it did in fact mislead—the driver of the pursuers' van. I also think that the absence of anything in the nature of a fence at the end of the trench was a source of danger. If both the lights had been red, or if the end of the trench had been guarded, as is very often done, by a batten laid across two uprights, the strong probability is that the accident would never have happened.

It seems to me, however, that the learned Sheriff-Substitute has not appreciated the extent to which the accident was due to the reckless conduct of the driver of the van. I think that gross negligence on his part, without which the accident could not have happened, has been proved. When a road is under repair, or an operation such as the laying of a drain is in progress, and the part of the road which is thereby rendered unfit for traffic is marked off by lights, great care is required on a dark night upon the part of the driver of a vehicle, however efficiently the lighting may have been done, because such lights not being sufficient to illuminate or intended to illuminate the roadway, their effect is to intensify the surrounding darkness.

Now in this case there were a number of lights. There were two at the south end of the trench—one practically in the middle of the road and the other close to the wall upon the right-hand side of the road as you go towards Edinburgh. There was also a line of lights running up the middle of the road for the whole length of the trench; and at the north end there were three red lights—one in the middle of the road, one at the wall on the right-hand side, and one between these two. Therefore one-half of the road (roughly speaking) was fenced off with a parallelogram of lights. Further, although the night was dark it was clear, and it is proved that the whole of the lights could be seen from a considerable distance by anyone approaching the place from the south. The driver himself admits that he saw the lights at the north end.

Now what the driver did was to drive at a trot between the red light and the white light which marked the south end of the trench. In other words, he drove into the part of the road which was marked off by lights. He says that he knew that a red light betokened danger, but that he always understood that a clear light indicated the proper road. He does not explain how he came to have that understanding. He does not say that anyone ever told him that a white light indicated safety, or that he had found by experience that that was the case. This much, however, is certain—he knew that there was danger ahead, but he did not know what the danger was nor precisely where it was. In such circumstances his plain duty was to proceed with the utmost caution. He should, in my opinion, have pulled his horses into a walk, and he ought not to have allowed them to advance a single step unless and until he could see what was immediately in front of them. There could have been no difficulty in doing that with the combined aid of the carriage lamps (which are not said to have been in any way defective) and the lights at the end of the trench. Instead of proceeding however, slowly and carefully—feeling his way, so to speak, at every step—he proceeded at a trot, evidently without having the least idea what was in front of him, with the result that he drove into the trench and one of the horses was killed.

Further, as it happened, the driver had it in his power to avoid even the slightest risk, because there were two men on the van with him, and if he had asked one of them to get down and see what was ahead the position of the trench on the one hand and of the open roadway on the other would have been ascertained in a few seconds.

The result, in my opinion, is that there was very clear contributory negligence on the part of the driver, and that accordingly the pursuers are not entitled to recover damages.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Appellants—Hunter, K.C. —Wilton. Agent—David R. M'Cann, S.S.C.

Counsel for the Respondents—The Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agents—Macpherson & Mackay, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WILLIAM BAIRD & COMPANY, LIMITED *v.* SAVAGE.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (2) (*b*)—"*Dependants*"—*Wholly Dependent—Husband Living Apart from and Not Supporting Wife—Foreigner.*

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 the deceased, who was a Pole, had resided in this country for nine months, during which period he had remitted to his wife in Poland £1. In addition to that sum the wife's means of livelihood were derived from employment as an outdoor worker, together with contributions from her relatives.

Held (1) that the wife was a "dependant" within the meaning of section 7, sub-section 2 (*b*) of the Workmen's Compensation Act 1897; (2) that she was not wholly dependent upon her husband's earnings within the meaning of the said Act.

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; and *Addie & Sons' Collieries Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85, *commented on.*

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 William Baird & Company, Limited, coalmasters, 168 West George Street, Glasgow (appellants), and Mrs Magdalena Podolska or Birsztan or Savage, widow of the deceased Maty (Motiejus) Birsztan *alias* Michael Savage, miner, Hamilton (respondent).

Mrs Savage claimed from the appellants the sum of £150 as compensation in respect of the death of her husband.

