section of the Bankruptcy Act 1856 to have a sum of £1000 which had been given to the law-agent to be invested in a heritable security and which he had paid into his own bank account, taken out of the bankrupt estate. The Lord Ordinary, whose judgment was adhered to, found that the petitioners had right to the £1000, and that the same must be taken out of the sequestration of the deceased law-agent.

The Lord President held that the point had been expressly and rightly decided in the case of *Pennell* v. *Deffell*.

For a concise statement of the law of England, which was recognised in *Macadam's* case to be the same as the law of Scotland, I may refer to the 10th Edition of Lewin on Trusts, ch. 31, sections 2-5, pp. 1095-97.

I am therefore of opinion that the Lord Ordinary's judgment should be affirmed.

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Petitioner and Respondent—Salvesen K.C.—D. Anderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent and Reclaimer—Mackenzie, K.C.—Horne. Agents—J. & R. A. Robertson, W.S.

Saturday, July 16.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

BROWN *v.* J. & J. CUNNINGHAM, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1) *and First Schedule* 1 (*b*)—*Limit of Employer's Liability — Amount of Compensation — Average Weekly Earnings — Weekly Wages Fixed by Contract.*

Where there is a contract between an employer and a workman for a fixed weekly wage and the contract is fulfilled over one week, the fixed weekly wage is the true basis for determining the amount of compensation payable under the Workmen's Compensation Act 1897.

A workman was engaged by his employer on Saturday 20th February at a wage of £1 per week. He worked on that day and during the whole of the succeeding week. He was injured by an accident in the course of his employment on Thursday 25th February but continued in his employment till Saturday the 27th, when his engagement was terminated by his employer, who paid him at the rate of £1 per week for the period of his employment.

Total incapacity for work having resulted from the injury, the workman claimed compensation from his employer under the Workmen's Compensation Act 1897.

Held that his average weekly earnings within the meaning of section 1 (*b*) of the First Schedule to the Act amounted to £1, being the rate at which he was employed and paid.

The Workmen's Compensation Act 1897, First Schedule (1), 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 50 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 £1."

This was an appeal upon a stated case from the Sheriff Court at Edinburgh in an arbitration under the Workmen's Compensation Act 1897, between William Brown, Tolbooth Wynd, Leith, pursuer and respondent, and J. & J. Cunningham, Limited, Leith, defenders and appellants, in which the pursuer claimed compensation from the defenders at the rate of 11s. weekly from 17th March 1904.

The Sheriff Substitute (GUY) held the following facts proved or admitted—"(1) That the appellants carry on trade at Bowling Green Street, Leith, as manufacturers of artificial manures and oil-cake. (2) That in the premises occupied by them at Bowling Green Street aforesaid, mechanical power, namely, machinery driven by steam, is used in aid of the manufacturing process. (3) That the said premises are a factory within the meaning of the Workmen's Compensation Act, 1897. (4) That on Saturday, 20th February 1904, the respondent was employed by the appellants to assist in the removal from one part of said premises to another, certain locust beans and crushed bones. (5) That the appellants contracted and agreed to pay to the respondent £1 a-week for his labour. (6) That the respondent worked on Saturday, 20th February, and thereafter on Monday 22nd, Tuesday 23rd, Wednesday 24th, and Thursday 25th February, on which date one of the fingers of his left hand was penetrated by a portion of one of the bones he was engaged in removing. That the respondent continued to work after his said injury on the day on which he received it and on the two followings days, on the latter of which (Saturday, 27th February) the appellants terminated his employment, and paid him in one sum at the rate of £1 per week for the whole period of his employment, together with a small sum for overtime. (7) That blood poisoning resulted from said injury, necessitating the amputation of the finger. (8) That total incapacity for work resulted from the injury. (9) That the respondent is a workman and the appellants are the undertakers within the meaning of the said Act."

