arrived. It must be taken, I think, as settled, that in order to recover compensation under the Workmen's Compensation Act the claimant must establish two things—first, that the accident arose in the course of the workman's employment; and secondly, that it arose out of the workman's employment; and that the *onus* of proving those facts lies upon the claimant. Now all we know is that this man was sleeping on board the steamship on which he was fireman. In the course of his employment it was his duty to be on board at night in order to submit himself to the orders of the master and chief engineer, and so far, therefore, he was in the performance of his duty in being on board. But then it was found that "from the time of his return to the ship the deceased had no duties to perform in the service of the ship, and, in particular, he had no duty which took him into the fore-extension, and had no right to be in that portion of the ship." It rather seems to me that that finding, taken by itself, negatives the proposition which the appellant seeks to make out, namely, that the accident happened out of his employment. He had no duty to perform at all, but was entitled to be on board and bound to be on board in order that he might be available for any duty that he might be called upon to perform. Now it may be that if it had been shown that in these circumstances an accident had befallen him from mere blundering through one door instead of going through another in going to a part of the ship where he was entitled to be, a question might have arisen, but that is not the fact. The fact is that he was found lying in the hold, that he could not have got there without in the first place going into a part of the ship where he had no right to be, and in the second place he could not go into that part of the ship without opening a locked door. The door was forced or broken open at some time by some person; the Sheriff says it is not ascertained how or by whom. But then all the facts are that this man was found to have been injured by going into a part of the ship where he had no right to be, and which he could not have reached without forcing a locked door. I am unable to see how that can be said to be an accident arising out of his employment. I am not disposed to speculate as to how the accident might have happened, or how the door might have come to be open, because it is for the claimant to prove how that happened, if he can show that it happened in such a way as to bring the case within the scope of the Act, and he has failed to prove it. It is possible to imagine a variety of ways by which such a thing might occur, but there is no reason to suppose that it occurred in the performance of duty. I agree with what was said by your Lordship in the chair that we must take into account that the Sheriff finds this man came aboard in a state of intoxication. How did an intoxicated man open or break through a locked door and tumble into a hold where he ought not to be? I agree with the Sheriff that upon the evidence we cannot say we know anything about that. It is not proved that he did these things in the course of employment in which he was engaged.

LORD MACKENZIE concurred.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court answered the question of law in the negative, and dismissed the appeal.

Counsel for Appellants—Wilton. Agent—Alexander Bowie, S.S.C.

Counsel for Respondents—Spens. Agent—Campbell Faill, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Sheriff Court at Paisley.

CARTER *v.* JOHN LANG & SONS.

Master and Servant — Compensation — Average Weekly Earnings— Basis of Calculation— Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, sec,* 1 (*b*); *sec.* 2 (*a*) *and* (*c*).

The question whether the period during which a workman has been employed is sufficiently long to enable his "average weekly earnings" to be calculated for the purposes of the Workmen's Compensation Act 1906 is a question of fact depending on the nature of the employment, and proper for the arbiter to decide. Where the arbiter is of opinion that it is so, it remains for him to take the number of complete working weeks such as are customary in the trade or employment during which the workman has been employed, and divide therewith the amount of wages earned during such weeks, and if owing, for example, to trade holidays it would be impossible for a workman to have employment in such trade for fifty-two weeks in the year, to deduct from the average wage thus obtained a percentage corresponding to the percentage of weeks employment could not be obtained.

A workman having been incapacitated was entitled to compensation under the Workmen's Compensation Act 1906. At the date of the accident thirteen weeks had expired since he had entered the employment, but of that period for one week he had earned nothing, and for a second very little, owing to illness, and again for one week he had earned nothing, and for a second very little, owing to the annual trade holidays. The arbiter found that the period during which there had been employment was not too short to enable him to compute the "average weekly earnings" of the workman, and that the proper mode for so doing was to divide the total amount of wages by thirteen. *Held*, on a stated case, that

the arbiter had erred on principle, not thirteen but nine weeks being the period to be considered, and *remitted* to him to proceed.

