HOUSE OF LORDS.

Friday, November 30, 1917.

(Before Lords Dunedin, Atkinson, Parker, Sumner, and Parmoor.)

GREAT WESTERN RAILWAY COMPANY *v.* HELPS.

(APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.)

Master and Servant—Workmen's Compensation—Compensation—Computation of the Compensation—Average Weekly Earnings—"Tips" Received under Sanction of the Employer—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *First Sched.* (1) (*b*), (2) (*a*).

A railway porter met with an accident under circumstances which entitled him to compensation under the Workmen's Compensation Act 1906. His employers contended that the compensation due to him fell to be computed on the basis of his weekly wage, viz., 25s. 10d., whereas the arbitrator took into account the average weekly sum received from passengers as "tips," bringing the average weekly earnings to 37s. 10d.

Held that where a workman systematically receives with the sanction of his employer gratuities which involve no breach of duty to his employer, such gratuities form part of his average weekly earnings.

Penn v. *Spiers & Pond Limited*, [1908] 1 K.B. 766, *approved.*

The respondent's counsel were not called on.

The *facts* appear from Lord Dunedin's judgment.

LORD DUNEDIN—This is an exceedingly clear case—the facts are simple. The respondent was a passenger porter stationed at Bath, and in his general occupation as a porter he was in the habit of getting tips from passengers. He was injured in the course of his employment by an accident arising out of his employment, and it is not denied that he is entitled to compensation. But the controversy between the parties is whether in estimating his compensation there is to be taken into account not only the weekly wage which he gets from the company, but also such sum as represents his average takings in this matter of tips. It was only a few weeks ago that I had occasion in this House, in the case of *Woodilee Coal and Coke Company Limited* v. *M'Neill*, [1918] A.C. 43, 55 S.L.R. 15, to point out that compensation which is directed to be paid by an employer to a workman who is injured by accident arising out of and in the course of his employment in section 1 of the Workmen's Compensation Act has its natural meaning—that is to say, something that is to be paid which makes up for the loss that the man has sustained. It is quite true that the full measure of the compensation is afterwards cut down by several rules, because the compensation which is directed to be paid under the first section is not compensation in general, but is compensation in accordance with the first schedule, and when we go to the first schedule we find certain things which, so to speak, cut down the compensation; but when we go to the first schedule we find a set of rules there for the computation which has the phrase "earnings" and "average weekly earnings," and it is upon a computation based upon "earnings" and "average weekly earnings" that a sum is arrived at. The whole point therefore is—Do these tips fall within the statutory expression "earnings"? If you were to ask a person in ordinary common parlance what this porter earned the answer would be—"Well, I will tell you what he gets; he gets so much wages from his employer and he gets on an average so much in tips."

It has been sought in the argument addressed for the appellants to limit the meaning of "earnings" to what the workman gets by what I may call direct contract with his employers. The simple answer is that the statute does not say so—it uses the general term "earnings" instead of the term "wages," or that expression "what he gets from his employers," and as a matter of fact the employer in a case where there is a known practice of giving tips obviously gets the man for rather less direct wages than he would if there was not that other source of remuneration to the man when he is in his post. More than that, in this case the employer is obviously a party and privy to the whole arrangement.

The learned arbitrator found as a fact "that the giving and receiving of these tips has been 'open and notorious,'" and says, "I find as a fact that they have been sanctioned by the employers." Now that fact found by the arbitrator could only be challenged on one of two grounds, either if it was founded upon some erroneous legal proposition which underlay it, or if it was a fact which had no evidence in the case to support it. It is quite obvious that neither of these objections can be stated in this case against the finding, and therefore the finding rules. The result is that these tips are part of the man's ordinary earnings.

I entirely agree with the decision of the Court of Appeal in the case of *Penn* v. *Spiers & Pond*, [1908] 1 K.B. 766, which was decided in 1908 by the Court of Appeal, and I would especially also commend the very careful limitation that is laid down in that case by the Master of the Rolls where he says—"To avoid misconception we desire to state that nothing in this judgment extends to 'tips' or gratuities (*a*) which are illicit, (*b*) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer, or (*c*) which are casual and sporadic and trivial in amount." There is here, as I have already pointed out, a direct finding which shows that this (*c*) is excluded in this case.

