REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Tuesday, April 11, 1916.

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

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

CONSIDINE AND ANOTHER *v.* M'INERNEY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 9, *Sched. I* (3)—*Compensation—Calculation of Amount.*

An employee of the Crown at the Dublin Central Criminal Asylum received an injury by an accident in the course of his employment which incapacitated him for life. He was accordingly retired upon a pension and paid a gratuity.

In his subsequent claim under the Workmen's Compensation Act 1906 he claimed that these payments should be disregarded in assessing the compensation due to him.

Held that both pension and gratuity were a "payment, allowance, or benefit" under Schedule I (3) of the Act, and should be taken into account in fixing the amount of weekly compensation.

Decision of the Court of Appeal in Ireland (1916, 2 Ir. R. 193) *reversed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. I (3), enacts—"In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of the incapacity . . ."

The *facts* are given in their Lordships' considered opinion, which was delivered by

LORD CHANCELLOR (BUCKMASTER)—This case raises for determination a point under the Workmen's Compensation Act 1906 at once novel and important.

The respondent was injured on the 10th December 1913 in the course of his employment as an attendant at the Central Asylum, Dundrum, County Dublin, where he had served since the 16th November 1893 under the regulation of the Civil Service Commissioners. His injury is permanent, and prevents the possibility of his continuing to discharge his duties. He was accordingly retired from the employment of the asylum on the 24th July 1914, and on such retirement received a gratuity of £67, 7s. and a superannuation allowance or pension of £21, 15s. per annum.

The Workmen's Compensation Act 1906 is, by section 9, made applicable to workmen employed by or under the Crown in any capacity other than that of naval or military service. The respondent accordingly, upon his injury, became entitled to compensation under the statute. In due course he caused a request for arbitration under the Act to issue in the Court of the Recorder of Dublin against the appellants, and on the hearing of this application an award was made on the 6th January 1915 awarding him 9s. 6d. a-week as from the 24th July 1914 until further order. In fixing this sum the Recorder states that he had regard to all the proved circumstances, including the fact that the respondent had a pension from the asylum authorities, though he says that he did not take into account the amount of the pension. The respondent appealed from such award to the Court of Appeal, who set the award aside and remitted the matter to the Recorder upon the ground that the pension represented a payment out of money which the workman must be taken to have saved out of his earnings. From that judgment the present appeal has been brought by the inspectors of the lunatic asylum, and its determination depends upon the meaning that ought to be attached to certain words contained in clause 3 of Schedule I of the statute. By section 1 of the Act the liability of the employer to make compensation is to be regulated by the provisions of this schedule, subject to certain exceptions not material for the present purpose, and the relevant words of clause 3 of the first schedule are these—"In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to

the amount of that difference as under the circumstances of the case may appear proper." There can be no doubt that the pension received by the respondent is within the scope of this wide and unqualified language; but the sense of the statute requires the imposition of some restriction as this House declared in the case of *M'Dermott* v. *Steamship "Tintoretto,"* 48 S.L.R. 728, [1911] A.C. 35. It was there decided that debts owing from the master to the workman, and the payments which under the Merchant Shipping Act a shipowner is bound to discharge in favour of a seaman in his service, were not within the meaning of the words in the schedule. The respondent seeks to impose a further limitation, and asserts that, to be included, the payment must be one voluntarily made by the employer and arising entirely out of his bounty or compassion. The pension and the payment granted by the asylum authorities are, he asserts, not payments of this description, but payments to which he is entitled, to which he has a right, although that right is not of a character that could be enforced by any legal proceedings. It is, I think, desirable to state the provisions of the various Acts under which this pension arises, in order that the true position of the respondent under these statutes may be ascertained before testing the soundness of this contention.

By the Superannuation Act 1834 (4 and 5 Will. IV, c. 24) it is provided (see section 9) that superannuation allowances to be thereafter granted shall not exceed certain proportions set out in sections 9 and 10 of the statute and measured according to years of service.

