the last audit. I have ascertained that this will be equivalent to a fine of a little under twenty pounds." . . .

The petitioner reclaimed, and argued—The report by the Accountant showed that the curator had persistently neglected the duties of his office, and had repeatedly disregarded the remonstrances of the Accountant of Court. The case was one of such misconduct or failure in discharge of the curator's duty as called for his removal—Pupils Protection Act 1849, sec. 6; Judicial Factors (Scotland) Act 1889, sec. 7; *Mackenzie* v. *Gibson*, March 1, 1845, 7 D. 560; *Accountant of Court* v. *Jaffray*, December 20, 1851, 14 D. 292, and November 18, 1854, 17 D. 71; *Accountant of Court* v. *M'Allister*, December 22, 1853, 16 D. 301; *Macdonald* v. *Macdonald*, July 8, 1854, 16 D. 1023; *Lowe*, October 19, 1872, 11 Macph. 17; *Walker* v. *Buchanan*, July 20, 1888, 15 R. 1102.

The respondent, while admitting that he had been guilty of delay, maintained that, there being no proof of malversation the fine imposed by the Lord Ordinary was sufficient. At the close of the debate, however, he offered to resign his office.

LORD JUSTICE-CLERK—This is a most unusual case. If ever there can be cases short of conviction for crime where a person holding such an appointment as that held by the respondent ought to be removed, this is one such. I cannot agree with the conclusion which the Lord Ordinary has arrived at on the facts as stated by him. I think there has been persistent neglect on the part of the curator, neglect which has not been satisfactorily explained. I therefore without hesitation move your Lordships to grant the prayer of the petition.

LORD YOUNG — I must own that when I read the opinion of the Lord Ordinary I was more than surprised at the conclusion he has come to, that although it was a case for disallowing half the curator's commission it was not a case for removal. My view is that it is clearly a case for removal. I do not think that any professional man to whom such censure as the Lord Ordinary has expressed is applicable, and I think it is applicable, is fit to remain in office. I agree therefore that this is a case for removing the curator from his office, and for finding him liable to the petitioner in the expenses of the petition, and that it should be remitted to the Lord Ordinary to appoint a new curator.

LORD TRAYNER—I am of the same opinion. During the whole course of the curatory the curator has neglected his duties, and has turned a deaf ear to the remonstrances of the Accountant of Court. I think we must express our entire disapproval of his conduct by removing him from his office.

LORD MONCREIFF concurred.

The Court pronounced an interlocutor removing the respondent from the office of *curator bonis*, found him liable in expenses to the petitioner, and remitted to the Lord Ordinary to appoint a new *curator bonis*.

Counsel for the Petitioner and Reclaimer — Baxter—A. M. Anderson. Agents — Clark & Macdonald, S.S.C.

Counsel for the Respondent — Guthrie, K.C. — J. C. Watt. Agents—Anderson & Chisholm, Solicitors.

Tuesday, March 12.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

ROBERT FORRESTER & COMPANY *v.* M'CALLUM.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *First Schedule* (1) (*a*) (1)—*Amount of Compensation—Minimum of* £150—*Workman in Employment Less than Three Years.*

Held that the minimum sum of £150 fixed by section (1) (*a*) (1) of the First Schedule to the Workmen's Compensation Act 1897, with reference to injuries resulting in death, was applicable to the case of a workman who had been less than three years in the employment, and that the amount of compensation which could be awarded to his dependants was not limited to 156 times his average weekly earnings where that sum was less than £150.

Opinions contra in *Doyle* v. *Beattie & Sons*, July 10, 1900, 2 F. 1166, *reconsidered* and *disapproved.*

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 before the Sheriff-Substitute (STRACHAN) at Glasgow between Robert Forrester & Company, coalmasters, Glasgow, appellants, and Mrs Catherine M'Callum, widow of George Mitchell M'Callum, miner, Fauldhouse, for herself and as tutrix and guardian of her pupil children, claimant and respondent.

The admitted facts were as follows—"(1) That George Mitchell M'Callum, husband of the respondent, was on 2nd July 1900 killed while in the employment of the appellants. (2) That the said George Mitchell M'Callum had been in the employment of the appellants for a part only of two weeks prior to his death, and it was not disputed that the respondent was entitled to compensation under the Act. (3) That the average weekly wage of the said George Mitchell M'Callum was 12s., and this wage multiplied by 156 amounts to £93, 12. (4) That the respondent was wholly dependent on the said George Mitchell M'Callum at the date of his death."

