in the Dean of Guild's interlocutor. The respondents, Walter Bannerman's trustees, are in right of a contract of ground annual entered into in 1851 between James Grierson and others, and Walter Bannerman. That deed was recorded 7th March 1851. The petitioners again are in right of another contract of ground annual entered into a little later between the same disponers, James Grierson and others, and James Scott, recorded 5th June 1851; and the question is whether the respondents are entitled to enforce against the petitioners, whose property adjoins that of the respondents, certain building restrictions which occur in Scott's title.

In Bannerman's title the disponers imposed upon the disponee certain building restrictions, and bound themselves to insert similar clauses and conditions in the conveyances of other ground belonging to them fronting Bath Street, "to the benefit of which the said second party is hereby assigned." This they did in so far as Scott was concerned; but then Scott's title contains nothing which amounts to a *jus quæsitum* to Bannerman, or anything to indicate that the disponers had in Bannerman's title inserted similar clauses which Scott should have right to enforce, or that they undertook to insert such clauses for Scott's benefit in subsequent dispositions.

Secondly, there is no common building plan from which mutuality might be inferred.

There is thus an absence of the necessary evidence in the titles that Scott ever agreed that these restrictions should be enforceable against him by neighbouring proprietors. It is not immaterial to observe that the contract with Scott does contain a declaration expressly imposing upon him in favour of Walter Bannerman one servitude in connection with a meuse lane.

The appellants found separately on the words "to the benefit of which the said second party is hereby assigned" which is in Bannerman's title. In my opinion the assignation of the benefit of the restrictions and conditions which in Bannerman's title the disponer undertook to introduce in subsequent dispositions cannot be read as an assignation of the disponer's right to enforce the restrictions. Such an assignation—that is, an assignation of a superior's or disponer's right to enforce conditions of a contract apart from a conveyance of the disponer's reserved estate—would be unprecedented. I am not prepared to give the words that meaning. The only meaning which can legitimately be given to them is that when the conditions are introduced into subsequent rights Bannerman is intended to have and will have the benefit of them.

LORD YOUNG concurred.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD TRAYNER was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Dean of Guild.

Counsel for the Petitioners and Respondents—Campbell, K.C.—Craigie. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondents and Appellants—Wilson, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles.

LEGGET & SONS *v.* BURKE.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7, *sub-sec.* 2—*—Dependants—Person in Part Dependent—Father and Son.*

A mason's labourer aged sixty-three, who earned a wage of £1, 2s. 6d. per week, claimed compensation under the Workmen's Compensation Act 1897 for the death of his last surviving son and child, which occurred under circumstances to which the Act applied, on the ground that he was wholly or in part dependent upon the earnings of the deceased at the date of his death. The deceased had lived in family with the claimant, a sister of the claimant who acted as housekeeper to the family, and a crippled brother of the claimant who was unable to earn anything, but towards whose support the other brothers and sisters of the claimant contributed. The deceased had contributed a large part of his wages when in work towards the family expenses, and had paid the rent for the current year. In consequence of the death of the deceased the claimant was unable any longer to keep up a house of his own, and had been obliged to occupy a room in the house of a married sister. *Held* that the claimant was at the date of his son's death in part dependent upon the earnings of the deceased in the sense of the Workmen's Compensation Act 1897.

Question whether this was not a pure question of fact upon which appeal was not competent.

This was an appeal upon a stated case from the Sheriff Court of the Lothians and Peebles at Edinburgh in an arbitration under the Workmen's Compensation Act 1897 between Robert Legget & Sons, tanners, Damside, Water of Leith, Edinburgh, appellants, and William Burke, mason's labourer, Edinburgh, claimant and respondent.

Burke claimed from the appellants the sum of £150 as compensation in respect of the death of his son Andrew Burke.

