

would probably be well founded, but the respondent's counsel points out that that is not its character. It is not an initial writ, but merely a minute of compearance in a depending process of pointing to which the provisions relating to the ordinary Sheriff Court do not apply. Such procedure is in accordance with the practice as stated by all the writers of authority on the subject that I am familiar with. Up to a certain point the Sheriff's duties in a pointing are ministerial; but when the pointing is reported they become judicial, and one competent form of raising the question of property in the goods pointed is compearance in the pointing.

Sheriff Guthrie, who has had large experience in Lanarkshire, so states the practice in note *f* to section 2287 of Bell's Prin., 10th ed.

Mr Dove Wilson, whose experience was equally great as Sheriff-Substitute in Aberdeenshire (from which county this case comes), states the practice to the same effect at p. 40 of the 4th ed. of his work on Sheriff Court Practice.

In the latest work on diligence, namely, that of Mr Graham Stewart, the practice is stated to the same effect at p. 354.

On the question whether the pointing is a process or merely a diligence I may refer to Lord Shand's remarks in *Clark v. Hinde, Milne, & Company*, December 18, 1884, 12 R. 347, at p. 354, 22 S.L.R. 237; and lastly in the older work of Mr M'Glashan, section 1907, p. 358, the practice is so stated.

I may also refer to the case of *Scotland v. Lawrie*, June 12, 1828, 6 Sh. 961, and to the analogous cases of sequestration for rent, of which the case of *Lindsay v. Earl of Wemyss*, May 18, 1872, 10 Macph. 708, 9 S.L.R. 458, is an example.

[His Lordship then proceeded to deal with the merits.]

LORD TRAYNER was absent.

The Court dismissed the appeal, "of new sustain the objections for Alexander Wood and prefer him to the goods mentioned in the minute of compearance and note of objections for the said Alexander Wood."

Counsel for the Appellant—Campbell, K.C.—Hunter. Agents—P. Morison & Son, S.S.C.

Counsel for the Respondent—Lippe. Agent—William Croft Gray, S.S.C.

Friday, July 15.

SECOND DIVISION.

[Sheriff Court at Airdrie.]

SNEDDON v. ROBERT ADDIE & SONS' COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7 (2), and First Schedule sec. 1 (a) (1)—Dependants—Wholly Dependent—Husband and Wife—Wife Deserted by Husband and Supported by Mother.

In order to constitute total dependency of a wife on the earnings of her husband in the sense of the Workmen's Compensation Act 1897, it is not essential that the husband was at the date of his death supporting his wife.

In an arbitration under the Workmen's Compensation Act 1897, in which the widow of a workman claimed compensation from his employers on account of the death of her husband while in the course of his employment, it was proved that in July 1901 the husband had deserted his wife and contributed nothing to her support; that from July 1901 to October 1903 the wife was supported by her mother, with the exception of a fortnight spent at a convalescent home; that in October 1903 she became housekeeper to a friend of the family, and remained with him until February 1904, but after a few weeks in his service she became ill with bronchitis and pains in the legs so as to be unfit for the proper discharge of her duties, and received pecuniary assistance to a small amount from her mother; that in February 1904 she returned to her mother; and that she suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from any work requiring ordinary exertion.

Held (dub. Lord Justice-Clerk) that the claimant at the time of her husband's death was wholly dependent on his earnings within the meaning of the Workmen's Compensation Act 1897.

Cunningham v. James M'Gregor & Co., May 14, 1901, 3 F. 775, 38 S.L.R. 574, followed.

Turners Limited v. Whitefield, June 17, 1904, 41 S.L.R. 631, distinguished.

The Workmen's Compensation Act 1897, sec. 7 (2), enacts, *inter alia*—“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.”

This was an appeal upon a stated case in the Sheriff Court at Airdrie in an arbitration under the Workmen's Compensation Act 1897 between Margaret Russell or Sneddon, Orchard Street, Hamilton, widow of John Sneddon, miner, Rosehall, Lanark-

shire, pursuer and respondent, and Robert Addie & Sons' Collieries, Limited, coal-masters, Rosehall, defenders and appellants, in which the pursuer claimed compensation from the defenders in respect of the death of her husband while in their employment.