The facts which the Sheriff-Substitute (THOMSON) found proved or admitted were as follows—"(1) That the respondent, who was born in Poland on 17th January 1886, was married in Poland on 7th October 1902 to the said deceased Maty (Motiejus) Birsztan *alias* Michael Savage, who was also a Pole; (2) that a child was born of the marriage on 22nd August 1903; (3) that the deceased, with the acquiescence of the applicant, came to Scotland in December 1903 to find employment; (4) that shortly after his arrival he found employment as a miner with the respondents at a wage of under 20s. a-week; (5) that in the course of this employment he was killed on 15th August 1904; (6) that during his absence in this country the applicant worked as an out-door worker, earning 9d. per day; (7) that her father and mother kept the child of the marriage, and also assisted to support the applicant; (8) that the deceased sent her £1 before Easter 1904; (9) that he also wrote her without sending her money about a week before his death; (10) that after his death the applicant came to this country in order to present the present application; (11) that the law of Poland is that a husband is liable for the support of his wife and child so far as his means permit, and that this liability can be enforced in the civil courts; (12) that respondents paid the expenses of the deceased's funeral, amounting to £5, 7s."

On these facts the Sheriff-Substitute held in law that the respondent was wholly dependent upon her husband within the meaning of the Act, and awarded her £144, 13s. of compensation under the Act.

The questions of law for the opinion of the Court were—"(1) Upon the facts admitted and proved as above set forth, was the applicant a "dependant" within the meaning of section 7, sub-section 2 (*b*), of said Act? (2) Was the applicant within the meaning of said Act wholly dependent upon her late husband's earnings, of which she received only 20s. during his twelve months' absence?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) in section 1 allows compensation, the scale and conditions of which are given in the First Schedule to the Act. First Schedule sec. 1 provides—"The amount of compensation under this Act shall be (*a*) where death results from the injury; (i) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death . . .; (ii) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death . . .; (iii) if he leaves no dependants . . ." Section 7, 2 (*b*) of the Act enacts—"'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."

Argued for the appellants—The definition of "dependants" excluded dependants outwith England, Scotland, and Ireland; otherwise the Act might be more favourable to foreigners than to British subjects, since the latter had, in order to obtain the benefit of the Act, to fulfil conditions which might not apply to the former. The respondent was therefore not a "dependant" within the meaning of the Act. Further, dependency was a matter of fact—*Main Colliery Co.* v. *Davies*, [1900] A.C. 358; *Turners Limited* v. *Whitefield*, June 17, 1904, 6 F. 822, 41 S.L.R. 631. There must be not only a legal obligation to support but also *de facto* support, and such dependency must be established—*Rees* v. *Penrikyber Navigation Colliery Co., Limited*, [1903] 1 K.B. 259; *Pryce* v. *Penrikyber Navigation Colliery Co., Limited*, [1902] 1 K.B. 221. The respondent here was supporting herself by regular labour, which distinguished this case from those in which the wife was only earning money by casual and irregular employment. A contribution of £1 in nine months was so small it was to be disregarded. *Cunningham* v. *M'Gregor & Co.*, 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; *Addie & Sons' Collieries, Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85., were referred to.

Argued for respondent—The Act did not in terms exclude foreigners, and in these circumstances to exclude them would be an unjustifiable variation of the common law rule that nationality was not a bar to reparation. The respondent was therefore entitled to the benefit of the Act if she fulfilled its requirements. She was a dependant of the deceased workman, and as his wife was wholly dependent on him. There was no permanent separation and no suspension of the relation of husband and wife. The facts proved and admitted showed indigence on the part of the wife and obligation of the husband to support her. As a matter of fact, the husband had contributed, and no inference could be drawn against the continuance of contributions if he had lived. In any event the respondent was partly dependent on her husband—*Turners, Limited (cit. supra)*; *Main Colliery Company, Limited (supra)*; *Arrol & Company, Limited* v. *Kelly*, July 6, 1905, 7 F. 906, 42 S.L.R. 695; *Simmons* v. *White Brothers*, [1899] 1 Q.B. 1005.