By section 11 no pension may be granted to any officer or clerk under the age of sixty-five unless it appears on the certificate of the head of his department and of two medical practitioners that he is incapable from infirmity of mind or body of discharging the duties of his post; by section 27 certain abatements are made from the salary and emoluments of the persons employed in the several offices specified in the schedule to the Act in order to reduce the charge incurred in providing the allowances. In this section for the first time in the Act a reference is made to persons "entitled to superannuation allowance under this Act," but I am unable to regard these words as anything but a description of the class of persons to whom the superannuation allowances would be paid, and indeed by section 30 it is expressly provided that nothing in the Act shall be construed to give any person an absolute right to compensation for past services or to any superannuation or retiring allowance under the Act. By an Act passed in 1857 (20 and 21 Vict. c. 37) section 27 of the earlier Act was repealed, so that thereafter the provision of the pension was entirely independent of any money actually retained or received out of the salary or emoluments of the officers or clerks.

In 1859, by 22 Vict. c. 26 (the Superannuation Act 1859) a different scale was imposed from that provided by the Act of 1834, and by section 10 sixty was substituted in the place of sixty-five as the age below which superannuation allowances should not be granted unless upon medical certificate that the recipient is incapable from infirmity of body or mind of discharging the duties of his situation and that such infirmity is permanent.

By the Superannuation Act of 1887 independent provision was for the first time made for the case of a person injured in the discharge of his duty, and by section 1 it was enacted that in such a case the Treasury might grant the person injured such gratuity or annual allowance as they might consider reasonable, with a provision that the gratuity should not exceed one year's salary and an allowance should not, "together with any superannuation allowance to which he is otherwise entitled, exceed the salary of the person injured or £300 a-year, whichever is less"; but this provision is again guarded by section 9, which makes the decision of the Treasury final as to the amount of any allowance or gratuity under the Act. Section 10 is relied on by the respondent, but though section 10 says that "Nothing in this Act shall be construed so as in any way to interfere with the rights existing at the passing of this Act of any civil servant then holding office," those rights were never of such a character as could enable a civil servant to compel their enforcement in his favour.

Warrants were duly issued under this Act to establish the scale of payments that the Treasury were prepared to make for injuries, and these continued until 1906, when the passage of the Act under consideration changed the position of the civil servant receiving injuries arising out of and in the course of his employment from that of a person entitled to expect the exercise of statutory powers in his favour to that of one entitled to assert a statutory right to compensation against his employer.

The Act of 1909 (9 Edw. VII, c. 10) has not altered the fundamental position established by the earlier Acts, for on the one hand it merely changed the rate of allowance from one-sixtieth of the salary a-year to one-eightieth, and on the other enabled the Treasury to make an additional allowance by way of a lump sum calculated by one-thirtieth of the salary multiplied by the number of years served, and in this Act again in section 3 reference is made to the right to superannuation allowance of a civil servant. In this Act power was given to a civil servant who entered the service before 1909 to elect to receive his pension under the Act, and this election the respondent exercised. His position therefore under the statute may be summarised as follows:—

He was entitled to expect an allowance at the rate of one-eightieth for every year of service which he had served, and a lump sum down, but such an allowance would not begin before sixty unless upon medical certificate that he was by reason of bodily infirmity permanently unable to continue his work. This expectation, though it might be relied on with full certainty, was

none the less not a legal right and no claim for it could be enforced by any legal proceedings. In the present case, on the certificate being forwarded to the Treasury as to the permanent incapacity of the respondent, a gratuity or allowance was paid to him under section 1 of the Act of 1909, and a superannuation allowance was granted representing twenty-eightieths of his salary, he having served for twenty years. Now this pension could not have been granted at the age when the respondent received it but for the fact of his having become physically infirm, and that infirmity was due to his having been injured in the public service. The occasion therefore on which the pension was payable was inseparable from his injury. He had not directly contributed any money at all to the funds out of which the payment was made, and the only manner in which he could be said to have indirectly contributed would be by establishing that he had accepted a lower salary than such services as he could offer would command in the open market, by reason of the fact that he was entitled to expect the payment of the pension, either in the event that happened or on his attaining the age of sixty years.

There seems to have been no evidence whatever tendered for the recorder to establish this suggestion, and it may have been very difficult to prove. In these circumstances it is to my mind unreasonable to say that regard was not to be had to the payment which the respondent received from his employer in determining the amount of compensation to which he was entitled under the Workmen's Compensation Act; and the recorder was in my opinion right in taking such payments into account. I have carefully considered the words of the schedule in order to see if any limitation can be placed on these words which would exclude such a payment as the one in question from their operation; but I have been unable to discover any rule or principle by which such limitation could be imposed.

