

Counsel for the Pursuer—Wilson, K.C.—D. Anderson. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defenders—Jameson, K.C.—Hunter. Agents—Tait & Crichton, W.S.

Thursday, June 19.

FIRST DIVISION.

[Sheriff-Substitute at Dunfermline.

FLEMING v. LOCHGELLY IRON AND COAL COMPANY, LIMITED.

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

In the computation of the "average weekly earnings" of a workman totally or partially incapacitated, under section 1 (b) of the First Schedule of the Workmen's Compensation Act 1897, the week which is to form the unit of division is not the calendar week but the trade week, *i.e.*, the week for which, by the custom of the particular mine, factory, or other employment, the workmen are usually paid.

A miner entered the employment of a colliery company on Saturday, 20th October, and worked regularly until Wednesday, 13th November, when he was injured. By the custom of the colliery the miners were paid every second Saturday the amount due for the work done by them up to the previous Wednesday night. *Held* that the miner's average weekly earnings must be computed by taking the week as the period commencing on Thursday morning and ending on the following Wednesday night, and accordingly that he had worked during three weeks, and that his average weekly earnings were one-third of the total amount he had earned.

Section 1 of Schedule I. of the Workmen's Compensation Act 1897 enacts— "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 Dunfermline (GILLESPIE) in the matter of an arbitration under the Workmen's Compensation Act 1897 between Shanks Fleming, wheeler, Dundas Street, Lochgelly, claimant and appellant, and the Lochgelly Iron and Coal Company, Limited, respondents.

The case set forth the following facts as admitted— "The appellant entered the employment of David M'Lean, a contractor with the respondents, in their Jenny Gray pit on Saturday, 26th October 1901, and continued in M'Lean's employment until Wednesday, 13th November following, when he was injured by an accident arising out of and in the course of his employment. The appellant has been, and still is, totally incapacitated for work as the result of said injury. Said 'Jenny Gray' pit is a 'mine,' and the respondents are the 'undertakers' in connection therewith in the sense of the Workmen's Compensation Act 1897. The appellant was engaged under the general regulations and conditions of employment in force at the respondents' colliery, which provide, as at all other collieries in Fife, that all workmen are bound to work eleven lawful days each fortnight, and give fourteen days' written notice, lodged at the respondents' office, before terminating their employment. At the respondents' colliery, and throughout Fife and other districts, with a view of facilitating the making up of the wages, the workmen are paid every second Saturday for the work done by them up to the previous Wednesday night. The appellant's employment from Saturday 26th October 1901 until Wednesday, 13th November following, including Sundays, embraces a period of nineteen days, and in that time the appellant worked fourteen and a-half shifts, being a shift every lawful day except Wednesday, 6th November, when the appellant did not work, and Monday, 11th November, when the appellant worked only half a shift. The appellant's wages were 5s. 6d. per shift, and he earned a total sum of £3, 19s. 9d. during the said period of his employment."

On these facts the Sheriff stated his judgment in the following terms—"Upon these facts I was prepared as arbiter to hold, and would have so held, that the average weekly earnings of the pursuer were fairly stated at £1, 9s. 4d. per week, and I was accordingly prepared to award, and would have awarded, one-half of that sum weekly as the compensation due to him, but I considered myself precluded from so doing in consequence of the judgment of the Second Division in *Niddrie and Benhar Coal Company, Limited v. Peacock*, on 21st January 1902, and following that decision I awarded only the sum of ten shillings weekly, representing one-half of the average weekly wage of the appellant as distributed over the four calendar weeks in which he was employed."

To his interlocutor in the arbitration the Sheriff appended the following note:—"Apart from authority I should have agreed with the pursuer's view that his average weekly earnings while in M'Lean's employment were fairly stated at £1, 9s. 4d., and consequently that he was entitled to half that sum weekly as compensation."

"In reckoning average weekly earnings there is nothing in the statute in my humble opinion to show that the weeks to

be taken into consideration must be calendar weeks, ending with Saturday night. In point of fact in many trades the pay week or fortnight does not end with Saturday, but runs from mid-week to mid-week. Notably this is so in the Fife Collieries.

"The pursuer's contention is supported by the opinions delivered in the House of Lords in *Knowles v. Lysons*, though there seems a curious inconsistency between the opinions and the order of the House. It is also supported by the decisions of the Court of Appeal in *Wheale v. Rhymney Iron Co.*, and *Jones v. The Same*, November 6, 1901, 1 K.B. [1902], 57.

