

tain what the average weekly earnings are; that therefore the schedule in the Act is inapplicable to the case, and that you are at liberty to use such materials as are at your disposal to measure what is the amount of compensation to be awarded under the Act.

I think that this is contrary to the decision in *Lysons' case*. It will be observed that in that case their Lordships had in view that a case might occur in which the schedule was not applicable, and that recourse might be had to other means in fixing the compensation, for both the Lord Chancellor and Lord Davey say so, yet they held the schedule to be applicable in that case, and awarded compensation according to it, although the workman had only earned wages one day of each week. It follows that in the judgment of the House such a case is not a *casus omissus*, in the words of Lord Davey, for which the sub-section has not provided a mode of calculation of the compensation.

It is true that the present question does not appear to have been argued in that case, but it was very material to the issue, and it is singular that if there had been substance in it it should have escaped the notice of all the learned Lords and counsel engaged in the case.

In the case of the *Niddrie and Benhar Coal Company v. Peacock*, 39 S.L.R. 317, a miner who had entered the service of the company on Thursday, 15th August, was killed by an accident on Sunday, 1st September. During that time he had worked three days in the first week, then two full weeks, and then one day of the fourth week. 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, was a certain sum, and he gave judgment awarding £300 of compensation. The questions of law were—(1) Whether his average weekly earnings fell to be calculated by dividing his total earnings by four calendar weeks; or (2) Whether the weekly earnings were rightly calculated on a seven days' working week.

The Court answered the first question in the affirmative, and recalled the arbiter's award, and remitted to the arbiter to grant decree in terms of that decision. I may remark that no question was raised in that case as between a calendar week and a trade week, and that although the cases of *Ayres*, *Wheale*, and *Jones* were cited they were not followed, but the Court followed the construction of the Act adopted by the Court in the cases of the *Cadzow Company v. Gaffney*, 3 Fr. 72; *Nelson v. Kerr*, 3 Fr. 893, and *Russell v. M'Luskey*, 2 Fr. 1312, and, as I think, by the House of Lords in *Lysons' case*.

If, then, a workman's earnings, although he may not have worked a full week, but only one or more days in the week, are to be taken as his weekly earnings in the sense of the Act, what is to be said when he has not worked a full day, but only, as in this case, part of a day, and been paid only for

part of a day? I do not see how the conclusion is to be avoided that if a day's earnings in a week are to be taken as the workman's weekly earnings, so also must his earnings for part of a day in the week be so taken. In either case the question is, what has been the amount of his actual earnings for the week. The question is not what was he capable of earning. That this construction of the Act will produce most capricious results is obvious, as the amount of compensation to be awarded will vary as the accident happened to occur earlier or later in the course of the week's employment, but that is only one more of the many anomalies which the Act has developed in the course of its application.

I think the third question should be answered in the affirmative.

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

The Court pronounced this interlocutor—

“Find in answer to the first question in the case that the appellant was a workman in the sense of the Workmen's Compensation Act 1897 on 4th October 1900; and in answer to the second question, that the period of the appellant's employment by the respondents commenced on said 4th October 1900; and answer the third question in the case in the affirmative; and decern,” &c.

Counsel for the Appellant—Watt, K.C. — Malcolm. Agent — J. Ogilvie Hood, S.S.C.

Counsel for the Respondents—Campbell, K.C. — Chree. Agents—Hope, Todd, & Kirk, W.S.

Thursday, June 19.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.]

M'HUGH v. BARCLAY, CURLE, & COMPANY.

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

A labourer entered the service of a shipbuilder on Wednesday, 23rd October, and worked on that day and on the following Thursday, Friday, and Saturday, and for some hours on the Monday of the next week, when he was injured in an accident. There was no finding as to the trade week in this trade. In estimating the amount of compensation to which he was entitled under the Workmen's Compensation Act 1897, held (1) that he had been employed for parts of two weeks, the days from Wednesday till Saturday being treated as one week and the hours worked on Monday being also treated as one week, and (2) that his

average weekly earnings were half the amount actually earned by him for the days in the two weeks during which he had worked.

Grewar v. Caledonian Railway Company, June 19, 1902, 30 S.L.R. 687, followed.