Bailey v. *G. H. Kenworthy, Limited*, [1908] 1 K.B. 441, *commented on.*

The Workmen's Compensation Act 1906, Sched. I, enacts—Section 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 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. . . ."

Section 2—"For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman the following rules shall be observed:—(*a*) 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: Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, 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 the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer, or if there is no person so employed by a person in the same grade employed in the same class of employment and in the same district . . . (*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, uninterrupted by absence from work due to illness or any other unavoidable cause."

This was a case stated on appeal from findings of the Sheriff-Substitute at Paisley (LYELL) acting as arbitrator in an arbitration under the Workmen's Compensation Act 1906 between John Carter, labourer, Johnstone (appellant), and John Lang & Sons, engineers, Johnstone (respondents).

The case stated—"On 8th August 1907 the appellant, who was a workman in the employment of the respondents, sustained personal injury by accident arising out of and in the course of his employment, whereby he was and is incapacitated. He had been in the said employment and in the same grade, and the relationship of master and servant had existed between the parties from Wednesday, May 8th, 1907, till Thursday 8th August, the day of the accident. The trade week in the works of the respondents runs from Wednesday till the following Tuesday, and the period of his employment had thus embraced thirteen weeks and two days, inclusive of the day of the accident. During that time there had been certain short periods in which the pursuer had earned no wages owing to his absence on account of (1) illness, and (2) Johnstone general holidays. As thus, for the week ending June 11th 1907 the appellant had earned nothing on account of being off work through illness; for the week ending July 2nd he had earned only 15s. 11d., being off work for part of the time through the same cause; for the week ending July 16th he had earned nothing, and for the following week ending July 23rd he had earned only 3s. 8d. on account of the occurrence of Johnstone general holidays.

"I held that the period of the pursuer's employment with the defenders was from 8th May to 8th August 1907, that the said period of employment was continuous and uninterrupted by the necessary absences above detailed, that the said period consisted of thirteen weeks and two days, and that it was practicable, at the date of the accident to the appellant, to compute his rate of remuneration. I found further that the proper method of computing the appellant's weekly earnings during that period, in the manner best calculated to give the rate per week at which he was being remunerated, was to discard the amount earned during the two days of the week when the accident occurred, and to divide the total of the rest of the earnings by the number of weeks in the period of employment, viz., thirteen, and that the compensation to be awarded should be 50 per cent. of the sum so arrived at."

The *questions of law* for the opinion of the Court were—"1. Whether the said period of employment was so short as to make it impracticable at the date of the accident to compute the rate of the appellant's remuneration? 2. Whether the said period of employment should have been regarded as continuous and uninterrupted by the said short periods of absence due to illness and the occurrence of Johnstone general holidays? or 3. Whether the times of absence from the said unavoidable causes should have been, in the first place, discounted in reckoning the said period of employment, before the arbiter proceeded to compute the average weekly earnings of the appellant?"

On the first question no argument was submitted by either side.

Argued for the appellant—The proper method of computing the average weekly earnings was to divide the wages actually earned by the number of weeks actually worked—*i.e.*, the weeks in which no work was done should be discarded, and when only part of a week was worked, the divisor representing that portion should be the corresponding fraction—*Bailey* v. *G. H. Kenworthy, Limited*, [1908] 1 K.B. 441, especially Cozens-Hardy, M.R., at p. 454. "Uninterrupted by absence from work" meant excluding absence from work. The Sheriff had erred by dividing by the number of weeks he might have worked. The Court should answer the third question in the affirmative, and find it unnecessary to answer the second.

Argued for the respondents—The total sum actually earned, not that which conceivably might have been earned, should be divided by the number of weeks in which the appellant was in the respondents' employment. The appellant's method of striking an average, which disregarded non-working periods, if applied in the case of death and where the workman had been less than three years in the employment, would, being multiplied by 156, give more than full compensation. Paragraph (c) had done its work by saying that the period of continuous employment was here thirteen weeks and not a fortnight. It fixed the period of employment, and was not relevant to striking the average. Reference was also made in the course of the argument to *Jones* v. *The Ocean Coal Company, Limited*, [1899] 2 Q.B. 124, and *Grewar* v. *The Caledonian Railway Company*, June 19, 1902, 4 F. 895, 39 S.L.R. 687, as illustrating what the 1906 Act was meant to remedy.

