Counsel for the Claimant (Appellant)—Roberton Christie—J. B. Young. Agents—R. & R. Denholm & Kerr, W.S., Edinburgh—John Cuthbert, London.

Counsel for the Respondents—Munro, K.C.—Harold Beveridge. Agents—W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge, Greig, & Company, Westminster.

COURT OF SESSION.

Tuesday, May 20.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

SMITH *v.* PETRIE.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (3); *Sched. I,* 16; *Sched. II* (9)—*Memorandum — Recording — Agreement to Pay Compensation during Total Incapacity—Finding that Workman was Fit for Some Work — Duty of Arbiter to Determine Extent of Wage-Earning Capacity.*

An employer agreed to pay an employee a weekly sum as compensation during total incapacity. The employee having subsequently sought to have a memorandum of the agreement recorded the employer objected on the ground that total incapacity had ceased and craved the arbiter to end or diminish the compensation. It was proved that the workman though unable to resume his former work was fit for some work, but no evidence was adduced to show what particular kind of employment he was fit for. The arbiter having dismissed the employer's application and granted warrant to record the memorandum, the employer appealed.

Held that the arbiter ought to have pronounced a finding whether the workman's wage-earning capacity was *nil*, or, if not, to what amount of compensation, if any, he was entitled.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between David Petrie, barman, Wallfield Place, Aberdeen, *respondent*, and John Smith, Pittodrie Bar, King Street, Aberdeen, *appellant*, the Sheriff-Substitute (YOUNG) granted warrant to record a memorandum of an agreement between the parties dated 27th December 1911, dismissed the employer's application to diminish or end the compensation, and at his (the employer's) request stated a Case for appeal.

The *facts* as set forth in the Case were as follows—"On 27th December 1911 the respondent David Petrie, then a barman in the employment of the appellant John Smith at Pittodrie Bar, King Street, Aberdeen, was injured within the premises there by falling down an open hatchway. By this accident, which arose out of and in the course of his employment, the respondent, who is a heavy man fifty years of age, was severely injured in his left arm and shoulder, the humerus being fractured a little below the shoulder. At the time of the accident his wages were 24s. a-week, and by an agreement made on 27th December the appellant agreed to pay him the sum of 12s. weekly during the period of his total incapacity. The agreement was acted on up to 6th July 1912, and on 16th July the respondent applied to have a memorandum of the agreement registered. By minute lodged on 18th July the appellant craved the Court to end the weekly payment of 12s. as from 6th July 1912 on the ground that the respondent's incapacity had altogether ceased as from that date. The minute contained an alternative crave to diminish the weekly payment by such amounts and at such dates as the Court might think fit. A proof having been taken it appeared on the evidence that the appellant is still quite unable to resume his former occupation of barman, and is not fit for its duties because of weakness and pain. He is not pretending to be worse than he is, and his present disability is not due to the neglect of means to promote recovery. It was proved, however, in general terms that though incapable of doing the work at which he used to be employed he is fit for some work. In August last, and again in September, he tried to do hoeing work in the fields, but found he was unequal to it, and he has not sought for work because he did not feel able for it, and did not know of any work he could do. There was no evidence to show what particular kind of employment he was fit for, and what earnings could be had at such work as he might be able to do; and no data were furnished to enable the Court to fix compensation on the basis of partial incapacity. At the proof the attention of parties was directed to the absence of specific information in this connection, and further evidence was suggested but none was offered or proposed. Not inclined to proceed merely on conjecture I dismissed the appellant's application and granted warrant to record the memorandum of agreement."

The *question of law* was—"Whether in the circumstances I was justified in dismissing the application for review and allowing the memorandum to be recorded."

After the case had been boxed the appellant presented a note to the Court in which he craved their Lordships to remit the case to the arbiter in order that he might pronounce findings as to, *inter alia*, the nature of respondent's injuries, his (the respondent's) efforts to find work, and as to whether or not, he (the respondent) was at the date of the proof still totally incapacitated.

The following additional *questions of law* were also submitted—"1. Whether it is competent after the total incapacity of the workman concerned has ceased, to order to be recorded a memorandum of

agreement conditioned in point of time by the phrase 'during the period of total incapacity?' 2. Whether an employer who has entered into an agreement containing the said condition, and who has proved to the satisfaction of the Court that his employee is at the date of the proof, or at some earlier date, able for some work, has discharged the *onus* of proof lying upon him so as to be entitled to have the agreement declared at an end; and whether the *onus* is thereafter upon the workman to prove partial incapacity, and the extent thereof? 3. Whether it is necessary before the arbitrator can diminish the compensation to be paid that he should have direct evidence as to the workman's capacity to earn a specific weekly wage at a specific employment?"

