process, although it might be cheaper, provided he kept within the provisions of the Act of Sederunt.

Counsel for the defender argued that where a note was added by the Auditor to his docquet the Court would consider it, although no objection had been lodged—*Dempster* v. *Wallace, Hunter, & Co.*, 1834, 12 S. 844. As it was now possible to get type-writing done outside, inconvenience could not be pleaded.

LORD PRESIDENT—There is a good deal to be said in support of the view that type-writing is a kind of printing, but it is obviously not the printing contemplated by the provision which has been read to us. At the same time I think that if there had been any abuse in multiplying manuscript copies of the papers in this case the Court might well have considered whether the rule suggested by the Auditor should not be adopted and applied. But, as I understand, only two manuscript copies of the papers were made, and accordingly, if this had been a case of printing, the rule of the Act of Sederunt would not have applied.

LORD M'LAREN — I agree that type-writing might be regarded as a species of printing, but I am not quite sure that for the purposes of taxation we should so treat it. For I understand that law-printing is charged at a uniform rate, and that rate is probably higher than type-writing. I think we are indebted to the Auditor for the suggestion in his special report, and if it appeared that undue expense was occasioned by the multiplication of hand-written copies instead of making use of the type-writer, we might correct the evil by making a new rule. In the meantime we can all see that type-writing is being extensively used by the agents practising in our Courts.

LORD ADAM and LORD KINNEAR concurred.

The Court gave decree for the expenses as taxed.

Counsel for the Pursuer—A. S. D. Thomson. Agent—P. Adair, S.S.C.

Counsel for the Defender — Munro. Agents—Auld & Macdonald, W.S.

Tuesday, December 2.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

CAMPBELL *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule* 1 (*a*)—*Amount of Compensation*—"*Average Weekly Earnings*"—*Trade Week or Calendar Week.*

In calculating the average weekly earnings of a workman under section 1 (*a*) of the First Schedule of the Workmen's Compensation Act 1897, his total earnings for the period of employment fall to be divided by the number of "trade" weeks, and not by the number of "calendar" weeks in which he has been employed.

Fleming v. *Lochgelly Iron and Coal Company, Limited*, June 19, 1902, 4 F. 890, 39 S.L.R. 684, *followed.*

Section (1) of the First Schedule of the Workmen's Compensation Act 1897 enacts —"The amount of compensation under this Act shall be—(*a*) where death results from the injury—(1) if the workman leaves any dependents wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of those sums is the larger, but not exceeding in any case £300, provided that the amount of any weekly payments made under this Act shall be deducted from such sum; and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

In an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court at Dunfermline, Maggie Black or Campbell, widow of Andrew Campbell, miner, Kelty, as an individual and as tutor and administrator-in-law for her pupil child John Campbell, claimed from the Fife Coal Company, Limited, compensation for the death of her husband, who was killed by an accident on 10th June 1902 while in the employment of the Company.

The Sheriff-Substitute (GILLESPIE) found the claimant entitled to £234 as compensation, and the Coal Company appealed.

In the case for appeal the Sheriff-Substitute stated that the following facts were admitted:—"The deceased Andrew Campbell was a miner, and entered the employment of the appellants on Thursday, 15th May 1902, at their Blairadam Colliery. He continued to work at said colliery until Tuesday, 10th June 1902, when he was fatally injured by a fall of material from the roof, succumbing to his injuries the same day. Said Blairadam Colliery is a 'mine,' and the appellants are the 'undertakers' in the sense of the Workmen's Compensation Act 1897, and the death of the said Andrew Campbell was the result of an accident arising out of and in the course of his employment. The earnings of the deceased during the period of his employment amounted to £6. Under the general regulations and conditions of employment in force at said colliery the deceased was bound to work eleven lawful days each fortnight. At appellants' said colliery, with a view to facilitating the making up of the wages, the trade or colliery week commenced on Wednesday morning and ended on Tuesday night. From the time that he entered the em-

ployment of the appellants till he was fatally injured the deceased worked in five calendar weeks, but only in four colliery or trade weeks."

