alleged they saw the offence committed, that the acting fiscal objected to the question, but stated that he had no objection to the witnesses writing the answer on a slip of paper to be handed to the Court and the law-agent of the accused, on the understanding that the latter would not in further cross-examination disclose the information so obtained, and that the agent for the accused having declined to accept the answer on these conditions, the magistrate thereupon sustained the objection.

The Court *sustained* the appeal on the ground that the magistrate was wrong in imposing any condition upon the allowance of the question, and that competent evidence had been thereby excluded.

John Thomson, 451 Duke Street, Glasgow, was charged in the Police Court at Glasgow on a complaint, under the Glasgow Police Acts and the Summary Jurisdiction (Scotland) Acts, 1864 to 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of George Neilson, Procurator-Fiscal, setting forth that he did, on the 4th day of April 1900, in Hope Street Glasgow, contravene the Glasgow Police Acts, particularly the Glasgow Police (Further Powers) Act 1892, sec. 20, by doing a series of acts in the aforesaid street for the purpose of enabling certain persons to engage in betting on horse races. The accused pleaded not guilty, but, after evidence led, was convicted and fined £10, and in default of immediate payment was adjudged to be imprisoned for sixty days.

Thomson obtained a case, in which the Magistrate, *inter alia*, stated as follows:—"In the course of the evidence for the prosecution, during the cross-examination of James M'Pherson, sergeant of police, Northern Division of Police, Glasgow, the law-agent for the accused asked the witness where he was at the time the alleged offence was being committed which he had been describing, and of which he said he was an eye-witness. The witness replied that he was looking from a window in Hope Street, in a house entering from Sauchiehall Street, on the north side of Sauchiehall Street, close to Hope Street, three stairs up. On further questions being asked, which would have disclosed the house and the name of the occupant, the acting Fiscal objected to the witness giving particulars that would lead to the public identification of the house and its occupant, but at the same time stated that he had no objection to the witness writing on a slip of paper the name of the occupant of the house and the number of the street in which it was situated, and handing same to the Court and the law-agent of the accused, on the understanding that the agent would not, in the course of his further cross-examination publicly disclose the name and address of the person who had given the police facilities for taking observations from his house. The witness thereupon wrote on a slip of paper the name of the tenant and the number of the street, and offered the slip to the agent for the accused, but the agent declined to accept it on such condition, whereupon I then sustained the objection of the acting Fiscal. During the cross-examination of William Cannon, police-constable, Northern Division of Police, Glasgow, what occurred in the examination of the said James M'Pherson, before described, was repeated, the sergeant and the constable having been together at the time of the alleged offence. I again sustained the objection.

The question of law stated by the Magistrate was:—"Whether I was right in sustaining the objection of the acting Fiscal to the question put to the said James M'Pherson and William Cannon as before set forth."

Argued for the appellant—The conditions were wrongfully imposed by the magistrate, with the result that competent evidence was excluded, and the accused was prejudiced.

Argued for the respondent—The propriety of imposing the condition was a matter within the discretion of the magistrate.

LORD YOUNG—I am of opinion that the question in this case was a competent question and a very proper question to put to the police-constables, and that the Magistrate was wrong in imposing any condition upon the allowance of the question, such as that the answer should be in writing and that the agent of the accused should not make use of it in cross-examining the witness, or disclose the information in any way.

This competent evidence having been disallowed, the appeal must be sustained.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court answered the question in the case in the negative, and sustained the appeal.

Counsel for the Appellant—Salvesen, Q.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Respondent—Lees—Deas. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Friday, July 20.

FIRST DIVISION.

RUSSELL *v.* M'CLUSKEY.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule* 1 (*a*) (1)—*Amount of Compensation—Injury Resulting in Death—Maximum of* £300—*—Limit of Employer's Liability—Average Weekly Earnings.*

The limitation of the employer's liability to £300 in the First Schedule, section 1 (*a*) (1) of the Workmen's Compensation Act 1897 applies both

where the workman has been three years in the same employment, and where he has been less.

Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule 1 (a) 1—Amount of Compensation—Injury Resulting in Death—"Average Weekly Earnings"—Period of Employment Necessary to Enable Average Weekly Earnings to be Calculated.

A miner was accidentally killed in the course of his employment. He had entered the service of his employer on Wednesday of the week preceding his death, and had worked on Wednesday, Thursday, and Friday of that week, and from Monday to Friday of the succeeding week (when he was killed). In a claim for compensation under the Workmen's Compensation Act 1897, by his widow and children, the Sheriff found in fact that miners in the district in question were not obliged to work for any fixed number of days in the week, and did not work on Saturdays. *Held* that there were sufficient materials to enable the Court to estimate the "average weekly earnings" of the miner in the employment in question, as required by the First Schedule, section 1 (*a*) (1) of the Act, in respect that he had been employed for two weeks.

Opinion reserved (*per* Lord M'Laren) upon the question whether employment for one week only would not be sufficient to enable the Court to estimate the "average weekly earnings."

By section 1 of the First Schedule of the Workmen's Compensation Act 1897 it is provided as follows:—"The amount of compensation under this Act shall be (*a*), where death results from the injury—(1) If the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of these sums is the larger, but not exceeding in any case three hundred pounds, . . . and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 between Mrs Janet Weir or M'Cluskey, widow of John M'Cluskey, miner, Low Blantyre, John M'Cluskey, his son, and Mrs M'Cluskey as tutor of his pupil children, claimants and respondents, and Archibald Russell, coalmaster, Whistlebury, Blantyre, appellant. The claimants claimed compensation for the death of John M'Cluskey, who died on 23rd February 1900 from the effects of injuries received while in the employment of the appellant at Whistlebury Colliery.

The facts of the case, as set forth by the Sheriff-Substitute of Lanarkshire at Hamilton (DAVIDSON) as arbitrator, in a case stated for appeal, were as follows:—"That the deceased John M'Cluskey died on 23rd February 1900 leaving a widow and eight children; that the two eldest, John, aged sixteen, and Andrew, aged twelve, worked with their father; that they received no wages from him, but the earnings from the work they did would in ordinary cases amount to 22s. and 15s. a week respectively; that the said deceased entered the employment of the defender on Wednesday 14th February; that he was employed from day to day, his wages being payable fortnightly, though he was entitled to draw them weekly if he desired; that he worked in the defender's pit on 14th, 15th, and 16th February, but not on the 17th; that it is not the practice among miners in the county of Lanark to work on Saturday; that he worked in the same pit on Monday, the 19th, and each succeeding day till Friday the 23rd, on the morning of which day he was killed in the course of his employment; that his two sons aforesaid worked with him, and the total earnings of the three for the period from 14th to 16th were £2, 17s. 3d., and for the period from 19th to 23rd, £4, 17s. 8d.; that miners in the district are not compelled to work for any set number of days in a week, and can absent themselves for a day or days without notice; that as a general rule the miners in the appellant's employment work more than eight days per fortnight, but the miners in the appellant's employment work more steadily than in other Lanarkshire collieries."

The Sheriff-Substitute decided that there was quite a sufficiency of evidence to enable him to calculate an average weekly wage to the deceased; that the average weekly wage amounted to £2, 6s. 5½d., after allowing fair earnings to John and Andrew, and that the respondents, other than John and Andrew, were entitled to £300 of compensation under the Workmen's Compensation Act in the following proportions:—£100 to the said Mrs Weir or M'Cluskey, and £33, 6s. 8d. to each of the said pupil children.

The questions of law were as follows:—"(1) Is a claim by the applicants excluded under the Workmen's Compensation Act 1897, in respect that the deceased was not engaged in the employment of the appellant for at least two weeks previous to the accident, having only been in the employment of the appellant on Wednesday, Thursday, and Friday of one week, and Monday, Tuesday, Wednesday, Thursday, and Friday morning (when he was killed) in the following week? (2) Assuming that the applicants are not excluded from the benefits of the Workmen's Compensation Act 1897, is their claim restricted to £150? (3) Assuming the applicants are entitled to greater compensation than £150, should the sum earned by the deceased and his two sons be divided into three equal parts, and the wages of the deceased stated to be one of these three equal parts?'

