY COUNCIL.

Wednesday, February 21, 1912.

(Before Lords Macnaghten, Shaw, Mersey, and Robson.)

WEBSTER *v.* BOSANQUET.

(ON APPEAL FROM THE SUPREME COURT OF CEYLON.)

Contract—Breach of Contract—Liquidated Damages—Penalty.

Question whether a sum named in a contract for the sale of the crops of certain tea estates was by way of penalty or liquidated damages. Reference to *Clydebank Engineering Company, Limited* v. *Castaneda* ([1905] A.C. 6, 7 F. (H.L.) 77, 42 S.L.R. 74), where test is reasonableness.

The *facts* sufficiently appear from their Lordships' judgment, which was given, after consideration, as follows:—

LORD MERSEY—This is an appeal from a judgment of the Supreme Court of Ceylon, dated the 21st December 1909, reversing a judgment of the District Court of Colombo, dated the 1st March 1909. The question raised by the appeal is whether a payment stipulated by deed to be made by the defendant to the plaintiff is to be regarded as a payment by way of liquidated damages or merely as a penalty.

The Court of first instance held that the stipulation was for a payment by way of liquidated damages; the Supreme Court took a different view and held that the stipulation was for a penalty only.

There is no dispute about the facts of the case, and they are as follows:—In 1891 the plaintiff and the defendant entered into partnership for the purpose of exporting and selling Ceylon tea, and particularly tea grown upon certain estates in the island belonging to the defendant and known as the Palamcotta and Marawilla estates. The part of the plaintiff in connection with the enterprise was to travel for the purpose of pushing the sale of the tea, and this he did so successfully that by 1895 he had established a valuable trade. In that year the partnership was dissolved, the plaintiff buying the defendant's interest in the goodwill for a sum of £3500, and taking over the assets at a valuation. The dissolution was effected by a deed dated the 14th February 1895, which contained among other things a provision that the defendant should for a period of ten years after the 30th July 1896 sell the whole or any part of the crops of the Marawilla and Palamcotta estates to the plaintiff at a