Thursday, June 19.

FIRST DIVISION.

[Sheriff-Substitute at Forfar.

GREWAR *v.* CALEDONIAN RAILWAY COMPANY

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*b*)—*Amount of Compensation—Average Weekly Earnings—Continuity of Employment — Employment for Part of One Day only.*

An occasional labourer paid by the day was employed by a railway company from 1st to 25th August, on 17th and 18th September, and on 4th October, when he was injured. In the intervals between these dates he attempted to obtain work from other employers but failed. Before he was injured on the 4th he had worked for a few hours, for which he was paid by the piece. In fixing the amount of compensation to which he was entitled under the Workmen's Compensation Act 1897, *held* (1) that the period of his employment commenced on the 4th October, and (2) that the amount of his actual earnings on that day was to be taken as his average weekly earnings in the sense of the Act.

Ayres v. *Buckeridge* [1902], 1 K.B. 57, *not followed.*

The Workmen's Compensation Act 1897 enacts (First Schedule, sec. 1)—"The amount of compensation under this Act shall be, . . . (*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week, not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

This was a case stated for appeal by the Sheriff-Substitute at Forfar (LEE) in an arbitration under the Workmen's Compensation Act 1897, between James Grewar, labourer, Forfar, claimant and appellant, and the Caledonian Railway Company, respondents.

The case set forth that the following facts were admitted or proved — "The appellant is a day labourer in no fixed employment. He was employed by the respondents from 1st to 25th August 1900, and again on 17th and 18th September 1900. On both occasions his engagement was only from day to day, and both on 25th August and on 18th September his employment by the respondents absolutely ceased. From 25th August to 17th September and again from 18th September to 4th October, the appellant being out of work sought employment elsewhere but failed to obtain it. On 3rd October 1900 the respondents' locomotive foreman engaged the appellant for the subsequent day to load coal, and asked him to find two other labourers to work with him. The wage fixed was fourpence per ton of coal loaded by the three, that being the ordinary rate for such labourers so employed. The appellant had no control of the method of the work, which was supervised by the respondents' foreman, and the only distinction so far as appeared between his position and that of the two labourers who worked with him was that he was to receive and apportion the total wages for the work done. The appellant was also assisted in the work by another labourer engaged by the respondents, and under their orders.

"A few hours after he began work on 4th October 1900 the appellant was injured by a fall from the crane which the respondents supplied for the work. As a result of this fall the appellant has since been and still is incapacitated for work.

"The appellant's earnings in the employment of the respondents were as follows:—from 1st to 25th August £3, 4s. 1d.; on 17th and 18th September, 6s. 6d.; and on 4th October 1s. 6d. In August and September he was, in terms of his engagement, paid at the rate of 4d. per hour."

On these facts the Sheriff-Substitute held that the appellant was on 4th October 1900 a workman, not a contractor; that the period of employment began on 4th October; and that the Workmen's Compensation Act 1897 does not provide for compensation except in cases where employment in more than one week forms the basis of calculation of the injured workman's weekly earnings; and found that the appellant was not entitled to compensation under the Act.

The following questions of law were stated:—"(1) Was the appellant on 4th October 1900 a workman in the sense of the Workmen's Compensation Act 1897, or was he a contractor? (2) Was the period during which the appellant was in the employment of the respondents, the ten weeks between 1st August and 4th October 1900, or did the period of employment only begin on 4th October 1900? (3) In the event of it being held that the period of employment began on 4th October 1900, is the amount of the appellant's earnings on that day to be taken as his average weekly wage in the sense of the Workmen's Compensation Act 1897, Schedule 1, section 1 (*b*)?"

At the hearing the respondents admitted that in view of the decision of the House of Lords in *Lysons* v. *Knowles* [1901], A.C. 79, they could not support the Sheriff's finding that the appellant was not entitled to compensation. Parties were ultimately agreed that the Sheriff was right in holding that the appellant was a workman and not a contractor. On the question of the amount of compensation the appellant argued that the whole earnings of the appellant during the different times he was employed by the respondents must be taken into account. The appellant was a casual labourer, and the employment was, for casual labour, substantially continuous. It might have been different had he in the interval been

employed by someone else, but he was not. A break of a few days did not interrupt employment—*Small* v. *M'Cormick*, June 6, 1899, 1 F. 883, 36 S.L.R. 700. Alternatively, if it should be held that he was only employed for one day, his average weekly earnings must be arrived at by considering what he probably would have earned in one week at the labour on which he was employed on that day—*Ayres* v. *Buckeridge*, *Wheale* v. *Rhymney Iron Company*, *Jones* v. *Rhymney Iron Company* (all reported together) [1902], 1 K.B. 57.