At advising—

LORD PRESIDENT—The question raised in this case is a very important one, not because of the amount involved, but because we are, I think, bound to give what guidance we can as to the way of arriving at an average wage under the recent Workmen's Compensation Act 1906.

The facts upon which the case arises are these. The appellant was taken into the service of the respondents on Wednesday, 8th May 1907, and he worked till Thursday, 8th August 1907, upon which day the accident happened. The history of his employment, so far as his wages were concerned, is this. The period within the dates which I have specified extends to thirteen weeks and two days. Discarding the two days, he worked nine out of these weeks at what may be called full wages. For the week ending June 11th he earned nothing on account of being off work through illness; for the week ending July 2nd he earned only 15s. 11d., from the same cause, being partially off through illness; for the week ending July 16th he earned nothing; and for the week ending July 23rd he earned only 3s. 8d., the reason for that shortage being that there intervened the period of the Johnstone general holidays. What the learned Sheriff-Substitute, as arbitrator, did is set forth in the case. He said—"I found that the proper method of computing the appellant's average weekly earnings during that period, in the manner best calculated to give the rate per week at which he was being remunerated, was to discard the amount earned during the two days of the week when the accident occurred, and to divide the total of the rest of the earnings by the number of weeks in the period of employment—viz., thirteen—and that the compensation to be awarded should be 50 per cent. of the sum so arrived at." The question is whether he was right in that determination. The question of law that the learned Sheriff has put to your Lordships is—Whether the said period of employment was so short as to make it impracticable at the date of the accident to compute the rate of the appellant's remuneration? and, secondly, whether his method of computation was right?

We were referred to the only case that has been decided upon this part of the recent Act, namely, four cases decided together of *Perry, Cain, Bailey*, and *Gough*, decided by the Court of Appeal in England—*Perry* v. *Wright, Cain* v. *Frederick Leyland & Company* (1900), *Limited, Bailey* v. *G. H. Kenworthy, Limited, Gough* v. *Crawshay Brothers, Cyfartha, Limited*, [1908] 1 K.B. 441. I have exceedingly carefully considered what was said by the learned Judges in that case. We are, of course, not bound to follow them. On the other hand, their opinions are entitled to the greatest respect, and there will doubtless be sooner or later an occasion when both these opinions and any opinions which your Lordships may deliver to-day will be subjected to the review of the House of Lords. Therefore I am very anxious that we should, if possible, lay down, once for all, what we consider to be general rules under the statute.

Your Lordships are well aware that this question really arises upon a new section which makes its appearance in the Workmen's Compensation Act 1906, and which was not in the Workmen's Compensation Act 1897. But the sections which are before and after are precisely the same in the two Acts. The point arises under the schedule, and the schedule runs in both cases thus—Schedule 1, section 1—"Scale and Conditions of Compensation—The amount of compensation under this Act shall be (*a*) where death results from the injury, (i) if the workman leaves any dependants wholly dependent upon his earnings, 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 these sums is the larger, but not exceeding in any case £300." Then there is the proviso that if he has not been in the same employment for three years, the amount of his earnings shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer. That is in the case of death. Then the Act proceeds — "(*b*) Where total or partial incapacity results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed." That is the first case. "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." That is the second.

So far the words I have read may be taken from either Act, and there is no question that under the decisions under the earlier Act there were occasionally cases of hardship, which I think the section of this Act undoubtedly set itself to remedy. The cases of hardship arose in this way. If there had been employment for less than twelve months, and the scale of the average weekly wage had to be taken from the experience gained during a period shorter

than twelve months, and if it so happened that in the last weeks, just before the accident, the workman had been only a very little employed, or had been employed even so little as one day, the average that was so found was made unduly small. I may remind your Lordships of the case of *Grewar* v. *Caledonian Railway Company*, decided in 1902, 4 F. 895, as a good illustration of the class of hardship that I mean.

