Saturday, February 23.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

FIFE COAL COMPANY *v.* COOPER.

Reparation—Master and Servant—Title to Sue—Solatium—Damages—Grandchild and Maternal Grandfather—Disappearance of Father—No Information as to Paternal Grandfather—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7—"*Dependants.*"

The Workmen's Compensation Act 1897 gives a title to claim compensation to the "dependants" of a workman whose death has resulted from an injury in the course of his employment, and (sec. 7) defines "dependants" to mean "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."

A workman whose death resulted from an injury received in the course of his employment, had, for a period of eight years from the death of his daughter and the simultaneous disappearance of her husband till his own death, been the sole support of their child, a girl two years old at the time of her mother's death. Nothing had been heard of the father since his disappearance, and nothing was known about the girl's paternal grandparents. The workman was also survived by a son and daughter.

Held that the granddaughter was a person entitled to sue for damages or solatium, and was accordingly a "dependant" and entitled to compensation.

The following *contentions* were *negatived* by the Court:—(1) That the right to sue for damages or solatium did not extend to maternal grandparents and grandchildren. (2) That as the right to sue for damages and solatium admittedly depended upon the "existence during life . . . of a mutual obligation of support" (L.P. Inglis in *Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638), there was here no such "mutual obligation," there being (*a*) none on the deceased to support his grandchild until it was proved that her father and paternal grandfather were dead or incapable; (*b*) none on the grandchild to support her grandfather, his own son and daughter being alive.

In an arbitration under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), between Lilly Cooper and the Fife Coal Company, Limited, the Sheriff-Substitute (SHENNAN) of Fife and Kinross at Dunfermline, awarded the former compensation, and at the request of the latter stated a case on appeal.

The following were the *facts* admitted or proved:—"1. On 25th September 1905 David MacLeod, a miner in the defenders' employment at their Peesweep Pit, Cowdenbeath, was killed in said pit by a fall from the roof. It is admitted that David MacLeod was a 'miner,' and the defenders' 'undertakers,' and the said pit a 'mine,' all within the meaning of the Workmen's Compensation Acts. The said accident arose out of and in the course of David MacLeod's employment in defender's service.

"2. Lilly Cooper, who sues this action by her tutor, is David MacLeod's granddaughter. She is ten years of age. Her mother, David MacLeod's daughter, died about eight years ago. Since her mother's death her father has never been heard of, and has contributed nothing to her support, and it is not known whether he is alive or dead. During all this time Lilly Cooper was supported solely by her maternal grandfather David MacLeod. David MacLeod's wife predeceased him, and at the time of his death Lilly Cooper was wholly dependent upon his earnings and was the only person thus wholly dependent. David MacLeod was survived by a son and daughter. Nothing is known about Lilly Cooper's paternal grandparents. David MacLeod had no expectation of being reimbursed by Lilly Cooper's father for the sums he expended on her maintenance.

"3. Parties agree that if compensation is due the amount is £222, 7s."

On these facts the Sheriff-Substitute *found in law*—"(1) That Lilly Cooper was entitled through her tutor to sue for damages or solatium in respect of the death of her maternal grandfather David MacLeod; (2) That Lilly Cooper was a 'dependant' in the sense of the Workmen's Compensation Act, and was the only dependant who was wholly dependent on David MacLeod, and is therefore entitled to compensation in respect of his death by accident; and (3) That pursuer was entitled to recover full compensation, amounting to £222, 7s. sterling, from the defenders."

The *question of law* for the opinion of the Court was—"In the circumstances narrated was the pursuer Lilly Cooper a 'dependant' within the meaning of the Workmen's Compensation Act 1897?"

Argued for the appellant—The question should be answered in the negative. A person in Lilly's position had never yet been included in the limited class of persons entitled to sue an action for damages or solatium—a class which the Court would be careful not to extend—*Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638; *Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910. The foundation of the claim was based upon two considerations, viz., (*a*) nearness of relationship, (*b*) the existence during life of a mutual obligation of support in case of necessity between the deceased and the claimant—*Eisten* and *Darling, supra*. As to (*a*), the proper nearness of relationship was wanting here—a paternal grandfather, it was true, had been recog-

