

always in the power of the Court to say—"This is so obviously fair comment that there really is no stronger meaning in it;" and I certainly think the opinion of the Court in the last case was that the only thing that prevented the action from being dismissed there and then was this possible imputation of dishonesty. If that is so, it seems to me to settle the question, because here the pursuers have got an issue of dishonesty,—and they are perfectly entitled to prevail on that if they can,—but on the other hand, if they fail, then it follows from what I have said that I think there is nothing left in this schedule.

In saying that I am not for one moment supposing that there may not be cases where, although there is no actually slanderous statement, yet there may be such injury done by writing which is false that an issue may be allowed. On the whole matter I am clearly of opinion that the Lord Ordinary was right in refusing the second issue, because I think the true question between the parties will be perfectly properly tried upon the first issue.

LORD KINNEAR—I am of the same opinion. I do not think it is necessary to consider whether to make statements of another which are designed to expose and do expose him to public odium and contempt is a wrong distinguishable from slander, although I am disposed to think that language which falsely and without lawful excuse imputes conduct worthy of public hatred and contempt is slanderous language. The question we have to consider is whether an issue, putting to the jury that certain statements were made with the design of exposing pursuers to contempt, could serve the purpose of innuendo, and I am of opinion that it will not. The assumption of the argument was that the pursuer is not entitled to put the whole series of articles complained of before the jury and ask generally whether they are injurious without indicating the particular injurious meaning which he says they convey, but that, according to the judgment already given in the case of *Ogston*, it lies upon pursuer to innuendo the articles and show why they are slanderous or why they are actionable. Now to say that the articles exposed him to contempt is not, to my mind, an innuendo at all. Therefore I agree with your Lordship in the chair that the first issue raises the question sufficiently, and that to allow the second issue would only be misleading.

LORD PEARSON—I agree.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuers (Reclaimers) — Murray, K.C.—D. Anderson. Agents—Steedman, Ramage, & Company, W.S.

Counsel for Defenders (Respondents) — Cooper, K.C.—Lyon Mackenzie. Agents—W. & F. Haldane, W.S.

Saturday, May 22.

## SECOND DIVISION.

[Sheriff Court at Kirkcaldy.]

### FIFE COAL COMPANY, LIMITED v. WALLACE.

#### *Husband and Wife—Irregular Marriage—Cohabitation—Habit and Repute.*

In September 1907 a man and a woman began to cohabit, and continued to live together till the death of the man in July 1908. During that time they were regarded by those with whom they came in contact as man and wife. Both before and after cohabitation began there was some talk between the parties of having the marriage ceremony performed, but the man wished to postpone it until he should be in better circumstances. He had asked her to go with him as his wife, and about a month after cohabitation began he gave her a wedding ring, which she afterwards wore. A child of the intercourse born after the death of the man was registered by the woman as illegitimate, in the belief as she explained that "they could do something to her" if she registered it as legitimate, she not having been regularly married and the father being dead.

*Held* that it had not been proved that the parties were married.

#### *Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 1 (3) and 13, Sched. I (8)—Arbiter—Jurisdiction—Sheriff—"Dependent"—Husband and Wife—Irregular Marriage.*

*Opinions reserved* whether it is competent in an arbitration under the Workmen's Compensation Act 1906 for the arbiter to consider and decide whether the claimant has proved by evidence of cohabitation, habit and repute, that she was married to the deceased, in respect of whose death she claims compensation.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Kirkcaldy, Annie Herd Shepherd or Wallace claimed compensation as an individual and as tutor for her child Jessie Agnes Wallace Shepherd, or alternatively as tutor for the child, from the Fife Coal Company, Limited, in respect of the death of David Wallace, whom the claimant alleged to be her husband, and who was killed by an accident arising out of and in the course of his employment with the Fife Coal Company. The Sheriff-Substitute (SHENNAN) awarded compensation, and at the request of the Fife Coal Company stated a case for appeal. The case gave the following *facts*:—" (1) On 14th July 1908 the said David Wallace, then residing at 22 Main Street, Lumphinnans, met with an accident in the course of his employment as a miner with defenders in their No. 11 pit at Lumphinnans, and sustained injuries in conse-

