

health that this one was. Whereas in this case the husband, if able-bodied, however poor, is liable to support the wife. But in that case if the father had been in affluent circumstances the child would have ceased to be in a position *de jure* to receive relief, the chargeability would have ended, and the settlement of the child would then have followed the settlement of the father, just as here the settlement of the wife would follow that of the husband if discovered.

The fallacy of the opposite argument may, I think, be tested in another way. It is said that the husband has certainly lost his settlement in Row. Now that is necessarily based on the assumption that he lived for three years after he disappeared, for if he died within the three years then his settlement in Row remains a historic fact unaltered, and the case comes to be the ordinary one of a widow who at the moment of pauperism still retains the derivative residential settlement of her husband, and it is well settled that so long as she remains a pauper no change takes place. Now while I agree that there is no presumption that the disappeared man is dead, yet, if Erskine's view be the true one (see Inst. iv. 2, 36), the presumption of life would not be available where the person pleading it did not do so in defence but needed it *positive* whereon to found his plea. In one of the cases Lord Deas, although he does not express it in the same words, seems to have held the same opinion, because he said he did not think the presumption of life was applicable to poor law cases—*Greig v. Simpson & Craig*, May 16, 1876, 3 R. 642, at p. 644.

For these reasons I am of opinion, though on grounds differently expressed, that the decision of the Sheriffs is right and should be affirmed.

LORD JUSTICE-CLERK—From the first my opinion was in accordance with the view which your Lordship has expressed, and I entirely concur.

LORD M'LAREN—I concur in your Lordship's opinion. I will only add that the first principle to be applied to cases of this kind is that every pauper who has a claim for relief must continue to be supported by the parish of settlement until that parish can establish a claim against some other parish. If the husband of this woman could be traced it would either be found that he had acquired a settlement in some other parish or that he had not. If he had another settlement, then, of course, the woman would be entitled to relief from that quarter, and the new settlement would be liable on exactly the same ground as Row is at present liable, viz., the ground of derivative settlement. But the case is that nothing whatever is known about the deserting husband, and it cannot be assumed that he has acquired a new settlement, or that he has reverted to his birth settlement, or that he has any settlement in this world at all. He may be dead for anything we know to the contrary.

While I agree with your Lordship that this is a case of a pauper receiving relief in her own right, because her husband is not a pauper—has never applied for relief—that does not seem to me really to be decisive of the question, which I think depends upon the principle that Row must continue to be liable until it is able to show that there is another parish against whom a preferable claim can be made.

LORD KINNEAR—I agree with the Lord President.

LORD STORMONTH DARLING—I am of the same opinion.

LORD ARDWALL—I concur.

LORD GUTHRIE—I also concur.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute dated 18th December 1905, as varied by the interlocutor of the Sheriff dated 14th March 1906, affirmed the last-mentioned interlocutor, and of new decreed as craved, subject to the restriction mentioned, against the defenders the Parish Council of the Parish of Row.

Counsel for Pursuers (Paisley Parish Council)—MacRobert. Agent—A. C. D. Vert, S.S.C.

Counsel for Defenders (Appellants) (Row Parish Council)—Dean of Faculty (Campbell, K.C.)—Orr Deas—Carmont. Agents—Reid & Crow, Solicitors.

Counsel for Defenders (Respondents) (Glasgow Parish Council)—Clyde, K.C.—Hunter, K.C.—W. Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 13.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

LINDSAY v. M'GLASHEN & SON,
LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7 (2)—Dependants—Wholly or in Part Dependent—Wife and Pupil Child Living Apart from and not Supported by Husband.

In an arbitration under the Workmen's Compensation Act 1897 in which the widow of a workman claimed compensation for herself and as tutor of her pupil child, in respect of the death of her husband while in the course of his employment, it was proved that the workman was killed in June 1907; the spouses were married in August 1895; the wife left her husband in December 1895; the child of the marriage was born in January 1896; during the separation the wife supported herself, the child of the marriage, and an illegitimate child born to her in January

1903, by working as a weaver, with the aid of occasional contributions from her relatives; the deceased did not contribute to the support of his wife or child. *Held* that neither the wife nor the child was wholly or in part dependent on the earnings of the deceased at the time of his death within the meaning of the Workmen's Compensation Act 1897, section 7 (2).

Turners Limited v. Whitefield, June 17, 1904, 6 F. 822, 41 S.L.R. 631, *followed*.

