As regards the area of limitation, the limitation is no more than is required. As regards the limitation of time, it appears to me, having regard to the business of a solicitor, that a restriction during the lifetime of the appellant is not too wide a restriction. It is in fact no more than adequate protection for a solicitor who desires to protect his professional secrets and to protect his clients from being enticed away by a former clerk who has had access to all his papers and has been in direct personal relation with a number of his clients. I should adopt myself the words used by Younger, L.J., who says that the covenant does no more than protect the professional connection of the respondent, who is a solicitor.

I think there is no public interest involved.

LORD CARSON concurred.

Counsel for the Appellant—Clayton, K.C. —Harman. Agents—Sharpe, Pritchard, & Co., for James, Barton, & Kentish, Birmingham, Solicitors.

Counsel for the Respondent—Maughan, K.C.—Johnston. Agents - Andrew, Wood, Purves, & Sutton, for J. H. Dewes, Tamworth, Solicitor.

HOUSE OF LORDS.

Friday, June 24, 1921.

(Before Lords Buckmaster, Sumner, Parmoor, Wrenbury, and Carson.)

THOMSON & COMPANY *v.* MACKAY.

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

Master and Servant—Dock Pilot—"Workman"—Amount of Remuneration—Accident after only a Few Weeks' Work—Total Earnings at Time £6 per Week—Concurrent Contracts—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13, *Sched.* 1, 2 (*b*).

The respondent after the war resumed work as a member of the Barry Dock Pilots Association, his remuneration being a fixed share in the pool made up from the payments by the various shipowners for services rendered by the pilots. On the 23rd July 1919 after he had been working for a short time he met with an accident while getting on board the steamship "Cramond" and claimed compensation from her owners, the present appellants. The claim was resisted substantially on the ground that the respondent was not a "workman" within section 13 of the Act. It was agreed at the hearing (1) that the respondent had resumed his occupation as dock pilot since the war within ten weeks of the happening of the accident and that his earnings during that period were £6 a-week; that the amount earned by the members of the association amounted to £6 per week, and that the average amount earned by persons in the same grade and employed at the same work was £6 a-week. The arbitrator held that the respondent's remuneration did not exceed £250 a-year and made an award in his favour, and his award was affirmed by the Court of Appeal. *Held* that as there was no evidence before the County Court Judge beyond the fact that the respondent had been earning £6 a-week and that men similarly engaged had received that sum during the previous year, it was open to him to consider the possibility that the employment might become irregular and that the rate of earnings might fall; that the question was one of fact, and that accordingly there being evidence on which the arbitrator could decide as he did, the award could not be disturbed.

Decision of the Court of Appeal (reported *sub nom. Mackay* v. *Owners of the Steamship "Cramond,"* 123 L.T.R. 794) *affirmed.*

Appeal by the employers from an order of the Court of Appeal affirming an award of His Honour JUDGE HILL KELLY of the County Court at Barry.

LORD BUCKMASTER—It is not necessary that we should hear counsel for the respondent in this case. In order that the appellants can succeed they must show either that the arbitrator has misunderstood what it was that he had to decide or that the decision at which he has arrived has no basis of fact on which it can be supported, and they have not been able to discharge either of those obligations.

The circumstances of the case are these—It appears that in the port at Barry there are a number of boatmen from whom there are selected a group of pilots thirty in number, this group of pilots being from time to time engaged in moving from place to place the various vessels that came into Barry Dock. The course of business was this—The agents of a ship desiring a pilot communicate with the representative of the pilots, and the pilots go out one after the other, watch after watch, until when the work is done the last man received the money earned. This is then brought back and divided in equal shares among all the pilots. The plaintiff in this case was one of these thirty men, and on the 23rd July he was called upon to take his place in connection with piloting a vessel owned by the present appellants. He seems to have slipped and hurt himself, and there is no dispute that the injury he then received was an injury that arose out of and in the course of his employment. The claim that he made for damages in consequence of this accident is not resisted upon the familiar ground that the accident did not so arise, but upon the ground that by virtue of the definition in section 13 of the Workmen's Compensation Act 1906 the appellant was not a "workman," since he was a person who was not engaged in manual labour and whose remuneration exceeded £250 a-year.