The Sheriff-Substitute (MACKENZIE) stated—"The case was heard before me, when the following facts were proved:—1. That on 26th January 1904, John Sneddon, while in the employment of the respondents as a miner, sustained injury by accident arising out of and in the course of his employment, and that said injury caused his death. 2. That the applicant is the widow of the said John Sneddon, and that he left no children. 3. That about the beginning of July 1901 the said John Sneddon deserted the applicant, and that he never thereafter contributed anything to her support with the exception of £1, which he placed in the hands of the parochial authority before his departure, and which she received subsequently. 4. That the applicant went to live with her mother at Hamilton towards the end of July 1901, and resided with her from that time until October 1903, with the exception of a fortnight in August 1901, which she spent in the Dunoon Convalescent Home. 5. That during the whole of this period, with the exception of the fortnight spent in the Dunoon Home, the applicant was entirely supported by her mother. 6. That in October 1903 the applicant went to Cambuslang to act as housekeeper to Alexander Simpson, a friend of her family, the bargain between them being that she should receive board and lodging in return for her work, but no wages in money. 7. That she remained in Simpson's house until 3rd February 1904, when she returned to her mother. 8. That the applicant suffers from chronic bronchitis and varicose veins in the legs to an extent which incapacitates her from any work requiring ordinary exertion. 9. That for about a year prior to August she suffered from suppurating sores in her legs due to the varicose veins, and was attended regularly by a nurse. 10. That after a few weeks in the service of Alexander Simpson she became ill with bronchitis and pains in her legs, and that as a result of these ailments she was unfit for the proper discharge of her duties during the remainder of the time she stayed in this house. 11. That during this period she on several occasions received pecuniary assistance to a small amount from her mother. 12. That it is admitted that in the event of the applicant being found entitled to compensation in respect of her husband's death on the footing of total dependency, she is not entitled to more than £150, toward which she has already received £5 without prejudice. On these facts I found in law that the applicant was, in the sense of sub-section 2 of section 7 of the Workmen's Compensation Act 1897, wholly dependent upon the earnings of her husband at the time of his death, and is entitled to compensation in respect of his death upon that footing.

I therefore awarded the applicant the sum of one hundred and forty-five pounds sterling, and found her entitled to expenses."

The question of law for the opinion of the Court was—"Was the applicant wholly dependent upon the earnings of her husband at the time of his death within the meaning of the Workmen's Compensation Act 1897 so as to entitle her to compensation from the appellants?"

Argued for the defenders and appellants—The claimant was not at the time of her husband's death dependent on his earnings in the sense of the Act. Mere relationship was not enough. Whether there was dependency was entirely a question of fact in each case. There was here no dependency in point of fact on the earnings of the deceased. At the time of his death the claimant occupied the position of a wife independent of her husband's support, and the death of her husband did not alter that position in any way—*Turners Limited v. Whitefield*, June 17, 1904, 41 S.L.R. 631; *Main Colliery Co. v. Davies* [1900], A.C. 358; *Rees v. Penrhyber Navigation Colliery Co., Limited*, 1902, 19 T.L.R. 113.

Argued for the pursuer and respondent—"Dependence" did not mean actual support at the time of the husband's death. A wife must either be dependent on or independent of her husband's support. In the present case the wife was destitute and incapable of earning anything. She was therefore dependent on her husband according to the law of Scotland. The case was ruled by *Cunningham v. James M'Gregor & Co.*, May 14, 1901, 3 F. 775, 38 S.L.R. 574.

At advising—

LORD YOUNG—The question submitted to us in this case is this—"Was the applicant wholly dependent on the earnings of her husband at the time of his death within the meaning of the Workmen's Compensation Act 1897, so as to entitle her to compensation from the appellants?" It has been determined in England that this is not a question of law but a question of fact, but the question whether within the meaning of the statute the party claiming was or was not dependent on the deceased is, I think, as much a question of law as any question under section 7, sub-section (2), of the statute can possibly be. The decisions in England by the House of Lords as well as by the High Court of Appeal were that it is to be regarded as a question of fact. I have difficulty myself in seeing the soundness of that view, but it would be a strong thing for us, if the question were to arise in any case, to dissent from the judgment of the highest English Courts, including the House of Lords, on this very statute. But I do not think the question really arises here.