The Sheriff-Substitute held in these circumstances that the minimum sum fixed by section (1) (*a*) (i) of the First Schedule to the Workmen's Compensation Act 1897 was

applicable to the case of a workman who had been less than three years in the employment, and he accordingly awarded the respondent the sum of £150, and found her entitled to £3, 3s. of expenses.

The questions of law for the opinion of the Court were—"(1) Is the minimum of £150 fixed by section 1 (*a*) (i) of the said Schedule applicable to the case of a workman who has been less than three years in the employment? *or* (2), Is the average wage, amounting in this case to £93, 12s., the limit of the compensation which can be awarded in such a case?"

The Workmen's Compensation Act 1897, by the First Schedule (under the head "Scale of Compensation") provides as follows—"(1) The amount of compensation under this Act shall be (*a*) where death results from the injury—(i) 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 those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this 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 deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

Argued for the appellants—The Sheriff-Substitute was wrong in holding that the minimum award of £150 was applicable to the case of a workman who had been in the employment less than three years. Clause 1 (*a*) (i) of the Schedule was divided into two parts, which were quite distinct, and the provision regarding the maximum and minimum awards applied only to the case of a workman who had been three years in the same employment. The point was directly decided in *Doyle* v. *Beattie & Sons*, July 10, 1900, 2 F. 1166, which was supported by *Small* v. *M'Cormick and Ewing*, June 6, 1899, 1 F. 883. The point was not expressly raised in *Lysons* v. *Andrew Knowles & Sons* and *Stuart* v. *Nixon & Bruce*, [1901], A.C. 79, and the opinions expressed in the House of Lords adverse to the appellants' contention were merely *obiter*. The same observation applied to the opinion of the Lord President in *Russell* v. *M'Cluskey*, July 20, 1900, 2 F. 1312. It was conceded that the maximum of £300 was in the same position as the minimum of £150, so that if in one case the workman might get less than £150 in another case he might get more than £300.

Argued for the respondent — The two parts of the clause fell naturally to be read together, and no reason could be suggested why the maximum and minimum should apply to one case and not to the other. No doubt opinions were expressed in *Doyle*, *supra*, to an opposite effect, but they were not essential to the judgment, which merely decided that on the facts stated it was possible to ascertain the workman's average weekly earnings. On the other hand, the House of Lords had expressed clear opinions that the maximum and minimum applied to the case of a workman who had been less than three years in the employment—*Stuart*, *supra*, *per* Lord Chancellor Halsbury and Lord Lindley, at page 101, and Lord Macnaghten, at page 93. See also *Russell*, *supra*, *per* Lord President, at page 1315.

At advising—

LORD JUSTICE-CLERK—The decision of this case depends upon the interpretation to be put upon head (1) of sub-section (*a*) of the First Schedule of the Workmen's Compensation Act, which settles the limits of compensation which may be awarded to the dependents of a workman who has died in consequence of an injury. That head provides, in the case of a workman who has been three years in the employment, that the dependants shall receive a sum equal to his earnings if they exceed £150, and a minimum of £150 if they do not, but not exceeding a maximum in the first case of £300. It then goes on to deal with the case of a workman who has not been three years in the employment, enacting that "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."

In this case the period was less, but the Sheriff-Substitute has held that his duty was to multiply the weekly average wages by 156 to ascertain the actual amount, and finding that that amount was less than the minimum of £150 set forth in the earlier part of the schedule, to award £150.