Argued for appellant—The arbiter was in error in ordering the memorandum to be recorded where, as here, total incapacity had ceased—*Popple* v. *Frodingham Iron and Steel Company*, [1912] 2 K.B. 141; *M'Lean* v. *Allan Line Steamship Company, Limited*, 1912 S.C. 256, 49 S.L.R. 207. The evidence showed that the respondent was able to do some work, and that being so the agreement was spent, and the *onus* thereafter lay on the respondent to prove partial incapacity—*M'Ewan* v. *William Baird & Company, Limited*, 1910 S.C. 436, 47 S.L.R. 430; *Wilsons and Clyde Coal Company, Limited* v. *Cairnduff*, 1911 S.C. 647, 48 S.L.R. 500. Failing his doing so, the arbiter should have reduced the compensation — *Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009. The cases of *Durie* v. *Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708, and *Ball* v. *William Hunt & Sons, Limited*, [1912] A.C. 496, 49 S.L.R. 711, were distinguishable, for there it was proved that the workman had sought for work but failed to find it. *Esto* that the question was not whether the respondent's physical incapacity had ceased, but whether his wage-earning incapacity had come to an end, the appellant averred that it had, and that being so, it was the arbiter's duty to have determined that question in disposing of the appellant's application to vary. This he had omitted to do, for the application to vary had been dismissed. He was also in error in ordering the memorandum to be recorded before determining that question—*Hanley* v. *Niddrie and Benhar Coal Company, Limited*, 1910 S.C. 875, 47 S.L.R. 726. The case of *Coakley* v. *Addie & Sons, Limited*, 1909 S.C. 545, 46 S.L.R. 408, was distinguishable, for it implied a subsisting agreement although the workman might have temporarily recovered. It was the duty of the arbiter to have allowed a proof as to the respondent's wage-earning capacity, as was done in the cases of *Carlin* v. *Stephen & Sons, Limited*, 1911 S.C. 901, 48 S.L.R. 862, and *Cardiff Corporation* v. *Hall*, *cit. sup.* The case ought therefore to be remitted again to the arbiter to ascertain the facts set forth in the appellant's note.

Argued for respondent—*Esto* that the question was whether the respondent's total incapacity as a wage-earning unit had ceased, there was no evidence that it had, for where, as here, the consequences of his injury prevented his getting work, it was immaterial that his physical condition allowed him to work as before—*Ball*, *cit. sup.* The arbiter therefore was right in ordering the memorandum to be recorded—*Bryson* v. *Dunn & Stephen, Limited*, December 14, 1905, 8 F. 226, 43 S.L.R. 236. It was the appellant's duty, if he wished the compensation diminished, to aver specifically what kind of work the respondent was fitted for, and where he could find it. This he had failed to do, and the arbiter was therefore entitled to dispose of the case without further evidence—*Bryce & Company* v. *Connor*, December 6, 1904, 7 F. 193, 42 S.L.R. 154.

At advising—

LORD PRESIDENT — In this case the respondent, who was a barman in the employment of the appellant, met with an accident in the course of his employment on the 27th December 1911. The parties came to an agreement at that time under which the appellant was to pay the respondent a sum of 12s. weekly during the period of his total incapacity. Although the agreement was made on or about the date of the accident, no memorandum of it was recorded at that time; but eventually the respondent proposed a memorandum which was drawn up as upon the 16th July 1912, in which he set forth that the appellant had agreed to pay him 12s. weekly during the period of his total incapacity, and he craved that the memorandum should be recorded in the special register of the Sheriff Court of Aberdeen. The appellant objected to the recording of the memorandum by letter to the Sheriff Clerk, and accordingly, in terms of the Act of Sederunt, the respondent was told that the memorandum could not be recorded without special warrant from the Sheriff.

At the same time as he objected the appellant lodged a minute in which he craved the Court "to end the weekly payment of 12s. agreed to be paid by the said John Smith to the said David Petrie during the period of his total incapacity, and that as from the sixth day of July 1912, or to diminish the said weekly payment by such amounts and at such dates as the Court may think fit. The incapacity of the said David Petrie for work in respect of which the said weekly payment was agreed to having now altogether ceased, the said weekly payment should be ended." A proof was led on both these applications.

