

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-

ing the proposed trust-purposes above mentioned.

In December 1873 the s.s. "Celerity" of Dundee was wrecked, and the entire crew, which was mainly composed of natives of Dundee, and numbered twenty-one, lost their lives in the disaster. At a public meeting held in Dundee on 24th December 1873 the following resolution was passed:—"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 discretion, and in the event of a surplus to apply it to any similar object." A committee was appointed, who received subscriptions, amounting in all to £1696, 10s. 11d., which were contributed almost exclusively from Dundee and district. They entered upon the management of the fund, and made allowances and other grants to all those whom they found to be in need of assistance. No formal trust-deed was executed, and the committee exercised their functions purely in virtue of the resolution passed at the public meeting, and administered the fund entirely "according to their discretion."

In 1900 a petition was presented by the two surviving members of the committee craving the Court to settle a scheme for the administration of the balance of the funds still in their hands, which amounted to £1890, 4s. 3d.

The petitioners averred—"The beneficiaries originally numbered fifty or thereby, and for many years allowances and grants continued to be made to them. In course of time, however, their number and requirements and the consequent claims upon the fund gradually diminished, and during the past ten years in particular the charitable disbursements of the committee have not exceeded £4 in all. The petitioners are at present unaware of any case requiring contribution from the fund. Of the original subscriptions received, amounting, as already stated, to £1696, 10s. 11d., a sum of £1601, 16s. 10½d. has been expended in relief, and this notwithstanding, the petitioners find themselves now in possession of the said sum of £1890, 4s. 3d. or thereby, this total being largely made up by material increase in the value of investments made by the committee. The petitioners consider that in the altered circumstances above set forth the future administration and management of the fund should be placed upon a new basis as nearly as may be akin to the original intention of the subscribers thereto, provision being of course made for any future emergent claims of persons at present entitled, directly or indirectly, to participate in its charitable distribution." . . .

A scheme was proposed by the petitioners under which it was suggested that the fund should be handed over to a body of seven *ex officio* trustees, a majority of whom should constitute a quorum.

The proposed trust purposes were as follows:—"3. The free income of the said

fund shall be applied primarily in relief of dependants of the crew of the s.s. 'Celerity,' if any such survive and be in necessitous circumstances; and if, or in so far as, not required for that purpose, the said income shall be applied in relief of persons belonging to and resident in Dundee and district, who may hereafter suffer loss or damage by shipwreck, storm, or other perils of the sea. Shipwrecked seamen and fishermen belonging to Dundee and district may receive assistance from the fund, either by pecuniary grant or by making good the loss of personal clothing or of property. The wives, families, and parents, and other dependants belonging to Dundee and district of persons who have lost their lives at sea, or by shipping casualties of any kind, may receive temporary relief or assistance by grants extending over a period of years; and the maintenance, upbringing, and education of the children of such deceased persons may be contributed to out of the fund. 6. Record of the income and expenditure of the fund, and of the beneficiaries thereof, and of meetings to be held from time to time as occasion may arise, shall be kept in such manner as the trustees may determine."

No one appeared to oppose the petition.

The Court remitted to Mr Ewan Macpherson, Advocate, to report upon the petition and scheme.

The reporter confirmed the averments of the petitioners, and further stated—"The petitioners having assisted in the administration of the fund for twenty-seven years are not unnaturally desirous of resigning office, but are in doubt as to whether they can competently do so, and at the same time ensure that the purposes for which the fund was subscribed shall be carried out. I am informed that there is no institution in Dundee or the neighbourhood which can be said to fall even approximately under the term 'similar object' contained in the resolution passed at the public meeting in 1873. Accordingly, while that resolution gave very wide powers as to the application of a surplus, the petitioners do not see their way to apply it in any way without the sanction of the Court." He also stated that the subscribers to the fund numbered over 350, the subscriptions varying in amount from one shilling to £500, that many of the subscriptions were given anonymously, and that it was evident that at the present time it would be very difficult if not impossible to trace and communicate with the majority of the subscribers. He reported generally in favour of the proposed scheme, but expressed some doubts as to the competency of the petition. With regard to this point, he made the following observations:—"It humbly appears to me, however, that there is some doubt as to whether the present application is one which your Lordships will entertain. It is to be noticed that the position of the committee was a somewhat anomalous one. . . . They seem to me to be rather in the position of the office-bearers of a voluntary association formed for a particular object, and in-