EARL LOREBURN—The Workmen's Compensation Act 1906 directs the arbitrator that "in fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." In the present case the workman receives a pension from his employers, for the Asylum Board and the Treasury have been regarded by both sides as one and the same. He had no legal right to claim it, but he had an expectation practically amounting to a certainty of obtaining it at the age of sixty, and even before sixty if he should get a medical certificate that he was incapable from infirmity of mind or body. He got the certificate and received a pension at the age of forty-eight on a lower scale than he would have received at the age of sixty. It was granted by the Treasury under statutory powers. There is no doubt that the incapacity was due to an injury by accident which brought him within the Workmen's Compensation Act. In fixing the amount of the weekly payment which the workman was to receive under that Act the arbitrator had regard to this pension. The Court of Appeal decided that he was not entitled to have regard to it. And that raises the point which we have to settle.

With all respect to the Court of Appeal, I think the arbitrator was right. This payment came from the employer. The employer was not obliged by statute to pay it, and in my opinion it would have made no difference had he been so obliged. It is an error to say that the workman contributed toward the pension. It came wholly out of the employer's pocket.

Under this Act the employer is the person required to pay compensation (section 1), and it is in ease of this burden on the employer that the arbitrator is directed that regard shall he had to any payment, allowance, or benefit which the workman may receive from him (Schedule I, 3). These words are quite general, but it is obvious there must be some limitation, or the declared purpose of the Act will be frustrated. They can refer only to what the workman receives in respect of the incapacity. If that were not so, then the employer might be relieved of his statutory burden by the accident that he had given to the workman some money or some benefit for a perfectly different purpose or connected with a perfectly different duty. Again, these words can refer only to payments, allowances, or benefits that come from the employer's own resources. If that were not so, then money which the employer might pay out of a fund, for example, of which he was manager, might enable him to diminish the burden which the statute places on himself. He must himself be the poorer for the payments or the arbitrator cannot have regard to them. These limitations are fairly clear.

Your Lordships were asked to say that the employers were in effect obliged to pay the pension in the present case though not in law bound to do so, and that therefore it could not be regarded in fixing the weekly payment. I do not understand how they could be obliged yet not bound. But even if they had been compelled to pay this pension, I am of opinion that the arbitrator would still have been right in having regard to it. It was a payment out of their own funds in respect of the incapacity. It is not necessary for giving full effect to the Act that the payment should be a voluntary payment, and the Act does not say so. Why should we say so?

We were also asked to say that the workman had in substance purchased this pension because he would naturally take less wages in view of the prospective advantage of receiving it if he should be incapacitated. I do not think so. Even if the employers had contracted to pay the pension and the workman had accepted the employment at less wages expressly for that reason, the arbitrator would still have been required to have regard to the pension in fixing the weekly payment, for the money came out of the employers' pocket. They are the poorer for having to pay it, and would be the richer if it were withheld when the con-

tingency arose. It is none the less money out of their pocket that they had prospectively received value for their promise to give the pension if the contingency should arise.

I can see this means that the workman will be in a slightly worse position if he insures against accidents with his employer than if he insures with some other person or company. In practice I do not suppose such a thing is common. If a payment or pension came from a fund to which the employers had contributed it would not be a payment from the employers at all. The money they had contributed was no longer their money, and it could not be so regarded by the arbitrator. Whatever difficulty there may be in applying the words of the schedule arises, perhaps necessarily, from their generality, but we cannot restrict them unless the Act requires a limitation by what it says elsewhere; and I do not think practical hardship will arise from a logical interpretation. The arbitrator has a discretion as to the degree to which he will regard payments, benefits, and allowances, and can look at all the circumstances in exercising his discretion. That provides a useful safety-valve.

LORD ATKINSON—In this case the respondent, who was employed as an attendant in the Central Asylum at Dundrum in the county of Dublin, at a salary which, with allowances, amounted to about £1, 18s. 3d. per week, received an injury arising out of and in the course of his employment which resulted in partial incapacity, permanent in character, to discharge his duties.

