

Tuesday, January 21.

SECOND DIVISION.

(Sheriff-Substitute at  
Edinburgh.)

NIDDRIE AND BENHAR COAL COMPANY, LIMITED v. PEACOCK.

*Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule (1) (a)—Amount of Compensation—“Average Weekly Earnings.”*

A miner entered the service of a coal company on Thursday, 15th August, and worked till Saturday, 17th August, but did not work on Sunday, 18th August. He then worked continuously from Monday, 19th August, including Sunday, 25th August, till Sunday, 1st September, when he was killed. On that day he had earned a full day's wage.

In a claim by his representatives for compensation, held that in computing the average weekly earnings of the deceased the total amount of the earnings must be divided by the number of weeks, namely four, over which the employment extended.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, before the Sheriff-Substitute at Edinburgh (HENDERSON), between the Niddrie and Benhar Coal Company, Limited, appellants, and Mrs Mary Peacock, widow, and others, the children, of George Peacock, miner, claimants and respondents.

The facts admitted, as set forth in the stated case, were as follows:—“Peacock was killed by accident in one of the appellants' pits on 1st September 1901. The respondents, his widow and children, were wholly dependent upon him. Deceased entered the employment of the appellants on Thursday, 15th August 1901, and worked on Thursday, Friday, and Saturday of that week, but did not work on Sunday, 18th August. He then worked continuously from Monday, 19th August, to Sunday, 1st September (when he was killed), including Sunday, 25th August. On Sunday, 1st September, he had earned a full day's wage before he met with the accident from the consequences of which he died. While working as above described he was paid at the rate of 5s. 10d. per shift.”

Upon these facts 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—were £2, 0s. 10d. sterling,” and gave judgment awarding £300 of compensation.

The questions of law for the opinion of the Court were—“(1) Whether the period of the employment of the said deceased George Peacock having extended from Thursday, 15th August, till Sunday, 1st September 1901, inclusive, his average weekly earnings fall to be calculated by dividing his total earnings for said period by the four calen-

dar weeks in which he was employed? (2) Whether the weekly earnings of the deceased were rightly calculated by me on the basis of a seven days' working week?”

The Workmen's Compensation Act 1897, First Schedule, 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 . . . and if the period of the workman's employment by the same 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 had proceeded on a wrong basis of calculation in disregarding the broken weeks during which the deceased had worked. The proper method for ascertaining the workman's average weekly earnings was to take the total sum earned and to divide that by the number of calendar weeks during which he had been employed—*Small v. M'Cormick and Ewing*, June 6, 1899, 1 F. 883, 36 S.L.R. 700; *Cadzow Coal Company v. Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40; *Nelson v. Kerr and Mitchell*, June 8, 1901, 3 F. 893, 38 S.L.R. 645; *Russell v. M'Cluskey*, July 20, 1900, 2 F. 1312, per Lord Adam, 37 S.L.R. 931; *Lysons v. Knowles* (1901), A. C. 79. Applying that principle to the present case, it appeared that the workman had been employed during four weeks. The total amount earned must therefore be divided by four, and the result multiplied by 156 gave the compensation due under the Act. The Sheriff had erred through following the rule adopted by the English Courts, which was inconsistent with that laid down in Scotland.

Argued for the respondents—The Sheriff had adopted the proper basis of calculation, which was that laid down in *Ayres v. Butteridge* (1902), 1 K.B. 57, per Smith, M.R., at p. 64; *Keast v. Barrow Hematite Steel Co.* (1899), 15 T.L.R. 141; *Waters v. Clover* (1901), 18 T.L.R. 60; *Jones v. Rhymney Iron Company* (1902), 1 K.B. 57. The strictness of the formula for ascertaining compensation had been relaxed since the decision in *Lysons, supra*, and the Court was entitled to estimate what the workman would probably have earned.

LORD TRAYNER—I think we find the answer to the question before us by attending to the words of the statute. The statute provides that in a case like the present, where a workman has served less than three years in the same employment, “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.”

The first question is, what was the period of this man's actual employment? That

is given by the Sheriff, and it extends over four calendar weeks. What was the total amount earned by him? That also may be ascertained from the Sheriff's statement. It amounts to £4, 19s. 2d., which falls I think to be divided by four, and that fourth when multiplied by 156 brings out £193, 7s. 6d. That is the sum which must be deemed to be the deceased's earnings for three years and the amount of compensation to which his dependants are entitled.

