language that facts must be averred from which the inference was inevitable that the defender had been guilty of either gross neglect or gross mistake. I am clearly of opinion that no such facts are averred in the present action.

On these grounds, which I assume are the grounds on which the Lord Ordinary has decided the case, I agree in the judgment arrived at by him.

LORD TRAYNER—I am unable to say that the pursuer's averments are irrelevant. It is quite possible, and indeed probable, that the defender may be able to prevail in his defence, for if his statements were established it would be difficult, I think, to hold that he had violated or neglected his professional duty towards the pursuer so as to incur liability for damages. But having regard merely to the pursuer's averments, I do not think that the case can be dismissed without inquiry.

LORD MONCREIFF — I agree with the majority of your Lordships that on the pursuer's statements there is a case for inquiry. I do not doubt that in some circumstances a medical man may render himself liable in damages if through gross negligence or remissness he induces or permits a patient to continue under a course of treatment which, though beneficial at first, becomes injurious and dangerous if continued too long. If, for instance, a doctor prescribes medicine containing a small dose of poison, the action of which, though beneficial if taken with caution, requires to be watched and, if necessary, stopped after a certain time, and tells the patient to continue to take it until his next visit, and then, without reasonable excuse, through carelessness fails to visit his patient, and serious consequences ensue, I think there is clearly a right of action against the medical man. In the case supposed the doctor has undertaken the case, and the patient is not expected to be qualified to know the effect of the drug or how long it can be taken with impunity.

The mode of treatment prescribed by the defender in the present case was not a poison but a poultice, and therefore at first sight perhaps the case appears more trifling. But the consequences, according to the pursuer, were serious enough, as a finger had to be amputated.

If at the trial the defender succeeds in proving either that the loss of the pursuer's finger was not due to poulticing, or that the defender was unavoidably prevented through sudden illness from visiting the pursuer or sending directions as to his treatment, or that the pursuer was himself responsible for or contributed materially to his injuries, the defender will be entitled to a verdict.

The pursuer proposed the following amended issue for the trial of the cause:—"Whether the defender, in violation of his duty to the pursuer, negligently failed to give sufficient and proper attention and care to the pursuer as his patient, in consequence of which the pursuer's finger had to be amputated, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The pursuer quoted *Barlas* v. *Strathern*, January 21, 1859, 21 D. 307, in support of this form of issue.

Argued for the defender—"Wrongfully' or "grossly" ought to be inserted in the issue. Gross negligence was affirmed on record, and as it was absolutely necessary for the pursuer's success that he should prove gross negligence, the fact that he was bound to do so should be brought prominently before the jury.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against: Repel the first plea-in-law for the defender: Approve of the issue as amended, and remit the case to the Lord Ordinary to proceed."

Counsel for the Pursuer and Reclaimer—Young—Melville. Agent—Jas. Campbell Irons, S.S.C.

Counsel for the Defender and Respondent — Jameson, K.C. — M'Clure. Agents — Bruce & Stoddart, S.S.C.

Saturday, June 8.

SECOND DIVISION.

[Sheriff Court at Hamilton.

NELSON *v.* KERR & MITCHELL.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1), *and First Schedule* (1) (*b*)—*Amount of Compensation—Average Weekly Earnings.*

A miner entered the service of a firm of coalmasters on Tuesday 15th May, and worked on that and the following day. He did not work on Thursday, the 17th or Saturday the 19th, but he worked on Friday the 18th. He also worked on Monday the 21st, and after working two hours, during which he was engaged preparing a workingplace, but did not put out any coal, and earned no wages, he received injuries on account of which he claimed compensation under the Workmen's Compensation Act 1897. The amount earned by him for his work in the week ending Saturday 19th was 16s. 2d.

Held that in accordance with the construction put upon the Act in the case of *Lysons* v. *Andrew Knowles & Sons, Limited* [1901], A.C. 79, the average weekly earnings of the claimant must be taken to be 16s. 2d.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1), *and First Schedule* (1) (*b*)—*Amount of Compensation—Average Weekly Earnings—Workman Assisted in Work by Son.*

A miner while working in a colliery received injuries, on account of which he claimed compensation under the

Workmen's Compensation Act 1897. He was assisted in his work by a boy, his son, who acted as his drawer, but he paid this boy nothing. The usual wage for a boy so assisting a miner was 2s. 9d. per day.

