

the answer to that is that while in a case like the present the action must be raised within the six months, so that the public authority may have notice to enable them to inquire into the circumstances and to prepare their defence while the matter is fresh, yet if it can be shown that the person injured is not in a fit state to prosecute the action properly, I am quite satisfied that no judge would insist on the action going forward till the pursuer is in a sufficiently sound state of health.

LORD YOUNG concurred.

LORD TRAYNER — The reclaimer has stated two grounds on which he maintains that the interlocutor of the Lord Ordinary should be recalled. Both these grounds turn on the construction of the Public Authorities Protection Act 1893, and in my opinion the argument fails on both. On the first ground, viz., that the Act does not apply, I adopt the judgment of the President of the Probate Division in the case of "*The Ydun*," L.R. [1899] p. 236 (at p. 239.) On the second ground, which was to the effect that there was here a continuing injury or damage, and that the statutory six months only dated from the time when the full effects of the injury became certain and ascertained, I adopt the opinion of Lord Low in the case of *Christie v. Glasgow Corporation*, 36 S.L.R. 694.

LORD MONCREIFF was absent.

Counsel for the defenders and respondents moved for expenses as between agent and client, in terms of section 1 subsection (b).

Counsel for the pursuer and reclaimer objected to the expenses being taxed as between agent and client, on the ground that subsection (b) did not apply to appeals — *Feilden v. Mayor of Morley* [1900], A.C. 133.

LORD TRAYNER—I think the statute applies to the expenses incurred by the reclaiming-note.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court adhered, and found the defenders and respondents entitled to additional expenses as between agent and client from the date of the reclaiming-note.

Counsel for the Pursuer and Reclaimer — Clyde, K.C. — Hunter. Agents — Webster, Will, & Company, S.S.C.

Counsel for the Defenders and Respondents—Kincaid Mackenzie, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Friday, June 17.

FIRST DIVISION.

[Sheriff-Substitute at Hamilton.

TURNERS LIMITED v. WHITEFIELD.

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

In an arbitration under the Workmen's Compensation Act 1897, in which the widow of a workman claimed compensation from his employer on account of the death of her husband while in the course of his employment, it was proved that the spouses had separated by mutual consent six months after their marriage in October 1897, and thereafter, till the husband's death in September 1903, had only had three meetings—all quite casual—on each of which occasions the husband had given the wife five shillings; that otherwise the husband had not contributed to the maintenance of his wife, who had lived with some of her illegitimate children, and had supported herself by keeping house for one of them and doing occasional washing; that at the date of the husband's death the wife was physically unfit to do anything for her own support, and was being maintained in the illegitimate child's house.

Held that the claimant at the date of her husband's death was not wholly or in part dependent upon his earnings within the meaning of the Workmen's Compensation Act 1897, section 7 (2).

This was an appeal upon a stated case from the Sheriff Court of Lanarkshire at Hamilton in an arbitration under the Workmen's Compensation Act 1897 between Turners Limited, coalmasters, Stane Colliery, Shotts, Lanarkshire, appellants, and Mrs Isabella Gillies or Whitefield, widow, residing at 744 London Road, Glasgow, claimant and respondent.

Whitefield claimed from the appellants £300 as compensation in respect of the death of her husband George Whitefield.

The facts which the Sheriff-Substitute (THOMSON) found proved or admitted were as follows—“(1) That the applicant is the widow of the deceased George Whitefield, to whom she was married on 4th October 1889; (2) that about six months after the marriage the spouses separated of mutual consent, and have never since cohabited, the deceased having lived with his four children by a former marriage (who are all married, and were not dependent to any extent on the deceased at the time of his death), and the respondent with some of her illegitimate children (of whom she has six to two different men, all born prior to her marriage with the deceased); (3) that since their separation the spouses had only three meetings—all quite casual—and on each of these occasions the deceased gave the respondent five shillings, and beyond

this they have had no intercourse whatever; (4) that the deceased never mentioned the respondent's name to his children, who believed that she was dead; (5) that the respondent supported herself by doing occasional washing and by keeping house for one of her illegitimate sons, but that she is now, and was at the date of the death of her husband, physically unfit to do anything for her own support, and has no means of support whatever, being maintained in the house of the son referred to."

On these facts the Sheriff-Substitute held that the respondent was wholly dependent upon her husband at the time of his death, and he assessed the amount of the compensation due to her at £156, 19s. 6d., for which sum he gave decree against the appellants.

The question of law submitted for the opinion of the Court was—"Was respondent dependent upon the earnings of her late husband within the meaning of the Workmen's Compensation Act 1897 so as to entitle her to compensation from the appellants?"

The Workmen's Compensation Act 1897, sec. 7 (2), *inter alia*, enacts—"Dependants' means . . . (b) 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 upon the earnings of the workman at the time of his death."

Argued for the appellants—The Sheriff had erred in finding in fact that the wife was dependent upon the earnings of the husband when there was no evidence to support such a finding. The statute did not give compensation to all who by the law of Scotland could claim damages or *solatium*, but only to those dependent upon the earnings of the workman at the time of his death. Such dependency must be established—*Rees v. Penrikyber Navigation Colliery Company, Limited*, December 13, 1902, 87 L.T. 661; *Main Colliery Company v. Davies* [1900], A.C. 358, and the proper test was whether the earnings formed the source of maintenance—*Pryce v. Penrikyber Navigation Colliery Company, Limited* [1902], 1 K.B. 221. It was impossible to find dependency where the parties had for years been living apart and had had no communication whatever.

