different. There is nothing *per se* dangerous about putting down waste paper. The danger, on the pursuer's averments, was, or may have been, caused solely by the act of a third party for whom the defenders were not responsible. There could be no duty on their part to have a watchman constantly on duty to see that all and sundry did not light the paper, or to see that, if they did, the fires were extinguished. Nor was there any duty on the defenders' carter, who, it is said, was aware that the fire was burning, if it had been lit by someone else not connected with the defenders.

This is taking the case on the footing that the pursuer has averred on record that the paper that went on fire was put on the heap by the defenders. This is to my mind by no means clear on the pursuer's averments. Refuse is deposited on the heap by persons other than the defenders. In Cond. 6 the reason is explained why children were specially attracted to the coup. There is no statement in that article that the objects said to have attracted the children were put on the heap by the defenders.

I am of opinion that the pursuer has stated no relevant case.

The LORD PRESIDENT did not hear the case.

The Court pronounced this interlocutor—

"Recal the second interlocutor of the Sheriff-Substitute of date 6th May 1913, and also the interlocutor of the Sheriff, dated 25th January 1913: Revert to and affirm the interlocutor of the Sheriff-Substitute dated 8th November 1912, of new dismiss the action, and decern."

Counsel for Pursuer—Watt, K.C.—MacRobert. Agent—D. R. Tullo, S.S.C.

Counsel for Defenders—Constable, K.C.—Lowson. Agent — Robert Davidson, S.S.C.

Friday, July 4.

FIRST DIVISION.

[Sheriff Court at Leith.

DALGLEISH *v.* EDINBURGH ROPERIE AND SAILCLOTH COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule*, 1 (*b*), *and* 2 (*c*)—"*Average Weekly Earnings*"—"*Grade*"—*Change in Grade of Employment.*

The Workmen's Compensation Act 1906 enacts—First Schedule, 1 (*b*)—that the amount of compensation due to an injured workman is to be calculated on the basis "of his average weekly earnings . . . in the employment of the same employer," and, section 2 (*c*), "employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident."

A mill girl entered the service of a roperie company in January 1912 when about fourteen years of age. From that date to 23rd May she was employed at a wage of 5s. 6d. a-week in carrying bobbins filled with twisted yarn from the roving machines to the spinning or weaving machines, and from 23rd May to 1st June at 6s. a-week as signal girl to intimate when bobbins were ready for removal. On 1st June 1912 she was appointed by the manager to work a drawing machine in which a coarse class of yarn was drawn out, her wages being increased to 6s. 6d. a-week. On three occasions—17th October, 14th November, and 5th December 1912—she was moved to other drawing machines, where finer and still finer qualities of material were drawn, each time with an increase of 6d. of wages. After operating the last of these drawing machines at a wage of 8s. a-week for a period of five weeks she met with an accident which totally incapacitated her for work.

Held that the change in the girl's employment on 5th December 1912 was a change of grade in the sense of the Workmen's Compensation Act 1906.

Mary Dalgleish, 43 Bridge Street, Leith, *appellant*, with consent of Edward Philips, residing there, her curator *ad litem*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) at the rate of eight shillings a-week, or alternatively at the rate of seven shillings and tenpence a-week, from the Edinburgh Roperie and Sailcloth Company, Limited, Leith, *respondents*. The Sheriff-Substitute (GUY) awarded her compensation at the rate of six shillings a-week, and at her request stated a Case for appeal.

The *facts* were as follows—"The appellant, who is fifteen years old, entered the employment of the respondents in January 1912. She worked in the department where hemp and tow, after being teased and carded by machinery, are drawn out by a drawing machine and thereafter twisted and filled into bobbins in a roving machine before being spun into twine or rope or woven into sailcloth. The work performed by the employees in said department consists in tending the machines and performing various duties connected therewith. The rate of wages paid to the female employees in the said department depends partly on the particular duty assigned to them and partly on the length of their employment, and partly on the aptitude for their work, which they may develop by experience. The employees have their duties assigned to them from time to time by the manager of the department. The appellant's duties at first were to act as one of a number of girls in removing bobbins which had been filled with twisted yarn from the roving machines to the