By reason of this incapacity he became enabled to retire from the service of the asylum on a pension long before he had reached the age of sixty years.

The pension awarded to him amounted to £21, 15s. per annum, or about 8s. 3d. per week, plus a gratuity of £62, 7s.

It is admitted that he had no legal right to recover either of these sums. In that sense they are gratuities, paid out of the bounty of the Crown, though presumably they were looked forward to and taken into account by the employee as benefits he was likely to receive when he entered the service. In like manner the benefits conferred on him by this very Act of 1906 itself may also be taken into account. There is no evidence that in fact any diminution of the employee's salary took place, or that any deduction from it was in fact made in respect of his prospect of obtaining a pension or a gratuity either at sixty years of age or in the event of his becoming incapable of performing his duties at an earlier period. In the absence of that evidence I do not think it is legitimate to infer that the employee purchased and paid for either pension or gratuity by his own labour.

The Court of Appeal in Ireland have, however, decided that in fixing the compensation payable to the respondent under the Workmen's Compensation Act of 1906 in respect of the incapacity arising from the injury he has received, the pension and the gratuity given to him should be entirely ignored, and the same weekly sum be awarded to him as if no pension or gratuity had in fact ever been granted to him. The principle upon which this decision is apparently based is, as I understand it, this—that the respondent by his labour while he served either bought this pension and gratuity or bought the chance of obtaining them; that they, in truth, resembled deferred pay; that the remuneration for the respondent's labour while he served was his weekly wages plus this pension and gratuity, or plus the chance of obtaining them, whichever it be. If the reasoning which leads to this conclusion be sound, it would follow that if an employer contracted with a workman at the time of hiring that in the event of the latter's being totally incapacitated by an injury by accident arising out of or in the course of his employment he, the employer, would pay his workman during the time that incapacity should last a weekly sum equal to 50 per cent. of the average weekly wages he was receiving before the accident; or, in the case of only partial incapacity arising from the accident, would pay him during that incapacity a weekly sum equal to the difference between these same average weekly wages and the wages the workman was earning or could earn in an employment suitable to his impaired powers, this contract and the performance of it by the employer should be equally ignored in fixing the workmen's compensation under the Act. Indeed this, as I understood, was insisted on in argument by the learned counsel who appeared for the respondent on the hearing of this appeal. So this strange result follows, that though the workman when he enters into his employment must be fully cognisant of the vast benefits conferred upon him by the Act of 1906, and must, according to the contention, be presumed to accept lesser wages because of them, a contract by which he is to receive the maximum he could be awarded under the statute is to be ignored, and he is to receive that maximum plus such sum as the arbitrator, while ignoring it, may consider sufficient to compensate for his injury, but that if no such contract be entered into he would receive the latter sum only. That is, however, a conclusion as illogical as it is unjust and oppressive to the employer, yet every argument urged to show that the workman presumably accepted lower wages by reason of the benefits secured by the supposed contract, and therefore purchased by his labour the benefit resulting from its performance, is equally applicable to show that he accepted lower wages by reason of his chance of receiving under the statute such sum as the arbitrator might think it right to award to him. If the workman has by his labour purchased the benefit under the contract and it is his own, he has equally by his labour purchased the benefit under the statute, and it is his own. He has, in effect, paid his employer for it, and the burden of paying compensation to the workman would not, in the result, fall upon the employer, as is designed by the statute that it should, but upon the workman himself. In order not to defeat