Argued for the respondent—The question in this case was one of fact, and the Sheriff had had sufficient evidence before him to reach his conclusion—*Simmons v. White Brothers*, 1899, L.R. [1899], 1 Q.B. 1005; *Legget & Sons v. Burke*, March 18, 1902, 4 F. 693, 39 S.L.R. 448. The husband need not be living with the wife or alimending her in order to give her a claim—*Cunningham v. M'Grigor & Co.*, May 14, 1901, 3 F. 775, 38 S.L.R. 574. Besides, the statute did not use the words "supported by" but "dependent upon," which had an entirely different meaning. The wife here was not self-supporting, and she could not be dependent on her illegitimate son—*Clarke v. Carfin Coal Company*, July 27,

1891, 18 R., H.L. 63, 28 S.L.R. 950. She must therefore have been dependent upon the husband.

At advising—

LORD PRESIDENT—The question of law stated for our opinion is, Was the respondent dependent upon the earnings of her late husband, at the time of his death on 14th September 1903, within the meaning of the Workmen's Compensation Act 1897 so as to entitle her to compensation from the appellants?

The Sheriff has answered this question in the affirmative, and as the average weekly earnings of the deceased were 20s. 1½d., he has found the respondent entitled to £156, 19s. 6d. in name of compensation.

It was stated by the Lord Chancellor, in giving judgment in the case of the *Main Colliery Company, Limited v. Davies*, 1900, A.C. 361, that the question whether a person was a dependent in the sense of the Act is a question of fact. The respondent in the present case was not supported by nor was she receiving any contribution towards her support from the deceased, and it appears that she was not to any extent relying upon him for her support. In other words, she was not in fact dependent upon him, and I am therefore of opinion that she was not dependent upon his earnings within the meaning of the Workmen's Compensation Act 1897 so as to entitle her to compensation from the appellants. For these reasons I consider that the question put in the case should be answered in the negative.

LORD ADAM—The question in this case arises under section 7 (2) of the Act, and is whether the respondent was wholly or in part dependent upon the earnings of her husband at the time of his death in the sense of the Act. It appears to me that this is entirely a question of fact, the question being whether she was at the time of her husband's death dependent upon his earnings for support either by receipt of money or subsistence. In this case there is no evidence that she was dependent on her husband's earnings at his death. On the contrary, 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. I therefore think that the Sheriff's judgment is wrong, and that the questions should be answered in the negative.

LORD KINNEAR—I am of the same opinion. The question whether the respondent was dependent upon the earnings of her husband is a question of fact, but when all the facts are ascertained in detail, as they have been ascertained by the Sheriff, the question still remains whether the position of

this woman, as established by these facts, answers to the description of "dependent" in the statute or not. 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 dependent 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 think it quite possible that questions of greater difficulty might arise than any that we have to decide in this case. But it is sufficient to say that in no reasonable sense could this woman be said to be dependent upon her husband, whether that means relying upon him for support or actually supported by him.

LORD M'LAREN was absent.

The Court answered the question in the negative and sustained the appeal.

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

Counsel for the Respondent—G. Watt, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

HIGH COURT OF JUSTICIARY.

Friday, June 17.

(Before the Lord Justice-General, Lords Adam and M'Laren).

RAE v. HAMILTON.

Justiciary Cases—Nuisance—Summary Complaint—Jurisdiction—Magistrates—Sheriff—Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), secs. 16 (6), 22, 32, 36, 146, 153, 154.

A tallow melter was convicted and fined by the police magistrates of a burgh, on a complaint at the instance of the sanitary inspector of the burgh setting forth that the accused had been guilty of offences against the byelaws made by the local authority of the

burgh under the Public Health (Scotland) Act 1897, and craving for his conviction and the adjudication of certain penalties. *Held* that the jurisdiction of the magistrates was good, and that the jurisdiction of the Sheriff in an application for recovery of penalties, such as the present, was not exclusive (*contra* perhaps in a petition *ad factum præstandum*, e.g. for the discontinuance of a nuisance).

Justiciary Cases—Jurisdiction—Magistrates—Interest—Summary Complaint—Nuisance—Public Health (Scotland) Act 1897, sec. 158.

An accused was convicted by a court of magistrates of a burgh on a complaint at the instance of the sanitary inspector of the burgh, setting forth that the accused had contravened certain bye-laws made by the local authority. Three members of the sanitary committee of the town council, which had authorised the prosecution, were amongst the magistrates who sat. *Held* that in virtue of section 158 of the Act they were entitled to sit, apart altogether from the question of their right at common law.

Opinion (per Lord M'Laren) that the interest alleged was not such as would disqualify.

Justiciary Cases—Nuisance—Byelaws—Ultra Vires—Public Health (Scotland) Act 1897.

Objections to certain byelaws made by a local authority to regulate the industry of tallow melting on the grounds that they were (a) unreasonable; (b) dealt with matters expressly regulated by the Act; (c) *ultra vires*—*repelled*.

Justiciary Cases—Summary Complaint—Unwarranted Conviction—Conclusion for Expenses—Conclusion not Acted on—Validity of Conviction.

A complaint brought under the Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), the Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), the Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), and the Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), contained a crave for the expenses of prosecution. The accused was convicted but no award of expenses was made against him. On appeal the accused maintained that the conclusion for expenses was unwarranted under the Acts and the conviction consequently bad.

Held that it was not a good objection to a conviction that a complaint contained an unwarranted conclusion for expenses which was not acted on.

Thomas Rae, tallow melter, Church Street, Hamilton, was charged under the Public Health (Scotland) Act 1897, The Summary Jurisdiction (Scotland) Acts 1864 and 1881, and The Criminal Procedure (Scotland) Act 1887, on a complaint addressed to the Police Magistrates of the Burgh of Hamilton, at