spinning or weaving machines. She continued at this work till 23rd May 1912, her wage up to this time being at the rate of 5s. 6d. a-week. On 23rd May 1912 the appellant was assigned the duty of acting as signal girl at a wage of 6s. a-week, her duty then being to give a signal to the other girls when bobbins were to be removed as aforesaid. On 1st June the appellant had assigned to her by the manager of the department the duty of operating a drawing machine where coarse yarn made from New Zealand hemp was drawn out, her wage then being raised to 6s. 6d. a-week. On 17th October 1912 the appellant was appointed by said manager of the department to operate a drawing machine where finer hemp was dealt with, her wage for this work being raised to 7s. a-week. On 14th November 1912 the appellant was appointed by said manager to work a drawing machine where a still finer hemp, called Russian hemp, was dealt with, her wage being raised to 7s. 6d. a-week. The hemp dealt with at these three machines was afterwards spun into rope. On 5th December 1912 the appellant was appointed by the said manager to operate a drawing machine where a different and a finer quality of material, called B and C tow, was dealt with, her wage being raised to 8s. a-week. This material after being drawn is woven into sailcloth. At each change in her duties as aforesaid the appellant's wages were increased as aforesaid. On 11th January 1913, while the appellant was engaged at said last-mentioned work and in receipt of said wage of 8s. a-week, her right hand was caught in the machinery and crushed and cut. In consequence of said injuries the first finger of her right hand was afterwards amputated at the knuckle joint. She was and still is totally incapacitated for work as the result of said accident. During the twelve months previous to the accident the appellant's total actual earnings amounted to £15, 4s. 2d. The respondents' works are closed for holidays during two weeks annually, one week in July and one in December. In the respondents' wages books the only particulars given of the appellant's work is that it was classified under the description 'preparing' from July 1912 up to 14th November 1912, and thereafter under the description 'drawing frames (tow).' During the period from 7th March to 18th April, when the colliers were on strike, the respondents were unable to give their employees full employment, as they could not obtain sufficient supplies of coal to keep their works fully going, and in consequence the appellant's earnings during these weeks were reduced. The appellant was in the habit of stopping work an hour before closing time on Saturdays, for which 1d. a-week was deducted from her weekly wage. In the week ending 9th January 1913 she was absent from work one morning owing to illness."

The Sheriff-Substitute further stated—"I found in fact and in law that the various changes in the appellant's duties were not changes in the grade of her employment. I further held that the weeks during which the appellant earned reduced wages owing to the coal strike fell to be included at the reduced wages in ascertaining her average weekly earnings. In these circumstances I found that the average weekly earnings of the appellant prior to the accident were 6s. per week. I awarded her compensation at this rate, and as the respondents had offered to pay compensation at this rate I found the appellant liable in expenses."

The *questions of law* were—"1. Should the weeks from 7th March 1912 to 18th April 1912, during which the respondents could not give the appellant full employment in consequence of a shortage of supplies of coal owing to the colliers' strike, have been included or excluded in computing the average weekly earnings of the appellant? 2. Was the change in the employment of the appellant from the work of removing bobbins to that of machinist a change in the grade of the employment of the appellant in the sense of the Workmen's Compensation Act 1906? 3. Were the subsequent changes in the employment of the appellant, viz., the successive changes from the work of operating a drawing machine of a lower class to that of operating one of a higher class, changes in the grade of her employment in the sense of the said Act?"

Argued for appellant (*Questions* 2 *and* 3)—The appellant's average weekly earnings were those she was obtaining in the grade of her employment at the time of the accident—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), Sched. I, secs. (1) (*b*), and (2) (*c*). Her prior earnings therefore fell to be excluded—*Babcock & Wilcox, Limited* v. *Young*, 1911 S.C. 406, 48 S.L.R. 298. The changes in the appellant's employment were changes in grade, for any step up or step down was a change of grade in the sense of the Act—*Perry* v. *Wright* [1908], 1 K.B. 441; *Edge* v. *John Gorton, Limited*, (1912) 5 B.C.C. 614; *Jury* v. *Owners of s.s.* "*Atalanta*," (1912) 5 B.C.C. 681. The legal meaning of the word grade was matter of law—*Barnett* v. *Port of London Authority*, [1913] 2 K.B. 115, *per* Hamilton, L.J., at p. 128; *Jury* (*cit.*) *per* Farwell, L.J., at p. 684. In finding that there was no change of grade the Sheriff had misdirected himself, for there were present here all the *indicia* of a change of grade, viz., promotion to a more difficult and substantially different kind of work at a higher wage for a permanent time, and on the appointment of a responsible person. That being so question 1 did not arise. (*Question* 1)—*Esto*, however, that there was no change of grade, the Sheriff was in error in including the weeks from 7th March to 18th April 1912, for a coal strike was not a normal incident of the appellant's employment. These weeks, therefore, had been wrongly included in calculating the appellant's average weekly wages—*Perry* (*cit.*); *Carter* v. *Lang & Sons*, 1908 S.C. 1198, 45 S.L.R. 938; *Anslow* v. *Cannock Chase Colliery Company, Limited*, [1909] 1 K.B. 352, *affirmed* [1909] A.C. 435; *Bailey* v. *Ken-*

