

not in all the grounds of his judgment. This application was made by the appellant to the Sheriff Court in terms of section 68, sub-section 1, of the Friendly Societies Act 1896. The object of the application was to get the Court to enforce a decision pronounced by the Keith District Committee of the defenders' Society ordering the Glenbogie Lodge to reinstate the appellant in his membership.

While under the Act the Sheriff Court is bound to enforce the decisions of the Committees or other tribunals who are authorised by the rules of the Friendly Society to decide disputes, and while review on the merits is entirely excluded, the Court is entitled to take cognisance of the character of the decision or order for which executorial orders are desired, and it is not bound blindly to pronounce a decree which cannot be carried into effect. The kind of order or decision for which application to the County Court is authorised, is, I apprehend, one attended with certain patrimonial consequences, the recovery of a penalty, or the payment or repayment of a subscription, and so forth, as to which the Sheriff can pronounce an operative decree.

But the order in the present case is to have the Glenbogie Lodge ordained to reinstate the pursuer in his membership of the Lodge. Now, in the first place, that is not a matter in which the Civil Court is in use to interfere, and accordingly even if decree in terms of the prayer were pronounced, I do not at present see how or against whom it could be enforced if the defenders refused to obtemper it. I therefore agree that this appeal should be dismissed.

The Court dismissed the appeal.

Counsel for the Pursuer—Guthrie, Q.C.—Munro. Agents—Sim & Garden, S.S.C.

Counsel for the Defenders—Salvesen, Q.C.—Glegg. Agents—Macpherson & Mackay, S.S.C.

Tuesday, July 10.

SECOND DIVISION.

[Sheriff-Substitute
at Edinburgh.]

DOYLE v. WILLIAM BEATTIE & SONS.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule (1) (a) (i)—Amount of Compensation—Injury Resulting in Death—Minimum Sum of £150.

The dependants of a deceased workman are not entitled under the Workmen's Compensation Act 1897 to the minimum sum of £150, referred to in the First Schedule 1 (a) (i), unless the workman has been for three years or more in the employment of the employer.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule (1) (a) (i)—Amount of Compensation—Injury Resulting in Death—Average Weekly Earnings—Period of Employment from which to Calculate Average Weekly Earnings — Employment after Injury.

Where a deceased workman has been at the time of his death for less than three years in the employment of his employer, in order to calculate his average weekly earnings during the period of employment, so as to fix the compensation due to his dependants under the Workmen's Compensation Act 1897, it is necessary that the workman should have been in the employment for at least two weeks, but it is not necessary that he should have been in the employment for every day of these weeks, and it is competent to take into account a period of employment by the same employer subsequent to the date of the injury.

The First Schedule appended to the Workmen's Compensation Act 1897 provides—(1) 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 £150, whichever of those sums is the larger, but not exceeding in any case £300, 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."

Mrs Mary Sullivan or Doyle, widow of the deceased Thomas Doyle, labourer, Leith, appealed from the decision of the Sheriff-Substitute at Edinburgh (HAMILTON) in an arbitration under the Workmen's Compensation Act 1897 between her and William Beattie & Sons, contractors, Edinburgh, in which she claimed £219, 14s. as compensation for the death of her husband.

In the case stated for appeal the Sheriff-Substitute stated that the parties concurred in admitting the following facts:—The work was an engineering work, and the defenders were the undertakers thereof, both in the sense of the statute founded on. The deceased Thomas Doyle was a labourer employed by the defenders by the hour, and paid at so much an hour. His services began about one o'clock on Monday, 18th December 1899, on which day he worked 3½ hours, and continued during Tuesday, Wednesday, and Thursday, on each of which days he worked 9½ hours. On Friday he worked from the usual starting hour until about three o'clock on the afternoon, when he was injured. He worked on that day 7½

hours in all. During the whole period above mentioned the rate at which he was employed was 6½d. per hour, and he received in all £1, 1s. 5d. On Monday, 25th December 1899, he was re-engaged by the defenders at a wage of 5½d. per hour. On each of Monday, Tuesday, Wednesday, Thursday, and Friday he worked 9 hours, and also an extra night-shift. During the whole period the rate at which he was employed (excluding the night) was 5½d. an hour, and he received in all £1, 5s. 2d., including 4s. 6d. for the night-shift. On 22nd December 1899 he was injured by an accident arising out of and in the course of his employment, and he died from the effects thereof on 10th January 1900. The pursuer was wholly dependent on her husband and was with child to him.