Argued for the respondent—Here the appellant had only been employed for one day in the employment in which he met with the accident. The fact that he had previously been employed by the same employer was irrelevant, unless it could be shown that there was a continuity in the relationship of master and servant in so far as that was consistent with the character of the employment—*Russell* v. *M'Clusky*, July 20, 1900, 2 F. 1312, 37 S.L.R. 931; *Jones* v. *Ocean Coal Company* [1899], 2 Q.B. 124; *Hathaway* v. *Argus Printing Company* [1901], 1 K.B. 96. Here the dissolution of the relationship of master and servant was perfectly clear, because the appellant went away and tried to find other work. Assuming that the only employment to be considered was that on 4th October, the average weekly earnings must be the amount he actually earned on that day. That was implied in the decision in *Lysons* v. *Knowles* [1901], A.C. 79, and in *Niddrie and Benhar Coal Company* v. *Peacock*, January 21, 1902, 4 F. 443, 39 S.L.R. 317. The English cases referred to on the other side — *Ayres*, *Wheale*, and *Jones* [1902], 1 K.B. 57—had adopted a different rule, but in doing so they went quite outside the Act. "Average weekly earnings" meant what the workman in fact earned, not what he might have earned.

At advising—

LORD ADAM—The appellant in this case is an occasional labourer employed and paid by the day. He was so employed by the respondents from 1st to 25th August 1900, and again on 17th and 18th September 1900. On the 3rd October he was engaged by the respondents' foreman to work next day, who asked him to find two other labourers to work with him. The wages fixed were 4d. per ton of coal loaded by the three, that being the ordinary rate for such labourers so employed. He was to receive and apportion the total wages for the work done. A few hours after the appellant began to work on the 4th October the accident to him happened for which compensation is now claimed. He was paid for his work on that day the sum of 1s. 6d.

In these circumstances the Sheriff held that on 4th October the appellant was a workman and not a contractor. It was not disputed that the Sheriff's judgment in this respect was right, so that matter need not be further referred to.

The Sheriff further held that the appellant's period of employment began on 4th October, and that the Workmen's Compensation Act didn ot provide for compensation except in cases where employment for more than one week forms the basis of the calculation of the injured workman's weekly earnings, and he accordingly found that the appellant was not entitled to compensation.

It is clear that the decision in the case of *Lysons* (1901 Ap. Cas., H.L. 79), which affirms the contrary, had not been brought under the Sheriff's notice when he pronounced this finding, and the case must in any view go back to him to assess the amount of compensation due.

It will be observed, however, that the Sheriff's judgment depended on whether he was right in holding that the period of the appellant's employment began on 4th October, and accordingly the second question of law put to us is, whether the period during which the appellant was in the employment of the respondents includes the ten weeks between 1st August and 4th October, or whether the period of employment began on 4th October 1900.

The amount of compensation to be awarded in respect of total or partial incapacity is in the words of the Act "a weekly payment during the incapacity, after the second week, not exceeding fifty per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer."

It is clear that the only earnings which are to be taken into consideration in fixing the amount of compensation are earnings during the period that the workman has been in the employment of the same employer, and that any reference to what he may have earned or be capable of earning under other employers is excluded.

In the next place, I think that the period which is to be taken into consideration is the period during which the workman has been in the employment at the time of the accident.

The Act says that the workman is to be entitled to fifty per cent. of his average weekly earnings during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer.

It appears to me that the first of these alternatives refers to continuous employment for the twelve months prior to the date of the accident, and that the less period referred to in the second alternative must also be continuous before the date of the accident. I do not think that separate and distinct periods of employment which may have occurred during the twelve months prior to the accident are intended to be taken into consideration. It will be observed that the Act does not say that "any less periods" are to be considered, but "any less period."