The Sheriff-Substitute further stated—"In these circumstances I held in law that

the appellants are liable to make payment to the respondent of compensation by weekly payment during the respondent's incapacity after the second week after the injury, not exceeding 50 per cent. of the respondent's said average weekly earnings, and that the average weekly earnings of the respondent for the period previous to the injury in which he had been in the employment was 20s., being the rate at which he was employed and paid. The amount he in fact was paid was 23s. 6d. This included the said small sum for overtime and also included wages earned for the time the respondent worked after receipt of the injury. I further held that if the amount actually earned by the respondent was to be held as fixing the maximum of his average weekly earnings, that sum did not fall to be divided by two, as at the date of his injury he had not been employed for two weeks, and no evidence had been led as to the terms of the working weeks in the appellants' employment, or as to how much the respondent had actually earned at the date of his injury. I assessed the compensation payable to the respondent at 50 per cent. of said £1, and decerned against the appellants to make payment to the respondent of the sum of 10s. per week, beginning the first weekly payment as on 17th March 1904, and so forth weekly thereafter."

The questions of law for the opinion of the Court were:—"(1) Whether the average weekly earnings of the respondent, within the meaning of section 1 (*b*) of the First Schedule to the Workmen's Compensation Act 1897, amounted to £1. (2) In the event of the first question being answered in the negative, whether the respondent having been employed and paid at the rate of £1 per week, but not having worked for a whole calendar week in his employment prior to the injury, the average weekly earnings fall to be assessed at the sum actually earned by him at the date of the injury. (3) Whether, in ascertaining the respondent's average weekly earnings, the sum earned by him ought to have been divided by two in respect that the first day on which he worked was a Saturday, and the other days were in the following calendar week. (4) In the event of the wages earned by the respondent falling to be divided by two in respect of his having worked during two different weeks, whether the whole wages earned by the respondent, including the wages earned after the injury, fall to be so divided, or only the wages earned prior to the injury."

Argued for the defenders and appellants —The Court had decided that the measure of compensation under the first schedule of the Act was not what the workman contracted to get, but what he had actually earned. To get at the average weekly earnings what the workman had earned must be divided by the number of weeks during the course of which he had been employed. In the present case he had been employed during the course of two weeks and his wages must be divided by two—*Russell* v. *M'Cluskey*, July 20, 1900, 2 F. 1312, 37 S.L.R. 931—opinion of Lord M'Laren, 1317 and 935; *Cadzow Coal Company Limited* v. *Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40—opinion of Lord Trayner 74 and 42; *Peacock* v. *Niddrie & Benhar Coal Company, Limited*, January 21, 1902 4 F. 443, 39 S.L.R. 317; *M'Hugh* v. *Barclay, Curle & Company*, June 19, 1902, 4 F. 909, 39 S.L.R. 690; *Grewar* v. *Caledonian Railway Company*, June 19, 1902, 4 F. 895, 39 S.L.R. 687—opinion of Lord Adam 899 and 690; *Gibb* v. *Dunlop & Company, Limited*, July 9, 1902 4 F. 971, 39 S.L.R, 750; *Lysons* v. *Andrew Knowles & Sons, Limited* [1901], A.C. 79.

Argued for the pursuer and respondent —None of the authorities quoted by the other side were in point. They dealt either with a daily labourer or a labourer employed over broken terms. Here there was a definite contract for a specified rate of weekly wages and that weekly wage had been earned during one week. In such circumstances there was no need to go into a hypothetical case in order to strike the average wage. There was here a definite standard of compensation, and it was not necessary to employ an arithmetical computation to reduce the wages to a definite standard—*Lysons, supra*, opinion of Lord Halsbury [1901], A.C. p. 87, Lord Davey, p. 98, and Lord Robertson, p. 100.

At advising—

LORD JUSTICE-CLERK — In this case it appears that the injured man who claims compensation was engaged at a fixed weekly wage of 20s. to do the work in which he was employed. It is the fact that he began work on a Saturday and worked throughout the whole of the following week, when he was discharged. The contest between the parties is whether he is entitled to compensation on his weekly agreed-on wages, for which he worked for the whole week before his employment ceased, or whether, as he worked a day in the previous week, the average of the earnings must be struck between the two weeks. In the one case obviously the sum on which compensation could be assessed under the statute is much larger than the other. Now, it is quite certain that it may often be necessary to take an average of weeks where there has been broken service on day's wages, or where the earnings were not by stipulated fixed wages but by piece-work. And it has been held to be the true intent of the statute that in such cases the earnings are to be arrived at by striking an average of what has been earned. But it seems to be quite a different matter where the earnings were fixed by contract at a certain rate per week. There would appear, then, nothing to be ascertained by average. If the contract was made and the wages earned by fulfilment of the contract over a week, then that gives a certain basis for fixing the compensation. It would be obviously most inequitable that while if an employee worked under the contract one whole week, and no more, the basis of com-