Dictum of the Lord President in *Baird & Co., Limited v. Birsztan*, February 2, 1906, 8 F. 438, 43 S.L.R. 300, to the effect that there is no presumption of law, merely an inference in fact, that a wife is dependent on her husband, *approved per* Lord Ardwall.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 39), section 7 (2), enacts—“In this Act . . . ‘dependants’ means . . . in Scotland such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent on the earnings of the workman at the time of his death.”

Mrs Alexandrina Allan M'Inroy or Lindsay, widow of William Jamieson Lindsay, for herself and as tutor and administrator-in-law of her pupil child Isabella Walker Lindsay, claimed compensation under the Workmen's Compensation Act 1897 from Stewart M'Glashen & Son, Limited, sculptors, Warriston Road, Edinburgh, in respect of the death of William Jamieson Lindsay.

The matter was referred to the arbitration of the Sheriff-Substitute (GUY) at Edinburgh, who refused compensation, and at the request of the claimant stated a case.

The facts found proved were stated by the Sheriff-Substitute to be, *inter alia*, as follows:—“(1) On 13th June 1907 the said William Jamieson Lindsay was a workman in the employment of the respondents, and on that day he met with an accident arising out of and in the course of his employment with them at their yard at Warriston Road, Edinburgh, which is a factory within the meaning of said Act, by being crushed against a wall of the yard by a block of stone which was being raised by a crane, and he died almost instantaneously; (2) the appellant Mrs Alexandrina Allan M'Inroy or Lindsay is the widow of the said William Jamieson Lindsay, and her pupil child the said Isabella Walker Lindsay, who was born on 8th January 1896, is the only child of the deceased and her; . . . (4) the deceased and the appellant the said Alexandrina Allan M'Inroy or Lindsay were married on 26th August 1895; (5) that in December 1895, and shortly before the birth of the said Isabella Walker Lindsay, the said Alexandrina Allan M'Inroy or Lindsay left her husband and went to reside with her mother and brothers in Dundee; (6) that the said Alexandrina Allan M'Inroy or Lindsay stated her reason for leaving her husband to be his cruelty, but she led no evidence corro-

borative of this, and she took no proceedings against her husband; (7) since leaving her husband the appellant has worked as a weaver, and by this means, and with assistance from her mother and brothers, has maintained herself and her said pupil child, born on 8th January 1896, and an illegitimate child to which she gave birth on or about 30th January 1903; (8) that since the separation neither the said Alexandrina Allan M'Inroy or Lindsay nor her daughter Isabella Walker Lindsay received any alimony or support from the deceased; (9) that at the date of the said William Jamieson Lindsay's death neither the said Alexandrina Allan M'Inroy or Lindsay nor her child the said Isabella Walker Lindsay was in fact dependent either wholly or partially upon his earnings.”

The Sheriff-Substitute further stated—“On 27th December 1907 I issued my award refusing the claim for compensation by the said Alexandrina Allan M'Inroy or Lindsay and her pupil child Isabella Walker Lindsay, with expenses against the former, and I found in law that, according to the facts before stated, the appellants were not dependants within the meaning of the Workmen's Compensation Act 1897.”

The question of law for the opinion of the Court was—“Whether the said Mrs Alexandrina Allan M'Inroy or Lindsay and her pupil child, or either of them, were wholly or in part dependent upon the earnings of the deceased at the time of his death within the meaning of the Workmen's Compensation Act 1897?”

Argued for the appellant—A husband was under a legal obligation to support his wife—*Main Colliery Company, Limited v. Davies*, [1900] A.C. 358. There was a presumption of law that a wife was dependent on her husband's earnings—*Cunningham v. M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574; *Sneddon v. Addie & Sons' Collieries, Limited*, July 15, 1904, 6 F. 992, 41 S.L.R. 826; *Coulthard v. Conssett Iron Company, Limited*, [1905] 2 K.B. 869; *Williams v. Ocean Coal Company, Limited*, [1907] 2 K.B. 422; *Queen v. Clarke*, [1906] 2 J.R. 135. The Lord President's *dictum* in *Baird & Company, Limited v. Birsztan*, February 2, 1906, 8 F. 438, 43 S.L.R. 300, to the effect that there was no such presumption of law, was inconsistent with the other authorities and was unsound. In the present case the presumption was not overcome. It was not enough that the wife was living apart, that the deceased had not in fact contributed to her support, and that the wife had managed to support herself by casual labour with assistance from her relatives—*Cunningham v. M'Gregor & Company, cit.*; *Sneddon v. Addie & Sons' Collieries, Limited, cit.*; *Williams v. Ocean Coal Company, Limited, cit.* To overcome the presumption it was necessary that the wife should have elected to go her own way, and should have ceased to look to the husband for support, as was the case in *Turners, Limited v. Whitefield*, June 17, 1904, 6 F. 822, 41 S.L.R. 631. That was not the case here, and therefore the wife was entitled to compensation. *Addie*