Upon these facts the Sheriff-Substitute held, following the decision of the First Division of the Court of Session in *Fleming* v. *Lochgelly Iron and Coal Company, Limited*, June 19, 1902, 4 F. 890, 39 S.L.R. 684, that the average weekly earnings of the deceased were to be ascertained by dividing his total earnings by the number of colliery or trade weeks in which he had been employed. On this basis the compensation payable to the respondent was £234, and the Sheriff-Substitute granted decree for this sum, with expenses accordingly."

The questions of law for the opinion of the Court of Session were—"(1) Whether the period of the employment of the said deceased Andrew Campbell having extended from Thursday, 15th May, till Tuesday, 10th June 1902 inclusive, his average weekly earnings fall to be calculated by dividing his total earnings for said period by five, that being the number of calendar weeks in which he was employed? (2) Whether in making said calculation the divisor should be four, that being the number of colliery or trade weeks in which deceased was in said employment?"

Argued for the appellants—The weekly earnings of the deceased fell to be calculated by dividing his total earnings by five, that being the number of calendar weeks in which he was employed. The calendar week — that is, the time which commences on Sunday and ends on Saturday, and not the trade week, was the basis of calculation—*Cadzow Coal Company, Limited* v. *Gaffney*, November 6, 1900, 3 F. 72, opinion of Lord Trayner, p. 74, 38 S.L.R. 40; *Peacock* v. *Niddrie and Benhar Coal Company*, January 21, 1902, 4 F. 443, 39 S.L.R. 317. No doubt the decision in *Fleming* v. *Lochgelly Iron and Coal Company*, June 19, 1902, 4 F. 890, 39 S.L.R. 684, was against this view, but that case was decided by the First Division on a mistaken view of the decision in *Lysons* v. *Andrew Knowles & Son* [1901], A.C. 79. The decision in this latter case did not touch the point. It only decided that a man who had worked during one week was entitled to compensation under the Act as well as a man who had worked during two or more.

Argued for the respondent—The Sheriff-Substitute's decision was sound. The case was governed by the decision in *Fleming, supra.* The matter of the distinction between calendar week and trade week had not been raised in either *Cadzow Coal Company, Limited, supra,* or *Peacock, supra.* In the case of *Lysons* the preference for the trade week might be said to have been foreshadowed, and the effect of the judgment had been since explained in *Ayres* v. *Buckeridge* [1902], 1 K.B. 57.

LORD JUSTICE-CLERK—It was admitted frankly by Mr Thomson that the decision of the First Division in *Fleming* v. *Lochgelly Iron and Coal Company* was expressly in point. It is quite plain that the decision in that case was arrived at after a full discussion, and as it fixes a rule it is desirable that there should be uniformity. In these circumstances I see no reason whatever for going contrary to that decision.

LORD YOUNG concurred.

LORD TRAYNER—I think it would be unfortunate if we were to pronounce any judgment in conflict with the decision of the First Division which has been referred to. In the *Cadzow Coal Company* case I expressed an opinion on the construction of the statute different from that recently adopted by the First Division in the case of *Fleming.* I have not changed the opinion I expressed formerly, but in deference to the decision of the First Division I am willing to surrender that opinion. Their decision fixes a rule, and it is material that a rule should be fixed, while it is not so material what that rule is.

LORD MONCREIFF—I am of the same opinion. If the point had been open I am not sure I should have arrived at the same conclusion as the First Division came to in the case of *Fleming.* But that being a distinct decision upon this point I am not prepared to decide differently. I agree that we should follow that judgment.

The Court answered the second question of law in the affirmative, dismissed the appeal, and affirmed the award of the arbitrator.

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

Counsel for the Claimant and Respondent—Watt, K.C.—Wilton. Agent—P. R. M'Laren, Solicitor.

Tuesday, December 2.

SECOND DIVISION.

[Sheriff Court at Hamilton.

KEENAN *v.* FLEMINGTON COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1)—*Accident "arising out of and in the course of the employment"—Workman Leaving Work to get Drink of Water.*

A miner left the pit-head where he was working and went to the boilers to get a drink of water. When returning he was struck by a runaway hutch and killed.

Held that he was killed "in the course of his employment" in the sense of section 1 (1) of the Workmen's Compensation Act 1897, and that his employers were consequently liable in compensation under the Act.