It is quite settled in the case of a day labourer, which is this case, that although his contract of employment may terminate at the end of each day, that does not

determine the continuity of his employment. Although he may be employed at irregular intervals only he may still be considered as being in the continuous employment of the employers. But I think that where the facts and circumstances of the case show that a period of previous employment had come to an end for the time, it cannot be taken into consideration in fixing the amount of compensation.

In this case we are told that the appellant had been employed by the respondents from 1st to 25th August and on 17th and 18th September prior to the 4th October, and that from 25th August to 17th September and again from 18th September he sought employment elsewhere but failed to obtain it. From these facts the Sheriff inferred that both on 25th August and 18th September his employment by the respondents absolutely ceased. I agree with this. I do not see how in any view the appellant can be considered after these dates to have been in the employment of the respondents. If he had succeeded in getting employment elsewhere he could not have been at the same time in the employment of the respondents. That he did not succeed does not appear to me to make any difference.

The third question on which the appellant asks the opinion of the Court is whether, if that be so, the amount of the appellant's earnings on the 4th of October is to be taken as his average weekly earnings in the sense of the Workman's Compensation Act, Sched. 1, sec. 1, sub-sec. (*b*).

This appears to me to be a very difficult and novel question. Cases have occurred in which where a workman has worked for a full day his earnings on that day have been taken as his average weekly earnings in the sense of the Act, but so far as I am aware this is the first case in which the question has arisen under this particular sub-section whether, when a workman has only worked for a part of a day his earnings for the time so worked are to be taken as his average weekly earnings.

But it was maintained to us that even in the case where a workman has worked for a full day his earnings on that day are not to be taken in the matter of assessing compensation as being his average weekly earnings.

It appears to me that the first question to be considered is, what is the meaning in the sub-section of "average weekly earnings." I think that it is clear that a week is the unit for the calculation of the amount of the workman's earnings in estimating the amount of compensation; whether it be a calendar week or a trade week or a week of several continuous days commencing from the date of the workman's employment does not arise in this case. But whichever it may be, I think that a week must be taken as the unit of calculation. There is no reference to days being considered except as being part of a week. Accordingly, as I understand the matter, where there has been continuous employment for two or more weeks, in calculating the average weekly earnings the actual earnings earned in each week are always taken as the weekly earnings whether the workman has worked one, two, or more days during the week, and I think it would be difficult to construe the Act otherwise. But if that be so, it is difficult to see why "weekly earnings" should have a different meaning at the beginning of a course of employment from what it has during a course of employment. If, then, a week be the unit of calculation, and weekly earnings means the earnings actually earned during the week, it is difficult to avoid the conclusion where the workman has only worked one or two days in a week and earned only a correspondingly small sum, that that sum must be taken to be his weekly earnings in the sense of the Act.

This appears to be in entire conformity with the order of the House of Lords in *Lysons'* case.

In that case the workman had worked either one day in two weeks or two days in one week, according as the calendar or trade week was to be taken. The County Court Judge held that he had worked two days in one week, and awarded him 50 per cent. of 12s., or 6s., but by the order of the House that sum of 6s. is divided by two, on the footing that he had worked one day in each of two weeks, and only 3s. awarded weekly. This order appears to me to affirm that the week is to be taken as the unit of calculation, and the actual earnings, although only for one day of the week, taken as the weekly earnings.

It is said, however, that this order is not in conformity with the judgments delivered in the House. That is an assumption not lightly to be made, but I can see no discrepancy between the judgments and the order following thereon. It appears to me that the learned Lords assume throughout that the week is the unit of calculation, and the weekly earnings are the actual earnings paid for the week. Lord Macnaghten says—"The obvious meaning" (of the Act) "I think is that you are to take a week's earnings as the unit of calculation, but if there has been a series of weekly earnings of different amount, you are to take an average, and the unit will then be not an actual week's earnings but a hypothetical week's earnings;" and Lord Shand says—"It appears to me that you read the provision quite fairly when you propose to get at the average weekly earnings by taking that which the man has made in the week in that particular employment, which is only the wages for a particular day." That is precisely what the order does.

We were referred to three cases decided in England since the decision in *Lysons'* case. The cases of *Ayres*, *Wheale*, and *Jones*, reported together, 1902, 1 L.R., K.B. Div. 57.