quence of which he died on the same day. (2) In September 1907 the pursuer Annie Herd Shepherd, who was then only fifteen and three-quarter years old, left Kirkcaldy with David Wallace, and they went to Hamilton, where they cohabited as man and wife. They had previously courted at Lumphinnans and Kirkcaldy. Wallace asked pursuer to go with him as his wife. About a month after going to Hamilton he gave pursuer a wedding ring, which she afterwards wore. Shortly thereafter they went to Blantyre, where they took a house and furnished it. All the time they were at Hamilton and Blantyre they behaved themselves as married persons. They held themselves out as married, and they were so regarded by all who came in contact with them. Wallace gave pursuer his wages, and she kept house for him; and they regarded each other as husband and wife. Wallace's mother visited them in Blantyre, and she states that she never would have done so had she not believed they were married. They returned to Lumphinnans in June 1908, and lived with Wallace's sister Mrs Innes, who states that she would not have admitted them to her house unless she believed that they were married. In Lumphinnans, Wallace and pursuer held themselves out as married persons, and they were so regarded by their neighbours. There is absolutely no evidence that either Wallace or the pursuer, or any one of their friends or the public had any doubt that they were married persons. Pursuer's father was dead, and as she had not had a happy home she did not keep up intercourse with her mother and brother. (3) Before the pursuer and deceased left Kirkcaldy there was some talk of having the marriage ceremony performed, and this was subsequently talked of between them, but Wallace wished to postpone it until he should be in better circumstances. Wallace had not been previously married. (4) Subsequent to Wallace's death a female child was born of the intercourse between him and pursuer on 26th July 1908. The child is still alive. Pursuer registered it as Jessie Agnes Wallace Shepherd, and described it as illegitimate, stating that she thought 'they could do something' to her if she registered it as legitimate, she not having been regularly married and the father being dead. She had no one to advise her at the time. . . . Evidence was given at the proof by relatives of the deceased David Wallace, but neither pursuer's mother nor her brother nor any relative of her own was examined. Pursuer deposed that she did not know the address of either her mother or her brother."

On these facts the Sheriff-Substitute found that the claimant was married to the deceased David Wallace, and that Jessie Agnes Wallace Shepherd was his legitimate child; that the claimant and her child were wholly dependent on the earnings of David Wallace at the time of his death, and he assessed the compensation at £280, 16s.

The questions of law for the opinion of the Court were:—"1. Was it competent for the Sheriff-Substitute in the present

process to determine whether or not the pursuer Annie Herd Shepherd or Wallace was the widow of the said David Wallace? 2. Assuming question 1 to be answered in the affirmative, do the facts proved warrant the finding that the said Annie Herd Shepherd or Wallace was the widow of the said David Wallace, and that the said Jessie Agnes Wallace Shepherd was his child? 3. Was the said Jessie Agnes Wallace Shepherd wholly or partially dependent upon the said deceased David Wallace in the sense of the Workmen's Compensation Act 1906?"

Argued for the appellants—(1) It was not competent for the Sheriff to decide in this process a question of status as was involved here. In *M'Donald v. M'Kenzie*, February 6, 1891, 13 R. 502, 23 S.L.R. 404, where the Sheriff did decide such a question, he was not final on the facts. The case of *Johnstone v. Spencer & Company*, 1908 S.C. 1015, 45 S.L.R. 802, involved only the paternity of an illegitimate child, and no question of status. The Sheriff would be entitled to decide that the claimant and the deceased were married only if a certificate or a decree of declarator were produced. (2) In any event, the facts did not warrant the conclusion that the parties were married. That question was one of law. Cohabitation, habit and repute, did not constitute marriage, but might be founded on as proof that consent had been interchanged and marriage thereby constituted—*Fraser, Husband and Wife*, 2nd ed., i, 391; *Lapsley v. Grierson*, November 19, 1845, 8 D. 34, per Lord Moncreiff at p. 61. The cohabitation must be for a considerable time—*Stair*, iv, 45, 19; *Fraser, op. cit.*, i, 400; and there was no case in which cohabitation for a period of only ten months had been held sufficient. Further, there were facts proved which negated the view that consent had been interchanged. A ceremony was put off till the deceased should be in better circumstances. The claimant registered the child as illegitimate. The habit and repute was of no avail if the conduct of the parties themselves was inconsistent with marriage—*Lapsley v. Grierson, cit.*, per Lord Justice-Clerk Hope at p. 47; [*Glass v. Glass's Trustees*, December 20, 1907, 15 S.L.T. 716, was also referred to.] (3) Counsel also argued that there was not sufficient evidence that the deceased was the father of the child, and that in any event it was not wholly dependent on him, and cited *Schofield v. Orrrell Colliery Company, Limited*, 1909, 1 K.B. 178, and in H.L. *The Times*, 15th May 1909.