nised (*Hanlin* v. *Melrose & Thomson*, June 27, 1899, 1 F. 1012, 36 S.L.R. 814) but never a maternal grandfather. As to (*b*), there was no mutual obligation of support upon either side. The deceased had to his credit *ex pietate* supported Lilly, but the legal obligation rested in the first instance upon her father until it was proved that he was dead or incapable—see *Cunningham* v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574; *Aitken* v. *Gourlay & M'Nab*, March 4, 1903, 5 F. 585, 40 S.L.R. 398—and, in the next instance, on the paternal grandfather and ascendants until similar non-existence or incapacity was proved of them. Neither was there a corresponding obligation on the part of Lilly, as it was not she, but the deceased's son and daughter, who would have been liable to support him had he become indigent—*Campbell* v. *Barclay, Curle, & Company, Limited*, February 6, 1904, 6 F. 391, 41 S.L.R 289. An excellent test to apply was to ask, against whom had Lilly a legal claim for aliment? Surely, in the circumstances, not against the deceased—see generally Erskine's Inst., i, 6, 56; Bell's Prin., 1633.

Argued for the respondent—The question should be answered in the affirmative, Lilly being a person who would have a title to sue for damages or solatium. Admittedly the question depended upon "nearness of relationship," and upon the existence of "a mutual obligation of support." Both requisites were satisfied here—grandparent and grandchild were included—*Eisten* and *Hanlin*, *cit. sup.*; Erskine's Inst., i, 6, 56; *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860—and although a paternal grandfather was liable before maternal, the latter was "liable *subsidiarie* in every case where those who are more directly obliged become indigent"—Erskine, *supra*—and therefore *a fortiori*, in every case where they were not to be found. See Fraser on Parent and Child, 3rd ed., pp. 101 and 102; *Buchanan* v. *Morrison*, January 21, 1813, F.C.; *Wilson* v. *Heritors and Kirk Session of Cockpen*, February 18, 1825, 3 S. 547. *Cf. Muirhead* v. *Muirhead*, December 15, 1849, 12 D. 356; *Chrystie* v. *MacMillan*, 1802, M. App. Aliment, 5. It was an important element here that the deceased had admitted the claim—*Parish Council of Leslie* v. *Gibson's Trustees*, February 23, 1899, 1 F. 601, 36 S.L.R. 426. The burden of proving that Lilly's father or paternal grandfather were alive and able to aliment her, lay upon her opponent, and it was quite inadequate merely to suggest that somewhere or other in the world there might be someone upon whom that burden should fall instead of on the deceased—*Hamilton* v. *Hamilton*, March 20, 1877, 4 R. 688, 14 S.L.R. 448; *Duncan* v. *Duncan*, May 25, 1882, 19 S.L.R. 696; *Bell* v. *Bell*, March 1, 1890, 17 R. 549, 27 S.L.R. 437. Further, the fact that the deceased was survived by a son and daughter of his own did not relieve Lilly from the counter obligation of supporting him if he became indigent; it merely suspended its fulfilment. The cases of *Weems* v. *Mathieson*, May 31, 1861, 4 Macq. 215; and *Miller* v. *Harvie*, December, 24, 1827, 4 Murray 385, were also referred to in the course of the debate.

At advising—

LORD STORMONTH DARLING—From the case stated by the Sheriff-Substitute it appears that all the conditions were present which raise a liability in the employers to pay compensation to the petitioner if she can be regarded as a "dependant" of the workman at the time of his death within the meaning of the Act. Parties have agreed as to the amount of compensation, if compensation is due. According to the definition of "dependants" applicable to Scotland, the expression means "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."

The question accordingly is, would Lilly Cooper (who is a girl ten years of age), according to the common law of Scotland, have had a title to sue the employers for damages or solatium in respect of the death of David Macleod, her maternal grandfather, by whose earnings she was entirely supported for about eight years down to the time of his fatal accident? That being a question turning on the common law, it of course presupposes that the pursuer would have been able to show in an action of damages that the death of David MacLeod had been due to the fault of his employers. On that necessary assumption both parties are agreed that the common law is most conveniently explained by Lord President Inglis in *Eisten* v. *North British Railway Company*, 8 Macph. 980, in a well-known passage at p. 984 of the report, where he states the "derivative claim" which the law of Scotland allows for the death of a relative as partly founded on near relationship and partly on the existence during life "as between the deceased and the claimant of a mutual obligation of support in case of necessity." The question is thus narrowed down to this—Did there exist between Lilly Cooper and David MacLeod a mutual obligation of support in case of necessity—an obligation which the law would enforce?