This was a case stated for appeal by a Sheriff-Substitute of Lanarkshire (BALFOUR) in an arbitration under the Workmen's Compensation Act 1897 between John M'Hugh, fitter's helper, Glasgow, claimant and appellant, and Barclay, Curle, & Company, shipbuilders, Whiteinch, respondents.

The following facts were found by the Sheriff-Substitute to have been admitted or proved—“(1) That the appellant was employed with the respondents as a fitter's helper, and on Monday, 28th October 1901, he met with an accident while working at the tank of a ship in the respondents' yard. (2) That the appellant, who had not been previously in the employment of the respondents, entered on his employment on Wednesday, 23rd October 1901, and worked on the following Thursday, Friday, and Saturday, and that on Monday, 28th October, he had been working for a few hours, when he met with an accident. (3) That his wages were at the rate of 8½d. an hour, and his earnings for the week or period ending on Saturday, 26th October, amounted to £1, 4s., and his earnings for the Monday amounted to 2s. 6d., or £1, 6s. 6d. in all. (4) That a full working week at the work at which the appellant was engaged in defenders' employment consists of fifty-four hours, and the average working week of a fitter's helper in the respondents' employment is forty-five hours. (5) That the appellant as the result of said accident was incapacitated for work as a fitter's helper from the date of said accident until the 4th February 1902.”

On these facts the Sheriff-Substitute found in law (1) that the average weekly earnings of the appellant while in the respondents' employment amounted to 13s. 3d., and (2) that the respondents were liable in compensation to the appellant in the weekly sum of 6s. 7½d. from 12th November 1901 till 4th February 1902, which amounted to the sum of £3, 19s. 6d. He awarded said sum to the appellant as compensation, and found no expenses due between the parties.

The questions of law were as follows—“(1) Whether on the facts proved the compensation payable to the appellant should be 19s. 1½d. per week during the period of his incapacity, viz., from 12th November 1901 to 4th February 1902. (2) Whether the period of four days from Wednesday, 23rd October, till Saturday, 26th October 1901, should, for the purpose of ascertaining appellant's compensation, be treated as one week, and the few hours worked by appellant on 28th October 1901 should also be treated as one week for said purpose?”

The Workmen's Compensation Act 1897, First Schedule, enacts—“(1) 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.”

Argued for the appellant—There was no week unit in this case upon which to reckon the amount of earnings, and accordingly the day unit must be taken, and the average weekly earnings arrived at by considering what the appellant would probably have earned in the week—*Lysons v. Andrew Knowles & Sons* [1901], A.C. 79; *Leonard v. Baird & Company*, June 8, 1901, 3 F. 890, 38 S.L.R. 649; *Ayres v. Buckeridge* [1902], 1 K.B. 57; *Cadzow Coal Company, Limited v. Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40; *Nelson v. Kerr & Mitchell*, June 8, 1901, 3 F. 893, 38 S.L.R. 645.

Argued for the respondents—“Average weekly earnings” must be held to mean the amount actually earned in the week, not the potential amount which might have been earned by the appellant during the week. Moreover, it must be assumed that the week was the ordinary trade week, ending on Saturday, unless a special trade week were averred. Even if the decision in *Ayres v. Buckeridge, cit.*, as to hypothetical earnings, were sound, the case was distinguishable as depending on a special contract—*Niddrie and Benkar Coal Company v. Peacock*, January 21, 1902, 39 S.L.R. 317.

At advising—

LORD ADAM—The appellant in this case was injured by an accident on Monday 28th October 1901 while in the employment of the respondents.

He entered on his employment on Wednesday 23rd October, and worked on that day and on the following Thursday, Friday, and Saturday, and for some hours on the Monday of the next week, when the accident happened. He earned 2s. 6d. on this Monday, and £1, 4s. for the week ending 26th October, being £1, 6s. 6d. in all.

The Sheriff-Substitute found in law that the average weekly earnings of the appellant were 13s. 3d., and that the respondents were liable to the appellant in compensation in the weekly sum of 6s. 7½d.

The questions in law put to us are (1) whether, on the facts proved, the compensation payable should be 19s. 1½d. per week, during the period of his incapacity, or (2) whether the period of four days from Wednesday 23rd October till Saturday 26th October should be treated as one week and the few hours worked on 28th October should also be treated as one week for the purpose of ascertaining appellant's compensation.