the statute the arbitrator should do what in fact he has no power to do, namely, to award the workman double the sum to which he thinks he is entitled, so that the employer's proper burden may fall upon him. The unsoundness of the contention is thus shown by the absurd result to which it leads. All the provisions of Schedule 1 attached to the Act are conversant solely with the amount of the compensation which the employer is by the first section of the statute made liable to pay to the workman in respect of the personal injury sustained by the latter. It is obvious, therefore, that if the "payment, allowance, or benefit to be taken into account" to diminish the amount of that compensation is to be treated in effect as part payment of it, it should be paid, made, or conferred at the expense of the person liable to pay the compensation, the employer, and be given in respect of that for which the compensation is to be awarded, namely, the injury received by the workman. The opening words of section 3 of the schedule must be read in this restricted sense, as was decided in *M'Dermott* v. *Steamship Tintoretto*, 1911 A.C. 35, 48 S.L.R. 728. The principle it embodies is, I think, precisely the same as that embodied in section 7, sub-section (*e*), of the statute. It is in my view this—since the workman, as has been often decided in this House, is to be compensated under this Act not for the pain or suffering he has endured but for the loss of his capacity to earn wages, the employer is not liable to compensate him for that loss twice over to any extent whatever. If the workman should insure himself with some insurance company against loss sustained by an injury from such an accident as the statute contemplates, any sum he might receive from the company when that loss accrued could obviously not be had regard to. I think it would make no difference if the workman should make his employer his insurer, paying the latter, or allowing him to deduct from his the workman's wages a sum equal to the premium proper to be paid according to the ordinary actuarial principles on the amount insured. In that case the sum received by the workman should equally be ignored. There might well be a third case where the employer contented himself with deducting from the workman's wages a sum less in amount than the premium above mentioned, the employer himself in effect making up the balance. In such a case the insurance would be effected for the workman's benefit at the joint expense of his employer and of himself. This expenditure upon the part of the employer should in my view be regarded to some extent under the words of section 3. No rule, I think, can be laid down as to the precise amount by which the weekly payments awarded should be diminished in respect of that expenditure. That is altogether a matter for the decision of the arbitrator. In my view, however, a decision that this payment by the employer must in fixing the compensation be ignored by the arbitrator would be wrong law. There is no evidence whatever before your Lordships in this case to show whether any fund is provided for the payment of pensions or gratuities to officers of the Civil Service (such as the respondent) to which these officers themselves contribute, or, if so, whether or not a grant in aid is made by the State to enable the claims upon the fund to be met.

There is nothing therefore to show whether this case at all resembles the third case above mentioned. The question for decision accordingly narrows itself down to this—Were the pension and gratuities in this case granted to the respondent at the expense to any extent of his employer, the State, and in respect to any extent of the injury he received in his employment? If they fulfilled these two conditions the direction to the arbitrator to ignore them altogether is in my opinion wrong.

By section 8 of the Superannuation Act of 1909 it is provided that it is to be read as one with the Superannuation Acts of 1834 to 1892. The respondent apparently took advantage of the privilege conferred upon him by section 3 of the first-mentioned Act and adopted the provisions of that statute. The Statute of 1834 (4 and 5 Will. IV, cap. 24) by section 27 provided that in order to reduce the charge for pensions a sum of 2½ per cent. should be deducted from the salaries amounting to £100 of the civil servants therein mentioned and of 5 per cent. from salaries of a higher amount. That section was repealed by the 20 and 21 Vict. cap. 57, and no similar provision has been introduced into any of the subsequent Superannuation Acts. The Act of 1834 like that of 1859 provided a scale according to which the amount of any pensions granted should be measured.

The latter statute by section 2, still unrepealed, provided that subject to certain exceptions the scale should in cases such as the present be as follows (that is to say)—"To any person who shall have served ten years and upwards, and upwards and under eleven years, an annual allowance of ten-sixtieths of the annual salary and emoluments of his office," and so on according to years served.

And by its 10th section it is provided that it should not be lawful to grant any superannuation allowance under that Act to any person under sixty years of age unless upon a medical certificate to the satisfaction of the Treasury that he was incapable from infirmity of body or mind to discharge the duties of his situation and that such infirmity was likely to be permanent.

By the Superannuation Act of 1887 a further change was made in the law which does not however affect this case.

The respondent's case is rested in the 10th section of the Act of 1859, and accordingly he has, long before he reached sixty years of age, been granted an allowance and a gratuity because he has, by an injury through accident met with while he was discharging the duties of his employment, and arising out of the discharge of those duties, been rendered incapable of further discharging them. That is the very kind of incapacity for which he would be entitled to be compensated under the Workmen's Compensation Act of 1900. This incapacity is the very

thing which secures to him his pension and gratuity; they will be paid to him as far as appear at the expense of his employer, the State, and though the amount of the pension will still be measured by his years' service according to the scale, yet it is, in my view, clearly given to him at the date it is given in respect in this case of the very incapacity to which the Act of 1906 and rule 3 of the schedule applies.

In my opinion the decision appealed from was erroneous and should be reversed and this appeal allowed with costs.

