to what was included in the valuation. So in *Minister of Inverkeillor* v. *The Heritors*, March 4, 1902, 39 S.L.R. 551, a reservation was inserted in view of the fact that there was a question of reclaiming teinds from extraneous parishes. The mere fact that the teinds might not be sufficient to meet the augmentation was not in itself a reason for inserting a reservation.

Argued for the heritors—When the heritors denied that there was sufficient free teind to meet the augmentation the practice was to insert in the interlocutor a reservation or declaration that the modification and the settlement of the locality should depend on its being shown that there existed a fund available for the purpose—*Minister of Bonhill* v. *Orr Ewing*, February 22, 1886, 13 R. 594, 23 S.L.R. 406; *Minister of Peebles* v. *The Heritors*, January 8, 1897, 24 R. 293, 34 S.L.R. 294; *Minister of Banchory* v. *The Heritors*, July 1, 1863, 1 Macph. 1014; *Minister of Morvern* v. *The Heritors*, November 22, 1865, 38 Scot. Jur. 49.

The Court granted an augmentation of four chalders and refused to insert any reservation in the decree, the Lord President observing that it was safer on the whole not to introduce the reservation suggested in respect that if the effect of such a reservation was merely to express what the law would imply it was unnecessary, and if, on the other hand, it meant anything else it might be mischievous.

Counsel for the Minister—J. C. Watt. Agent—P. Gardiner Gillespie, S.S.C.

Counsel for the Heritors — Constable. Agents—J. & J. Turnbull, W.S.

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## COURT OF SESSION.

*Wednesday, July 9.*

### SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire at Airdrie.

### GIBB *v.* DUNLOP & COMPANY (1900) LIMITED.

*Reparation—Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* (1) (*b*)—*Amount of Compensation — Average Weekly Earnings—Continuity of Employment.*

A workman was employed for over twelve months prior to 16th August 1901 by a colliery company as a brusher at an average weekly wage of £1, 17s. 6d. On that date he was accidentally injured, and was thereafter off work till 15th October. From 31st August till 15th October he was paid compensation by the company at the rate of 18s. 9d. per week. On 15th October 1901 the workman resumed work, and was again accidentally injured after working for two hours and earning 1s. 10½d.

*Held* that the period of employment contemplated by Schedule 1, section 1 (*b*), was a continuous employment during which the relation of master and servant substantially continued to exist between the employer and workman; that the period from 16st August to 15th October 1901, during which the workman was off work, constituted a break in his employment with the company; and that he was only entitled to compensation on the footing that his employment with the company had commenced on 15th October, the date on which he had resumed work.

*Grewar* v. *Caledonian Railway Company*, June 19, 1902, 39 S.L.R. 687, *followed.*

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."

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 before the Sheriff-Substitute of Lanarkshire at Airdrie (MAIR), between James Gibb, brusher, Airdrie, claimant and respondent, and James Dunlop & Company, Limited, coalmasters, Calderbank, appellants.

The following facts were admitted:—"(*First*) That for over twelve months prior to 16th August 1901 the respondent was employed by the appellants as a brusher at an average weekly wage of £1, 17s. 6d., the engagement being terminable at the will of either party: (*Second*) That on that date he was accidentally injured in the course of his employment: (*Third*) That from 31st August to 15th October he, being unable to work, was paid compensation by the appellants under the Workmen's Compensation Act 1897 at the rate of 18s. 9d. per week: (*Fourth*) That on 15th October he being able to resume work did so, and was again accidentally injured in the course of his employment after working for two hours and earning 1s. 10½d."

On these facts the Sheriff-Substitute found in law that the respondent was entitled to compensation at the rate of 18s. 9d. per week.

The following questions of law were stated for the opinion of the Court—"(1) Whether the period of eight and a half weeks prior to 15th October 1901, during which respondent was off work but in receipt of compensation from the appellants, did not constitute a break in his employment with them? (2) If not, does said period fall to be taken into account in calculating the respondent's average weekly earnings for the 12 months prior to 15th October 1901, the date of the accident in respect of which compensation has been

awarded? (3) If said period is to be so taken into consideration, is the amount paid in compensation during that period to be treated as earnings?"

James Dunlop & Company (1900) Limited, appealed.