worthy, Limited, [1908] 1 K.B. 441; *Edge* (*cit.*).

Argued for respondents (*Questions* 2 *and* 3)—The question of grade was one of fact in each case. It was therefore one for the arbitrator, who had all the facts before him. To constitute a change of grade there must be some very substantial distinction in the kind of employment—*Jury* (*cit.*). That was not so here, for the appellant had always worked as a mill girl in the same department of the factory. (*Question* 1)—The weeks in question had been rightly included, for they were not weeks in which no work at all was done. They were weeks of reduced work at reduced wages. That being so, these weeks as well as the amount earned therein had been rightly included—*Carter* (*cit.*); *White* v. *Wiseman*, [1912] 3 K.B. 352.

At advising—

LORD JOHNSTON—The injured person in this case, who is the appellant, was a mill girl employed in a large roperie and sailcloth work in Leith. She entered the company's employment in January 1912, when about fourteen years of age. From that date to 1st June 1912 she served as a beginner, at a wage of 5s. 6d. a-week, very much in the position of a departmental message girl, carrying bobbins from one set of machines to another. But on 1st June 1912 the manager set her to the work of operating a drawing machine, where coarse yarn from New Zealand hemp was drawn, and increased her wages to 6s. 6d. a week. On three occasions (17th October, 14th November, and 5th December 1912) she was moved to other drawing machines where finer and still finer qualities of material were drawn, each time with an increase of 6d. of wages. From 5th December 1912 to 11th January 1913, or for a period of five weeks, she operated the last drawing machine to which she was assigned at a wage of 8s. a-week. On 11th January 1913 she met with an accident which wholly incapacitated her, at any rate for the time in question.

The Sheriff, after a proof, averaged the appellant's wages during the twelve months previous to the accident, and awarded her 6s. compensation accordingly. The question whether he was right in so doing depends upon the effect of section 1 (*b*) as interpreted by section 2 (*a*) and (*c*) of the First Schedule to the Act of 1906.

Under section 1 (*b*) the appellant is entitled to a weekly payment based on her average weekly earnings during the twelve months, if so long employed, but if not then during any lesser period of employment by the same employer.

Did the Act stop there, there is no doubt that the Sheriff would have been right in striking an average as he did.

But then section 2 says that for the purposes of the provisions of the schedule relating to "earnings" and "average weekly earnings" the following rules shall be observed, viz., *inter alia*, "(*c*) employment by the same employer" shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident." Reading these words into section 1 (*b*), what the Sheriff had to determine was, what was the grade in which the appellant was employed at the time of the accident? because upon the determination of this question depends the answer to the further question, Whether the compensation is to be based on an estimate of the average wages for the twelve months previous to the accident, or for a shorter, and if so, for what period?

Was then the grade in which the appellant was employed at 11th January 1913 the same grade in which she had been employed during the past twelve months, or did any of the various changes made in the work on which she was employed amount to a change or changes in the grade of her employment in the sense of the schedule?—in which latter case the average wage must be calculated on the wage not of twelve months but of a lesser period.

I think that in this matter the nature of the employment has an all-important bearing. And in addition to summarising as above the information afforded by the case as to the changes in the appellant's work and wages, I should probably have read the Sheriff's further explanation of the circumstances of the employment, which is as follows:—"She worked in the department where hemp and tow, after being teased and carded by machinery, are drawn out by a drawing machine and thereafter twisted and filled into bobbins in a roving machine before being spun into twine or rope or woven into sailcloth. The work performed by the employees in said department consists in tending the machines and performing various duties connected therewith. The rate of wages paid to the female employees in the said department depends partly on the length of their employment and partly on the aptitude for their work which they may develop by experience. The employees have their duties assigned to them from time to time by the manager of the department."