Now, the Lord President does not mention expressly as among the relationships between which there existed such a mutual obligation of support that of grandfather and grandchild; but I think he must be held to have done so by implication when he spoke of the relationship of parent and child, for two of his colleagues (Lords Deas and Ardmillan) in agreeing with him referred to the Scottish practice having been to draw the line at "ascendants and descendants." They had ample warrant for doing so, for Mr Erskine in his Institutes (i, 6, 56) after speaking of the natural obligation of the father to support his children (and adding that it is not merely natural, for the performance of it by fathers may be compelled by the civil magistrate according to their station in life and the measure

of their fortune) goes on to say—"It is not limited to the father alone, though he, as the head of the family and as the sole manager of the goods in communion, is bound most directly and in the first place; but in default of the father, who is the ascendant in the first degree, either through death or incapacity, the burden of maintaining the children falls upon his father or the children's paternal grandfather, and so upwards upon the other ascendants by the father, and failing them upon the mother and the ascendants by her." I do not of course mention the fact as bearing on the law of Scotland, but in construing a statute applying to all the three kingdoms it is satisfactory to find that in Lord Campbell's Act of 1846 (which is the test made applicable to England and Ireland of the meaning of "dependants") the word "child" is defined as including "grandson" and "grand-daughter" when it enumerates those for whose benefit the action is to be brought in respect of the death of a "parent," whom in like manner it defines as including "grandfather."

I cannot doubt therefore that the relationship between grandfather and grandchild is quite close enough to make the grandchild a "dependant" of the grandfather, if the grandchild was in fact supported by his earnings at the time of his death. For that proposition as applicable to this very Act it would be enough to cite the case of *Hanlin* (1899), 1 F. 1012, were it not that that case is distinguished from the present in two respects—(1) that the father of the claimants had died two years before the grandfather, and (2) that the grandfather was a paternal instead of a maternal grandfather. It is these two points of distinction which seem to me to create the only difficulty in this case. But I do not think that either of them makes any real difference in principle when regard is had to the true nature of the reciprocal obligation of support.

Let me first deal with the point of the relationship being on the mother's side. We are told in the case that "nothing is known about Lilly Cooper's paternal grandparents." What *is* known is that her mother's father accepted and fulfilled the obligation of supporting her for eight years before his death. The suggestion is that it would have been a good answer in his mouth to a legal demand for aliment to say that the child must first find out and discuss her paternal grandparents. But would it have been a good answer? To say so is, I think, to mistake the true nature of the demand for aliment. The demand is founded not merely on relationship in the ascending degree, but on ability to discharge the obligation, combined with the immediate necessity of the person making the demand. It is a demand which will not brook delay. Though Mr Erskine lays it down that a certain order of liability is to be observed, that is all subject to the condition that there must also be ability to afford the aliment. Accordingly, in 1825, a case arose with the *Heritors and Kirk Session of Cockpen*, from whom relief had been claimed by a widow and five infants, on the one hand, and the paternal and maternal grandfathers of the children on the other. The maternal grandfather did not deny his liability for the aliment of his daughter (the mother of the children) and allowed decree to pass against him for her aliment and that of three of the children whom he had consented to maintain. The paternal grandfather resisted the action on the ground of his own necessitous condition, and the Court, after receiving a report from the minister of the parish, held that he should be exempted from payment of aliment and even from the obligation of receiving the remaining children into his house, on the ground that any payment of money would reduce him and his invalid wife to the condition of paupers. The case is reported in 3 S. 547. Therefore I cannot think that the mere order of liability of ascendants would have formed any good defence to an action of damages in respect of the death of David MacLeod, in the absence of averment that the paternal ascendants would have been in a position to perform the duty of support.

The same may be said—though I own the question is more difficult—about the disappearance of the father. All that we know about him is that for eight years he has never been heard of, and it is not known whether he is alive or dead. Could a child in destitution say more? The necessity of such an averment by a defender as I have last figured is illustrated by the case of *Hamilton*, (1877) 4 R. 688, where a father who had fallen into indigence sued one of his four children for aliment. Undoubtedly all the four children were equally liable. But the defender's plea that the action should be dismissed because they had not also been called was repelled, for want of an averment that they had a superfluity of means after providing for themselves and their families. In short, it is not a sufficient answer to a claim for aliment to say that there may be somebody, even a father, knocking about the world, who is primarily bound to supply the aliment. The question remains—can he be found, and found in a condition to supply the aliment? If it be said that it is hard to throw this duty on a stranger who may be without fault in causing the death of the person who in fact alimented the claimant, the answer is, it is the statute which creates the duty, and creates it by a definition which assimilates the position of the employer to that of one who *is* in fault.