The facts with regard to the receipts of the plaintiff do not appear to be in dispute.

It is stated that he had been working for ten weeks prior to the accident, and in the course of those ten weeks he had received as his share of the pooled money an average sum of £6 a-week. It was also proved, or at least it was admitted, that for the preceding year people similarly engaged had received £6 a-week throughout the year. Upon those facts it is urged on behalf of the appellants that the learned arbitrator was bound to conclude that the remuneration of the present applicant exceeded £250 a-year, because as there had been no continuous employment of the applicant for twelve months, the arbitrator was bound by virtue of the rules contained in the first schedule to the statute not only to consider what had been received by people who had been engaged in the same work, but was compelled to accept the amounts so earned as the standard by which to measure the remuneration that the applicant received. The words in the schedule upon which reliance is thus placed are to be found in the first schedule in the second section under sub-head (*a*). It is there stated—"Provided that where by means of the shortness of the time during which the workman has been in the employment of the employer, or the casual nature of the employment or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer."

The phraseology of the schedule shows clearly to my mind that it never was intended to do more than to permit the arbitrator to take into consideration for the purpose of forming his judgment the remuneration received by people engaged under the same conditions in the same work. To say that it compelled him to accept their receipts as the standard to apply to a particular incident is to disregard entirely the phraseology in which the schedule is framed.

The circumstances attending this case fairly illustrate the injustice that might arise were the appellant's view accepted. The preceding twelve months to the accident was the period from the 23rd July 1918 to the 23rd July 1919. It would, I should imagine, be impossible to say that a year so full of such unusual commercial and economic incidents could in connection with the piloting of vessels at a dock like the Barry Dock be regarded as a standard year by which to fix the remuneration that a pilot would necessarily receive for the year which was then to come. There was in fact nothing before the learned County Court Judge except the fact that for employment, which might or might not be continuous, £6 had in fact been received by the applicant for the previous ten weeks, and that for the previous twelve months people similarly engaged had received that sum during the whole year. Such evidence is certainly, in my opinion, wholly insufficient to exclude from the learned Judge's consideration the possibility that the employment might become irregular, that the rate of pay might fall, and that from either or both of these causes what had been received for the previous year would not necessarily be that which the applicant would receive for the year that was then to come.

These circumstances are sufficient to show that there was no matter before the arbitrator to exclude him from forming the opinion that the rate of remuneration had not exceeded the £250 fixed by the statute. For these reasons I think that the appeal fails and should be dismissed with costs.

LORD SUMNER—I concur.

LORD PARMOOR—I concur. I should only like to mention one matter of caution so far as my opinion is concerned, and that is that schedule 2 (*a*) applies to the method of finding the average weekly earnings in order that you may assess the amount of compensation when compensation is in fact payable. I doubt whether the system of computation of average weekly earnings has any bearing upon the proper construction of section 13.

LORD WRENBURY—I also concur. I can plainly foresee that the words of the statute, "whose remuneration exceeds £250 a-year," may, and I am afraid will, raise many questions of great difficulty for decision. It is unnecessary, and I think inexpedient, to express any opinion on them now. They do not arise.

I cannot find that the learned County Court Judge in any way misdirected himself as regards the meaning of those words, and if he has not misdirected himself, then the question is only one of fact. The fact was for him whether or not it was proved that the man was one whose remuneration exceeded £250 a-year. He has come to the conclusion upon that fact, and there was evidence upon which he could so find. There was no evidence before him to show that the man would necessarily or even probably have continued in this employment for the period of a year. Whether he would have remained in his employment for a year was wholly uncertain. I think the question was one of fact for the arbitrator, with which we cannot interfere.

LORD CARSON—I concur.

Counsel for the Appellants—A. Neilson, K.C.—James. Agents—Botterell & Roche, for Donald Maclean, Handcock, & Hann, Cardiff, Solicitors.

Counsel for the Respondent—Shakespeare. Agents—Helder, Roberts, Giles, & Company, Solicitors.