Accordingly in the Act of 1906 there is a new section which gives certain directions upon this matter, and that is the 2nd section of the First Schedule, which says this—"For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed—(*a*) 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." Then comes a long proviso to this effect—"Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, 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 the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment, and in the same district. . ." Then, after another sub-section which I may leave out, comes this sub-section—"(*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, uninterrupted by absence from work due to illness or any other unavoidable cause."

The first observation I have to make is that I entirely agree with the Master of the Rolls and Lord Justice Moulton, [1908] 1 K.B., pp. 451 and 456, in the remark which they both make that the leading proposition in these somewhat complicated sub-sections is the one at the beginning—that the 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. In other words, you are so far as possible to cut yourself loose from what I may call the circumstances of the moment, and to take a broad view of the matter in order to get at truly what the workman was in the habit of earning week by week. Even without going any further, that would seem to me to displace completely what the Sheriff-Substitute has done in this case, because in a period of thirteen weeks where the man was ill for a fortnight, and for another fortnight made almost nothing in respect of the trades holidays, the Sheriff-Substitute has taken the total earnings and divided by the number of weeks. That, of course, when you come to put it in other words, really means this—that in regard to the work the man had during a year or two years you are to assume that out of every thirteen weeks he is always two weeks ill, and he has always got two weeks of trades holidays. Both these assumptions are obviously against the fact. Therefore I think it is perfectly clear that the Sheriff-Substitute's method sins against the first and leading canon which is laid down in the sub-section I have read.

The real difficulty arises on how you are to calculate the average weekly wage—I mean what sort of process you are to go through. This difficulty is not lightened by the last section which I read about the same employment being taken to mean employment uninterrupted by absence from work due to illness or any other unavoidable cause. But following the example of the English Judges, and keeping myself for the moment to general remarks, as I have already said I agree with them so far. But there is something in the rubric of these cases, and something in some of the expressions which were used by these learned Judges, with which I cannot altogether agree. I do not agree with the rubric; I do not say that I disagree with the expressions, because I really do not think that they mean by these expressions all that is stated in the rubric. The portion of the rubric to which I refer is this; it is put as the result of these cases—"In an ordinary case the average weekly earnings are to be calculated by dividing the total earnings of the workman during the relevant period, not by the number of weeks in that period, but by the number of weeks actually worked within that period; days in which no work is done and no wages are earned are to be disregarded." That last proposition seems to me to be much too general. The particular case which brought out this portion of the rubric—one of the four cases—was the case of *Bailey*. The facts in *Bailey's* case were these. The appellant was a spinner employed in a cotton mill. At the time of the accident he had been in the employment of his masters for more than twelve months. He was paid by the piece, not by a weekly wage, and his actual receipts during the twelve months amounted to the sum of £83, 2s. 1d. In the course of the year there had been several times that he did not actually work—once by reason of a canal having burst its bank and stopped the whole works; once by reason of accidents in the works to boilers and machinery; and twice by holidays—one being what is called "Wakes Week," when all the mills at Ashton were closed—which corresponds with the Johnstone trades holidays in this case—and one being the usual Bank holidays, when the works were not open. The problem was to reduce piece work payments to an average weekly wage. What the County Court Judge did was simply to take this £83, 2s. 1d. and divide it by 52. The Court of Appeal held that was wrong, but I do not think the three Judges came to quite the same conclusion as to what was right. So far as I am concerned, I