Held that in calculating the claimant's "average weekly earnings" no deduction was to be made in respect of the work done by the claimant's son.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1, enacts—"(1) If in any employment to which this Act applies 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." The First Schedule contains the following provision:—"(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 before the Sheriff-Substitute at Hamilton (DAVIDSON) under the Workmen's Compensation Act 1897 between Kerr & Mitchell, coalmasters, Cleland, appellants, and William Nelson, miner, Wishaw, claimant and respondent, in which the claimant claimed compensation in respect of injuries received by him on 21st May 1900 by a fall from the roof while working as a miner in the appellants' Glencleland colliery.

The facts admitted or proved, as stated by the Sheriff-Substitute, were as follows:—"That the respondent was in the employment of the appellants from October 1899 till February 1900, when he left them, and procured work elsewhere. His wages for that period were at the average rate of £2, 10s. per week. On the 15th day of May 1900 he again entered appellants' employment, and worked on that and the following day. On the 18th day of May he worked in a different section of the pit, preparing a working-place, but put out no work. On the 21st day of May he worked in a third place, and while holing coal there was injured after having worked two hours only. He earned no wages on the 21st, which was a Monday, and the amount earned by him for his work in the preceding week was 16s. 2d. He employed a boy, his son, who assisted him in his work, but he paid the boy nothing. The boy only assisted him as a drawer, and on the 18th and 21st May, when the respondent had no output, he had no work to do. The usual wage for a boy so assisting a miner is 2s. 9d. per day."

On the foregoing facts the Sheriff-Substitute found that the average weekly earnings of the respondent while in the appellants' employment were 16s. 2d., and awarded him compensation at the rate of 8s. 1d. per week.

The questions of law for the determination of the Court were—"(1) Should a deduction be made in respect of the work done by respondent's son from the total amount earned by the respondent? (2) Should the average weekly wage of the respondent be taken as 16s. 2d. or 8s. 1d.?"

Argued for the appellants—*On question* 1—The earnings of the injured man must alone be taken account of, and not the earnings of a person assisting him in his work. It made no difference that the person assisting received no wages for doing so; that did not make his work the work of the person injured. The value of the son's work must therefore be deducted. *On question* 2—The claimant had been for part of two weeks in the employment of the appellants, and therefore the wages which he had earned during these two weeks must be divided by two in order to strike the average weekly wage. The earnings *de facto* made by the injured party must be taken as the basis of compensation, the wages earned being divided by the number of weeks in which the workman was employed—*Cadzow Coal Company, Limited* v. *Gaffney*, November 6, 1900, 3 F. 72; *Russell* v. *M'Cluskey*, July 20, 1900, 2 F. 1312, opinion of Lord M'Laren, 1317. If the workman had worked one week, and then left and returned and worked the third week, in order to calculate the average weekly earnings the amount *de facto* earned would require to be divided by 3—*Small* v. *M'Cormick & Ewing*, June 6, 1900, 1 F. 883; *Keast* v. *Barrow Hematite Steel Company*, 1899, 15 Times L.R. 141. The decision in *Lysons* v. *Andrew Knowles & Sons, Limited* [1901], A.C. 79, did not deal with the mode of computation of average weekly earnings where the workman had been in the employment of the undertakers more than one week.

Argued for the claimant and respondent—*On question* 1—No deduction should be made from the claimant's earnings in respect of the assistance rendered to him by his son, as no payment was made to the latter for his services. *On question* 2—The Sheriff was right in holding that the average weekly earnings of the claimant were 16s. 2d. The whole argument of the other side was based on the fallacy that the amount of the weekly earnings was to be determined by the number of weeks the workman had been in the employment. This was not the case. The question under the statute was not, How many weeks did the man work? but, In how many weeks did he earn wages? In most of the cases before the decisions in *Lysons, supra*, the Court was inclined to strain the meaning of the statute in order to get employment for two weeks made out, holding, as they did, that employment for two weeks must be made out in order to entitle the workman to anything at all under the statute. After the decision in *Lysons* there was no need for any artificial attempt to get two weeks' employment. From the earnings made during one week the aver-

age weekly earnings could be calculated, and in the present case the claimant had earned wages only during one week.

At advising—

LORD JUSTICE-CLERK—Two points arise for decision in this case. The first is, whether in computing the earnings of the injured party there is to be deducted from these earnings a proportion of their amount in respect that he had the assistance in his work of a boy, his son. The fact is, that the son, who acted as his father's drawer, was not paid any money for doing so by his father. In that state of matters I see no ground for holding that any deduction should be made. The pursuer received all the wages earned by his work, and did not have any outlay for assistance, and that seems to me to be a sufficient ground for holding that in this arbitration no deduction should be made from the earnings in considering the compensation.

The second question is, whether the computation of his wages is to be taken at 16s. 2d., being the amount of the earnings he made during the week before the accident, or whether, as he worked in two weeks but had not at the time of the accident earned anything in the second week, the wages are to be counted on an average of the two weeks, and therefore fixed at 8s. 1d. Considering that it has been decided in the House of Lords that where there has only been employment in one week, compensation may be assessed by considering the earnings of that week only, although the schedule declares that it is average weekly earnings by which computation is to be made, I think it may be fairly taken to follow that if there were no earnings except in one week, that amount must be taken as the basis of assessment, and is not to be cut down by the fact that the workman was in the employment in a small part of another week during which he did not earn any sum, as his work had not proceeded so far in that week as to give rise to a claim for wages.

I would propose to answer the first question in the negative, and to affirm the first alternative of the second question.

LORD TRAYNER—The important fact in this case is, that the respondent had earned wages for only one week. My view (previously expressed), in accordance with the views expressed by some of the learned Judges in England, was, that in such a case no compensation could be claimed under the Workmen's Compensation Act, because it could not be ascertained what were the workmen's "average" weekly earnings. That being the only standard according to the statute by which compensation was to be estimated, I could not supply any other, and if the statutory standard could not be applied, then the compensation could not be ascertained, and consequently there could be no award. But the opinions delivered in the case of *Lysons* in the House of Lords are adverse to the view I hold, and in deference to those opinions I can no longer act upon that view. I am accordingly of opinion, on the authority of *Lysons'* case, that the amount earned by the respondent in one week must be taken as his average weekly earnings, and his compensation determined on that footing. I think no deduction should be made from the respondent's earnings on the ground that he had some assistance from his son. No sum was in fact paid to the son for his assistance, and there was therefore no deduction from the week's earnings on that account.

LORD MONCREIFF—As the case is presented I do not think that much difficulty exists. The first question of law may be left out of view altogether; it is not arguable, and should be answered in the negative. The second question is—"Should the average weekly wage of the respondent be taken at 16s. 2d. or 8s. 1d.?" The meaning of that question is, Are we to hold that the respondent earned wages for two weeks or for one? If for two weeks, we must, I assume, reach the average weekly earnings by dividing what he earned in the two weeks by 2. But although he went to his work on the Monday of the second week, he was injured by a fall from the roof before he had earned any wages, he being paid by output. The appellants' argument is, that as the respondent was in the employment of the appellants for more than one week the sum which he earned during the first week must be divided by the number of weeks—that is, by 2.

The argument before the Sheriff and the Sheriff's judgment have evidently proceeded in view of the judgment of the House of Lords in the case of *Lysons*, which was pronounced on 14th December 1900, [1901], App. Ca. 79. But for that decision the respondent would probably not have obtained a judgment, as under some of the previous decisions, and in particular the decision in the case of *Lysons* in the Court of Appeal [1900], 1 Q.B. 780, it had been decided that in order to entitle a workman to compensation under the Act he must have been in the service of the employer and earning wages for at least two weeks, so that an average of his weekly earnings could be taken.

The views of the learned Judges in the Court of Appeal are very clearly stated by Lord Justice Smith and Lord Justice Collins. The former says, p. 785, "Is not this Court then necessarily driven to say that in order to come within the Act a man must have been in his employment for at least two weeks at the date of the accident. Unless we say that I cannot see how an average of the weekly earnings can be taken;" and Lord Justice Collins says, p. 786, "It seems to me, therefore, that the schedule contemplates the existence of the relation of master and servant for not less than two weeks between the injured man and his employer."

In *Lysons'* case the workman only worked for two days—on Tuesday and on Thursday of the same week. The County Court Judge took the earnings for those two days as his average weekly earnings; but the Court of Appeal differed from him, and

allowed the appeal although Lord Justice Romer doubted.

On the case going to the House of Lords their Lordships, consisting of the Lord Chancellor, Lord Macnaghten, Lord Shand, Lord Davey, Lord Brampton, Lord Robertson, and Lord Lindley, unanimously reversed the order of the Court of Appeal; and they took occasion to lay down certain broad principles as to the construction of the statute, and the weight to be attached to the schedule. I think we are bound to give effect to the views thus enunciated. As I read them they come to this. The statute confers a right of compensation upon every workman who sustains personal injury in an employment to which the Act applies, by accident arising out of and in the course of the employment, however long or however short a time he may have been in the employment, and whether wages have been received or not. The view of Lord Justice Collins in the Court of Appeal was, that the statute contemplated employment of considerable duration. He says—"It seems to me that, when it was dealing with the assessment of the amount of compensation, the Legislature in taking in case of death a maximum of three years' earnings as a basis of the assessment, was evidently contemplating the existence for a considerable time of the relation of master and servant." The House of Lords negatived that view, and I think rightly. While some of the expressions in the schedule give colour to it, it is conceded that if a workman was injured after being in the same employment for two weeks his representatives would be entitled to just as much remuneration in the event of his death as if he had been in the employment for three years. Further, the employer in the sense of the Act is not necessarily the workman's own employer in whose service the workman may have been for three years. He is the undertaker with whom the workman may have been sent to work for a very short time. See section 4.

The real difficulty arises on the construction of the words in the first section of the statute, "compensation in accordance with the first schedule to this Act." The view taken by the House of Lords was, that the schedule is really ancillary to the leading provisions of the Act, and does not control it. Lord Halsbury says, p. 87—"It seems to me that the Legislature in using the phrase that you must take the average of the earnings for the week did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in the arithmetic he was not to get it at all, but it provided an artificial means of finding out what that quantum was to be, and that was no doubt by the use of the word 'average.'" In short, their view was that where the schedule in terms applies, it should receive effect, but where it is inapplicable and it is impossible to arrive at a weekly average by taking the earnings of two or more weeks, the Arbitration Court is free to ascertain in some other way the amount of compensation to be awarded. There are certain conditions in the schedule which no doubt must receive effect in any case, such as the maximum to be awarded, and the provisions that weekly payments are not to be made until after incapacity for two weeks from the date of the injury. But the schedule does not prescribe any particular way in which the arbitrator is to arrive at the amount of compensation, where he has not the earnings of two or more weeks to guide him.

Applying the principle laid down by the House of Lords to the present case, we find that the only earnings were those of the week ending 19th May 1900, amounting to 16s. 2d. Nothing was earned in the next week although the man went to his work. I do not think that we should be giving effect to the judgment of the House of Lords if we divided the wages earned in the first week by two. We have only the earnings of one week, and we are entitled to regard these as the average weekly earnings of this workman. A more difficult question would have arisen if he had earned wages on the Monday and been injured on the Tuesday. I should like to reserve my opinion as to whether in such a case the earnings of one day could be regarded as the week's earnings, his earnings being interrupted by injuries sustained in the service of the employer. But it is enough for the present case that nothing was earned on the Monday.

I am therefore of opinion that the Sheriff-Substitute's judgment was right.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Answer the first question of law therein stated in the negative: Find, in answer to the second question of law therein stated, that the average weekly wage of the respondent falls to be taken as 16s. 2d.: Find and declare accordingly: Therefore dismiss the appeal and affirm the award of the arbitrator, and decern."

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

Counsel for the Claimant and Respondent—Salvesen, K.C. — M'Clure. Agents—Simpson & Marwick, W.S.