The facts which the Sheriff-Substitute (HENDERSON) found proved or admitted were as follows:—"Andrew Burke, the respondent's son, died upon 23rd April 1901 at the age of twenty-two from injuries which he received in consequence of an

accident that day, which arose out of and in the course of his employment in the appellants' tannery, which is a factory within the meaning of the Workmen's Compensation Act. He was employed by the appellants at the date of his death as a labourer at a wage of 17s. a-week, and met with the accident which caused his death on the first day of his employment by them. He was the last surviving son and child of the respondent, and lived in family with him. The respondent, who is a widower, sixty-three years of age, is a mason's labourer, and earns, and has for the last three years earned, an average weekly wage of £1, 2s. 6d. In addition to himself and the deceased, the respondent at the time of his son's death had in family with him a sister who acted as housekeeper for him and the deceased, and had while so acting no other means of support, and a cripple brother who was unable to earn anything, but towards whose maintenance the respondent's other brothers and sisters contributed either in money or provisions. The deceased during his apprenticeship, when his earnings were 10s. a-week, was in the habit of contributing to the household expenses almost to the full extent of his earnings. After the expiry of his apprenticeship, which took place on 30th September 1899 until some nine weeks before his death, the deceased contributed more largely to the family expenses, his contributions amounting to between 16s. and 20s. a-week. His earnings during this latter time averaged £1, 9s. 11½d. per working week. The respondent's sister had become housekeeper to the respondent and deceased, at the deceased's request, and her so acting saved the cost of a paid charwoman, who had received when so employed 2s. a-day. In consequence of the death of his son the respondent was unable any longer to keep up a house of his own, the deceased having after the expiry of his apprenticeship and while he was in full work, paid the rent (£9 a-year), taxes, and gas of the house they lived in, and the respondent has since been obliged to occupy a room in the house of a married sister, whither his housekeeper sister and his cripple brother also removed. For nine weeks prior to his death the deceased was out of work and earning no wages, during which time the household was dependent on the respondent's own earnings and upon what the housekeeper sister obtained by pawning her personal property. The respondent suffers from rheumatism, and is not therefore in the future certain to be able to work regularly at his occupation as a labourer."

On these facts the Sheriff-Substitute held in law that the respondent, at the time of his son's death, was in part dependent on the earnings of the deceased, and assessed the compensation due to him at £75, for which sum he granted decree against the appellants, and also found them liable in expenses.

The question of law for the opinion of the Court was—"Whether in these circumstances the respondent at the date of the death of his son Andrew Burke was in part dependent upon the earnings of the said Andrew Burke in the sense of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts as follows:—Sec. 7 (2)—"Dependants means— . . . (*b*) in Scotland, such of the persons entitled, according to the law of Scotland, to sue the employer for damages or solatium in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death."

Argued for the appellants—The Sheriff-Substitute had put a wrong interpretation on the words "in part dependent." "Dependants" was defined in section 7 of the Act, sub-section 2 (*b*), as meaning "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." In the present case the deceased was not supporting his father, but was himself in receipt of support. The respondent was supporting his cripple brother from charitable motives, and his employment of his sister as housekeeper was solely for his own convenience. Therefore there was here no "family" in the sense used by the Lord Chancellor in the case of *Davies* (cited *infra*), for the obligation which the respondent had taken upon himself was purely voluntary. The legal obligations alone ought to be taken into account. The Sheriff-Substitute had also been influenced by facts which ought not to have weighed with him in deciding the legal question, *e.g.*, the fact that the respondent was suffering from rheumatism and might not in future be able to work regularly at his occupation as a labourer. The question of what was meant by "dependants" had been considered so far as regards England in the case of *Simmons* v. *White Brothers*, March 11, 1899 [1899], 1 Q.B. 1005; and the *Main Colliery Company, Limited* v. *Davies*, June 22, 1900 [1900], A.C. 358; and as regards Scotland in *Cunningham* v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574.

Argued for the respondent—There were persons living in family with him, for his sister had become housekeeper to him and the deceased at the latter's request, and her so acting had saved the cost of a paid charwoman. The mode of the respondent's life must be looked at in order to see if there was actual pecuniary deprivation by the death of his son. Now, in consequence of his son's death the respondent had to give up his house and to occupy a room in the house of a married sister. The fact that the person alleged to be a dependant of a workman can maintain himself without the deceased's assistance does not of itself prevent him from being a dependant—*Howell* v. *Vivian & Sons*, November 8, 1901, 18 T.L.R. 36.

