broken up the home by committing a criminal offence and being sent to prison. The effect of the Guardianship of Infants Act had been to reduce the old legal right of a father to the custody of his children to a *prima facie* right in a question with the mother, and the bare fact that the spouses were living apart without a decree of judicial separation would not prejudice the mother's claim or prevent the Court considering the surrounding circumstances—*MacKellar* v. *MacKellar*, May 19, 1898, 25 R. 883, opinion of Lord President Robertson, 884, 35 S.L.R. 483. The admission of a conviction for crime on the part of the petitioner entitled the respondent's statement that the father was not a fit guardian for the child to great weight. Looking to this admission, to the respondent's statements, and to the age of the child, the Court would best safeguard the physical and moral interests of the child by permitting the mother to retain it, the father being given right of access—*Reid* v. *Reid*, January 9, 1901, 3 F. 330, 38 S.L.R. 237.

The Court adjourned the case for a week, in order to give the respondent further opportunity for making inquiry as to the truth of the petitioner's statement that he was in a position to maintain his wife and child, and for stating anything additional which she was able to allege against the petitioner.

On November 12th, when the case was called, the respondent's counsel intimated that he had nothing further to add.

LORD JUSTICE-CLERK—There is no doubt that it is a well established principle that, unless there are reasons of a substantial character to the contrary, where a child is weaned and no longer requires the immediate attention of its mother, the father is entitled to its custody. That principle has been laid down in many cases—some of them very different in their circumstances from the present. This case is peculiar in this respect, that, so far as I have been able to gather, there is nothing whatever against the petitioner except the fact that he fell into pilfering habits for a short time and was convicted on his own confession and sent to prison. That took place a considerable time ago, and nothing has been stated against the petitioner's character since. When the case was before us formerly it was adjourned in order to give the respondent an opportunity of stating anything further against the petitioner if she felt herself justified in doing so, and she has stated nothing, so that the question which the Court has now to determine is simply this, whether that single incident in the petitioner's history to which I have alluded is of itself sufficient to exclude the petitioner from having his right as a father made good. Now it is nearly a year since the petitioner came out of prison. This petition was not presented till July last, and between July and the present time the respondent has not been able to lay her hand on anything else which she could lay before the Court for the purpose of showing that the petitioner ought not to have the custody of his child. The offence of which the petitioner was convicted was one no doubt highly discreditable to him, but unless such a thing is to be kept up against a man for ever, I see no reason why, after this lapse of time during which there was nothing against the petitioner, he should be deprived of his ordinary rights as a parent. I think therefore that the petitioner is entitled to have a judgment finding him entitled to the custody of the child. In moving your Lordships to decide the case in accordance with the view I have expressed, I would express my sincere hope that the parties may come together again in a forgiving spirit, and that by mutual forbearance happy relations may once more be established between them.

LORD YOUNG—In my opinion the petitioner has right to the custody of his child.

LORD TRAYNER—I agree in thinking that this petition should be granted.

LORD MONCREIFF—I agree, although not without some difficulty. I think that the respondent is entitled to a certain amount of sympathy if her statements are true. But the allegation of the petitioner is that after he had been released from prison he went back to the situation which had been kept open for him by his employers, and that he is now earning good wages. These statements are made by the petitioner and they are not disputed by the respondent. That being so I think that the petitioner has made out a case for obtaining the custody of his child, but if he relapses into his former ways his wife will have, I think, an unanswerable claim to the custody of the child.

The Court found the petitioner entitled to the custody of his child, and ordained the respondent to deliver up the child immediately to remain in his custody.

Counsel for the Petitioner—T. B. Morison. Agent—George T. Welsh, solicitor.

Counsel for the Respondent—D. Anderson. Agent—J. Anderson, solicitor.

Friday, November 14.

FIRST DIVISION.

[Sheriff-Substitute at Hamilton.

GOLDER v. CALEDONIAN RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1, *sec.* 1—*Death Resulting from Injury—Death from Disease Accelerated by Injury.*

A workman was injured in the course of his employment by jumping off a bogey, and died about two months after the injury. In an arbitration

under the Workmen's Compensation Act 1897 the Sheriff found in fact that he had been suffering from nephritis, a disease which would probably have proved fatal in the course of a few years, that he died from nephritis, but that his death was accelerated by the shock to his system resulting from the accident. In these circumstances he refused compensation. In a case stated for appeal, *held* that the workman's death had resulted from the injury within the meaning of Schedule 1, section 1, of the Act, and that his employers were accordingly liable in compensation.