At advising—

LORD PRESIDENT—This is a stated case in which the question is whether a woman

called Mrs Birsztan or Savage, who is the widow of a Pole who was killed in a mine in Lanarkshire, is or is not entitled to the full amount allowed by the Workmen's Compensation Act for the death of her husband, and the point entirely turns upon the question whether she was or was not wholly dependent upon her late husband. Now, several cases have been decided upon this branch of the statute, but of course the most authoritative case is the case in the House of Lords of the Main Colliery Company in the appeal cases of 1900 (*Main Colliery Company* v. *Davies*, [1900] A.C. 358), where it was laid down that the question of being wholly or partly dependent was a question of fact. I entirely adhere to that opinion, whether it is technically binding on us or not, and accordingly if the learned Sheriff here had simply come to a conclusion on the facts upon the amount of dependency or the pecuniary result which followed from dependency, I should not have thought myself entitled to interfere with that decision. But inasmuch as the Sheriff here has found that Mrs Savage was wholly dependent, and has then set forth the facts upon which he comes to that finding, I am bound, I think, to consider whether the facts as set forth by the Sheriff will support the finding at all. Now, the facts as set forth by the Sheriff are that these people were Poles, that the husband came over to this country with the view of getting work, and that he so came with the approbation of his wife. Nothing more is said, but one can easily see that they thought they would do better perhaps in a foreign country than at home, and that the wife, so to speak, concurred with the husband in so far risking the family fortunes by this change of abode. Accordingly, the husband came over alone, leaving the wife in Poland. He got work. He made one payment of a small sum to his wife. He wrote to her again, but on the second occasion he did not send her any money, and then before anything else happened he had the accident which caused his death. Altogether he was absent from December 1903 till August 1904. During that time his wife worked as an outdoor labourer at home at a wage of 9d. a day, and supported herself by her own earnings, assisted partly by her father and mother who seem to have kept her child and given a certain amount of assistance to herself, and assisted also by the small sum of money which her husband had sent her. She then came over to this country in order to prosecute this claim.

Now, it seems to me that on those facts it is impossible to say that this woman was wholly dependent upon her deceased husband. As a matter of fact she was not. That is treating the matter, as I think it must be treated, as a question of fact.

But I feel it incumbent to say something more upon this subject because of certain observations made by Lord Young in several of the cases quoted to us, which I think may be misunderstood, and which (at least if they are taken in a certain way) I think are not sound. There have been several cases on this matter, the case of *Cunningham* v. *M'Gregor & Company*, 3 F. 775; *Sneddon* v. *Addie & Sons*, 6 F. 992; *Addie & Sons* v. *Trainer*, 7 F. 115.

I am not saying a word against any of those decisions, because I think each decision must be upon its own facts; and even supposing I, from a jury point of view, should have come to a different conclusion from what other learned Judges did, that does not show that the decision is wrong. But the expression which I rather take exception to is about there being a legal presumption that a wife is dependent on the husband—a legal presumption which in each case has to be displaced. Let me remind you how the matter comes in under the statute. The first section in the statute says that where there has been an accident the employer shall be liable to pay compensation in accordance with the first schedule of the Act. The first schedule of the Act says that if a workman leaves any dependants wholly dependent upon his earnings at the time of his death the compensation shall be a sum equal to so and so. And then in the interpretation clause of the statute "dependants" is defined thus—"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." Now, I want to say most emphatically that, so far as I am concerned, in my opinion what I may call the legal category ends with the first sentence. In order to find out who is entitled, you have got to find out 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. That is to say, in other words, you have to find out who answers that description according to the provisions of the Scottish law. But when you have arrived at that point, then I humbly think you are done with the Scottish law as law, and that when you come to "as were wholly or in part dependent upon the earnings of the workman at the time of his death", that is a question of fact not affected by the Scottish law or by any other law. An illustration of that can be given very easily. If, as indeed has happened in this case, the workman who is killed is not a Scotsman at all but is a native of some other country, and if the person who is suing is a person who, according to Scottish law, is entitled to sue, that is to say, that his or her title is made out under the first branch of the sentence, then it does not seem to me to matter one bit whether according to the law of their country there is an obligation upon the husband or the father, as the case may be, to support him or her, if as a matter of fact he or she was in point of fact dependent upon the man's earnings. And, accordingly, while I am anxious not to do injustice to the observations of Lord Young—and I may be misunderstanding them—if by a presumption of law that a husband should support a wife he means