The workman who was injured here left a wife, and it is a familiar rule in our law that a wife who has not a fortune of her own is legally dependent on her husband—is a dependant of his. The definition clause of the Act, clause 7, sub-section 2, provides that "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 upon the earnings of the workman at the time of his death." There is no doubt the wife here was entitled to sue such an action for the death of her husband, but the question remains whether she was wholly or in part dependent on the earnings of the workman at the time of his death. She was deserted by her husband in 1901, and he never thereafter contributed anything to her support, and she was kept from dying of starvation, first by her mother, against whom she had no legal claim so long as her husband was alive and earning wages sufficient to support her. She lived with her mother, getting board and lodging from her in respect, but only in respect, that the husband was failing to do his duty. For about a year prior to the date of the accident she suffered from chronic bronchitis and varicose veins in the leg, which incapacitated her from work calling for physical exertion, and she was attended regularly by a nurse, who must have been paid by someone interposing to satisfy a claim, which was a good legal claim against the husband. It appears to me to be too clear to admit of dispute that the claimant here was a legal dependant upon the workman, having a claim against him so long as he lived and was earning money—legally dependent upon him and upon no other, for the wife of a husband who is earning wages sufficient to meet his liabilities to her has not a legal claim against anybody else. I am therefore of opinion that the judgment of the Sheriff here is right, and ought to be affirmed.

LORD MONCREIFF—The respondent's husband, John Sneddon, who was earning wages in the employment of the appellants, was fatally injured while in the service of the appellants on 26th January 1904. The respondent claims compensation from the appellants in terms of the Workmen's Compensation Act 1897, 1st Schedule I (a) (1), on the ground that she was wholly dependent on her husband's earnings at the time of his death.

The Sheriff-Substitute, on the facts proved by him, has found that the respondent was at the death of her husband John Sneddon wholly dependent on his earnings, and we have to decide whether that judgment is sound.

If in order to constitute total dependency in the sense of the statute it is essential that the deceased workman was at the date of his death supporting the respondent the judgment is wrong, because the deceased man did not contribute a farthing to her support from the time that he deserted her in 1901. But I do not think that we are tied up to such a construction of the statute. A husband is primarily bound to aliment his wife. Exceptional cases, no doubt, may be figured in which, notwithstanding that primary obligation, the wife could not

be said in any reasonable sense to be wholly dependent on his earnings. She might have means of her own, or she might be earning her own livelihood, or she might be living apart from her husband under an express and implied agreement with him that she would make no claim upon him, but look for support either to her own exertions or to her relatives. That was the case recently decided by the First Division of the Court in *Turners Limited v. Whitefield*, June 17, 1904, 41 S.L.R. 631. That case in no way conflicts with the Sheriff's judgment. There the parties married in 1889, at which time the husband had four children by a previous marriage, all grown up, and the respondent had several illegitimate children. It was an ill-assorted marriage; and after six months the parties separated by mutual agreement, and the wife never thereafter (during fourteen years) made any demand upon the husband.

In this case the facts are widely different. The separation was not voluntary. John Sneddon deserted the respondent and apparently disappeared. She was absolutely destitute, and unable from bad health to support or help to support herself. For some time her mother entirely supported her, and in October 1903 the respondent, wishing no doubt to relieve her mother of the burden, tried to act as housekeeper with a friend, Alexander Simpson, the bargain being that she should receive board and lodging in return for her work, but no wages. Unfortunately after a few weeks in the service of Alexander Simpson, and before her husband's death, she became unfit from illness to discharge her duties in return for which board and lodging were to be given. Simpson charitably allowed her to remain with him until 3rd February 1904, when she returned to her mother. But at the date of her husband's death, 26th January 1904, the state of matters was that she was destitute and absolutely unfit for work, and was being supported by the charity of a friend.

Now, as I have said, there may be cases in which a husband's legal obligation to support his wife may be held to be sopited or suspended. But when that legal obligation, not discharged by his wife, concurs with total destitution on the part of the wife and inability to support herself, the bare fact that at the date of his death the husband was not implementing his obligation is not sufficient to prevent us from holding that the wife was wholly dependent on him.

Neither, in my opinion, is the question affected by the fact that during the husband's absence and neglect the wife was kept from starvation by the casual charity of strangers, or even of relatives who might have been bound to support her if her husband had not been alive.