Now I pause here for a moment to say two things—in the first place, the appellant admits the genuineness of the memorandum as put forward—that is to say, he admits that he had agreed to pay the claimant 12s. weekly during the period of his total incapacity. The second matter that I mention is this, that he faces the situation—that is to say, that he says that the incapacity has altogether ceased upon the sixth day of July, and therefore craves

that the weekly payment should be put an end to altogether and the memorandum refused; but he also, alternatively, says, if it has not altogether ceased, the payment of 12s. ought to be reduced to such amount as the Court thinks fit.

Now that procedure, I think, was quite right, and in accordance with what has been laid down by this Court in several cases. The proof having been taken on both matters, the learned Sheriff-Substitute now gives us the result of the proof and I take it from a single sentence. A proof having been taken—I am now quoting from the case—"it appeared on the evidence that the appellant is still quite unable to resume his former occupation of barman, and is not fit for its duties because of weakness and pain. He is not pretending to be worse than he is, and his present disability is not due to the neglect of means to promote recovery. It was proved, however, in general terms that though incapable of doing the work at which he used to be employed he is fit for some work." Then, after setting forth that the respondent had tried to do certain work and found he was unable to do it, and did not try to get any other work, and that there was no evidence by either party to show what kind of work he was fit for, the learned Sheriff goes on to say—"I dismissed the appellant's application, and granted warrant to record the memorandum of agreement." And the question is whether that was a proper procedure under the circumstances.

The appellant relied particularly upon the judgment of the Court of Appeal in England in the case of *Popple* v. *The Frodingham Iron Company* ([1912] 2 K.B. 141), where an agreement had been entered into to pay a certain sum during the time the workman should be totally incapacitated for work. The application to register that agreement was given in that case and that was opposed, and the report bears that medical evidence was called which satisfied the learned Judge that the applicant was not totally incapacitated; that being so, he refused to record the memorandum, and that refusal was upheld by the Court of Appeal.

Now the difference I think between that case and this is this—that we do not find there that there was any counter application to reduce. It seems to have been a pure question of shall the memorandum be registered or shall it not, and the Court of Appeal held, inasmuch as the memorandum was to pay during total incapacity, and inasmuch as the evidence was that there was not total incapacity, the memorandum could not be registered. If this case was the same as that I should come to the same conclusion. I say with respect that I think *Popple* was perfectly rightly decided. But then I do not think *Popple* exhausts the position in this case, because here we have not only got a mere question of recording the memorandum, but we have also got the petition to reduce the compensation.

I think that the learned Sheriff has not really, in the true sense of the word, exhausted the case. I am not sure that he did not mean really by his finding to hold that the man was still incapacitated as a working man for earning his wages, but he has not really said so. In other words, I think what the learned Sheriff has said is really a contradiction in terms, but then I do not think that the justice of the case would be reached by mere refusal to record the memorandum as it was in *Popple's* case.

The cases—which I need not go through because we have had them very recently again and again—show this, that what you have got to look at is the wage-earning capacity of the man, and you have got to consider whether that wage-earning capacity has been either wholly destroyed or partially destroyed by the accident. A mere medical finding that the person is enabled to do some work leaves the question unsettled, because you have still got to consider whether his failure to earn wages, if there is such a failure at the time, is either due to a deterioration of his wage-earning capacity or is due to his own inertness and supineness in trying to find work, or is due to the state of the market. In either of the latter cases the employer is not liable. In the first case he is; it may be difficult to find the fact, but the fact is a fact for the arbiter. Now I humbly think that the learned Sheriff-Substitute has not at least expressed in a proper form his opinion upon that matter. I rather guess that he means to hold that the man's wage-earning capacity is at the moment entirely gone—I guess that from the fact that he wished to record the memorandum—but then I do not think that he can allow that to stand with the finding that he is fit for some work. I think he must either find that the workman's wage-earning capacity is still entirely gone, and that therefore he is entitled still to the payment of 12s., or if his wage-earning capacity is not entirely gone and he can earn some wages, then I think he must express that in shillings and pence in order to see what is to be the true judgment under the application to review the payment which has already been made.

I think, therefore, that the learned Sheriff-Substitute must have the case back again in order that there may be a distinct finding as to whether the workman's wage-earning capacity is gone, or whether, if it is not gone, the Sheriff is still of opinion that as a matter of justice he ought to be entitled to either 12s. or to some other less sum as a weekly compensation.

LORD JOHNSTON—I concur.