With the greatest respect I do not concur in the decisions in these cases. Without going into detail they all appear to me to proceed upon the principle that in assessing compensation, unless you can find earnings for at least two full weeks, you cannot ascer-

tain what the average weekly earnings are; that therefore the schedule in the Act is inapplicable to the case, and that you are at liberty to use such materials as are at your disposal to measure what is the amount of compensation to be awarded under the Act

I think that this is contrary to the decision in *Lysons'* case. It will be observed that in that case their Lordships had in view that a case might occur in which the schedule was not applicable, and that recourse might be had to other means in fixing the compensation, for both the Lord Chancellor and Lord Davey say so, yet they held the schedule to be applicable in that case, and awarded compensation according to it, although the workman had only earned wages one day of each week. It follows that in the judgment of the House such a case is not a *casus omissus*, in the words of Lord Davey, for which the sub-section has not provided a mode of calculation of the compensation.

It is true that the present question does not appear to have been argued in that case, but it was very material to the issue, and it is singular that if there had been substance in it it should have escaped the notice of all the learned Lords and counsel engaged in the case.

In the case of the *Niddrie and Benhar Coal Company* v. *Peacock*, 39 S.L.R. 317, a miner who had entered the service of the company on Thursday, 15th August, was killed by an accident on Sunday, 1st September. During that time he had worked three days in the first week, then two full weeks, and then one day of the fourth week. The Sheriff-Substitute held that the average weekly earnings of the deceased, calculated on the footing of a seven days' week, the deceased having worked fourteen days continuously prior to the accident, was a certain sum, and he gave judgment awarding £300 of compensation. The questions of law were—(1) Whether his average weekly earnings fell to be calculated by dividing his total earnings by four calendar weeks; or (2) Whether the weekly earnings were rightly calculated on a seven days' working week.

The Court answered the first question in the affirmative, and recalled the arbiter's award, and remitted to the arbiter to grant decree in terms of that decision. I may remark that no question was raised in that case as between a calendar week and a trade week, and that although the cases of *Ayres*, *Wheale*, and *Jones* were cited they were not followed, but the Court followed the construction of the Act adopted by the Court in the cases of the *Cadzow Company* v. *Gaffney*, 3 Fr. 72; *Nelson* v. *Kerr*, 3 Fr. 893, and *Russell* v. *M'Luskey*, 2 Fr. 1312, and, as I think, by the House of Lords in *Lysons'* case.

If, then, a workman's earnings, although he may not have worked a full week, but only one or more days in the week, are to be taken as his weekly earnings in the sense of the Act, what is to be said when he has not worked a full day, but only, as in this case, part of a day, and been paid only for part of a day? I do not see how the conclusion is to be avoided that if a day's earnings in a week are to be taken as the workman's weekly earnings, so also must his earnings for part of a day in the week be so taken. In either case the question is, what has been the amount of his actual earnings for the week. The question is not what was he capable of earning. That this construction of the Act will produce most capricious results is obvious, as the amount of compensation to be awarded will vary as the accident happened to occur earlier or later in the course of the week's employment, but that is only one more of the many anomalies which the Act has developed in the course of its application.

I think the third question should be answered in the affirmative.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Find in answer to the first question in the case that the appellant was a workman in the sense of the Workmen's Compensation Act 1897 on 4th October 1900; and in answer to the second question, that the period of the appellant's employment by the respondents commenced on said 4th October 1900; and answer the third question in the case in the affirmative; and decern," &c.

Counsel for the Appellant—Watt, K.C. — Malcolm. Agent — J. Ogilvie Hood, S.S.C.

Counsel for the Respondents—Campbell, K.C. — Chree. Agents — Hope, Todd, & Kirk, W.S.

Thursday, June 19.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

M'HUGH *v.* BARCLAY, CURLE, & COMPANY.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*b*)—*Amount of Compensation*—"*Average Weekly Earnings.*"

A labourer entered the service of a shipbuilder on Wednesday, 23rd October, and worked on that day and on the following Thursday, Friday, and Saturday, and for some hours on the Monday of the next week, when he was injured in an accident. There was no finding as to the trade week in this trade. In estimating the amount of compensation to which he was entitled under the Workmen's Compensation Act 1897, *held* (1) that he had been employed for parts of two weeks, the days from Wednesday till Saturday being treated as one week and the hours worked on Monday being also treated as one week, and (2) that his