Argued for the appellant—There was here no claim under the Act, because the workman had not been in the appellant's employment for two weeks, and therefore his average weekly earnings could not be determined as required by the First Schedule, section 1 (quoted *supra*). It had been decided in England that there was no claim unless an average wage could be determined — *Lysons* v. *Andrew Knowles & Company, Limited* [1900], 1 Q.B. 780; *Stuart* v. *Nixon & Bruce* [1900], 2 Q.B. 95. These English authorities should be followed in a question on the construction of a statute applying to both countries. Average implied comparison, and an average weekly wage could not be determined from one week alone.

Argued for the respondents—The Sheriff had found that the workman had been employed for two weeks. It was quite unnecessary that he should work for every day of each week—See *per* Collins, L.J., in *Stuart* v. *Nixon & Bruce* (cited *supra*), at p. 99. On that view there was no difficulty in striking the average weekly earnings here. See also *Small* v. *M'Cormick & Ewing*, June 6, 1899, 1 F. 883. Even if it were held that he had been only employed for one week, his average weekly earnings could be determined. A man's average weekly earnings were determined by dividing the total sum earned by the number of weeks employed, and that calculation could be performed even if the divisor was one.

At advising—

LORD PRESIDENT—John M'Cluskey entered the employment of the appellant as a miner on Wednesday, 14th February 1900. He was employed from day to day, his wages being payable fortnightly, although he was entitled to draw them weekly. He worked in the appellant's pit on 14th, 15th and 16th February, but not on the 17th, it not being the practice of miners in Lanarkshire to work on Saturday. He worked in the same pit on Monday the 19th, and each succeeding day till Friday the 23rd, on the morning of which day he was killed there in the course of his employment. His two sons, John aged sixteen and Andrew aged twelve, worked with him during the periods mentioned. The total earnings of the three for the period from the 14th to the 16th were £2, 17s. 3d., and for the period from the 19th to the 23rd £4, 17s. 8d. Miners in the district are not compelled to work for any stated number of days in a week, and they can absent themselves for days without notice. As a general rule the miners in the appellant's employment work more than eight days per fortnight, but the miners in the appellant's employment work more steadily than in any other Lanarkshire collieries.

The appellant maintained that the respondents had no claim under the Workmen's Compensation Act 1897, in respect that John M'Cluskey had been in his employment for less than two weeks previous to his being killed, and that an average weekly wage could not be struck, but the Sheriff-Substitute decided that there was quite a sufficiency of evidence to enable him to calculate an average weekly wage to the deceased, that the average weekly wage amounted to £2, 6s. 5½d., after allowing fair earnings to John and Andrew, and that the respondents other than John and Andrew were entitled to £300 of compensation under the Workmen's Compensation Act 1897 in the proportions of £100 to the widow and £33, 6s. 8d. to each of the pupil children.

By section 1 of the Workmen's Compensation Act of 1897 it is declared that if, in any employment to which the Act applies, personal injury by accident arising out of or in the course of the employment is caused to a workman, his employer shall, subject as thereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to the Act. By section 7 of the Act it is declared that it shall apply to, amongst other things, employment on, in, or about a mine. By the First Schedule it is declared that the amount of compensation under the Act shall be, where death results from the injury, (1) if the workman leaves any dependants wholly dependent on his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of these sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under the Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be one hundred and fifty-six times the amount of his average weekly earnings under the said employment.

It is to be observed that the schedule is referred to for the purpose of fixing the amount of compensation, not for defining the persons entitled to receive it, and therefore, unless its terms are such as unequivocally to exclude persons mentioned in the Act from the right to compensation, it should not be so interpreted as to have this effect.