It is not explained in the case how the 19s. 1½d. in the first week is arrived at, but it is in this way—a full working week at the work at which the appellant was engaged was fifty-four hours, and the wages

8½d. an hour, which amounts to 38s. 3d. a week—fifty per cent of which is 19s. 1½d.—so that the appellant's claim is founded not on his actual earnings at all but on what it was possible for him to have earned if he had worked full time on every day of the week.

I think this case is ruled by the *Niddrie and Benhar Coal Company* and the case of *Grewar*, which we have just decided, and I therefore think that the first question should be answered in the negative and the second in the affirmative, and the appeal dismissed.

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

The Court answered the first question in the negative and the second question in the affirmative, and dismissed the appeal.

Counsel for the Appellant—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Respondents—W. Campbell, K.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Tuesday, June 10.

FIRST DIVISION

[Lord Kyllachy, Ordinary.]

EARL OF GALLOWAY v. DUKE OF BEDFORD.

Entail—Powers of Heir in Possession—Lease—Tack—Trout Fishing.

An heir of entail in possession cannot grant a lease of trout fishings as a separate right which will be effectual in a question with a succeeding heir of entail.

Entail—Powers of Heir in Possession—Lease—Tack—Salmon Fishings—Personal and Real—Possession—Offer to Renounce ultra vires Provision of Lease—Entail Powers Act 1836 (Rosebery Act) (6 and 7 Will. IV. cap. 42), sec. 1.

The Entail Powers Act 1836 (Rosebery Act) enacts, section 1—"It shall be lawful for the respective heirs of entail in possession to grant tacks of any parts of the lands, estates, or heritages contained in the entail for the fair rent of such lands or heritages at the period of letting, and for any period not exceeding twenty-one years."

An heir of entail in possession, without applying for the authority of the Court, entered into a lease with a salmon angling association, whereby he let to the association the salmon and trout fishings in the river C and certain tributaries thereof, which formed part of the entailed estate, for a period of twenty-one years. It was therein declared that the object of the association was to improve the fishings of the river C, that for this purpose it had been arranged that leases of the salmon-fishings in other parts of the river

belonging to other proprietors should be granted to the association, and that the fishing during the currency of the lease should be by rod only. There was a provision whereby the lessor, and his successors in the entail, should after the conclusion of the first three fishing seasons under the lease have a right to one-seventh share of the fishings belonging to the association, on payment of one-seventh share of the expenses. The lease further provided that the right of the lessees as regards a portion of the fishings let should "cease and determine on the 31st of July in each year," and that "the lessor shall be entitled to enter into possession of, occupy, and use the said fishings, . . . or to let the same to one or more tenants for the remainder of such fishing season." It was further provided that with regard to one portion of the salmon fishings (which was then let to a third party) the right of the lessees should not come into operation for five years.

On the death of the lessor within a year of the granting of this lease the succeeding heir brought an action against the lessees concluding for the reduction of the lease.

Held that the lease fell to be reduced as a contravention of the fetters of the entail, and as not within the powers conferred by section 1 of the Entail Powers Act 1836 (Rosebery Act), in respect (1) that in view of the provision whereby the right of the lessees was to cease and determine on the 31st of July of each year, it was not a lease for twenty-one years, but an arrangement for a series of twenty-one leases, each for part of a year, and that these, in so far as applicable to the year now current and all future years, not having been made real by possession, were not binding on the succeeding heir; (2) that *ex facie* of the contract it appeared that the rent was not a fair one, since part of the return to the lessor was not rent, but the option of acquiring a right to one-seventh of the angling in the waters; (3) that a right of trout-fishing was a personal privilege which could not be leased by an heir of entail except for the period of his own possession; (4) that the lease *quoad* that part of the fishings of which the lessees were not to obtain possession until five years after the date of the lease was not effectual in a question with the succeeding heir, because it had not been made real by possession; and (5) that an offer by the lessees to hold these portions of the contract which purported to lease trout-fishings and that part of the fishings of which possession was not to be given for five years *pro non scripto*, was no answer to the action for reduction, inasmuch as to sustain the lease without these provisions would be to bind the succeeding heir by a contract which neither he nor his predecessor had made.