Wednesday, October 27.

FIRST DIVISION.

M'KEE *v.* JOHN S. STEIN & COMPANY, LIMITED.

Master and Servant — Compensation — Average Weekly Earnings—Deductions from Wages—Special Expenses—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule,* 2 (*d*).

A miner was killed by accident arising out of and in the course of his employment. He employed a drawer whom he himself paid out of his wages. The deceased had been accustomed to purchase explosives for his work from his employers, and the price of these they deducted in paying his wages.

Held, in an arbitration under the Workmen's Compensation Act 1906, that in determining the average weekly earnings of the deceased there fell to be deducted from his gross wages the amount of wages paid by him to his drawer, but not the sums retained by his employers as the cost of the explosives.

Abram Coal Company v. *Southern*, [1903] A.C. 306; *Midland Railway* v. *Sharpe*, [1904] A.C. 349, *followed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, 2 (*d*), enacts—"Where the employer has been accustomed to pay to the workman a sum to cover any special expense entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings."

Mrs Sarah Jane Ferguson or M'Kee, for herself and as curator for her daughter Esther M'Kee, a minor, and as tutor for her daughters Sarah Frances M'Kee and Eliza Jane M'Kee, pupils, being dissatisfied with an award of the Sheriff-Substitute at Falkirk (MOFFAT), acting as arbitrator under the Workmen's Compensation Act 1906, appealed by way of stated case.

The case stated—"This is an arbitration as to the amount of compensation payable to the dependants of the deceased Thomas M'Kee, who was a miner, and who was killed by accident arising out of and in the course of his employment with the respondents on the 5th day of February 1909. The deceased in the prosecution of his employment employed a drawer, whom he himself paid out of his wages. It was agreed between the parties that the earnings of the deceased were to be taken for a period of fifteen weeks in order to determine his average weekly earnings. It was also agreed that the gross sum due to the deceased for that period was £34, 1s. 7d. In estimating the earnings of the deceased the respondents claimed that the amount paid by him to his drawer should be deducted. The respondents also claimed that sums deducted by them from the wages paid to the deceased as the price of explosives purchased from them for the purposes of the employment ought not to be taken into account in estimating his average weekly earnings. I found as matters of fact that the amount of the wages paid to the deceased's drawer during the period the deceased was working to the respondents was £12, 16s. 6d., and that the amount deducted from the gross wages for explosives was £4, 0s. 9d. In these circumstances I awarded £178, 15s. as compensation to the appellant.

"The *questions of law* for the opinion of the Court are — 1. In determining the average weekly earnings of the deceased was I right in deducting from the gross wages paid to the deceased the amount of wages paid by him to his drawer. 2. In determining the average weekly earnings of the deceased was I right in deducting from the gross wages of the deceased the sum retained by the respondents as the cost of explosives bought by the deceased from them for the purposes of his employment."

Argued for the appellant (no argument was presented on the first question)—The £4 should not have been deducted in determining the average weekly wages. The cost of explosives was not a sum to cover any special expenses in the sense of First Schedule, 2(*d*). There was no such finding, and indeed the findings precluded that interpretation. The deceased was the judge of whether he should have explosives or not, and if so, what amount. The 1906 Act, First Schedule, 1 (*a*) and 2 (*d*), did not alter the law on this matter as laid down in *Houghton* v. *Sutton Heath and Lea Green Collieries Company*, [1901] 1 K.B. 93; *Abram Coal Company* v. *Southern*, [1903] A.C. 306, and *Midland Railway* v. *Sharpe*, [1904] A.C. 349.

Argued for the respondents—The words "sum to cover any special expenses"—First Schedule, 2 (*d*)—had been introduced into the Act of 1906 to meet such cases as this. The English cases cited for the appellant were prior to the 1906 Act and could not affect its construction.

At advising—

LORD PRESIDENT—In this case the Sheriff, acting as arbitrator, has awarded the sum of £178, 15s. as compensation to the appellant for herself and as tutor and curator for her children, they being the dependants of a miner who was killed in an accident, and the point that is raised depends upon what was the true amount of wages earned by the deceased, upon which amount of wages the capital sum of £178, 15s. is calculated. Now the deceased man was paid, as is very common in collieries, a certain sum per week as remuneration for himself as a miner and for a drawer whom he himself paid. The learned Sheriff-Substitute has deducted the wages of the drawer —that is to say, he has taken the average weekly earnings of the deceased man as the sum paid to him minus the sum earned by the drawer, and although a question was put upon that it was quite properly given up, because of course it would be

impossible to hold that the wages, which were really the wages of two men, were the weekly earnings of one man.