At advising—

LORD JUSTICE-CLERK—In this case the question is whether the Sheriff-Substitute must be held to have committed an error in law in holding that the respondent was in fact dependent upon the earnings of his son, who was killed by an accident while in the appellants' employment. I am unable to hold that there is any ground for finding that such error was committed. The deceased contributed to the support of the household of his father, who suffers from rheumatism so as to be in an uncertain state as to power for regular labour. It is true that the father was doing his best to help a crippled brother, for whose support he was, of course, not liable. The whole family seem to have assisted this crippled relative. That was a fact to be taken into account in considering the case, but in no way was conclusive on the question of partial dependence on the son's earnings for his own support. I am of opinion that on the facts before him as stated in the case, it was open to the Sheriff-Substitute to find partial dependence to have existed, and that the appeal should be refused.

LORD YOUNG—I think that the Sheriff is right.

LORD MONCREIFF—The respondent in this appeal is the father of the deceased workman. He therefore is a "person entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman," and thus satisfies the first part of the definition of the word "dependent" given in the statute, section 7 (2). But he is not entitled to receive compensation unless it is proved that he was "dependent on the earnings of the workman at the time of his death." The Sheriff-Substitute, acting as arbitrator, has held that the respondent was in part dependent on the earnings of the deceased, and assessed the compensation at £75. Against that judgment the employers have appealed by a stated case, the question put to us being whether in the circumstances stated the respondent was in part dependent upon his son's earnings at the date of the latter's death.

We cannot entertain this appeal unless it raises a question of law; and assuming that it does, we cannot sustain it unless we are satisfied that there was no evidence on which the Sheriff-Substitute was entitled to decide as he did. I greatly doubt whether any question of law is raised, because assuming that the person claiming compensation possesses the requisite title in point of relationship, the question whether he was dependent, and if so, to what extent, seems to me to be a question of fact to be decided by the arbitrator.

The only way in which such a case can be represented as raising a question of law is that on the statement in the case there is no evidence to support the arbitrator's finding, and on that footing such appeals have been considered—*Simmons* v. *White Brothers*, L.R., 1899, 1 Q.B. 1005, and *The Main Colliery Company* v. *Davies*, L.R. 1900, App. Ca. 358.

If this appeal is competent to any extent, I can only say that I cannot affirm that there was no evidence to support the finding of the Sheriff-Substitute. We have nothing to do with the amount which he has awarded. That is not before us, and therefore we are not called upon to consider how much the award has been increased or diminished by the consideration that the respondent was burdened with the support of a brother and sister.

While I should have preferred to find that no question of law is properly raised, I am prepared to concur in answering the question put to us in the affirmative.

LORD TRAYNER was absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties to the stated case, answer the question of law therein stated in the affirmative: Therefore affirm the award of the arbitrator and decern: Find the respondent entitled to expenses since the date of the award of the arbitrator, and remit," &c.

Counsel for the Appellants—M'Kenzie, K.C.—Macphail. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Respondent—Crabb Watt—Sanderson. Agents—Wishart & Sanderson, W.S.

Tuesday, March 11.

FIRST DIVISION.

PROVOST, MAGISTRATES, AND COUNCILLORS OF ROTHESAY *v.* CARSE.

Burgh—Town Clerk—Dismissal by Magistrates—Interim Appointment—Public Officer—Nobile Officium.

A town clerk of a royal burgh was dismissed on the ground of incapacity by resolution of the provost, magistrates, and council. He refused to vacate office, and an action was brought to have the dismissal declared valid. While this litigation was pending the provost, magistrates, and council presented a petition in which they averred incapacity and excessive indulgence in alcohol on the part of the clerk, and also that he had been sequestrated, that the depute town clerk had resigned, and that owing to the relations of the parties it was impossible to carry on the business of the burgh. The Court in these circumstances *appointed* an interim clerk to act pending the litigation.

This was a petition by (1) The Provost, Magistrates, and Councillors of the Royal Burgh of Rothesay, acting as such, and as Commissioners for the said burgh, and as local authority under the Roads and Bridges (Scotland) Acts, the Public Health