As M'Cluskey had not been three years next preceding the injury in the employment of the same employer his case does not fall under the first part of sub-section 1 of the schedule, but under the second part, which declares that where the period of the workman's employment has been less than three years the amount of his earnings during the three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer. The important question in the present case is whether upon the facts stated there are the requisite materials for ascertaining the "average weekly earnings" by M'Cluskey during the period of his employment with the appellant, and I concur with the Sheriff-Substitute in thinking that there are the requisite materials for doing so. It is not enacted in the

schedule that the workman must have been two full calendar weeks, or even two full working weeks, in the employment of the employer prior to the injury—reference is only made to his "average weekly earnings" as a basis for calculating compensation, so that the question in the present case comes to be whether there were weekly earnings by M'Cluskey in the employment of the appellant which can be averaged. It appears to me that as to the second week there can be no question, as M'Cluskey worked the whole of the first four days of that week and part of the fifth day till he was killed, and even if he had not been killed he would not have worked on Saturday. Then in the previous week he worked three full days, and the fourth day, being a Saturday, was a *dies non.* It is not stated that he was in any other employment on the Monday or Tuesday, or indeed that he was working at all on either of these days, and even if he had been in the employment of the appellant throughout the whole week he might not have worked more than the three days on which he actually did work. His earnings on the three days were all that he earned in the appellant's employment, or, so far as appears, in any employment, during that week, and I think that they were, in the sense of the schedule, his weekly earnings for that week in the appellant's employment. But if this be so, they can be added to the practically full weekly earnings of the following week, and an average struck on the earnings of the two weeks will, in my judgment, give M'Cluskey's average weekly earnings in the appellant's employment.

With reference to the English cases cited, I may point out that in the case of *Stuart* v. *Nixon & Bruce* [1900], 2 Q.B. 95, Lord Justice Collins said that the standard in the part of the schedule now in question "involves the hypothesis that the workman must have been in the employment of the employer for at least two weeks, by which I do not mean that he must have been in that employment for every day of the two weeks, but that he must have been so employed during two weeks that his earnings can be averaged with reference to that period." This requisite appears to me to be fulfilled in the present case.

Assuming the average weekly earnings for the two weeks to have been ascertained, it would *prima facie* have required to be multiplied by 156, but this would in the present case bring the compensation above £300, and it appears to me that the provision as to a maximum in the first alternative of the schedule, viz., where the workman has been in the employment of the same employer during the three years next preceding the injury, also applies to the second alternative, and that consequently the compensation cannot exceed £300. I consider it is not limited to £150, which is mentioned as the first alternative to the three years' earnings, and in respect to which it is declared that the workman shall be entitled to whichever of the sums mentioned is the larger.

For these reasons I am of opinion that the first and second questions put in the case should be answered in the negative, and that the answer to the third question should be that the sums earned by M'Cluskey and his two sons should not be divided into three equal parts, and that the wages of the deceased should not be stated to be one of these three equal parts. It is not stated as a fact in the case that boys of sixteen and twelve working with their father in a mine earn as much as their father, and it is most improbable that they should do so. The Sheriff-Substitute says that he has arrived at the average weekly wage of M'Cluskey "after allowing fair earnings to John and Andrew," and I see no reason to doubt that the amount which he has allocated to them in name of earnings has been rightly ascertained, though he has not stated upon what he proceeded in doing so. At all events we have not before us any information which would suggest that this part of his decision is erroneous.

LORD ADAM—I am not quite sure that the first question of law in this case quite accurately represents the question which was argued to us. The question put is—"Is a claim by the applicants excluded . . . in respect that the deceased was not engaged in the employment of the appellant for at least two weeks previous to the accident?" But the question then goes on to show that he was engaged for two weeks, because it proceeds, "having only been engaged in the employment of the appellant on Wednesday, Thursday, and Friday of one week, and Monday, Tuesday, Wednesday, Thursday and Friday morning (when he was killed) in the following week." It therefore appears from the statement of the question in the case that the deceased was employed for two weeks, though not for two whole weeks, and the question would have been more accurately stated if it had been whether the claim was excluded because the deceased had not been employed for two full weeks. I find nothing in the Act to the effect that a workman must be employed for two full weeks in order to entitle him to compensation, and it is not said that there is any such direct provision. But, as I understand the argument, that result is arrived at thus:—Schedule 1, section 1 of the Act provides—[*His Lordship quoted the section*]—and the argument is that unless you can find in that section a mode of ascertaining the compensation due, you cannot give an award, because you cannot find out what amount is due. Under that section, in circumstances like the present, compensation is ascertained by taking the workman's average weekly earnings, and, on the authority of English cases, it is argued that if the workman has not been employed for at least two weeks you cannot have "average weekly earnings," because two weeks at least are necessary to strike an average. But that is not the present case. In the case of *Lysons* [1900], 1 Q.B. 780, the workman had not even been