agree with the method of Lord Justice Moulton. Lord Justice Moulton points out that there is a distinction between absences which are due to something personal to the workman, such as illness, or to accidental stoppages of the works, and absences owing to regular holidays in the course of the employment. Accordingly the calculation which he made in that case—and I think it was a correct calculation—was this. He assumed that the man had been absent for three weeks in the year. One of these weeks he took as due to temporary stoppages owing to accidents to boilers and machinery, and a fortnight as due to the fact that there were regular holidays during which the works were not open. Well, he says there are 49 weeks that the man has actually spent in labour in order to earn £83, 2s. 1d., which he was paid by piece work; and therefore he began by dividing the £83, 2s. 1d. by 49. But then he says if I take that to be the average weekly wage of the man I should really be putting him in a position of earning more in the year than any man *de facto* could earn, because any man in this particular trade could only have fifty weeks' work in the year, there being two weeks' holidays, and he says the employer must not be compelled to pay more to an injured workman than a sound workman could have earned. Inasmuch as two weeks is a twenty-sixth of the whole year he reduces the dividend which he first got by dividing £83, 2s. 1d. by 49, by a twenty-sixth, which is a perfectly right method of proceeding. But in the course of his opinion he uses the expression that if a man in receipt of £2 per week does not choose to go to work for a particular week, that does not alter the fact that the weekly rate at which he is being remunerated is £2 (p. 459), and that is what has crept into the rubric. If by that he only means that when you are thinking of a week's average wage, and considering the week as a unit, you are not necessarily to take into the computation another week in which the man gives himself a holiday, I agree with him; but if it be said that in every case, as is put in the rubric, days in which no work is done are to be disregarded, I do not agree. It depends upon the nature of the employment. For instance, in the colliery trade we are well aware that colliers, who are paid by each day that they go down into the pit, as a matter of fact rarely work six days a-week, and sometimes when wages are exceedingly high they work very few days in the week. Supposing you had a collier whose general method was to work two or three days a-week, and who was paid so much a day, it would be out of the question to compute that man's average weekly wage as being six times the amount he earned each day, as if he had worked for six days. As the first clause of the action is the dominating clause telling us that the average weekly earnings are to be computed in such manner as is best calculated to give the rate per week, the real practical experience of that collier's life is that for him a week's wage is the wage he earns for working on three or four days a-week. Therefore I think it necessary to be very precise about this, because otherwise I am afraid that that rubric would be misunderstood.

Now I come to the difficult part of the question in regard to this sub-section (*c*), which says that 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, uninterrupted by absence from work due to illness "or any other unavoidable cause." The English Court of Appeal have considered that directly in the case of *Bailey*, with reference to a case of illness. Lord Justice Moulton (p. 466) held that the temporary absences due to holidays and accidents to machinery were neither here nor there as far as this sub-section was concerned, because he held that "other unavoidable causes" must be *ejusdem generis* with illness. What I think he means by *ejusdem generis* with illness must be *ejusdem generis* not in the strictest sense of the word, such as a broken bone, which is not an illness but something like it. Unavoidable causes referred to in section two (*c*) must be causes personal to the workman, that is to say, anything which has to do, not with the workman but with the work, such as those stoppages referred to in the case of *Bailey* as not touched by this clause. I agree with another observation that was made in that case, namely, that you cannot argue as to the true meaning of what you are to do in a shorter period from what you find done in a longer period of three years (p. 460). That disposes of a somewhat ingenious but rather too fine argument of the learned Dean in this case.

I think the view of the Legislature in sub-section (*c*) was simple enough, and it applies not only to the three-year period but also to the one-year period. Where you have got a workman with one year's experience, then you have got a long enough period, and you may take it that the length of the period will give a fair average for the person concerned. The difficulty comes in where you have not got a long period, but where you have to find out the weekly average for the whole of the man's working life by a short period of work. It is in regard to that that this sub-section comes in. The meaning of it seems to me to be this. If you have not got twelve months' experience which will give you a law for that particular man, and if you find that the period is so short during which he has been working that you have to go to somebody else, not him, for an illustration, then you must take somebody else's history as that history is uninterrupted by illness or absence from any other unavoidable cause. In other words, you are not to assume that because A has been ill for so many weeks, and consequently has reduced the practical amount of his earnings, you are not to assume that B if he had been working would have been ill in the same way. No doubt that has the effect of doing away

with what I call the hardship in such a case as *Grewar*. Being such a rough provision it no doubt cuts the other way also. Where you have a really long period, practically you get such illnesses as a man in his life is subjected to, but where you calculate upon a short period, as evinced by somebody else, you really practically assume that the man would never be ill at all. I cannot help that; that is the way the statute has put it; and after all these things are done in a statute with a very rough axe.