I am of opinion that the decision of the Sheriff-Substitute is right. In the case of *Doyle* v. *Beattie & Sons*, which was quoted to us as being contrary to the Sheriff-Substitute's judgment, the question which arose was, whether the words in the first part of the schedule, by which the time of the running of the three years must be all before the accident, prevented a claim made under the latter part of the schedule being ascertained on average where the employment was only for one week before the accident, but the workman continued in the employment and worked during another week before his injuries took such effect as to cause him to cease working. We held that the two parts of the clause were quite separate, and that the second part gave in that case sufficient means for calculating the average and ascertaining the total, the calculation not being limited to work done before the accident as it was in the first half. I feel bound to confess that in so far as what I said in that case may be construed to mean that the two parts of head (1) of sub-section (*a*) of the Schedule

were absolutely separable, so that no part was to be read into the second, it cannot be justified upon a closer reading of the schedule. That schedule, I hold, provides that in the case of a death, the claim of dependants, both in the case of a complete three years service and in the case of a service more limited in time, extends to £150 in any case where either the total wages of the three years service in the one category, or the multiplication of the average wages by 156 in the other category, bring out a sum of less than £150. That is the case here, and I am of opinion that the Sheriff-Substitute has rightly decided that £150 is the sum to which the respondent is entitled.

LORD TRAYNER—The question raised by this appeal was incidentally argued and considered in the case of *Doyle*. In my opinion in that case I adopted a view of the meaning and effect of the first part of the First Schedule appended to the Workmen's Compensation Act different from that taken and given effect to by the Sheriff in the present case. I think the part of the schedule to which I have referred admits reasonably of two readings, and in *Doyle's* case I adopted the one which I thought the sounder reading of the two. After hearing the argument in this case, and considering what was said in the House of Lords in the case of *Stuart*, I have come to the conclusion (contrary to the opinion I formerly expressed) that the judgment now under appeal is well founded and ought to be affirmed.

LORD MONCREIFF—I think the Sheriff's judgment is right. The province of the latter part of section 1 (*a*) (i) of the First Schedule appended to the Workmen's Compensation Act is merely to provide a means of fixing the amount of the deceased workman's earnings during the three years next preceding the injury where he was not in the actual employment of the employer during the whole of the said three years. This is to be done by first ascertaining his average weekly earnings during the period of his actual employment, and multiplying that average by 156, being the number of weeks in a period of three years.

This being the sole purpose of the provision, article 1 (*a*) (i) amounts to this — Where death results from the injury, and the workman leaves dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or where his employment has been less than the said three years a sum equal to 156 times his average weekly earnings during the period of his actual employment. But in neither case shall the compensation exceed £300 or be less than £150.

If the latter part of article 1 (*a*) (i) were to be read as entirely independent of the maximum and minimum fixed in the former part, the result might be that the representatives of a workman who had only been one week in the employment might receive a larger sum than the representatives of a workman who had been in the employment during the whole period of three years. This was clearly not intended.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Appellants — W. Campbell, K.C.—Chree. Agents—W. & J. Burness, W.S.

Counsel for the Claimant and Respondent — Salvesen, K.C. — W. Thomson. Agents—Campbell & Smith, S.S.C.

Tuesday, March 12.

SECOND DIVISION.

[Sheriff-Substitute at Dunfermline.

GIBSON *v.* WILSON.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident arising out of and in the course of Employment — Workman Climbing Railing to get to Work.*

A workman who was employed in repairing a church, on coming one morning to his work at the usual hour was unable to unlock the gate of the churchyard which surrounded the church. He therefore, in order to get access to his work, climbed up on the railing of the schoolyard which adjoined the churchyard, and thence over the churchyard wall into the churchyard. While climbing up on the railing one of the spikes pierced his foot. This injury caused tetanus, from which he died.

Held (*dub.* Lord Moncreiff) that the accident did not arise "out of and in the course of his employment" within the meaning of section 1, sub-section (1), of the Workmen's Compensation Act 1897.

This was an appeal upon a case stated by the Sheriff - Substitute at Dunfermline (GILLESPIE) in the matter of an arbitration upon a claim under the Workmen's Compensation Act 1897, made by Jane Sheriff or Gibson, widow of Alexander Gibson, painter, Musselburgh, as an individual, and also as tutor and administrator-in-law for her son William Gibson, claimant and appellant, against John Nelson Wilson, painter, Inverkeithing, respondent.

The facts found proved by the Sheriff-Substitute were as follows—"In the summer and autumn of 1900 improvements had been in the course of execution on Inverkeithing Parish Church. These consisted, *inter alia*, of removing the gallery and stone staircases, and a brick or stone wall extending across the church behind the gallery to the height of the gallery, inserting ornamental rafters into the ceil-