This was a case stated for appeal by the Sheriff-Substitute of Lanarkshire at Hamilton (DAVIDSON) in an arbitration under the Workmen's Compensation Act 1897, between Mrs Christina Hutchison or Golder and George Golder, widow and son of the deceased John Golder, railway servant, Larkhall, on the one part, and the Caledonian Railway Company, on the other.

The case set forth the following facts as admitted or proved—"That the said John Golder was affected with nephritis, a disease which was likely to prove fatal to him, though probably not for a few years. He was injured about the head, back, and sides on 28th February last by jumping off a bogey while in the employment of the respondents. In so doing he was acting properly with a view to his own safety. In consequence of the injuries so received he left off work for three weeks and two days, after which he returned to respondents' employment as a watchman, being understood to be still unfit for his former duties. The shock of the aforesaid injury, however, so lowered his system that the disease nephritis from which he was suffering was accelerated in its action, and he died of it on 8th May last."

In these circumstances the Sheriff found that Golder did not die as the result of an accident under the Act, and assoilzied the respondents.

He stated the following question of law:—"Does the fact that, as a result of the injury to the head, back, and sides sustained by the said John Golder in the course of his employment with the respondents, his general physical condition was so lowered that the disease nephritis from which he was then suffering was greatly accelerated in its operation, and that in consequence he died on 8th May, entitle the appellants to compensation?"

The Workmen's Compensation Act 1897 enacts:—Section 1—"If in any employment to which this Act applies personal injury by accident resulting out of and in the course of his employment is caused to a workman, his employers shall . . . be liable to pay compensation in accordance with the first schedule to this Act." Schedule 1, section 1, provides for the assessment of compensation "when death results from the injury."

Argued for the Appellant—It was clear that there had been an accident to Golder, that he sustained injury, and that he died at a time when, but for the injury, he would not have died. Compensation was therefore due, unless the fact that Golder's was a bad life (which was all that the Sheriff's findings amounted to) excluded the operation of the Act. It was not found that he died from nephritis as a sole cause of death, but from nephritis accelerated by the shock of the accident. That was a finding that death resulted from the injury. If that was proved, compensation was due; the workman was not bound to show that the injury was the only cause of death—*Lloyd* v. *Sugg* [1900], 1 Q.B. 481; *Dunham* v. *Clare* [1902], 2 K.B. 292. In the case last cited Collins, M. R., pointed out the principle which was applicable in cases like the present. It was that, if there was an accidental injury, and death followed, without any *novus actus interveniens*, compensation was due. *Hensey* v. *White* [1900], 1 Q.B. 481, was not in point; there the death resulted from an injury to health resulting from the regular course of the employment, and the element of accident was absent.

Argued for the respondents—Here the Sheriff found in fact that the appellant died from nephritis, not from the injury. The Schedule awarded compensation "when death results from the injury." "Results" did not mean "results in any degree." The mere fact that the workman's death was accelerated by the injury did not entitle him to compensation—*Hensey* v. *White* [1900], 1 Q.B. 481; *Isitt* v. *Railway Passengers Assurance Company*, 1889, 22 Q.B.D. 504; *Anderson* v. *Scottish Accident Insurance Company*, October 24, 1889, 17 R. 6, 27 S.L.R. 20. The appellant's view would always make the employer liable if it could be said that but for the accident the workman would not have died at that particular time, and would therefore include every case in which a man's vitality being lowered by the accident he died from any disease, whether pre-existing or supervenient, from which he would probably have recovered had he been in his usual health. That was extending the scope of the Act to cases which were never contemplated.

At advising—

LORD PRESIDENT—John Golder, the husband and father of the appellants respectively, sustained injuries on 28th February 1902 when in the employment of the respondents. He was using a bogey to come down their line of railway at a point near Merryton, and lost control of the bogey. In endeavouring to get off the bogey he was thrown upon his head, and he died on 8th May 1902.