I come therefore to the conclusion that disappearance of the person primarily liable for a substantial period is, for all practical purposes—and the necessity for aliment is eminently a practical matter—the same thing as death. It has been so treated in the few cases that have arisen at common law. Mr Erskine, when he speaks in the passage I have referred to, of the burden being laid on remoter ascendants "in default of the father either through death or incapacity," obviously, I think, means

by "incapacity" inability to perform the duty of maintenance. So, in *Bell* v. *Bell*, (1890) 17 R. 549, where a grandfather was sued for the aliment of his son's child—the son having left for South Africa nine months before without communicating his intention to his wife or making any provision for her or his family—the defender was assoilzied, not because the father of the child might be, and probably was, alive, but because the duty of alimenting his grandchild must be left to be discharged in the way least burdensome to himself, and he had offered to take the child into his own house. But no doubt was cast on the liability of a grandfather to aliment his grandchild in the circumstances; indeed Lord Adam began his opinion by expressly asserting it.

I am therefore for answering the question of law in the affirmative, and sustaining the Sheriff-Substitute's decision.

LORD ARDWALL—This is a stated case from the Sheriff Court of Fife and Kinross at Dunfermline in the matter of an arbitration under the Workmen's Compensation Act 1897. The facts are clearly stated in the case, and the question of law is—In the circumstances narrated, was the pursuer Lilly Cooper a "dependant" within the meaning of the Workmen's Compensation Act 1897?

By section 7, sub-section 2, of that Act "dependants" are declared to mean "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 that as far as the latter part of this definition is concerned the pursuer's circumstances bring her within the definition, for it is stated in the case that at the time of the death of David MacLeod, who was the workman in respect of whose death the present proceedings have taken place, she was wholly dependent upon his earnings, and was the only person thus wholly dependent. The question remains whether she was a person entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of David MacLeod. I am of opinion that she was. Both parties agree in adopting the law regarding the right to sue for damages and solatium as laid down by Lord President Inglis in the case of *Eisten* v. *North British Railway Company*, 8 Macph. at page 984. The Lord President there says—"It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life as between the deceased and the claimant of a mutual obligation of support in case of necessity." What description of relationship is necessary is settled in the case of *Eisten*, following on that of *Greenhorn* v. *Addie*, 17 D. 860, to the effect that brothers and sisters and other collateral relatives of a deceased person have no title to sue such actions in respect of his death, that right being confined to ascendants and descendants. Now, the relationship of the deceased to the claimant was that of maternal grandfather, she was accordingly a descendant of the deceased. It was decided in the case of *Hanlin* v. *Melrose & Thomson*, 1 F. 1012, that the right to claim solatium and damages was not limited to children and parents, but extended to grandparents and grandchildren. In the same case it was decided that a mutual obligation of support existed between a child and his paternal grandfather.

The next point to be determined is whether a maternal grandfather is in the same position as a paternal grandfather. Now, so far as degree of relationship goes it would appear that no distinction can be drawn between the two, but with regard to the mutual obligation to support, a maternal grandfather is only *subsidiarie* liable as in a question with a paternal grandfather. That he is so liable, however, for the support of his grandchild seems to be settled by what is said in Erskine's Institutes, i, 6, 56. He says in speaking of the obligation to aliment—"It is not limited to the father alone, though he as the head of the family and the sole manager of the goods in communion is bound more directly and in the first place. But in default of the father, who is the ascendant in the first degree, either through death or incapacity, the burden of maintaining the children falls upon his father or the children's paternal grandfather, and so upwards upon the other ascendants by the father, and failing this upon the mother and the ascendants by her. And though the grandfather is not in the common case obliged to maintain any of the issue of his daughter, because daughters are by marriage transferred from their father's family to that of her husband, yet the law makes him liable *subsidiarie* in every case where those who are more directly obliged become indigent."

I consider it to be established by these authorities that the pursuer would have been entitled to sue an action of solatium and damages in respect of the death of her deceased maternal grandfather David MacLeod both on account of her nearness of relationship and because there existed between them "a mutual obligation of support in case of necessity."