But the point which has been argued was this, that a further deduction was made by the learned Sheriff-Substitute in respect of sums which the deceased man paid to his employers for explosives. The work that he was engaged on—that of mining—was so to speak paid for as piece-work—that is to say, that he got so much according to the amount of mineral that he turned out, and in order to turn out the mineral apparently he needed explosives, and the practice of the mine was that he should buy his explosives at the mine. Accordingly it was argued—and the learned Sheriff-Substitute gave effect to it—that that sum ought really to come off the earnings of the deceased because it did not truly represent wages.

Now certain cases were quoted to us—two I think in the House of Lords in 1903 and 1904—where expenditure of this sort was also dealt with, and I am of opinion that those cases absolutely cover this case—that is to say, if there has been no change in the law since these cases were decided. Under the old Act I think it would be perfectly impossible to say that this case was not ruled by them. Accordingly I think the sole question left is whether there has been any change made by the recent Act. Under section 2, sub-section (*d*), of the first schedule there is this provision—". . . [*quotes, v. sup.*] . . ." and I think the only question therefore is whether this expenditure or payment falls under that rule. I am of opinion that it does not. It might have been arranged otherwise, but in the circumstances as disclosed in the findings of the Sheriff-Substitute I do not think you can call this a sum paid to cover any special expenses, because such a sum I think obviously means a regular sum paid as part of the wage—that is to say, for example, such a payment as is common enough in domestic service where a man gets so much wages and then a certain sum to provide himself with a suit of clothes. That I think is the class of sum contemplated by this sub-section. But here there was no special sum named. The man was left to be his own judge as to whether he would use explosives or how much he would have. That was his own affair, and it was also his own affair whether he got them from the employer or elsewhere, subject no doubt to a veto on the part of the employer against his using an improper explosive in the mine, but there is no finding that he was thirled where he was to get the explosives. I think this case is clearly within the judgments, and whatever one might have said had the whole question been open I think these judgments bind us here. I think therefore that question 2 ought to be answered in the negative, and that it ought to be remitted to the Sheriff-Substitute to re-fix the sum of £178, 15s. upon the assumption that that sum of £4, 0s. 9d. does not fall to be deducted from the wages.

LORD KINNEAR—I agree. I think the main question is ruled by judgments in the House of Lords which are binding upon us, and that the only question is whether the provision introduced for the first time in the Act of 1906 makes any difference. Now that provision is that where the employer has been accustomed to pay to the workman a sum to cover any special expenses, the sum so paid is not to be reckoned as part of the earnings. That seems to me to mean a definite sum paid by the employer to the workman in order to cover a special expenditure; and upon the statement of facts as given us by the Sheriff I see no ground for holding that any such definite sum was paid by the employer to the workman here for any special purpose. The wages are to be put in at the full sum for which the man was engaged to work, but then if in addition to the sum for which he was engaged to work the employer pays him a certain further sum to meet a special expenditure, that is not to be put in. All that is said here is that in the course of his employment the man purchased a certain amount of explosives and paid a certain price for them. That does not appear to me to affect in any way the full sum for which he was engaged to work, for, so far as the case goes—and I do not know what the facts beyond those stated may be—the man is left to judge for himself what explosives he may buy and what he may pay for them; but when he does make his purchase, the price of them becomes due and is deducted from his wages. I agree with your Lordship that this is a totally different matter from what is dealt with in the excepting provision.

LORD JOHNSTON—The factor in ascertaining the compensation to be paid to a workman or his representatives in respect of his injury or death by accident in the course of his employment, under the Workmen's Compensation Act 1906, Schedule I, section 1, is his "earnings" in the employment of the employer in whose service he is at the time of the accident.

In the present case it was explained to the Court that the employers do not supply explosives to their miners. If they did so they would pay a sum per ton so much less for the coal raised. They do not supply explosives, because then the miners would most probably be reckless in their use. Further, that they do not allow the miners to bring their own explosives, because it is necessary that the employers should have a control over the quality. And the Sheriff-Substitute, in arriving at the earnings of the deceased for the purpose of the statute, has deducted from the gross sum payable to him during the period of his employment the cost of explosives charged against him. The competency of his doing so is questioned.