The Sheriff-Substitute states that Golder was at the time of the accident affected with nephritis, a disease which was likely to prove fatal to him, though probably not for a few years. He was injured about the head, back, and sides in jumping off the bogey, but in jumping off it he was acting properly with a view to his own safety. In consequence of the injuries which he then received he left off work for three weeks and two days, after which he

returned to the respondents' employment as a watchman, it being understood that he was unfit for his former duties. The shock, however, of the injury sustained in this accident so lowered his system that the nephritis was accelerated in its action, and he died of it on 8th May last.

Under these circumstances the Sheriff-Substitute found that Golder did not die as the result of an accident under the Workmen's Compensation Act, and therefore assoilzied the respondents.

The question of law put by the Sheriff-Substitute for our determination is whether the fact that as the result of the injury to his head, back, and sides, sustained by Golder in the course of his employment with the respondents, his general physical condition was so lowered that the nephritis from which he was then suffering was greatly accelerated in its operation, and that in consequence he died on 8th May, entitles the appellants to compensation.

It is to be observed that the Sheriff-Substitute does not state that the nephritis would certainly have proved fatal to Golder if the accident had not occurred, but only that it was likely to do so, though probably not for a few years. The case therefore is not the same as it would have been if Golder had been suffering from a disease which sooner or later was certain to prove fatal, and it is quite consistent with the statements in the case that, but for the accident, Golder might have lived to the ordinary term of human life and died from some cause other than nephritis. I am therefore of opinion that upon the statement in the case the efficient cause of Golder's death was the accident, and that consequently the respondents are liable to the appellants in compensation. It is, however, proper to add, that even if it had been stated in the case to be certain that Golder must, apart from the accident, have died sooner or later of the nephritis, it does not appear to me that this would have constituted an answer to the claim of the appellants. When, but for the accident, the person would not have died at the time at which, and in the way in which, he did die, the accident must, in my judgment, be held to have been the cause of his death in the sense of the Act.

For these reasons I am of opinion that the question put in the case should be answered in the affirmative.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR — At first sight there seemed to be some difficulty in this case, but I have come to the same conclusion as your Lordships. The ground of defence was stated generally that the injury which was caused to this man by the accident was not the immediate cause of his death, but that the immediate cause of death was nephritis, a disease from which he was suffering. I am not sure that I know precisely what is meant by "the immediate cause of the death," if that phrase is capable of exact definition, which I think is perhaps doubtful. But in the argument that was put in more detail I think it came to this—that the man was suffering from nephritis, which, though it did not threaten his life at the moment, was likely to be fatal sooner or later, and that, according to the Sheriff's statement of the case, the accident was not in itself fatal, but merely operated by lowering the man's system so as to enable the disease to act more quickly and fatally than it would otherwise have done, and therefore it is said that the true cause of the death was not the accident but the disease. Now, I must confess for myself that I do not know enough about the action and the reaction of the injury and the disease to be able to follow the pathological part of that argument, and as to the logical and metaphysical part of it I am not disposed in construing this statute to pay much regard to the subtlties which are so apt to perplex the idea of cause. I think, in construing the Act, which is expressed in ordinary language, we must go on plainer and simpler grounds. All that was required of the appellant was to show that her husband was injured by an accident, in the first place, and in the second place, that death resulted from the injury. Now, as to the first of these points there is no question. The man was very seriously injured, and he was laid up and unable to work for a time, and although he had come back to work (or, at all events, to some work, for apparently the work he returned to was much lighter than that in which he was previously engaged), the result was that in fact he died on 8th May. Now, I do not see how it can be said that the injury which he suffered from the accident did not result in death. It had no other result, for the man did not recover. It is clear enough upon the Sheriff's statement that the death was not so remote a consequence as to have no direct connection with the accident at all. That is not suggested, and, on the contrary, in the form of words in which he puts the question for the consideration of this Court he says—"Does the fact that as a result of the injury to the head, back, and sides sustained by the said John Golder in the course of his employment with the respondents, his general physical condition was so lowered that the disease nephritis from which he was then suffering was greatly accelerated in its operation, and that in consequence he died." Now, if he had died in consequence of the injuries described in that question, it seems to me that it is impossible to dispute that death was the result of these injuries. It is true enough, and it is obvious on the face of the statement that the injuries which proved fatal to this unfortunate man would probably not have proved fatal to a man in perfectly sound health, and there might be questions of liability in considering which that might be a perfectly relevant point, because, if liability were said to be the result of wilful wrong-doing, it might be quite relevant to inquire what an ordinarily prudent man would have contemplated as the probable consequence of his action. But in construing this Act we

have nothing to do with questions of conduct. There are two simple questions—was he in fact injured, and did he in fact die as the result of these injuries—and therefore it does not appear to me that that consideration at all affects the conclusion at which we must arrive.