Indeed, speaking for myself, I think this point has already been decided by an unanimous decision of this Division in the case of *Cunningham v. M'Gregor & Company*, 14th May 1901, 3 F. 775, 38 S.L.R. 574.

In that case it is true that the husband, who lived apart from his wife and family, contributed on an average about £5 a year towards their support. But the question raised was not whether the wife was partially dependent upon him—that was admitted—but whether she was wholly dependent upon him. The Court held unanimously that she was wholly dependent on her husband. The argument for the respondents in that case, which was unsuccessful, was that the wife was not wholly dependent on her husband because she was supported by occasional employment and contributions from her relatives. That argument was negated by the judgment of the Court, and I need only refer to the opinions of the Judges, including my own. I am still of opinion that that case was well decided, and further, that it decided the very point before us now. Because although the husband apparently gave the wife an average yearly dole of £5, he did not support her, and her living was eked out by precarious employment and charitable contributions from friends and relatives.

As I have already indicated, I do not think the judgment we are about to pronounce in any way conflicts with the judgment in *Turners v. Whitefield*. Indeed, this case is just such a one as was contemplated by Lord Kinnear in the second last sentence of his opinion, 41 S.L.R. 633.

I am therefore prepared to answer the question put to us in the affirmative, and dismiss the appeal.

LORD JUSTICE-CLERK—This case has seemed to me to be attended with great difficulty, particularly as the cases which were quoted present some conflict. Your Lordships have come to the conclusion that the decision of the Sheriff is right, and that the respondent in the appeal is entitled to compensation, holding that the case is not ruled by the case of *Turners*, and that the case of *Cunningham* is in point. That disposes of the case, and although I have hesitated to concur in that result I feel that this being a case under a remedial statute, and the Courts having given it very wide application in favour of compensation, I am not called upon to express a dissent, although I still have doubt as to the soundness of the decision.

LORD TRAYNER was absent.

The Court answered the question of law in the affirmative.

Counsel for the Pursuer and Respondent—Watt, K.C.—Lippe. Agents—Erskine, Dods, & Rhind, S.S.C.

Counsel for the Defenders and Appellants—Hunter—Moncrieff. Agents—W. & J. Burness, W.S.

Friday, July 15.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

JOPP v. JOHNSTON'S TRUSTEE.

Agent and Principal—Agent's Bankruptcy—Funds of Principal Mixed with those of Agent without Authority—Estate of Principal Taken out of Agent's Sequestration—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 104.

On 19th November 1900, A, a law-agent, without authority, sold stock belonging to a client B, for whom he acted under a factory and commission. For the stock sold, together with £45 of revenue collected for B, A received £1239, 19s. 3d., and he paid that sum into his own bank account, in which there was at that date £439, 17s. at his credit, and to which he paid a further sum of £155, including £139 belonging to another client, on 21st November 1900. On the latter date he drew a cheque for £1500 on his own account and received in exchange seven deposit-receipts, one for £300 and six for £200 each, two of which, the one for £300 and one for £200 he uplifted in April and May 1901 and applied to his own purposes. A died in July 1902, having in the interval between November 1900 and his death uplifted several deposit-receipts of later date than those referred to, five of which for £200 each remained undisturbed. A died insolvent and his estate was sequestrated. B presented a petition under section 104 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), to have the five deposit-receipts for £200 each taken out of the sequestration, claiming that they represented the proceeds of the stock sold by A on 19th November 1900.

Held (aff. judgment of Lord Pearson) that the proceeds of B's stock were sufficiently indentified, and prayer of the petition granted.

On 10th July 1903 Mrs Margaret Mackenzie or Jopp, 5 Norwood Terrace, West Park Road, Dundee, presented a petition under section 104 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) to have certain funds taken out of the sequestration of the estate of the deceased Robert Fleming Johnston, W.S., Edinburgh.

A similar petition was presented by Mrs Charlotte Hawtrey Thwaites or Drummond, with which it is unnecessary to deal for the purposes of this report. The two petitions were conjoined.

Answers were lodged by the trustee on Mr Johnston's estate.

The following narrative is quoted from the opinion of the Lord Ordinary (PEARSON):—"This dispute has arisen in consequence of the sequestration of the estates of the late R. F. Johnston, W.S., who died on 12th July 1902. Mr Johnston carried on business under the firm name of Richardson