& Sons' Collieries, Limited v. Trainer, November 22, 1904, 7 F. 115, 42 S.L.R. 85, was distinguishable. In any view, the child was entitled to compensation. While the wife might elect to go her own way and thus discharge her claim for support, a pupil child could not choose its mode of life, and could not discharge its claim for support. The case of the child, therefore, was even stronger than the case of the wife.

Argued for the respondents—The question was whether the wife was in fact dependent on her husband's earnings at the time of his death—*Moyes v. William Dixon, Limited*, January 13, 1905, 7 F. 386, 42 S.L.R. 319. No doubt it was not necessary that the husband should have been actually supporting the wife at the precise moment of his death. But the wife must at least be looking to her husband for support, and here it was plain that the appellant was not looking to her husband. *Turners, Limited v. Whitefield, cit.*, was in point, and ruled the present case. The cases relied on by the appellant—*Cunningham v. M'Gregor & Company, cit.*; *Sneddon v. Addie & Sons' Collieries, Limited, cit.*; *Coulthard v. Consett Iron Company, Limited, cit.*; *Williams v. Ocean Coal Company, Limited, cit.*, were all cases in which the wife was in fact relying on the husband for support, and thus had no application to the present case. There was no distinction between the case of the wife and the case of the child—*Addie & Sons' Collieries, Limited v. Trainer, cit.*; *Rees v. Penrikyher Navigation Colliery Co.*, [1903] 1 K.B. 259. The question was precisely the same—Whether the child was dependent on the deceased's earnings at the time of his death? Here it was plain that the child was not dependent on the deceased's earnings.

LORD STORMONTH DARLING—So far as one case can be an authority for the decision of another, I think that the nearest case to the present is the case of *Turners Limited v. Whitefield*, 1904, 6 F. 822. In that case a wife had been living apart from her husband for fourteen years, and was not in fact supported by him at the time of his death but by an illegitimate son. In these circumstances it was held that she was not dependent on her husband's earnings, and was not entitled to compensation. Mr Orr has pointed out that in that case there was no formal severing of the family tie such as by a deed of separation; but neither is there here. In fact, the separation took place by the wife leaving the husband and going to reside with her mother and brothers in Dundee about four months after the marriage, and about eleven years and a half before the husband met with his fatal accident in the respondents' works in Edinburgh, which occurred on 13th June 1907. The Sheriff does not say that the wife was in desertion. She stated her reason for leaving her husband to be his cruelty, but she led no evidence corroborative of this, and she took no proceedings against her husband. The

Sheriff had therefore no means of judging whether her reasons were good or bad. But whatever they were, all we know is that she left him voluntarily, and that at the time of his death they had been living apart since December 1895, a period of time nearly corresponding to the period of separation in *Turners Limited v. Whitefield*. That being so, I take the case simply upon the footing that the wife's action in leaving her husband was voluntary and unexplained. Shortly after the separation she gave birth to a child by the husband, and on 30th January 1903 she gave birth to an illegitimate child. Since leaving her husband the appellant has worked as a weaver, and by this means, and with the assistance of her mother and brothers, she has maintained herself and her two children.

The Sheriff has found that since the separation neither the wife nor the child has received any aliment or support from the deceased, and that at the date of his death neither the wife nor the child was in fact dependent on his earnings. Now the question which the Sheriff has decided by the first of these findings was a question purely of fact, but the question on which the second finding was pronounced was a question of mixed fact and law, and I quite concede that that question can be brought before this Court, because it is ultimately a question on the construction of the Act, and therefore a question of law. The Sheriff seems to have been satisfied that the claimants were persons who would have been entitled to sue for *solatium* and damages in respect of the death of the workman. But he had also to consider the question whether they were wholly or in part dependent on the earnings of the deceased, and he has decided that question by holding that they were not so dependent at the time of his death. There I am of opinion that the Sheriff is right, or, to put the matter as it would be put in England, that he has properly directed himself. I think that there is no flaw in the conclusion which he has drawn from the facts he has found.