Argued for the appellants—The workman had only worked for part of one day, and the only materials for fixing his average weekly earnings were what he had actually earned, viz., 1s. 10½d., and he was therefore entitled to half of that sum—First Schedule, section 1 (*b*). The Act contemplated an unbroken period of employment—*Niddrie and Benhar Coal Company, Limited* v. *Peacock*, January 21, 1902, 39 S.L.R. 317; *Lysons* v. *Knowles* [1901], A.C. 79; *Cadzow Coal Company* v. *Gaffney*, November 6, 1900, 3 F. 72, 38 S.L.R. 40. As to the effect of a break in the period of employment, see *Appleby* v. *Horseley Company*, [1899], 2 Q.B. 521; *Jones* v. *Ocean Coal Company* [1899], 2 Q.B. 124; *Small* v. *M'Cormick & Ewing*, June 6, 1899, 1 F. 883, 36 S.L.R. 700; *Russell* v. *M'Cluskey*, July 20, 1900, 2 F. 1312, 37 S.L.R. 931. The case of *Ayres, cited infra*, relied on by the respondent had been disregarded in the case of *Peacock*. The decision in *Ayres* was inconsistent with the decision in *Lysons*.

Argued for the claimant and respondent—The Sheriff had found in fact that the employment was continuous, and his decision was final—*Small* v. *M'Cormick & Ewing* (*cit. supra*); *Nelson* v. *Kerr & Mitchell*, June 8, 1901, 3 F. 893, 38 S.L.R. 645. A workman would be entitled to compensation although he had only gone to his work and had earned nothing before he was injured—*Leonard* v. *Baird & Co.*, June 8, 1901, 3 F. 890, 38 S.L.R. 649. From what had been actually earned it was competent to ascertain his probable weekly earnings—*Ayres* v. *Buckeridge* [1902], 1 K.B. 57; *Bartlett* v. *Tutton & Sons* [1902], 1 K.B. 72.

While the case was at avizandum the case of *Grewar* v. *Caledonian Railway Company*, June 19, 1902, 39 S.L.R. 687, was decided in the First Division.

At advising—

LORD JUSTICE-CLERK—The respondent in this appeal was in the employment of the appellants for twelve months prior to 16th August 1901, when he met with an accident which rendered him unable to work, and in respect of his inability to work he received compensation under the Workmen's Compensation Act. Having recovered, and become able for work, he began work again with the appellants on 15th October, and when he had been working for two hours he again met with an accident. His earnings after resuming work were only 1s. 10½d. The Sheriff has awarded him compensation, not in proportion to his earnings after he resumed work, but upon the footing of continuous employment. But the compensation paid between 31st August and 15th October was compensation for inability to earn wages because of his injuries, and was not money earned by him. Nor can I understand how it can be maintained that during that period there was employment. The respondent was doing nothing for the appellants, and no contract relation existed between them. His engagement to work necessarily ceased when he became physically unable to work, and it was for the loss of employment by inability to take employment that he was being compensated. The measure of his right to compensation was his incapacity to earn.

It has already been held in similar cases that "employment" means "continuous employment." Where employment ceases, and after an interval a new period of employment is begun under a new engagement, that period alone is to be considered. In short, as it was expressed in the case of *Jones* v. *The Ocean Coal Company* "there must be a continuous relation of master and servant." This view of the matter is strongly confirmed by the decision pronounced a few days ago in the First Division in the case of *Grewar*, June 19, 1902, 39 S.L.R. 687. In this case, counting back from the time of the second accident, there was only a continuous relationship for part of one day. That, under the ruling of the House of Lords in *Lysons'* case, is sufficient to give a title to compensation, although the schedule prescribes the calculation to be on an average of weekly earnings. But the calculation must be, in accordance with *Lysons'* case, on what was actually earned during the week, although work was only done on one day or only part of one day in the week. Therefore what he earned in the only week in which he was engaged must give the measure for the compensation, which unfortunately in this case is only a nominal sum.

In my opinion, the first question must be answered in the affirmative, and the case remitted back to the Sheriff Court, that an award may be given on the footing that the employment was only begun on 15th October, and that the rules as to compensation must be applied to what was earned in that week only, as there was no other week of continuous employment which can be legally included in ascertaining the earnings.

In this view it is unnecessary to answer the second and third questions.