It is said, however, for the appellants that the pursuer does not come within the required category, because it does not clearly appear on the case as stated that her father was either dead or indigent, but I do not see that this has much bearing on the question, because, in the words of Lord President Inglis, it is sufficient if there is a mutual obligation of support "in case of necessity," and that undoubtedly did exist, according to the passage above quoted from Erskine, between the child and her maternal grandfather. But if it were necessary to hold not only that such an obligation would come into operation in case of necessity but that it was in operation at the time of the death of David MacLeod, I would be prepared to hold that

that condition was satisfied, because, according to the case, the pursuer's father has not been heard of for eight years, has contributed nothing to her support all that time, and it is not known whether he is alive or dead. I accordingly think that in that state of matters, and nothing being known about the paternal grandparents, the deceased David MacLeod in default of nearer relatives was liable in the support of the pursuer, and that there were no nearer relatives available to afford support to the pursuer seems to be sufficiently established by the fact that David MacLeod undertook the burden of the pursuer's support for the last eight years.

But it was further argued for the appellants that as David MacLeod was survived by a son and daughter the pursuer's title to sue an action of solatium is excluded by the existence of these nearer relatives. I cannot assent to this proposition. The pursuer fulfils, as I have already explained, both the requirements set forth in the dictum above quoted from Lord President Inglis' opinion in *Eisten's* case, and has therefore a right to sue an action of solatium and damages in respect of the death of David MacLeod, and the fact that there are two persons nearer in degree of relationship who also are entitled to sue such an action has not the effect, in my opinion, of excluding the pursuer's title to sue, although her remoter degree of relationship might affect more or less the question of amount of damages if the matter had ever come to be submitted to the determination of a jury.

For these reasons I am of opinion that the decision of the Sheriff-Substitute is right, and that the Court ought to answer the question of law in the affirmative.

LORD JUSTICE-CLERK—I concur with your Lordships. Three questions arise in the case—1. Was there a claim? 2. Has the operation of that claim been put an end to by the accident? 3. Has the person who has the claim a right to compensation in respect of the death of the person upon whom the claim existed?

Here I have no doubt there was a claim. It was a claim for present sustenance. Such a claim may, I think, be directed against the nearest relative on whom at the time the claim can be made operative. In this case the questions are—1. Was the maternal grandfather responsible? and 2. was it a necessary condition that all other persons primarily liable should be discussed first, and that if this was not done must the support given by the deceased be held to be given *ex pietate* and not as of obligation? On the grounds stated by your Lordships I am of opinion that an ascendant on the mother's side is within the range of the obligation. If so, it is here ascertained that the claim was made during the life of the maternal grandfather, and was accepted by him in default of the father's residence or survival being known. I have no doubt on the question whether, had he resisted the claim, he could in the circumstances have been compelled to give the aliment. That being so, I have equally no doubt that the death of the grandfather by an accident while in the appellants' employment places them in the position under the Act of providing compensation for the loss of the support afforded by the deceased.

The LORD JUSTICE-CLERK stated that LORD LOW, who was absent at the advising, concurred in the judgment.

The Court answered the question in the affirmative.

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

Counsel for the Respondent—G. Watt, K.C.—Wilton. Agent—P. R. Tullo, S.S.C.

Tuesday, February 26.

FIRST DIVISION.

(SINGLE BILLS.)

SHERIDAN *v.* PEEL.

Process—Proof—Recovery of Documents—Diligence—Reparation—Slander—Malicious Charge of Theft—Documents in Hands of Crown Officials.

A mortgage broker's clerk, who had been summarily dismissed, brought an action against his employer to recover damages for an alleged malicious charge of theft made against him to the procurator-fiscal, upon which he had been arrested. The charge which was alleged to have been made was of the theft of certain letters from would-be clients of the employer. The employer admitted having complained to the procurator-fiscal of the conduct of the pursuer, who, he alleged, had improperly communicated to his competitors applications by would-be clients.

The pursuer sought a diligence to recover (1) all letters passing between the pursuer and the defender or his clients; (2) communications passing between the defender and the procurator-fiscal having relation to the complaint made by the defender; (3) the charge books and notes of the procurator-fiscal, that entries dealing with the complaint might be taken; and (4) the precognition taken of the defender by the procurator-fiscal.

Held that (1), (3), and (4) must be disallowed, but that (2), intimation having been given to the Lord Advocate, who had adjusted the article and did not object, was to be allowed. *Henderson* v. *Robertson*, January 20, 1853, 15 D. 292, *followed.*

Observations per the Lord President as to recovery of documents in custody of Crown officials. *Forbes* v. *Gracie*, October 29, 1901, 9 S.L.T. 217, *disapproved.*

On 9th July 1906 Thomas Patrick Sheridan, mortgage broker's clerk, 271 Camberwell