LORD SHAW—I concur. The respondent Thomas M'Inerney was an attendant in the Central Asylum, Dundrum, in the county of Dublin. This asylum was established under the provisions of the Lunatic Asylums of Ireland Act 1845. By the terms of the appointment of the attendants and by arrangements duly made these attendants come within the scope of the provisions of the Superannuation Acts 1834 to 1909.

On the 10th December 1913 the respondent sustained an injury arising out of and in the course of his employment, and this injury has unfortunately caused him to be permanently although only partially incapacitated. He has obtained from the recorder of Dublin a certain award under the Workmen's Compensation Act 1906. He had, however, previously also obtained, consequent upon his retirement owing to his incapacity, a superannuation allowance or pension from the asylum authorities of £21, 15s. per annum, and in addition a lump sum of £62, 7s. by way of gratuity from these authorities.

The question in the case is whether the learned recorder of Dublin in making an award to the injured man was right in having regard to the gratuity and allowance paid and made to him by his employers, the asylum authorities. The recorder was of opinion that he should "have regard" thereto. My view, in a word, is that in this the learned Judge was following the statute. The opposite view was, however, sustained by the Court of Appeal in Ireland, and I am humbly of opinion that the judgment of that Court cannot be supported in law.

Put broadly, the situation was this—The respondent's wages had been 38s. 3d. per week. Accordingly if there had been no question as to making a deduction of any payment, allowance, or benefit from his employers, and the case been treated as an ordinary one and an award made on the maximum scale permitted by the Workmen's Compensation Act he would have received a little over 19s. per week. That would have been the extreme measure of his rights under the statute against his employers. And that amount is what was claimed under arbitration proceedings. He, however, is in receipt of £21, 15s. per annum, which is equal to about 8s. 4d. per week. In addition to this a gratuity of £62, 7s. actuarially estimated on the life of a man of his age, namely, fifty, is equal to a few shillings more. If the judgment of the Court of Appeal be right the recorder should have been blind to all that. The partially incapacitated man would accordingly receive from his employers this pension and gratuity, the whole payments being considerably in excess of the maximum allowance contemplated and provided by the Workmen's Compensation Act.

What the learned recorder did was to take the whole circumstances into account, to have regard to the superannuation and gratuity, and to give an award of 9s. 6d. per week under the Act. I think that he was right in doing that; he was doing what the Act of Parliament prescribed.

By the first schedule to the statute, which contains the scale and conditions of compensation, it is provided—"(3) In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." These words as they stand would appear to cover the case, it being, of course, admitted that in any view the payment of what is given under the Superannuation Acts must be treated as received "from the employer during the period of incapacity."

I respectfully adhere to what I said in the *Tintoretto* case, 1911 A.C. 35, 48 S.L.R. 728, that the expression "payment, allowance, or benefit" must be considered in this way —(1) that it must be a payment by way of allowance or benefit; and (2) that it must be received from—by which I mean out of —the resources of the employer.

There is at once excluded accordingly from the category payment to the workman of moneys which are his own and which may have been accumulating, let us suppose, in the employers' hands. The employers are in such a case no more than the holders or bankers for the workman, and he is on the occasion of incapacity occurring entitled to have his own back and thereafter to a settlement for his injuries. Under convenient arrangements such moneys would become instantly due by the employers to the workman, but they could never be treated as payments, allowances, or benefits from the employers' own resources, and therefore they could not form deductions from what is due under the Workmen's Compensation Act.

There are, however, two other stages which can be set out—(1) the payment, allowance, or benefit may come out of a fund to which both workman and employers have in the past contributed. This is by no means an uncommon case. On the contrary I believe it to be not infrequent. (2) There is the case where a scheme of payment, allowance, or benefit is wholly set up by or or behalf of the employers. It is in my humble opinion the duty of the arbitrator in both of these cases to have regard to the "payments, allowances, or benefits."

This latter case is I think substantially the nature of the arrangement for the superannuation of civil servants in the position of the respondent. For a short time it was not so in Ireland. For by sec. 27 of the Superannuation Act 1834 (4 and 5 Will. IV, c. 24) a certain deduction was

made from the salaries of civil servants in order to establish at least *pro tanto* a superannuation fund. This section of the 1834 Act, however, was abolished by 20 and 21 Vict. cap. 57.