pensation should be the full sum of a week's wages, but that if one day was worked in the previous week, the earnings of that day should be put together with the earnings of the following full week, and the sum divided by two, representing two weeks. I am satisfied that where there is a fixed contract, and it is fulfilled over a full week, the earnings so made by contract form the true basis for ascertaining the rights as to compensation. This is I think consistent with the view expressed in the House of Lords in the case of *Lysons*. But even if there had been no such authority I should have held the same view on this point. It is novel, as apparently no case has been tried yet in which there was a week of earned wage of a fixed contractual amount by the week as there is in this case.

I am therefore of opinion that the judgment of the Sheriff is right, and that the first question should be answered in the affirmative and the third question in the negative, it being unnecessary to answer the second and fourth questions.

LORD YOUNG—I am of the same opinion. I think the judgment of the Sheriff-Substitute is clearly right and should be affirmed, it being unnecessary to answer any of the questions.

LORD TRAYNER—I think the Sheriff's determination is right. In this case the respondent was engaged by the appellants as their servant at a wage of £1 per week. He served them for a week, towards the end of which he received the injury in respect of which he now seeks compensation, and earned and was paid his wage of £1. In these circumstances there appears no necessity for discussing what was his "average earnings" at the time of his injury. From some of the opinions delivered in *Lysons'* case it appears that where the earnings of a workman are fixed and definite no average need or should be sought. The wage, fixed and definite, earned by the workman at the time of his injury seems to be regarded as the basis for determining the amount of compensation payable. Applying that rule here the Sheriff's award appears to be unobjectionable.

LORD MONCREIFF—When a workman is not engaged by the week, but works say three days one week, four days the next, and six days the next, and so forth, for a daily wage, probably the only way of arriving at his weekly earnings is to lump all his earnings together and divide them by the number of weeks during which he has worked. In such a case it has been decided that part of a week counts as a week, and therefore the divisor is arrived at by taking the total number of weeks during which or part thereof he has worked.

But the simple solution of this case is that the workman was engaged by the week at a wage of £1 a-week, and that he worked a full week of six days, beginning Monday 22nd February.

The only difficulty arises from the fact that instead of waiting till Monday the 22nd of February to commence work, he seems to have done some work on Saturday 20th February, and the real object of this appeal is to have it found that because the workman did some work on the one day of the week ending 20th February his average earnings must be held to amount only to 10s. instead of £1 a-week.

It does not appear from the case, however, that the workman was paid anything for the work which he did on the Saturday 20th February. He was paid one sum of 23s. 6d., £1 of that certainly was for the week's work which he did during the week beginning 22nd February. The Sheriff states that the sum of 23s. 6d. included a payment for overtime, presumably during the week ending 27th February. In that case nothing is left for the work done on Saturday the 20th, because at the rate of £1 a week he should have been paid 3s. 4d. for that day's work.

Therefore I think we may treat the case on the footing that there was an engagement for the week at the wage of £1, and that the workman earned the whole of the £1. But even if the work done on Saturday the 20th is to be taken into consideration, I do not think that this can affect the question, because we have here a definite contract and the weekly wage is fixed and was earned.

I reserve my opinion as to how the case would have stood if the workman had continued to work longer and during the following weeks had not worked every day. In such a case we might possibly have been driven to adopt the method of calculation which is applied in cases where the workman is not employed by the week. But the workman in this case having worked for the whole of one week, I am not disposed to increase the divisor simply because he did some work on the last day of the week preceding. To do so would I think be entirely against the spirit of the Act.

I am therefore of opinion that the Sheriff Substitute's judgment is right, and that the first question should be answered in the affirmative and the third in the negative.

The Court affirmed the award of the arbitrator, and decerned.

Counsel for the Pursuer and Respondent —George Watt, K.C. — Lippe. Agent— John Pole, Solicitor.

Counsel for the Defenders and Appellants — Campbell, K.C. — Hunter. Agents — Anderson & Chisholm, Solicitors.