Argued for the respondent—In deciding the question whether the claimant was a dependant in the sense of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13, the Sheriff was not only entitled but bound to decide whether the claimant was married to the deceased—*Workmen's Compensation Act 1906*, section 1 (3), Schedule 1 (8); *Johnstone v. Spencer & Company, cit.* (2) The question whether the claimant was a dependant was a question of fact—*Bowhill Colliery Company, Limited v. Smith*, 1909 S.C. 252, 46 S.L.R.

250. In any event, the inference of marriage was warranted by the facts. The absence of a ceremony and the talk of having one did not negative the view that the parties meant marriage. The registration of the child as illegitimate was explained by the claimant in a way perfectly consistent with the idea of marriage. The other facts clearly indicated marriage, and it had never been laid down that any stated period of cohabitation was necessary. If the marriage was proved, it dated back to the commencement of the cohabitation—*Campbell v. Campbell*, July 16, 1867, 5 *Macph.* (H.L.) 115, 4 S.L.R. 214.

LORD JUSTICE-CLERK—The first question here might present considerable difficulty, but in the view I take of the case it is unnecessary to consider it. Therefore I pass it by, holding it unnecessary to answer it.

Assuming that it might be answered in the affirmative, I take up the second question. I am quite clear, upon the facts found and stated by the Sheriff-Substitute in the case, that he was not justified in law in coming to the decision which he did upon this question. I do not think it necessary to go over the findings in detail. The whole question turns really upon this—whether the Sheriff, having before him certain facts relating to a cohabitation extending over a period of ten and a-half months, was entitled upon these facts to hold that a marriage, established by habit and repute, must be affirmed. I am of opinion that he was not entitled to do so, and that no such proof as has been led in this case can in law justify such a finding. Therefore I am for answering the second question in the negative.

In that case the question will still arise before the Sheriff, what compensation, if any, is to be paid in the interests of this female child, which in that case must be held to be illegitimate? Therefore I propose that we should answer the second question as I have suggested, and remit the case back to the Sheriff to proceed.

LORD ARDWALL—I concur in the course proposed by your Lordship in the chair. Having regard to the wording of the first question, I think it might be difficult in answering it to give effect to the general rule laid down in *Johnstone v. Spencer & Company*, 1908 S.C. 1015, and at the same time to reserve the effect of the specialities of the present case. Accordingly, as there is ample room for disposing of the case otherwise, I think the preferable course is to find it unnecessary to answer the first question.

I also agree with your Lordship in the answer that ought to be given to the second question. I do not think that the facts stated in the case are sufficient to raise the presumption that the parties were married persons. In the case of *Lapsley v. Grierson*, 8 D. 47, Lord Moncreiff says—“Marriage is not constituted by the mere fact of cohabitation with the assumption of the characters of husband and wife, and repute to that effect. The proper doctrine is that the consent by which marriage is

constituted by the law of Scotland may be proved by such cohabitation and repute.” He then enumerates the conditions which are necessary to render the cohabitation and repute sufficient to establish a marriage. Among other things he points out that the cohabitation must have been for a considerable period, the repute must have been undivided during the whole period, and the acts must have been done with the deliberate intention by both parties to constitute marriage *de presenti* from the beginning. Now the facts as stated here are, first, that the cohabitation and any repute that there was commenced in September 1907, and continued, it is said, till the death of David Wallace on 14th July 1908, having thus existed for about ten months. In my opinion this is not a sufficient time to establish a marriage by cohabitation and habit and repute.

But the third finding in fact by the Sheriff seems to me to exclude altogether the idea that it was the intention of both parties to constitute a marriage *de presenti* from the beginning, because it is there stated that there was some talk of having a marriage ceremony performed, but that Wallace wished to postpone it until he should be in better circumstances. Then the fourth finding seems equally adverse to the contention that marriage *de presenti* was intended, because the respondent registered the child which was born subsequent to Wallace's death as illegitimate.

I accordingly agree with your Lordship that the presumption that a marriage had been constituted between the parties is not supported by the facts of the case.

This is sufficient for the disposal of the case, but I desire to reserve my opinion on the question whether when the Sheriff learned that the respondent's claim to be a married woman depended upon proof of cohabitation and repute he should not either have sisted the proceedings to give the respondent an opportunity of having the marriage declared by a competent Court, or otherwise have dismissed the arbitration on the ground that at the time the respondent initiated the arbitration proceedings she was not the wife of the deceased in terms of the definition in the Act, and that therefore she was not a member of the family within the definition of “dependant.”