As regards the subsequent case of *Skailes* v. *Blue Anchor Line Limited*, [1911] 1 K.B. 360, not only do I find that the majority of the Court adhered to the judgment in *Penn* v. *Spiers & Pond*, but the dissentient member of the Court, Fletcher Moulton, L.J.,

dissents, not because he does not agree with the decision in *Penn's* case—indeed, he was a party to that judgment himself—but because the question there being upon section 13, what was the true meaning of remuneration, he held that "remuneration" and "earnings" were not synonymous terms, whereas the other judges held that they were.

I think that the appeal should be dismissed.

LORD ATKINSON—I concur and I have nothing to add.

LORD PARKER—I concur.

LORD SUMNER—I concur.

LORD PARMOOR—I think that the true effect of Mr Schiller's argument would be to limit earnings to the amount which an employee is entitled to claim under or in consequence of his contract of service. I use those two words because Mr Schiller used them himself. I think this construction of the Workmen's Compensation Act is not accurate, and that the word "earnings" is not so limited in its meaning, and if it is not so limited then the question arises whether notorious tips such as are received by a railway porter should be taken into account. It was within the competence of the arbitrator to find that the tips in question were earned by the applicant in his employment, and it appears to be a finding which settles the matter in this case. The history of these tips points in the same direction. I think it is quite accurately stated by the Master of the Rolls in his judgment in these words—"At one time and for a good many years the Great Western Railway Company had a rule which said that no gratuity is allowed to be taken from passengers or other persons by any servant of the company. It was found that that rule was habitually disregarded, it was a mere waste of paper, and in 1913 new rules were passed. The old rule was abolished and there is this one now—that no servant of the company is allowed to solicit gratuities from passengers or other persons." I should like to associate myself with the caution expressed by the noble and learned Lord on the Woolsack, that the decision in this case is applied to where the tips are notorious and well known, and not to where tips are sporadic in character.

Appeal dismissed.

Counsel for the Appellants—Schiller, K.C.—Cotes-Preedy. Agent—L. B. Page, Solicitor.

Counsel for the Respondent—H. Gregory, K.C.—Wethered. Agents—Church, Adams, Prior, & Balmer, Solicitors, for Arthur Withy, Bath.

HOUSE OF LORDS.

Friday, January 25, 1918.

(Before Lords Dunedin, Atkinson, Parker, and Sumner.)

ERTEL BIEBER & COMPANY *v.* RIO TINTO COMPANY, LIMITED.

DYNAMIT ACTIEN-GESELLSCHAFT (VORMALS ALFRED NOBEL & COMPANY) *v.* RIO TINTO COMPANY, LIMITED.

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

Contract—War—Rescission or Suspension—Suspensory Clause—Legal Proceedings against Enemies Act 1915 (5 *Geo. V, cap.* 36).

In the first appeal the respondents, an English company, brought an action under the Legal Proceedings against Enemies Act 1915 to have it declared that contracts entered into by them with the appellants, a German firm, were avoided by the outbreak of war with Germany. The contracts contained a clause providing that if owing to war the respondents were prevented from delivering the ore which was the subject of the contracts the obligation to ship and/or deliver should be suspended during the continuance of the impediment and for a reasonable time afterwards. The Court of Appeal decided in favour of the respondents on the ground that the contracts involved intercourse with the enemy (116 L.T.R. 810). *Held* that this view was correct, and that in any view the contracts were void as being contrary to public policy.

In the other two appeals there were contracts in somewhat similar terms, but executed in Germany in the German language. It was contended that the rights of the parties fell to be determined by German law. *Held* that even if this were so the *onus* of proving the German law different from the English had not been discharged by the appellants. Further, that even had they proved that German law regarded such a contract as enforceable, that fact would not weigh with the English courts if they considered the contract contrary to public policy. The ruling in the first appeal therefore applied.

Furtado v. *Rogers*, 3 Bos. & P. 191, and *Janson* v. *Driefontein Consolidated Mines Company*, [1902] A.C. 484, *followed.*

Esposito v. *Bowden*, 7 E. & B. 763, *considered* and *explained.*

The *facts* appear from their Lordships' considered judgments.

Ertel Bieber & Company v. *Rio Tinto Company, Limited.*

LORD DUNEDIN—The respondents, whom I shall hereafter allude to as the plaintiffs, taking advantage of the provisions of the