A number of cases were cited to us which I do not propose to go over. I proceed on the broad facts of the case—on the fact that the spouses voluntarily separated nearly twelve years ago; on the fact that the husband was never made liable (because, as I gather, he was never asked) to support his wife and child; and on the further fact that he did not contribute a single penny to their support down to the day of his death. Now in these circumstances can it be said that the Sheriff was wrong in the conclusion to which he has come? I think not.

It was argued by Mr Orr that the husband was liable in law to support his wife. Now it is true that he might in certain circumstances have been called on. But does the husband's legal obligation affect the matter at all? I agree with the opinions expressed by Lord Adam and Lord Kinnear in the case of *Turners Limited v. Whitefield*, that the fact of the

husband being under a legal obligation to support his wife does not alter the fact that she was not dependent on him at the time of his death. Lord Adam says—“The facts found show that she separated from her husband some fourteen years ago when she cast in her lot with some illegitimate children of her own, by whom and partially by her own exertions she was being maintained at the time of the death. I do not think that the fact that the husband was under a legal obligation to support her makes any difference. It does not alter the fact that she was not dependent on his earnings at the time of his death.” Lord Kinnear agrees with Lord Adam, for he says—“I agree with what has been said by Lord Adam, that the question does not depend merely upon the legal liability of a husband to support his wife, because the section in question requires that two conditions shall have been satisfied. In the first place, it is provided that the person said to be a dependant shall be a person ‘entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman.’ That condition is satisfied when the woman claiming compensation is in the position of a wife who is legally entitled to be supported by her husband. But then the statute goes on to prescribe as a second condition that the claimant must be such a person among those already described as was ‘wholly or in part dependent upon the earnings of the workman at the time of his death.’ I do not think it necessary to define the word ‘dependent’ more exactly than the statute defines it. But I am not prepared to say that its meaning is exhausted when it is said to cover those who were in fact supported by the deceased workman up to the time of his death.” I agree with every word of that; I think that the Sheriff was right in holding that while the claimants here answer the description of persons “entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman,” they do not, either of them, answer the description of persons dependent on the earnings of the deceased at the time of his death.

LORD LOW—The deceased William Lindsay was in the employment of Stewart M'Glashen & Company, Limited, sculptors, and on 13th June 1907 he met with an accident arising out of and in the course of his employment which resulted in his death. In consequence of that his widow, for herself and for their pupil child, claims compensation, and whether they are entitled to compensation or not depends upon whether, in the language of the seventh section of the Workmen's Compensation Act 1897, they were wholly or in part dependent on the earnings of the deceased at the time of his death. The material facts are these. The claimant Mrs Lindsay and the deceased were married in August 1895. She voluntarily, whether for good reason or not we do not know, left her

husband in December 1895 and has never lived with him since. After she left him, namely, in January 1896, the child for which she now claims compensation was born, and, as I have said, Lindsay was not killed till June 1907. The Sheriff-Substitute tells us that when Mrs Lindsay left her husband in December 1895 she went to reside with her mother and brothers in Dundee, and that since leaving her husband she has worked as a weaver, and by that means, and with the assistance of her mother and brothers, with whom she was living in family, she has maintained herself and her pupil child. Further, since the separation neither she nor her daughter have received any aliment or support from the deceased. Now I think that as regards the widow the case is a very plain one. As I have said, she voluntarily left her husband some eleven years before his death. She never received or apparently asked any aliment from him during that period, but supported herself. Now I think if a wife voluntarily leaves her husband and chooses her own line of life and supports herself by her own earnings, it is impossible to say that in any reasonable sense she is either wholly or partially dependent on his earnings at the time of his death. So I have no doubt that the Sheriff-Substitute is right in his view about the widow.

The case of the child is more difficult, because a pupil child cannot choose his own line of life and cannot earn his own livelihood, and there is no doubt that in one sense every pupil child may be said to be dependent on its father, because the father is under an obligation to support it. Now if a father deserted a pupil child and refused to support it, and if that child were kept from starvation only by charity from others, I would have no hesitation in saying that although the father was not in fact supporting it at the time of his death yet the child was within the meaning of the statute dependent on the earnings of the father. That, however, is an extreme case in one direction, and I think an equally extreme case in the other direction might be supposed. For instance, if a child had independent means which were administered by trustees, and which were ample for his support and by which he was in fact supported, it is plain that he would not be dependent on the earnings of his father. But between such extreme cases there may be a great variety of circumstances where the question whether or not a pupil child was dependent on the earnings of the father at the time of his death would be attended with considerable difficulty. It is perhaps impossible to lay down a rule which will be applicable to every case, but I am inclined to think that as good a test as can be found is that given by Lord Moncreiff in the case of *Cunningham v. Macgregor & Company*, 3 F. 775. That was the case of a wife, but I think the case of a child is substantially the same, and what Lord Moncreiff said was that the question whether a wife was or was not entitled to claim compensation depended on whether she had at her hus-