That is all I have to say, except one thing about the question of the shortness of time making it impracticable for the Sheriff to calculate an average. There are very good instances in the three English cases other than the case of *Bailey*, where the question was raised of whether it was impracticable from shortness of time. Although we are asked here to answer the question as one of law, I think the question as to whether the time was so short as to make it impracticable to calculate an average is a question of fact. Accordingly, if the Sheriff acting as arbiter had come to the conclusion that the time which this particular workman worked was either so short as to make it impracticable, or was long enough to make it practicable, I should be very slow to disturb his judgment. I cannot help disturbing the Sheriff's judgment here, because he has, for the reasons I have already stated, gone altogether wrong upon the principle; and accordingly his judgment, such as it is, about the shortness of time was a judgment based upon the assumption that he had thirteen weeks to go on, whereas as a matter of fact he only had nine. But as little am I inclined to lay down as a fact in this case that it was impracticable to reckon an average on account of the shortness of time, because I think that also depends upon considerations which are not before me, but which could be before the Sheriff. Supposing there is a trade in which there is an absolutely steady wage, as, for example, the case of an ordinary man employed in a shop at so many shillings weekly during the whole year, and supposing that the man had only been in the particular service two or three weeks, yet inasmuch as it was an engagement by the week, which would have lasted on to the end of the year, I think these two or three weeks or even one week would be quite sufficient to show what was the average weekly wage. But, on the other hand, where you have classes of employment which vary very much in different times, in which the wages per week would be very different at one period of the year from those of another, and in which employment is very much more abundant at one period of the year than at another, then a very much larger number of weeks might be required in order to calculate a proper average. Lord Justice Moulton also notices this and gives the illustrations of a ferryman and a charwoman (p. 459).

Therefore I do not think that the question of the shortness of time being practicable or impracticable to reckon an average can be settled by a mere question of figures. It must be settled in each case by a consideration of the whole circumstances of the employment. I think that is a matter which the Sheriff has got to look into and determine. Therefore I am not for answering the question of the Sheriff, but am for telling him that with such help as he may get from the views we are now laying down he must determine that matter for himself. If he holds that the experience he has got of this man's nine week's work is sufficient, that the work is always very much the same in this employment, and that nine weeks at this time of the year will enable him to have the proper factors for arriving at an average, then I think he must proceed with his sum as Lord Justice Moulton did, that is to say, he must divide what the man earned by the number of weeks in which he earned it, and then go on to consider whether the man would have worked fifty-two full weeks in the year. If there were holidays he must make a deduction. Assuming that he has holidays extending over two weeks he must deduct a twenty-sixth from the average sum obtained by dividing the total amount earned by the number of weeks during which the man was working. Without answering the question as put, we should, I think, remit the case to the Sheriff to inquire for himself whether he considers in the whole circumstances that the period was or was not too short to allow him to judge from the man's own wages what a proper average wage would be. If he thinks it is long enough he could then proceed arithmetically to determine the average. If he thinks it is not long enough he must take somebody in the same work and in the same grade if he can find him. If there is no such person, then he must take somebody in the same grade in some other work in the neighbourhood, keeping steadily in view the first sentence of subsection (*a*) to find what that man in the course of the year would earn fairly one week with another, and not pinning his attention particularly to the week or the few weeks preceding the time at which the accident actually happened.