LORD YOUNG—It is not disputed that the appellants are liable to pay compensation to the respondent "in accordance with the first schedule" to the Workmen's Compensation Act 1897. The question in dispute regards only the amount, which by the Act must be settled by arbitration in accordance with the second schedule. The arbitrator (the Sheriff) by his judgment has found that total incapacity for work resulted to the respondent from the injury which he sustained, and awarded compensation by a weekly payment of 18s. 9d. from 5th November 1901, to be continued till further orders. The appellants complain of the amount as excessive having regard to Schedule 1, section 1 (*b*), of the Act. It is stated, and indeed admitted, that the respondent was employed by the appellants

at an average weekly wage of £1, 17s. 6d. for over twelve months prior to 16th August 1901, when he sustained an injury which incapacitated him for work till the 15th of October following, when he was again employed by the appellants as he had been before. On that day, the first of his new employment, after working for two hours and earning 1s. 10½d., the "personal injury by accident arising out of and in the course of his employment," for which he is, as I have said, indisputably entitled to compensation, was caused to him.

I take it as a fact that the incapacity which was caused to the respondent by the injury which he sustained on 16th August had ceased by 15th October, and that he then resumed work in the appellants' employment with the full capacity which he had before the accident of August which forced him to leave it and go without any employment during the intervening two months. The deprivation of this capacity resulting from the accident of 15th October is what he is to be compensated for. Regarding the amount and mode of payment of any compensation under the Act the parties may of course agree. If they do not the statute enacts that it shall in all cases of incapacity for work be by weekly payments of amounts determined by the arbitrator, and necessarily subject to variation, seeing that total incapacity may diminish to partial, or partial increase to more or diminish to less than it was at first.

The Sheriff (the arbitrator) in the case before us states as a fact—or decides the case on the footing that it is—that the respondent's working capacity, estimated by his wage-earning capacity before the accident, was to work so as to earn £1, 17s. 6d. on an average weekly. He, however, orders a weekly payment of only 50 per cent. of that amount, because of section 1 (*b*) of the First Schedule of the Workmen's Compensation Act, which enacts that the weekly payment to a workman as compensation for "total or partial incapacity for work" shall be not "exceeding 50 per cent." . . .

It is said that the effect of this section is to entitle a workman who has met with an accident to 50 per cent. of his average weekly earnings. It does not—it would be altogether extravagant to say it did. The words are—"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 one pound." Now, the partial incapacity may not amount to one-half or one-quarter of 50 per cent. of his capacity before the accident. To say that the statute in such circumstances entitles him to the whole of the 50 per cent. would be ridiculous. The Sheriff's view is that the respondent having been employed by the appellants during, not the whole, but ten of the twelve months, previous to 15th October 1901, when the incapacitating accident occurred, the weekly payment awarded to him as compensation cannot at any time be one exceeding 50 per cent. of his average weekly earnings (£1, 17s. 6d.) during that period.

The contention of the appellants, as I understand it, is that the period less than the whole of "the previous twelve months" (meaning previous to the accident) during which the respondent was employed by them was two hours of the day of the accident, and that the sum of 1s. 10½d. which he then earned is therefore to be taken as his average weekly earnings whereby on a true construction of the Act the compensating weekly payment to him while his incapacity lasts cannot exceed 11½d., to be reduced by anything he is able to earn when his incapacity becomes only partial.

I concur in the judgment of the Sheriff and reject the contention of the appellants.

To avoid misapprehension I think it right to explain that in my opinion it was the duty of the Sheriff to ascertain and have regard to the average weekly earnings of the respondent before the accident, and thereby and with the aid of any other evidence having legitimate bearing on the subject to form a judgment as to his working capacity on 15th October, of which the injury for which he asked compensation deprived him. The facts as stated and the judgment pronounced satisfy me that the Sheriff discharged this duty properly and fully. I make this explanation because the three questions of law stated in the case seem to me to be all of them quite irregular and irrelevant. They must have been stated by one of the parties and somehow overlooked by the Sheriff, whose judgment and the grounds of it are, as I have observed, distinctly stated in the narrative which precedes them.

I think it clear that the Sheriff's judgment cannot be impeached otherwise than on the ground that he erroneously in law took account of or had regard to the average weekly earnings of the respondent in the employment of the appellants on contract antecedent to that on which he was working on 15th October. It was, I think, conceded by the appellants' counsel that their antecedent employment of him might have been taken account of had it subsisted till the day before 15th October, when that in which the accident occurred commenced. I think there was no legal connection between the contract of employment which ended on 16th August and that which commenced on 15th October, nor would have been had the interval been much less than six weeks, say six days or six hours. The 15th October 1901 was a Tuesday. Suppose that the respondent had taken holiday or rest from the previous Wednesday, feeling slightly unwell, or to attend a wedding, his own or a friend's, and returning to the appellants' colliery on the Tuesday, was again employed by them as he had been, and proceeded to work with unquestioned capacity for it. Suppose everything else in the case to be exactly as it is—that the