band's death means of support of a more or less permanent and substantial character. Now, applying that test here we find that this pupil child had been supported by his mother for very nearly eleven years prior to the father's death, which gives the support the character of substantial permanence, and there is nothing to suggest that at the time of the father's death the support which the pupil child was receiving had come to be of a precarious character.

I am therefore of opinion that in the case of the child, as in the case of the mother, the determination of the Sheriff-Substitute was right, and accordingly I concur that the question of law should be answered in the negative.

LORD ARDWALL—I concur with both your Lordships. This is a Compensation Act, and its purpose is to give compensation to workmen and also to dependants of workmen who may have suffered by their deaths or disability. Now that being the purpose of the Act, we must start with this, that it is only actual loss for which compensation is to be awarded and not prospective or possible loss, and accordingly the Act provides that the dependants who are to be entitled to compensation are such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman "as were wholly or in part dependent upon the earnings of the workman at the time of his death." Now it appears to me that that definition excludes altogether the idea that a legal right to support from a person killed by an accident on the part of a person surviving him can by itself constitute the latter a dependant of the deceased in the sense of the Act; it concentrates the attention of any Court which has to decide a case like the present on these points—*first*, whether the person claiming compensation was in fact dependent upon the earnings of the workman, and *second*, whether he or she was so at the time of the workman's death. Now it has been decided in the case of the *Main Coal Company* in the House of Lords, and in the cases of *Turners*, *Baird*, and *Moyes* in the First Division of this Court, that the question raised by this definition is primarily one of fact, and, if I may humbly say so, I think that that is the true view of the matter. Of course every question of fact under a statute may become a question of law in so far as a question may arise whether certain circumstances bring a person within a certain category laid down in the statute—for instance, whether certain facts render or do not render a person a dependant within the meaning of the Act—and so far that may be said to be a question of mixed fact and law, but being so it is primarily a matter of fact that has to be decided. Now after what your Lordships have said I do not think I need say more except that I desire to express my concurrence with what was said by the Lord President on the construction of this Act in the case

of *Baird*, 8 F. 438, and in particular I concur in his criticism of Lord Young's judgment in the case of *Sneddon v. Addie*.

I accordingly agree with your Lordships that we should affirm the judgment of the Sheriff-Substitute.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the negative.

Counsel for the Appellant—Orr, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents—Murray—MacRobert. Agents—Cadell, Wilson, & Morton, W.S.

Friday, March 13.

FIRST DIVISION.

[Glasgow Dean of Guild Court.]

SUMMERLEE IRON COMPANY,
LIMITED v. LINDSAY AND OTHERS.

(See *ante*, July 12, 1907, 44 S.L.R. 854, and 1907 S.C. 1161.)

Burgh—Dean of Guild—Building Regulations—Height of Building—Consent of Corporation—Appeal to Dean of Guild—Objections to Consent—Relevancy—Procedure in Guild Court—Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl), sec. 60 (3).

The Glasgow Building Regulations Act 1900, sec. 60 (1), provides that no building except with the consent of the Corporation be erected in on or adjoining any street above a certain height.

Section 60 (3) enacts—"Whenever the Corporation consent to the erection of any building of a greater height than that prescribed by this Act notice of such consent shall, within one week after such consent has been given, be published in such manner as the Corporation may direct, and such consent shall not be acted on till twenty-one days after publication; and the owner or lessee of any lands or heritages within one hundred yards of the site of any intended building who may deem himself aggrieved by the grant of such consent may within twenty-one days of such publication appeal to the Dean of Guild, who shall have power to deal with the case as shall seem to him just."

Held that the grounds of appeal contemplated by section 60 (3) included, not being restricted to whether the Corporation in giving consent had acted capriciously or *ultra vires*, grounds upon which the owner or lessee within one hundred yards of the site of the proposed building alleged that owing to his proximity (apart however from his legal rights which fell to be considered in the ordinary petition for