employed for one week; he had only been employed for a few days; and the English court said that in these circumstances you could not ascertain the amount of compensation due, and therefore you could not make an award. It is only in that indirect way that it is made out that a workman requires to be a fortnight in his employment before compensation can be due. I am not concerned to dispute that proposition. But I find nothing in the Act to the effect that employment during a week necessarily means employment during the whole seven days. Suppose a workman was engaged for six months, are we to leave out of account, in estimating his average weekly earnings for that period, every week in which he has not been working every day? That would be the logical result of the appellant's contention. If a workman works only three days a week, so much the worse for him and for his average weekly earnings. The proper course is to take the number of weeks of employment and the amount of wages, without inquiring how many days he worked each week. What is wanted is a man in employment for at least two weeks, and then there is no difficulty in striking an average. I see nothing in the Act to compel us to hold that you must have two whole working weeks, and work every day of those weeks. I see no authority for that, and I therefore agree with your Lordship.

LORD M'LAREN—I concur with your Lordship in the chair, and only desire to add that I do not wish to be understood as expressing any opinion to the effect that employment for two weeks is necessary to give a workman a claim under the Act. That question does not arise here, but it may arise, and there is a great deal to be said for the view that "average weekly earnings" simply means the arithmetical mean arrived at by dividing the total earnings by the number of weeks in which the workman was employed. That would include the case of a single week, and would be so treated in all scientific and actuarial computations.

LORD KINNEAR concurred.

The Court answered the first and second questions in the case in the negative, and in answer to the third question found that the sums earned by M'Cluskey and his two sons should not be divided into three equal parts, and that the wages of the deceased should not be stated to be one of these three equal parts.

Counsel for the Appellant — Salvesen, Q.C.—Younger. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents—H. Johnston, Q.C. — Orr. Agents — Simpson & Marwick, W.S.

Friday, July 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MOIR *v.* THOMAS DUFF & COMPANY, LIMITED.

Company—Limited Liability Company—Articles of Association—Power to Refuse to Register Successor of Deceased Member other than a Purchaser—Illegal Obligation—Obligation to Purchase Shares of Deceased Member—Offer by Company to Procure Purchaser Instead of Purchasing—Power to Exclude Representative of Deceased Member by Altering Articles —Ultra vires—Pendente lite nihil innovandum—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 50.

The articles of association of a limited liability company empowered the directors to decline to register any successor to a deceased member other than a purchaser, and provided that in the event of such declinature the company should be bound to purchase his shares at the price at which they were valued in terms of the articles of association. The widow and executrix of a deceased member claimed to be registered as owner of the shares held by her husband. The directors refused to register her, but offered to procure a purchaser for the shares at the price fixed as provided by the articles, and to register him as owner. At an extraordinary general meeting, held after the pursuer's demand had been made, the company altered the articles of association to the effect that no transfer should be made or registered in favour of a woman. Before the meeting of the company at which the amended articles were confirmed, the executrix raised an action concluding for declarator that she was entitled to be registered as owner of the shares in question.

Held, assuming but not deciding that the pursuer's rights must necessarily be determined by the original articles of association, (1) that the directors had an absolute and unconditional right under the original articles to decline to register any successor to a deceased member other than a purchaser; (2) that their offer to procure a purchaser, whose name they would register, deprived the pursuer of any ground she might have otherwise had for maintaining that it was inequitable for the company to insist upon their right to refuse to register her name, in view of their inability legally to fulfil their corresponding obligation to purchase the shares themselves; and (3) that consequently the defenders were entitled to refuse to register her name as a holder of shares in their company—*diss.* Lord Moncreiff, who was of opinion (1) that the defenders were not entitled to alter the articles of association to the prejudice of the pursuer, after her rights