respondent's average weekly earnings during the whole twelve months minus six days previous to the accident was £1, 17s. 6d., while his earnings on the day of the accident was 1s. 10½d., and that the question of law for decision was which of these sums was to be taken as in truth his average weekly earnings on a sound construction of Schedule 1 of the statute — the contention of the appellants is, that while it would certainly have been the former (the larger) but for the six days' (or it might be six hours') break, the statute, having regard to the break, compels the arbitrator to take the latter. I cannot concur in this. The result would be ridiculous.

I am therefore for not answering any of the questions, but would express the opinion on the general merits of the case as stated by the Sheriff-Substitute that the average weekly earnings of the workman during the time he was in the employment of the appellants ought to be taken into account, and that the arbitrator ought to divide what he earned by the number of weeks during which he earned it, the result giving his average weekly earnings in the sense of the statute.

My opinion clearly is that on a sensible and reasonable construction of the Act you must take his average weekly earnings during the time he was fully able to work, and give him compensation on that footing, as in fact the Sheriff-Substitute has done.

LORD TRAYNER—I concur in the decision pronounced by the First Division in the case of *Grewar* v. *Caledonian Railway Company*, and think that decision rules the present case. I am therefore of opinion that the first question in the case before us should be answered to the effect that the period there referred to during which the respondent was off work constituted a break in his employment with the appellants, and that any compensation to be now awarded must be ascertained as if the respondent's employment with the appellants commenced as at 15th October 1901.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the award of the arbitrator: Find in answer to the first question that the period of eight and a-half weeks prior to the 15th October 1901, during which the respondent was off work, constituted a break in his employment with the appellants, and remit to the arbitrator to determine the compensation due to the respondent on the footing that his employment with the appellants, in the course of which he received the injury complained of, commenced on said 15th October 1901: Find it unnecessary to answer the other questions: Find and declare accordingly, and decern."

Counsel for the Claimant and Respondent—Watt, K.C.—A. Moncreiff. Agents—Simpson & Marwick, W.S.

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

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*Wednesday, July 9.*

## SECOND DIVISION.

## RANKIN *v.* RANKIN.

*Succession—Testament—Revocation — Conditio si testator sine liberis decesserit.*

A, a day or two before his marriage, executed a will, whereby he left the residue of his estate to his wife. Two years afterwards he assigned to his wife certain policies of insurance on his life, on the narrative that he had "not yet made any marriage provision for" his wife, "and with the view of making such provision." Three years after the marriage a child was born; and five years after the child's birth A died after five weeks' illness, during which he was unable to attend to his affairs. A left no other testamentary writing. The widow ultimately did not maintain that the will in question was effectual to dispose of the deceased's heritable estate. *Held* that the *conditio si testator sine liberis decesserit* applied, and that the will was revoked.

*M'Kie's Tutor* v. *M'Kie*, 24 R. 526, 34 S.L.R. 399, *followed.*

This was a special case involving the question whether the *conditio si testator sine liberis decesserit* applied to operate revocation of the will of the deceased John Rankin, coalmaster, Glasgow, who died on 19th October 1901, leaving a widow, who was the first party to the case, and an only child, a son in pupilarity, whose factor *loco tutoris* was the second party.

The following facts, *inter alia*, were stated in the case:—The deceased John Rankin was married in 1893, and a day or two before his marriage he executed a holograph will in the following terms:—"I, John Rankin Jr., coalmaster, 28 St Enoch Square, Glasgow, being about to marry, and being desirous of providing for my wife in the event of my death, hereby appoint my brother Gavin Hamilton Rankin to be my sole executor, whom failing Alexander Bell Ferguson, writer, Hope Street, Glasgow, empowering him to realize my whole estate, and that for the following purposes:—viz. (1) To pay all my just and lawful debts, deathbed, and funeral expenses, (2) to pay, transfer, and hand over to my intended wife, Margaret M'Connell, residing at 25 Percy Gardens, Tynemouth, should the marriage be solemnized, the residue and remainder of my estate, and should she desire it, to transfer any shares in Limited Companies, without realising same, to her: In respect whereof I have subscribed these presents, written on this page by myself, on the twenty-eighth day of August Eighteen hundred and ninety-three. (*Signed*) JOHN RANKIN Jr."