"Admittedly, however, the defenders' contention is in accordance with the decision of the Second Division above cited.

"A peculiar and unfortunate situation has thus been created.

"While my award as arbitrator in a Scots application under the Act is subject to the review of the Court of Session in either of its Divisions—in the option of the appellant—the Court of Session has been made the Court of final resort, and no appeal lies to the House of Lords. The statute is clear on this point—Second Schedule (14) (c)—and it has been expressly decided by the House of Lords—*Osborne v. Barclay, Curle, & Co.*, March 29, 1901, App. Cas. [1901], p. 268. I think therefore that an arbitrator under the Act in Scotland is bound to follow the decision of the Second Division until it is overruled, even in preference to a decision of the House of Lords."

The questions of law were as follows:—
 "1. Whether it being the fact that the appellant's employment extended over the period from Saturday, 26th October, to Wednesday, 13th November inclusive, his average weekly earnings fall to be calculated by dividing his total earnings for said period by four, being the number of calendar weeks in parts of which he was employed? 2. Whether it was within my power as arbiter to find in fact and in law that the appellant is entitled to have his average weekly earnings assessed at £1, 9s. 4d., being proportion of said total sum earned, viz., £3, 19s. 9d. applicable to a period of his working week of seven days? or 3. Whether in any event it was within my power as arbiter to find that the appellant is entitled to have his average weekly earnings ascertained upon the footing of his actual earnings being divided by three or £1, 6s. 7d?"

Argued for the appellant—The proper method of arriving at the workman's average weekly earnings was to consider in how many trade weeks he had worked. There was nothing in the statute to compel the Court to read the word "week" as meaning "calendar week." The natural and convenient meaning was the week for which by the custom of the particular employment the workman was usually paid. That was in accordance with the order pronounced by the House of Lords in *Lysons v. Knowles* [1901], A.C. 79,—as explained in *Ayres v. Buckridge* [1902], 1 K.B. 57. In *Lysons* the workman had worked on a Tuesday, and also on the

Thursday following, and it was decided that he had worked in two weeks, because the trade week in that case began on a Wednesday. The cases of *Russell v. M'Cluskey*, July 20, 1900, 2 F. 1312, 37 S.L.R. 931, and *Cadzow Coal Company v. Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40, so far as adverse to the appellant's contention, must be held to have been overruled by the decision of the House of Lords in *Lysons v. Knowles*. The case of *Niddrie and Benhar Coal Company v. Peacock*, January 21, 1902, 39 S.L.R. 317, did not decide that "week" must mean "calendar week." The question was not considered there, and there was nothing to show that the calendar week and the trade week did not in that case coincide.

Argued for the respondents—A week must be taken to mean a calendar week. That was the ordinary meaning of the word, and it had been so construed in all the Scotch cases—*Small v. M'Cormick and Ewing*, June 6, 1899, 1 F. 883, 36 S.L.R. 700; *Cadzow Coal Company v. Gaffney*, *cit. supra*, opinion of Lord Trayner; *Niddrie and Benhar Coal Company v. Peacock*, *cit. supra*. Even if the appellant's interpretation of the order in *Lysons v. Knowles* was correct, *Niddrie and Benhar Coal Company* was a Scotch decision of later date and should be followed.

At advising—

LORD ADAM—The question raised in this case is whether the appellant's total earnings in the course of his employment are to be divided, in order to ascertain his average weekly earnings, by the number of calendar weeks during the whole or part of which he was employed, or by the number of his working weeks of seven days during which he was employed, or by the number of trade weeks during the whole or part of which he was employed. By a trade week, as it is called in some of the cases, I understand the period of seven days preceding and including the day for which the weekly earnings of the workmen are paid, according to the custom of the mine, factory, or other work in which they may be employed, and I shall, for convenience, so use the term.

The facts of the case are—that the appellant entered on his employment on Saturday 26th October 1901, and continued in the employment until Wednesday 13th November, when the accident occurred by which he was totally incapacitated from further work.

We are told that the appellant was engaged under the conditions of employment in force at the colliery, which provided that all workmen were bound to work eleven lawful days in each fortnight and to give fourteen days' written notice before terminating their employment.