structed by the members of the association to carry it out. I think it is clear that it was anticipated that the funds collected would be expended once and for all upon that object. There might be a surplus, and if so, it would be given once and for all to some similar object. The existence of a continued trust to hold the funds for carrying on a charitable scheme seems to me to have been altogether outwith the purpose of the subscribers. But it humbly appears to me that the question whether the committee have in the past carried out the instructions of the subscribers, and whether by handing over the surplus to a new set of trustees to be administered as they propose they will now be carrying out these instructions, in the exercise of the discretion given to them, is one which very possibly your Lordships will not feel called upon to decide." He referred to the case of *The Edinburgh Young Women's Christian Institute*, June 24, 1893, 20 R. 894.

With regard to the details of the proposed scheme, the reporter suggested, *inter alia*, that the words "The accounts of the fund shall be annually audited and" should be added at the beginning of article 6 of the proposed trust purposes.

LORD PRESIDENT—This case seems somewhat peculiar at first sight, but the explanations which have been given show that the petition relates not to a mutual benefit society, but to a charity in the nature of a trust, the funds having been invited and obtained on the faith of the resolution read to us. The object of the fund was primarily to provide for the particular case of the sufferers by the shipwreck of the 'Celerity,' but in the words of the resolution any surplus of the fund was to be devoted "to any similar object." That provision distinguishes this case from cases where people have given money for a special purpose which has failed, and in which this Court has held that it has no jurisdiction.

The question, however, remains, whether the Court should exercise its jurisdiction in the particular circumstances of the case. The petitioners say that they are getting old, and that they do not wish the trust to fail. They therefore naturally desire to be relieved of their duties. These seem to me to be reasonable grounds for making the application. The purposes set forth in the proposed scheme appear to be in accordance with the general resolution. The body of trustees proposed is a little large, and there might be a difficulty in getting a quorum if some of the trustees did not accept. I think therefore the last paragraph of the third clause should be altered so as to read "A majority of the accepting trustees for the time being shall constitute a quorum." The suggestion which the Reporter makes that there should be an audit seems a very proper one, and I understand the petitioners are willing to accept it. With these slight alterations I think we should approve of the scheme.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Some slight amendments having been made on the proposed scheme, the Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition, together with the proposed scheme annexed thereto, for the application and administration of the trust fund of £1890, 4s. 3d. sterling, with the interest that has accrued or may yet accrue thereon, referred to in the petition, with also the report thereon by Ewan Macpherson, Esq., advocate, and heard counsel for the petitioners, Settle the scheme No. 19 of process as the amended scheme for the application and administration of the said fund: Find the expenses of this application and incident thereto chargeable against the trust fund, as the same shall be taxed by the Auditor, and decern."

Counsel for the Petitioners — Watt — Duncan Smith. Agents—Ronald & Ritchie, S.S.C.

Tuesday, July 17.

FIRST DIVISION.

[Lord Pearson, Ordinary.

M'ALLEY'S JUDICIAL FACTOR.

Judicial Factor—Trust—Refusal of Trustee to Deliver over Documents—Warrant to Search for Documents and Open Lock-fast Places—Nobile Officium.

Two trustees were appointed under a trust-disposition and settlement which came into operation in January 1893. In November 1899 a petition was presented by one of the trustees and three out of the four beneficiaries under the trust praying for sequestration of the trust estate, removal of the two trustees if necessary, and appointment of a judicial factor. It was stated by the petitioners that the other trustee, who was the fourth beneficiary, while claiming to be an acting trustee, had refused to take any part in the trust administration. The Court, without removing the trustees, sequestrated the trust-estate and appointed a judicial factor. The judicial factor entered upon the duties of his office, and applied to the recalcitrant trustee for delivery of certain documents connected with the trust-estate which were in his possession. The trustee took no notice of the request, and the judicial factor raised an action for delivery of the documents, obtained decree in absence, and charged him upon the decree. The trustee paid no attention to the charge, and the judicial factor presented a note to the Junior Lord Ordinary craving the Court to ordain the trustee to appear and bring the writs in question, or alternatively to grant warrant to messengers-at-arms to search for and take possession