I am not prepared to hold without further consideration that an arbiter under this Act is practically entitled to declare a marriage in the course of arbitration proceedings. The question raised is very different from that which was decided in *Johnstone v. Spencer & Company* already alluded to. There the only fact to be proved was the paternity of an illegitimate child, a fact which forms the subject of constant investigation and decision in every Sheriff Court in the country in filiation cases, and it is not surprising accordingly that the Court held that it was competent for the Sheriff-Substitute acting as an arbiter to decide incidentally a question of paternity of an illegitimate child, but I think it is open to question

whether an arbiter under this Act has power to investigate and determine questions of status involving possibly nice questions not only of fact but of law.

LORD LOW concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

“Find it unnecessary to answer the first question of law . . . Find in answer to question 2 that the facts stated do not warrant the finding that Annie Herd Shepherd or Wallace was the widow of David Wallace: Find that the third question cannot be at present answered: Recal the award of the arbitrator, and remit to him to proceed as accords,” &c.

Counsel for the Appellants—Horne—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Wilson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Friday, May 28.

#### EXTRA DIVISION.

(Lord McLaren, Lord Pearson, and Lord Dundas).

[Lord Salvesen, Ordinary.]

#### INGLIS v. THE NATIONAL BANK OF SCOTLAND, LIMITED.

*Repetition — Payment — Fraud — Misrepresentation — Evidence — Payment Induced by Fraudulent Misrepresentation — Averments as to Defrauding Other Persons on Similar Occasions to Support Averments as to Defrauding Pursuer — Relevancy.*

In an action of repetition for the amount of a bill accepted by pursuer, which pursuer renewed and subsequently paid on the false representations (as he averred) of defenders' agent that said bill had not been paid, pursuer made averments that defenders' agent was in the custom of obtaining bills in this way from the bank's customers and specified an instance of this practice.

Held that these averments were irrelevant.

A v. B, February 23, 1895, 22 R. 402, 32 S.L.R. 297, followed.

On 9th December 1908 William Inglis, Engine Street, Bathgate, brought an action against the National Bank of Scotland, Limited, to recover £189, 8s. 8d., being the amount of the payments made by him to meet a bill, originally for £200 and subsequently renewed for various sums, drawn by his father-in-law A. L. Muir and accepted by the pursuer, and subsequently discounted with the defenders' bank at Bathgate by their agent there, Alexander Sloan.

Pursuer averred that at maturity said

bill was retired and debited to Muir's account in his bank pass book as made up by the defenders, and that after debiting the amount necessary to retire the bill there was a credit balance in favour of Muir; that he, the pursuer, was led by Sloan to believe that the bill had not been paid at maturity and had been induced from time to time to grant renewals thereof; that after Sloan had absconded, he, the pursuer, was given to understand by the defenders through their agent at Bathgate that the bill was still due and was induced to sign on 11th April 1906 another bill along with Muir for £150, having already paid part of the previous bills; that Muir's estates having been sequestrated on 9th February 1907, he, the pursuer, lodged a claim for the bill in the sequestration, receiving a dividend thereon, and at the same time paid the amount of the bill outstanding, with interest, to the defenders.

The pursuer further averred—“(Cond. 10) The pursuer has further ascertained that the defenders' said agent Mr Sloan, for whom they are responsible, was in the habit of manipulating the accounts of customers of the bank in order to cover his own defalcations, and that he so manipulated the account of Mr Muir. On a proper statement of Mr Muir's bank transactions with the defenders, it is averred, and it is the case, that the said bill for £150 had been extinguished long prior to the claims for payment made by the defenders upon the pursuer in respect thereof. Further, the defenders' said agent Mr Sloan, in the course of his manipulating as aforesaid of the bank books at said branch, with a view to deceiving the defenders and their inspectors when the latter came to examine his books, was in the habit of getting customers, on his representation to them that by so doing they would obtain easier terms from the defenders' bank, to sign bills blank in drawer's name, and, although appearing to be for a specific sum, without any value having been given therefor. In particular, he induced Mr Muir to sign such a bill for £785 dated 11th November 1905. No value was given by Mr Sloan or by the defenders for this bill. After Mr Sloan's departure this bill was found, unsigned by the drawer, in Mr Sloan's private house. The defenders obtained possession thereof after Mr Sloan's departure, and, against all banking practice, had said bill signed by their secretary Mr George B. Hart for and on behalf of the bank. At the time when it was so signed said bill was overdue. No entry of said bill was contained in the bank's books at the time, and the defenders had no right or title to intromit with said bill, nor had they given any value therefor. It is believed and averred that the bill, the renewal of which is contained in the said bill of 11th April 1906, was found in Mr Sloan's private house, and had been obtained by Mr Sloan from Mr Muir in the same way as the said bill for £785, and was dealt with in a similar way, and that the pursuer was induced by the defenders to sign the said bill for £150, and was kept