LORD MACKENZIE—On 16th July 1912 the workman presented to the Sheriff Clerk for registration a memorandum of agreement made with his employer dated 27th December 1911, in these terms — "The respondent agreed to pay the claimant twelve shillings weekly during the period of his total incapacity."

Two days later, on 18th July, the employer objected to the memorandum being recorded, and on the same day lodged a

minute asking the Court to end the weekly payment of 12s. as from 6th July 1912, or to diminish it by such amounts and at such dates as the Court might think fit. "The incapacity of the said David Petrie for work in respect of which the said weekly payment was agreed to, having now altogether ceased, the said weekly payment should be ended." The Sheriff-Substitute allowed a proof on both applications, and in doing so I think he was clearly right. As a result of the evidence it appears to me that one of three views might be taken. (1) The employer's extreme contention might be sustained, in which case the agreement would altogether cease to be operative, because the workman was earning as good wages as before the accident; (2) the workman's extreme contention might be sustained, in which case, there being no change of circumstances, the agreement would continue wholly operative and the weekly payment of 12s. would be continued; or (3) the employer's alternative contention might be sustained, in which case the agreement would be neither wholly operative nor inoperative, the workman not being wholly incapacitated, nor yet having wholly recovered.

In the case of (3), which appears, on the statements of the facts by the Sheriff-Substitute, to be the case here, my opinion is that it was the duty of the Sheriff-Substitute if he came to the conclusion that the workman was no longer wholly incapacitated, to express this in terms of shillings and pence, and then apply it to the memorandum of agreement. The course adopted of allowing the memorandum to be recorded as if it were wholly operative, if in the opinion of the Sheriff-Substitute the evidence contradicts this view and shows that it is no longer wholly operative, is illogical. It is further inconsistent with the authorities. I refer to the opinions of Lord Kinnear in *M'Ewan* v. *Baird & Company*, 1910 S.C. at p. 442, Lord Salvesen in *Hanley* v. *Niddrie and Benhar Coal Company*, 1910 S.C. 875, and Buckley, L.J., in *Popple* v. *Frodingham Iron and Steel Company*, 1912, 2 K.B. 141.

The question was argued to us as one of *onus*. Upon this I think it is not expedient *ab ante* to lay down too precise a rule. It is apparent that if a workman is entitled to have a memorandum of agreement in such terms as the present recorded, in the absence of any change of circumstances, the employer must in the first instance lead some evidence in the application for review to show that his wage-earning capacity is no longer *nil*. If the employer succeeds in convincing the Sheriff-Substitute of this fact, he will have discharged the *onus* upon him. It is not, in my opinion, necessary for him to prove to demonstration what wage the workman can earn. In the absence of any other evidence it is the duty of the Sheriff-Substitute, with such material as he has, to fix an approximate sum.

I think the case should go back to the Sheriff-Substitute so that the agreement may be recorded with a memorandum of the amount for which it is operative. This opinion proceeds on what appears to me to be the true construction of the case as stated by the Sheriff-Substitute. If the view of the Sheriff-Substitute really was that total incapacity to earn wages continued I should have thought the course he took right.

LORD KINNEAR did not hear the case.

The Court pronounced this interlocutor—

"The Lords having considered the stated case along with the note for the appellant . . . *hoc statu* remits the case to the Sheriff-Substitute as arbitrator to pronounce a finding whether the wage-earning capacity of the respondent is *nil*, or if not, to what amount of compensation, if any, he is entitled, and to report."

The Sheriff-Substitute having subsequently reported that the workman's earning capacity was *nil*, the Court on 20th May 1913, in respect that it was stated that the appellant did not now intend to insist in his appeal, of consent dismissed the same, and decerned.

Counsel for Appellants—Moncrieff, K.C. —A. M. Mackay. Agents—Simpson & Marwick, W.S.

Counsel for Respondent—Lippe—Black. Agents—Macpherson & Mackay, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, June 4.

(Before Lord Kinnear, Lord Johnston, and Lord Mackenzie.)

HODGSON *v.* MACPHERSON.

Justiciary Cases — Statutory Offences — Gaming — Betting Acts, 1853 (16 *and* 17 *Vict. cap.* 119), *secs.* 1 *and* 3, *and* 1874 (37 *Vict. cap.* 15), *sec.* 4—*Room Kept for Settling up Accounts in respect of Bets Made and Money Received Elsewhere.*

The Betting Act 1853, sec. 1 (extended to Scotland by the Betting Act 1874, sec. 4), enacts—"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof . . . betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper . . . as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid . . ."