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.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court at Hamilton between Michael Keenan, claimant and appellant, and the Flemington Coal Company, Limited, Glasgow, respondents, in which the claimant claimed £171, 12s., with interest from 30th May 1902, as compensation due to him under the Act in respect of the death of his son John Keenan.

In the case for appeal the Sheriff-Substitute (DAVIDSON) stated as follows:—"This claim was made by the appellant in respect of the death of his son John Keenan, who resided at Lorne Rest Buildings, Silverbanks, Cambuslang, upon whom, as is alleged, he was totally dependent. It is stated that the said John Keenan was in the employment of the respondents upon the 30th May 1902 as a drawer-off at Gateside Colliery, Cambuslang. He left the pit-head, at which his work was situated, for a few minutes to get a drink of water at the boilers, and when returning he was struck by a runaway hutch and killed. The case was heard before me on the 30th July 1902, when the following facts were admitted or proved—That the said John Keenan was working at Gateside Colliery on 30th May 1902; that there are two methods of reaching the boilers from the pit-head, one by means of a stair, which is the proper and recognised way, and one by means of a hutchway, which the workmen were in the habit of using, and were not prohibited from using; that water was provided at the pit-head by the workmen themselves, otherwise the nearest water the deceased could get was at the boiler; that on the date above mentioned Keenan left the pit-head and went to the boilers to get a drink of water; that on his way back to the pit-head he was crushed on the said hutchway by a runaway hutch and killed. The appellant received 8s. per week from the deceased, and received no support from anyone else, and was wholly dependent on the earnings of the deceased.

"In these circumstances I found that deceased was not killed while in the course of his employment, and awarded no compensation to the appellant.

"The question of law for the determination of the Court of Session is—Was the deceased John Keenan in the circumstances narrated killed in the course of his employment?"

Argued for the appellant—The Sheriff-Substitute had taken an unduly narrow view of the Act in holding that a man going for a drink of water to a place within his employers' premises during the period of his work was not at the time in the course of his employment. There was no allegation that Keenan went for a drink in order to waste time; he must be considered to have gone for the drink in order to conduct his work more efficiently. The case of *Goodlet* v. *Caledonian Railway Company*, July 10, 1902, 39 S.L.R. 759, was *a fortiori* of the present. In that case the claimant had gone out of his way in order to indulge in casual conversation with a fellow employee, and yet the accident was held to have arisen in the course of his employment.

Argued for the respondents—This was really a question of fact, and the Sheriff-Substitute's decision on such a question should not be disturbed. But even if the question was taken as one of law, the judgment appealed against was right. A man might not be acting in the course of his employment even although the accident happened within his employers' premises—*Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381. The case was ruled by *Smith* v. *Lancashire and Yorkshire Railway* [1899], 1 Q.B. 141. In the present case Keenan went for the drink of water not for any purpose of his employment but for his own pleasure.

LORD JUSTICE-CLERK—I am quite clear that the Sheriff-Substitute has pronounced a wrong decision in this case. This man when he went for a drink of water was still on his masters' premises, and still, in the ordinary sense, in his masters' employment. Is it to be said for a minute that a man ceases to be in the course of his employment every time that he for some necessary reason leaves his work? It would be contrary to all decency for an employer not to provide water for his men, or not to permit them to go for a drink of water when they desire to have one. Going for a drink of water is a necessary reason for stopping work for the moment, because when a man feels thirsty it hinders him from working with vigour, and it is very proper that he should be allowed to go for a drink of water on the premises. There may be cases imagined where this might be used as a pretence in order to waste time, but no such case is averred here. It is a simple case of a man feeling thirsty at his work and going for a drink of water to a place close at hand on his masters' premises. In such a case the workman is clearly still in his masters' employment.

LORD YOUNG—I am of the same opinion.

LORD TRAYNER—Many cases of difficulty have been presented to us in connection with this Act. The present case is not one of these. I have not heard and have not for myself discovered any grounds upon which the judgment of the Sheriff-Substitute can be sustained.

LORD MONCREIFF concurred.

The Court answered the question of law in the affirmative, recalled the dismissal of the claim by the arbitrator, and remitted to him to proceed in the arbitration.

Counsel for the Claimant and Appellant—M'Lennan—J. B. Young. Agent—Alastair Dallas, W.S.

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