On 2nd June 1900 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—"In respect of two decisions by the Lords Justices of Appeal in the cases of *Lysons v. Andrew Knowles & Sons, Limited*, March 3, 1900, 1 Q.B. 780, and *Stuart v. Nixon and Bruce*, L. T. Rep., April 6, 1900, dismisses the petition, and decerns."

The question of law for the opinion of the Court was—"Whether on the facts above stated the appellant is in law entitled to compensation under the First Schedule (1) (a) (i) of the said Act?"

The Court took exception to the form of the Sheriff-Substitute's decision, inasmuch as it contained no definite finding in law, and so were of opinion that it ought to be sent back to be amended. But in order to save expense to the parties they allowed the case to proceed on the parties inserting a statement that they agreed that the Sheriff-Substitute in point of law held that the pursuer was not entitled to compensation under the Act in respect that her deceased husband had not been in the employment of the respondents for a period of two weeks previous to the accident.

Argued for the appellant—Whether or not her husband had worked so that his average weekly wage could be ascertained, she was entitled in terms of section 1 (a) (i) of the First Schedule to £150. But in the present case the deceased had worked long enough to enable his average weekly wage to be ascertained. It was not necessary to have work during two weeks in order to ascertain the "average weekly earnings." At anyrate, work during the whole of two weeks was not necessary. In *Smith v. M'Cormick*, June 6, 1899, 1 F. 883, the work had been done at irregular intervals extending over a number of weeks. If the English decisions quoted by the Sheriff-Substitute were against this view they were wrong. But they were not. In the case of *Stuart v. Nixon and Bruce* [1900], 2 Q.B. 95, Lord Justice Collins, who gave judgment in the case of *Lysons v. Andrew Knowles & Sons, Limited* [1900], 1 Q.B. 780, laid it down that in order to get an average of the earnings there required to be employment during two weeks, but that it was not necessary that the workman

should have been in that employment for every day of the two weeks.—See [1900], 2 Q.B. 99. Here one of the two weeks taken into account was subsequent to the date of the injury. But that did not matter. The period to be taken into account was not restricted to the time prior to the date of the injury.

Argued for the respondent—The minimum of £150 was only due where there had been three years' employment "preceding the injury." It was not allowable to reckon the time after the accident. The language of the schedule showed that the employment must precede the injury. All through the clause the word "earnings" must be taken as qualified by the words "preceding the injury." For the sake of the workman himself it was desirable that the clause should be so interpreted, because otherwise if he was engaged after the accident at a smaller wage, that would reduce his average. In the present case the old employment stopped at the time of the accident, and when the deceased was re-engaged at the beginning of the next week he was under a different contract of service. The deceased not having been for two weeks in the actual employment of the defenders, the pursuer, on the authority of the English cases cited by the Sheriff-Substitute, was not entitled to compensation.

LORD JUSTICE-CLERK—I am of opinion that the conclusion at which the Sheriff-Substitute has arrived is wrong. I think that head (1) of section (1) (a) of the first schedule of the Workmen's Compensation Act is divisible into two parts, and that it is the second part which applies to the present case. What the Act says is this—[*His Lordship quoted the clause*]. I think these two branches of this provision are quite separate, and I am of opinion that there are means, and perfectly appropriate means, in this case, for ascertaining the average amount of the wages of the deceased. Mr Glegg maintained that, looking to the language of the first branch of the provision, the man must have been three years in the employer's service before the day on which the injury took place in order to entitle the representatives to take advantage of that branch of the provision, and Mr Glegg maintained that the same rule applied to the construction of the second branch of the provision. I am not of that opinion. Granted that under the first branch the three years are to be calculated backwards from the date of the injury, I do not see any ground for applying the same principle to the second branch. I think that if you can in any reasonable mode calculate, from days on which the man was actually employed, what his average earnings were, you sufficiently satisfy the statute, and I think further that on the facts stated here you can make that calculation in this case. It is not straining the facts here to say that the deceased was for two weeks in the employment of the defenders, and if you have two weeks that gives you the means of calculating an average. I do not

think the mere fact that the workman has been absent for an hour or an hour and a half at a time will make him cease to be in the employment. It is plain that the English cases to which we were referred proceed on the view that you must have the means of striking an average—that is to say, that you must have at least two weeks. But you are not to strain that principle—you are to give the words a reasonable meaning. I am of opinion that the Sheriff-Substitute ought to have found that he had the reasonable means of making that calculation in this case. I propose therefore that we should answer the question in the affirmative.