In the cases which I have mentioned—where there is no contribution or only a partial contribution by the servant—it appears to me to be fairly clear that not only the provisions but the principle of the Workmen's Compensation Act is this, that the arbitrator cannot be blind to the receipt of superannuation and gratuity, and that such things do fall within the scope of the words "payment, allowance, or benefit" contained in the Act. Otherwise very remarkable consequences might ensue. Employers without having gone through the process of contracting out may yet have had and have continued generous schemes by which injured workmen shall receive allowances in case of incapacity; such allowances or pensions may be on the scale of a very considerable proportion of their former wages. The employers having duly put these pensioners on their lists of incapacitated workmen, the latter, so the argument runs, would be entitled to bring their action under the Workmen's Act and receive an award thereunder without the arbitrator having any regard to what the same workman was already entitled to and receiving from the same employer in respect of the same incapacity. This does not appear to me to be in accord with the policy or provisions of the statute.

There is nothing in the case to suggest what appears to have been a controlling factor in the judgment of the learned Judges of the Court of Appeal, namely, that the superannuation allowance and gratuity were, if not exactly, yet in the nature of a payment to the civil servant of what had been contributed by him. Nor do I think it safe to approach such cases upon the principle of a conjecture as to what is the true nature of a pension itself, or whether it might not be denominated deferred pay.

Appeal allowed.

Counsel for the Appellants — O'Connor (Sol.-Gen. for Ireland) — Branson — J. M. Fitzgerald. Agent — Treasury Solicitor in Ireland.

Counsel for the Respondent—G. A. Swayne. Agents — Herbert Z. Deane, Solicitor, London — James R. Cresswell, Solicitor, Dublin.

HOUSE OF LORDS.

Friday, July 21, 1916.

(Before the Lord Chancellor (Buckmaster), Earl Loreburn, Viscount Haldane, Lords Shaw and Sumner.)

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

ATTORNEY-GENERAL (on relation of Pickfords Limited) *v.* GREAT NORTHERN RAILWAY COMPANY.

Railway — Highway — Bridge — Traffic by Heavy Vehicles—Obligation of the Railway Company to Maintain Bridge—Railways Clauses Consolidation Act 1845 (8 *Vict. cap.* 20), *sec.* 46—*Locomotive Act* 1861 (24 *and* 25 *Vict. cap.* 70), *and Locomotives on Highways Act* 1896 (59 *and* 60 *Vict. cap.* 36) —*Motor Car Act* 1903 (3 *Edw. VII, cap.* 36), *sec.* 12.

Where a bridge has been constructed under the Railways Clauses Consolidation Act 1845 to carry a high road over a railway, and was originally constructed of adequate strength to carry the normal traffic of the time, is it sufficient for the railway company to maintain it of such strength, or must it provide a bridge strong enough to carry modern traffic?

Held (*dis.* Viscount Haldane) that they are only liable to keep it in repair as originally constructed.

Appeal by the Attorney-General as relator from a decision of the Court of Appeal, 113 L.T.R. 835, which reversed a judgment of Warrington, J., reported 137 L.T.J. 112.

WARRINGTON, J., held, upon the principle of the decision of the Court of Appeal in *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Company*, 1914, 3 K.B. 1, that the Railway Company were bound to maintain a bridge which carried a road across their railway in such a condition of safety as would be sufficient for the passage of the traffic which might be expected to use the highway of which it formed part. In the interval between Warrington, J.'s, judgment and the judgment of the Court of Appeal in this case the *Sharpness* case had been considered by the House of Lords, 1915 A.C. 654, 52 S.L.R. 918, and the decision of the Court of Appeal reversed.

The Court of Appeal (SWINFEN EADY, PHILLIMORE, and BANKES, L.JJ.) held that the case was governed by the *Sharpness* case, and entered judgment for the Railway Company.

The appeal was argued twice, the House on the first occasion consisting of VISCOUNT HALDANE and LORDS SUMNER, PARMOOR, and WRENBURY.

LORD CHANCELLOR (BUCKMASTER)—The question raised in this case is of unusual importance. On the one side it involves an undoubted limitation of the rights of user of public roads carried by a bridge over the