This appeal should therefore be sustained and the first question answered in the affirmative. It is unnecessary to answer the second question.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

“Answer the first question of law therein stated in the affirmative: Find it unnecessary to answer the second question of law therein stated: Find and declare accordingly: Therefore recal the award of the arbitrator, and remit to him to grant decree for the sum of £193, 7s. 6d., being the amount due in terms of the foregoing decision.”

Counsel for the Appellants—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Counsel for the Claimant and respondent—Wilson, K.C.—Wilton. Agents—Gray & Handyside, S.S.C.

Tuesday, January 21.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

CLARK & MACDONALD v. SCHULZE.

*Agent and Client—Edinburgh Agent—Claim against Country Client—Payment to Country Agent for Edinburgh Agent—Payment Embzzled by Country Agent—Law-Agents (Scotland) Act 1873 (36 and 37 Vict. cap. 63), sec. 21.*

A country agent, with the authority of a client whom he disclosed, instructed a firm of Edinburgh law-agents to conduct a litigation in the interest of the client. The Edinburgh agents at the suggestion of the country agent wrote to the latter asking a payment to account of their outlays, and the client on receipt of a copy of the letter paid the amount asked to the country agent, who appropriated it to his own purposes and disappeared without having paid it over to the Edinburgh agents. Held that the client was liable to the Edinburgh agents for the full amount of their account, and could not take credit for the payment to account made to the country agent.

Clark & Macdonald, S.S.C., Edinburgh,

brought an action against William Schulze, tweed merchant, Galashiels, in which they concluded for payment of £33, 5s. 7d., being the amount of their business account in conducting an appeal from the Sheriff Court at the instance of the defender against the Burgh of Galashiels.

Schulze maintained that he was entitled to credit for a sum of £20 paid by him to one Peebles, his local law-agent, on behalf of the pursuers, and offered to pay the balance of £13, 5s. 7d. as in full of the pursuers' claim. Peebles was the country agent in the case and had conducted it in the Sheriff Court.

The defender pleaded, *inter alia*—“(1) The pursuers having instructed Mr Peebles, as their agent, to obtain payment for them of the £20 referred to in the defences, and payment thereof having been made by the defender to Mr Peebles on behalf of the pursuers, said sum falls to be credited to the defender in accounting between him and the pursuers.”

Proof was allowed and led.

The facts of the case sufficiently appear from the opinions of the Lord Ordinary (KINCAIRNEY), and of the Court.

The Law-Agents (Scotland) Act 1873 (36 and 37 Vict. cap. 63), section 21, is in these terms:—“Agreements between law-agents acting for the same client to share fees or profit shall be lawful, and a law-agent authorised and acting for a client whom he discloses shall incur no liability to any other law-agent employed by him except such as he shall expressly undertake in writing.”

On 26th June 1901 the Lord Ordinary pronounced an interlocutor by which he found that the defender was not entitled to deduct the sum of £20 from the account sued for in respect of the payment of £20 made by him to his agent, John K. Peebles; repelled the defences; and decreed in terms of the conclusion of the summons.

*Opinion.*—“The amount at stake is only £20, but the case is narrow and relates to important questions, although I think that this case is too special to be of general importance. It arises out of the defalcation of a Mr Peebles, a law-agent in Galashiels, who acted as law-agent for the defender Mr Schulze in a litigation with the Corporation of Galashiels, which was carried by appeal to the Court of Session and lost there, Clark & Macdonald being Mr Schulze's Edinburgh agents employed by Peebles. This action is for payment of their account, amounting to £33, 5s. 7d. The defender has tendered £13, 5s. 7d. He claims credit for £20 as previously paid.

“The facts are very few. On 22nd February 1899 the pursuers wrote to Peebles a letter containing the following paragraph:—‘We think you might now send us a payment of say £20 towards our outlays. We annex a note of these made and to be made. Of course there may be further outlays, but we cannot say what these will be until after the discussion.’

“On 23rd February 1899 Peebles forwarded this letter to the defender, and the defender says that in compliance with the