Some employments have in them an element of the casual, and some of the seasonal as well as the casual, in the ordinary sense, such as are illustrated in *Perry* v. *Wright* and the other cases reported at [1908], 1 K.B. 441; other employments are of a regular nature, where the employee is almost as much a part of the machinery of the establishment as the machine which he or she operates. In the former case a change of work by no means involves a change of grade of employment; in the latter case *prima facie* it much more readily does so. In the former case a rise or fall of wages, whether or not accompanied by a change of work, is no criterion of a change of grade of employment; in the latter a change of wages accompanied by a change of work goes very far to import such change of grade. There may be a change of department; there may be a change of the class of machine in the

same department. A change of wages will not of itself import a change of grade, but if it accompanies a change of department, or a change of the class of machine, or even of the species within the same genus of machine, and is not temporary but reasonably permanent, I think that there is in the sense of the schedule a change of grade.

If so, then the appellant changed her grade of employment when on 5th December 1912 she was moved to a drawing machine drawing "a finer quality of material called B and C tow," and her wages were raised to 8s. a-week. And it is unnecessary to consider the effect of earlier changes.

There remains to consider the effect of section 2 (*a*). On the assumption of the above, the basis of the compensation is the average wage of a period of about five weeks during which the appellant was employed in a grade in which she "was employed at the time of the accident." That is a comparatively short time. But section 2 (*a*) says "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Remunerated when? The manifest answer is, at the date of the accident. But that answer must be read reasonably. It does not mean at the rate being earned on a casual job without any reference to what I may call the industrial history of the workman during a more extended period. There are cases in which current earnings at the actual date of the accident do not give the rate, in the sense of the statute, "at which the workman was being remunerated," and accordingly the sub-section under consideration provides "that where by reason of the shortness of the time during which the workman has been in the employment of his employer"—that expression being interpreted according to section 2 (*a*)—"or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had" to outside considerations.

This provision, instead of creating any difficulty in the present case, confirms, I think, the view which I have expressed. For short as the time may have been it was long enough to give a continuous and uniform rate of wages over more than a month. The work was as far as possible removed from the casual. Given good conduct, there was no ground for saying that the employment was not permanent with a prospect of a rise, as the word "permanent" is understood in relation to employment. But "the terms of the employment," by which I understand the circumstances of the employment in fact, as well as the conditions of the employment as a contract, strongly support the view that the computation of the average weekly earnings on the basis of the wages earned in fact at the date of the accident by this particular employee "is best calculated to give the rate per week at which" she "was being remunerated."

I should therefore propose to answer question 3 to the effect that the change in the employment of the appellant on 5th December 1912 to the work of operating a drawing machine of a higher class was a change in the grade of her employment in the sense of the Workmen's Compensation Act 1906, and to find it unnecessary further to answer questions 2 and 3.

The case will have to go back to the Sheriff to assess the compensation, for though the average wage is by this judgment practically fixed at 8s., it does not follow that the compensation will be exactly that sum, as there may have to be certain allowances made.

I do not deal with the first question, as it was not argued on the footing of the view of the case which I have found myself called on to take.

LORD KINNEAR and LORD MACKENZIE concurred.

The LORD PRESIDENT did not hear the case.

The Court pronounced this interlocutor—

"Find in answer to the third question of law that the change in the employment of the appellant on 5th December 1912 to the work of operating a drawing machine of a higher class was a change in the grade of her employment in the sense of the Workmen's Compensation Act 1906: Find it unnecessary to answer the other questions of law: Recal the determination of the Sheriff-Substitute as arbitrator: Remit the cause to him to proceed as accords, and decern."

Counsel for Appellant—J. R. Christie—Fenton. Agent—T. M. Pole, Solicitor.

Counsel for Respondent—Constable, K.C.—Mackenzie Stuart. Agent—J. Ferguson Reekie, S.S.C.

Wednesday, July 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

STRUTHERS *v.* SMITH.

Discharge—Implied Discharge—Agent and Principal—Account—Docquet—"Fitted Accounts."

A, a house factor, who factored a property belonging to B, rendered every half year statements showing the rents which he had collected and the sums which he had disbursed. On payment to B of the balances brought out in the statements as due to him, B granted discharges to A. A resigned his position as B's factor, and rendered a statement of account showing a balance due to him. This claim against B he assigned to C, who sued. The claim