LORD M'LAREN—I concur in the opinion of your Lordship in the chair, and only add a few words on the construction of section 2 (*a*) of the First Schedule. That portion noted as (*a*) consists of two provisions, the first being a direction as to how the average weekly earnings are to be ascertained, and the second being a proviso to the effect that where it is impracticable to obtain a sound average in the ordinary way the arbitrator may draw his conclusion by considering what would be the average wage earned by a person in the same class and grade of employment. Under the statute of 1897 we had no difficulty in knowing what to do, because the statute gave right to a sum described as average weekly earnings. The week was the unit, and whether the number of weeks was great or small, the arbitrator, and the Court in reviewing his judgment, had only

to perform the operation of ascertaining the arithmetical mean by adding together the wages received in various weeks and dividing them by the number of weeks. In cases like *Grewar*, where the method was applied to short periods—in that case consisting of two broken weeks—the mean of two broken weeks would certainly not give a proper approximation to the wage that a healtby man might earn in the course of the year. But then no other mode of estimating the wage was open to the arbitrator or to the Court, and after all it was for the benefit of the workman that he should be awarded a sum based on this computation, small as it was, because in no other way could he get anything. It seems to have been brought to the notice of the Legislature that there were cases where owing to the shortness of the period or the irregularity of the work it was impossible to get fair results in this way. No doubt if there are only two weeks you may perform the operation of obtaining the amount by adding the two sums of wages together and dividing. But that is a mere operation, and it does not follow that it would give a true estimate of the average weekly earnings of the workman over a year. The principle of obtaining the mean result is to suppose there is some rule or permanent element underlying the varying elements of the computation. The object of taking the average is to eliminate all irregularities or incidental circumstances, and, of course, the greater the number of factors that are to be averaged the greater is the probability of arriving at a true result. This is really elementary, and I only mention it because I think it explains the motive of the Legislature in this provision of rule 2 (*a*). I judge from the terms of the statute that we are not intended to lay down any definite criterion as to the number of weeks which would in all cases be sufficient to enable the arbitrator to arrive at a true average. The proviso has reference to particular cases, and it may be that while in this case owing to the interruptions and other causes we do not see that a fair average can be got out of nine weeks' employment, there may be many cases where three or four weeks would be quite sufficient to enable the arbitrator to get an average, as, for example, in a case in which a man works steadily and for the full number of working hours during the whole time. With regard to the mode of proceeding where there are irregularities in the period of service, I think we are safe in availing ourselves of the aid of so distinguished a mathematician and scientist as Lord Justice Moulton, and I quite agree that the mode of calculation which he proposes is sound and applicable to the circumstances of the present case. I agree with your Lordship that the proper course is to remit the case to the Sheriff as arbitrator to proceed in terms of the rules we have referred to.

LORD KINNEAR—I concur with the opinion of the Lord President.

The Court found it unnecessary to answer the questions of law as put in the case, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to proceed.

Counsel for the Appellant—Munro—J. A. Christie. St Clair Swanson & Manson, W.S.

Counse for the Respondents—The Dean of Faculty (Campbell, K.C.)—D. Anderson. Agents—Cadell & Wilson, W.S.

Saturday, July 18.

FIRST DIVISION.

[Sheriff Court at Hamilton.

HENDRY (SIMPSON'S EXECUTRIX) *v.* THE UNITED COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *secs.* 1 (1) *and* 2, *and First Schedule, sec.* 1 (*a*) (1) *—Dependant—Death of Dependant before Making Claim—Right of Representative of Deceased Dependant to Claim Compensation.*

The right to compensation conferred by the Workmen's Compensation Act 1906 upon the dependants of a deceased workman who has met his death through personal injury by accident arising out of and in the course of his employment, is a right which vests in the dependant, and is transmitted to his legal representatives on his death notwithstanding that the dependant has died without having made the claim—*diss.* Lord M'Laren, on the ground that before it will transmit the claim must have been made by the dependant.

Darlington v. *Roscoe & Sons*, [1907] 1 K.B. 219, *approved; O'Donovan* v. *Cameron, Swan, & Company*, [1901] 2 I.R. 633, *disapproved.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—section 1 (1)—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

First Schedule—"(1) The amount of compensation under this Act shall be (*a*) where death results from injury (*i*) if the workman leaves any dependants wholly dependent upon his earnings, 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 one hundred and fifty pounds, whichever of these sums is the larger, but not exceeding in any case three hundred pounds. . . . . ."

Mrs Isabella Simpson or Henry, wife of Robert Henry, miner, Shettlestone, executrix-dative of the late Mrs Marion