We are also told that at this colliery, with a view to facilitating the making up of the wages, the workmen are paid on every second Saturday for the work done by them up to and including the previous Wednesday night. The trade week, therefore, commenced in this colliery on

Thursday morning and ended on Wednesday night. I may say at once, that except as to fixing the trade week, I do not think that the regulations in force at the colliery are at all material. In my view the simple question is, how much did the workman in fact earn during his employment, and not how much he might have earned or was bound to have earned under the pit regulations.

The appellant worked on Saturday 26th October and also on the two following weeks up till the 10th November and he worked from the 10th till the 13th November—that is, he worked on the whole or part of four calendar weeks.

As regards the trade week, he worked from Saturday the 26th October till Wednesday the 30th October, and from the 31st October till Wednesday 13th November, a period of two full weeks. He therefore worked on the whole or part of three trade weeks.

The appellant's employment from Saturday 26th October until Wednesday 13th November embraces a period of nineteen days. The appellant in that time worked fourteen and a half shifts, being, we are told, a shift every lawful day except Wednesday 6th November and Monday 11th November, when the appellant worked only half a shift. His wages were 5s. 6d. a shift.

He earned a total sum of £3, 9s. 6d. during his employment.

The Sheriff states that upon these facts he was prepared to hold that the average weekly earnings of the appellant were fairly stated at £1, 9s. 4d., and that he would have awarded one-half of that sum weekly as the compensation due to him had he not considered himself precluded from so doing by the judgment of the Second Division in the case of *The Niddrie and Benhar Coal Company, Limited v. Peacock*.

The Sheriff has not stated, and I cannot myself make out how he has arrived at this precise sum of £1, 9s. 4d., but he states that it is the proportion of the total sum earned, applicable to a period of his working week of seven days.

It is clear, therefore, that to arrive at this sum a working week of seven days has been taken as the unit of division. If that be so, then I think he was quite right in holding that he was precluded from awarding that sum as compensation by the decision in *The Niddrie and Benhar Coal Company* case. That case, the case of *Lysons v. Knowles & Son, L.R.*, Ap. Cas., 1901, p. 79, and other cases, decide that a working week of seven days is not the unit for calculating a workman's average weekly earnings.

That being so, the question remains whether in this case the calendar week or the trade week should be taken as the unit of division of the total earnings in order to determine the appellant's average weekly earnings.

A week, no doubt, has been adopted as the unit of calculation, because in the mines, factories, and other works in which

the workmen who have the benefit of the Act are employed, their wages are usually paid weekly either up to Saturday or to some other specified day in the week, so that it could be easily ascertained from the books of their employers what was the amount of their weekly earnings. It is obvious that to the workmen as a whole it can make no difference whether the calendar week or the trade week is adopted as the unit of division of their total earnings, because in the one case as in the other there may be as many broken weeks, depending on the day on which the workman enters on the employment. But in the individual case, as in this case, it does make a difference. It was decided in *Lysons' case* that the trade week was the proper unit for division. In that case the facts disclosed that the workman had worked two days, Tuesday and Thursday, in a calendar week, but only one day in each of two trade weeks, Wednesday being the beginning of the trade week. The arbiter had adopted the calendar week as the unit of division, and held that the workman had worked two days in one week, but the House recalled that finding, and decided that the workman had worked one day in each of two weeks, and compensation was awarded on that footing, his total earnings being divided by two.

No doubt the House was sitting in that case as an English Court, and not as a Scotch Court, but as a decision on the construction of the same Act which we have to construe I think that we must follow it.

It was said, however, that the decision of the Second Division in *The Niddrie and Benhar* case was to the contrary effect, but I do not think so. It is clear that the question was not raised in that case, possibly because the calendar week and the trade week coincided. It will be observed that the only questions put to the Court were whether the workman's average weekly earnings were to be calculated (1) by dividing his total earnings by four calendar weeks, or (2) on the basis of a seven days' working week. The Court simply answered the questions put by affirming the first and negating the second.

If these views are correct, the appellant having been employed only during three trade weeks, his total earnings will have to be divided by that number, and the result is that the first and second questions should be answered in the negative and the third in the affirmative.

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

The Court answered the first and second questions in the case in the negative and the third in the affirmative.

Counsel for the Appellant—Clyde, K.C.—Wilton. Agent—P. R. M'Laren, Solicitor.

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