Had I to determine the point raised irrespective of authority, I should have concurred with the learned Sheriff-Substitute, for I do not think that a man can be said to earn more than he carries away for his own behoof as the result of his work, and I think

here that he only earned what was paid him, less the cost of the explosives used by him. But I agree that the question is concluded by authority. Three cases were quoted to us from England—two of them decided by the House of Lords under the earlier Act of 1897, where, however, the words for construction are the same. These were *Houghton* v. *Sutton Heath Collieries Company*, [1901] 1 K.B. 93; *Abram Coal Company* v. *Southern*, [1903] A.C. 306; and *Midland Railway* v. *Sharpe*, [1904] A.C. 349. Though I might attempt to distinguish the present case from these in matter of detail, I think that on a fair reading of the opinions of the learned Lords who decided the two last cases the broad ground of their judgment is that the use of the word "earnings" in the schedule is a rough way of getting at the sum to be paid for compensation, and that what the company actually pay is to be treated as earnings in the sense of the schedule, without examining closely what it costs the workman to realise such payment, whether such cost is directly out of pocket or indirectly by way of retention by his employer. To do otherwise would, it is indicated, in the many differing circumstances which must occur, involve a refinement of consideration which the statute did not contemplate.

The provision in section 2, sub-head (*d*), of the schedule, to which your Lordship has adverted, confirms the construction so put upon section 1. It is new, and was enacted after, and no doubt in view of, the decisions to which I have referred.

I therefore concur in your Lordship's opinion that the second question of law submitted should be answered in the negative.

LORD M'LAREN was absent.

The Court answered the first question of law in the affirmative, and the second question in the negative, recalled the determination of the Sheriff-Substitute as arbitrator appealed against, and remitted to him to proceed as accorded.

Counsel for the Appellant—Hunter, K.C. —J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Morison, K.C. —Russell. Agent—J. Mullo Weir, S.S.C.

Saturday, October 30.

SECOND DIVISION.

[Sheriff Court at Airdrie.

UNITED COLLIERIES, LIMITED *v.* KING.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, par.* 15—*Certificate by Medical Referee that Incapacity had Ceased—Supervening Incapacity—Competency of Arbitration Proceedings—Bar.*

A having been injured in the course of his employment, was paid compensation by his employers under agreement until 20th October 1908, when payments were stopped. On 3rd December 1908 a remit was made to a medical referee under paragraph 15 of the First Schedule to the Workmen's Compensation Act 1906. The referee reported that incapacity ceased at 20th October 1908. The workman acquiesced in non-payment until 8th May 1909. He thereafter made application to the Sheriff as arbitrator for compensation as from that date, on the ground of supervening incapacity. The employers maintained that the medical referee's certificate was conclusive, and barred the workman's claim.

Held that the certificate did not bar his application for arbitration.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (15), enacts—". . . In the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment [the Sheriff-Clerk] . . . may refer the matter to a medical referee. The medical referee to whom the matter is so referred shall . . . give a certificate as to the condition of the workman and his fitness for employment, specifying, when necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified."

This was an appeal by way of stated case from the judgment of the Sheriff-Substitute (GLEGG) at Airdrie, in an arbitration under the Workmen's Compensation Acts 1897 and 1906 between George King (*respondent*) and the United Collieries, Limited (*appellants*).

The case as stated by the Sheriff-Substitute set forth—"This is an arbitration under the Workmen's Compensation Acts 1897 and 1906, in which the Sheriff is asked to ascertain and fix the weekly sum of compensation payable to the pursuer, and to grant an award against the defenders in favour of pursuer, finding him entitled to payment of 13s. 2d. per week, beginning the first payment on 8th May 1909 for the week preceding that date, and so on weekly thereafter until the pursuer is again able to earn full wages, or such weekly payments are varied by the Court, with expenses. The pursuer avers that he was injured while working as a stripper in the employment of the defenders on 25th February 1907, and that under agreement he was paid compensation at the rate of 15s. 7d. per week until 20th October 1908. Payments were then stopped, and on 3rd December 1908 the parties applied to the Sheriff-Clerk for a remit to a medical referee, under paragraph 15 of the First Schedule to the Workmen's Compensation Act 1906. The referee reported that incapacity ceased at 20th October 1908. The workman admittedly acquiesced in non-payment until 8th May 1909. The workman now says that incapacity recurred then, and asks payment of compensation