that it is necessary that you should start with that presumption according to the law of Scotland, and that that has necessarily to be rebutted by showing that this particular wife was not dependent on the husband, I humbly do not agree. Taking the sentence in another aspect I quite agree. In a proper sense it is not a presumption at all either of fact or of law, but it is an inference of fact drawn from the experience of ordinary life that if you know nothing about a wife except that she is simply the wife of a husband, more especially in the class with which we are here dealing, the woman is dependent on on her husband, because men's wives in such a class are as a matter of fact usually dependent on their husbands. Accordingly, if I could suppose that nothing in the world was proved except simply that the woman had been living with her husband, who was a miner, as a man of common sense and as a juryman I would assume that that woman had been dependent on that man, but that, I need scarcely say, is an inference of fact and not in any sense a legal presumption either *juris et de jure* or *facti*. I have thought it necessary to explain this in order that there should be no doubt upon the view I hold on the law in accordance with what was clearly laid down by the House of Lords in the *Main Colliery* case.

Accordingly, turning to this case it seems to me that the Sheriff-Substitute has shown on the facts sufficient to make it impossible to support his own finding of total dependency. But when you come to the question of the partial dependency, doubtless a rough axe must be taken. I think the person who wields the rough axe is the Sheriff-Substitute and not ourselves. I do not think we ought to go into that matter. The only hint one may give him is this, that evidently the woman was quite as much dependent in this case upon her own exertions as upon what she got from her husband, but that she was to a certain extent dependent on her husband I have no doubt. I am therefore of opinion that we should answer the questions in the case and remit to the Sheriff-Substitute in accordance with this opinion.

LORD M'LAREN—I take the same view as your Lordship in the chair. I think it is undisputed that the wife of this miner belongs to the class who are described in the statute by the word "dependant." She is a dependant because she is one of the persons who by the law of Scotland would be entitled to sue for damages in the case of death through fault. But then that is not enough to entitle her to compensation, unless she is also in the position to prove that she is either wholly or partly dependent on the person who has lost his life. Now, there are many cases—I should say the great majority of cases—where that is purely a question of fact and where it would be quite impossible to state a case on which we should be called upon to give an opinion. If, for instance, this miner had been able to send £10—he was only one year, I think, in employment in Scotland, or rather less—if he had been able to send £10 to his wife in Poland, and the Sheriff had then held that she was wholly dependent upon him, we should not have listened to an argument to the effect that the woman could not live on £10 in Poland, and that she must therefore be partly dependent on other sources of income. But then this husband, perhaps because he was not at first in regular employment, was only able to send £1 to his wife, and that during a period of nine months. Now, it is clear that even in Poland an individual cannot subsist upon £1 a-year. But then I hold that, as the Sheriff has taken the view that the lady is wholly dependent, it must be upon some misconstruction of the statute, because he could not possibly admit that she lived upon the £1 for the year to the exclusion of all other sources of subsistence. I therefore agree that we should find that the claimant was only partially dependent upon her husband. I also agree with your Lordship that although we do not assess the amount—that is for the Sheriff as arbitrator—it is plain enough that she was at least as much dependent during that year upon other sources as she was upon her husband's contributions.

LORD PEARSON—I am entirely of the same opinion.

LORD KINNEAR was not present at the argument.

The Court answered the first question in the affirmative and the second in the negative, remitted to the Sheriff-Substitute to proceed, and found neither party entitled to expenses.

Counsel for the Appellants—Wilson, K.C. —Horne. Agents—W. & J. Burness, W.S.

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

VALUATION APPEAL COURT.

Wednesday, February 7.

(Before Lord Low and Lord Dundas.)

THE LIVERPOOL, CHINA, AND INDIA TEA COMPANY, LIMITED, AND ANOTHER *v.* THE ASSESSOR FOR EDINBURGH.

(See *ante*, Jan. 14, 1905, 42 S.L.R. 500, 7 F. 415.)

Valuation Cases — Lease — Consideration other than Rent—Obligation on Tenant to Fit up Premises for his Trade—Measure of Consideration other than Rent—Competency of Looking at Negotiations prior to Lease—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Lands Valuation (Scotland) Amendment Act* 1895 (58 *and* 59 *Vict. cap.* 41), *sec.* 4.