LORD YOUNG—I concur.

LORD TRAYNER—I am of the same opinion.

The first question is, whether the appellant is right in maintaining that under the first part of Schedule I she is (if entitled to compensation at all) entitled to a minimum sum of £150. I do not think that a sound view. The clause is divided into two parts. The first deals with the case in which the dependants of the workman are to get a sum equal to his earnings for three years or £150, whichever of these sums is the larger, but both the maximum and the minimum of these alternatives are confined entirely to the case in which the workman has been for three years or more in the employment of the employer. The clause, in its second part, goes on to deal with the case of a workman who has been in the employment of the same employer for less than three years, and provides that in that case his dependants are to get a sum calculated on his average weekly earnings during the period of his actual employment under the employer. I agree with the views which are expressed by the learned Judges in the English decisions which were cited to us, that a case cannot come within this provision unless the workman has been in the employment for at least two weeks, for you cannot get the average weekly earnings unless you have at least two weeks to reckon by. I also agree with what was said by Lord Justice Collins in *Stuart v. Nixon & Bruce*, that it is not necessary that the workman should "have been in that employment for every day of the two weeks, but that he must have been so employed during the two weeks that his earnings can be averaged with reference to that period." On that reading of the schedule the appellant is entitled to compensation, because the deceased was in the employment of the respondents for two weeks, and we have thus the means of ascertaining his average weekly earnings while in the respondents' service. I see no good reason for holding (as the respondents contended we should) that the second week is not to be taken into consideration, because it was subsequent to the date of the injuries which ultimately proved fatal. The injuries occurred on the Friday of the first week, but did not immediately incapacitate the workman, who accordingly entered on and completed another week's service.

For the purposes of the Act I think the two weeks' services, which were of the same character, should be taken as affording the means of calculating the compensation due to the appellant.

LORD MONCREIFF was absent.

The Court answered the question in the affirmative.

Counsel for the Claimant and Appellant—Salvesen, Q.C.—Constable. Agent—A. J. Simpson, S.S.C.

Counsel for the Respondents—Kincaid Mackenzie, Q.C.—Glegg. Agent—James Wilkie, S.S.C.

Tuesday, July 17.

FIRST DIVISION.

GIBSON AND ANOTHER, PETITIONERS.

Charitable Trust — Jurisdiction — Fund Collected by Subscription for Particular Object—Surplus to be Applied to Similar Object—Settlement of Scheme—Cy près—Nobile Officium.

At a public meeting held in Dundee in 1873 a resolution was passed to the effect "that the meeting appoint the following gentlemen a committee for the purpose of receiving funds to relieve the families and dependants of those who were lost in the "Celerity," with full powers to administer them according to their own discretion, and in the event of a surplus, to apply it to any similar object." Subscriptions were collected and were applied by the committee year by year in the relief of the families and dependants of the shipwrecked crew. No formal trust-deed was executed, and the committee exercised their functions solely in virtue of the resolution quoted above. A petition was presented in 1900 by the surviving members of the committee, who stated that the primary objects of the charity had now failed, and craved the Court for authority to transfer the surplus of the fund to certain *ex officio* trustees, to be administered by them primarily in relief of dependants of the crew of the "Celerity," if any such still survived and were in necessitous circumstances, and secondarily for the relief of persons belonging to Dundee and district who should thereafter suffer loss by shipwreck, storm, or other perils of the sea.

Held that the Court had jurisdiction to entertain the petition, in respect that it related to a charity in the nature of a trust, and that the resolution contemplated the devotion of a surplus to objects similar to those originally in contemplation.

Proposed scheme *approved*, subject to some slight amendments not affect-