And then when it is said that the direct effect of the injury was only to accelerate the man's death, it appears to me that is a statement which forms the true basis of a claim for compensation in every case of this kind. The applicant can never be called upon to prove that but for the accident the deceased would not have died at all, but only that in all probability he would not have died so soon. The ground of claim is that a man's life has been cut short when but for the accident he might have been expected to continue in life and support his family for an indefinite time. That is all that is required. An accident never does more than accelerate death, and that the man would have died sooner or later is perfectly obvious. But the true point is that the man's life was cut short at a time when he might have been expected to continue to live. I am therefore of opinion with your Lordship that the case does fall within the statute.

The Court answered the question in the case in the affirmative and remitted to the Sheriff to award compensation.

Counsel for the Appellant—Watt, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Guthrie, K.C.—King. Agents — Hope, Todd, & Kirk, W.S.

Tuesday, November 18.

FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

DEVLIN *v.* JEFFRAY'S TRUSTEES.

Reparation—Negligence—Duty to Public—Invitation—Clay-Pit on Vacant Ground — Obligation to Fence — Liability of Owners—Ground Let to Tenant.

A child was drowned by falling into a disused clay-pit situated in the centre of an unused piece of ground near a block of workmen's houses. His father brought an action of damages against the proprietors of the ground. He averred that the clay-pit was unfenced; that it was the duty of the defenders to fence it; that the unused piece of ground was constantly used as a playground by the children of the district, with the consent, or at least without the disapproval of the defenders; and that the clay-pit was 25 yards from the nearest road, which was a private road and unfenced. It was admitted that the ground on which the clay-pit was situated had for some years been let to tenants. *Held* that the pursuer had not set forth a relevant case.

This was an action brought in the Sheriff Court at Glasgow by John Devlin, millman, Heathfield, Garnkirk, to recover damages for the death of his son, who was drowned by falling into a disused clay-pit on ground belonging to the trustees of the late John Jeffray, of Cardowan, the defenders.

Devlin averred that the clay-pit was situated on a vacant piece of ground which was adjacent to a block of workmen's houses at Heathfield, where he resided; that this ground was bounded by a private road by which his children went to school; and that his son, aged six years, on his way home from school on the afternoon of May 20th, 1902, had taken a short cut past the clay-pit, and had accidentally fallen into it. It was admitted that the clay-pit was not fenced in any way. According to the pursuer's statements the clay-pit was about 25 yards from the nearest part of the private road, and not separated from it by any fence.

The pursuer made the following averments of fault:—"(Cond. 6) The whole portion of ground described as containing the disused fireclay pit is uncultivated, and is constantly used by the children of Heathfield as a playing ground, with the consent or at least without any indication of disapproval on the part of the defenders, who are well aware that it is so used. All parts of it are also constantly passed over by people taking short cuts to points on the highway to the west of it without any objection on the part of the defenders. (Cond. 9) The said accident occurred through the fault and negligence of the defenders. The said pit was a source of danger both to people using the said road to the said workmen's houses, to which it was in close proximity, and also to the children playing upon the defenders' said property. It was the duty of the defenders to fence the said pit both for the purpose of protecting persons straying from said road and for the safety of the children who used the said vacant ground. This duty the defenders entirely failed to perform, and owing to their failure the pursuer's son was drowned. Had the said pit been fenced said accident would not have occurred."

The defenders averred that the piece of ground on which the clay-pit was situated was part of subjects let by them since 1888 to the trustees of the late John Faill, and now in the occupation of the Heathfield and Cardowan Fireclay Company, the pursuer's employers. The fact that the subjects were let as stated, though not admitted on record, was admitted at the bar.

The defenders also denied fault and pleaded—"(1) The action is irrelevant."

On 18th July 1902 the Sheriff-Substitute (GUTHRIE) pronounced an interlocutor whereby he found that the pursuer had not stated facts and circumstances relevant and sufficient to support the prayer of the petition, and dismissed the action.