here an express clause fixing the time of vesting—fixing it like the term of payment at the date when the youngest child of the truster reaches twenty-five years of age—and so fixing it quite generally, with respect to the interest of each child, and without so far as appears any reference to the question whether there were ultimately more children than one. I am not, I confess, prepared to expunge and read out of the settlement this express clause and the clauses which form its context; and, standing these clauses, they appear to me conclusive against the claim now made. It may be true that the expression "youngest child" is not strictly appropriate where only one child survives. The same might be said where only two children survive. But the expression is in a quite intelligible sense applicable to a youngest surviving child—a child, that is to say, who has ceased to have any brother or sister younger than himself. At all events, it seems to me that that is the sense in which the term is used in this settlement.

Reference was made to the case of *Maitland*, 23 D. 732, where it was said that a different view had been expressed as to the construction in a similar deed. Now, I am sure we should all be unwilling to treat, or appear to treat, that judgment with any want of respect. But it does not appear to me that anything of that kind is involved. In the first place, there has been no suggestion that the decision in that case is open to doubt. The only suggestion has been that if the case were to be decided now it would probably be so upon a simple ground, viz., this, that there was there no express postponement of vesting, that the destination-over to survivors had become inoperative, and that the destination-over to issue involved, as is now settled, only a resolutive condition. But apart from that, and with respect to the assigned grounds of judgment, we do not require or propose to express any adverse opinion. As applied to the particular deed those grounds may have been quite right. But it does not of course follow that they are applicable to a deed such as that which we have here—a deed which differs from the deed in *Maitland's* case, amongst others, in this important particular, that it contains, as I have pointed out, an express clause regulative of vesting, with a context before and after which has at least considerable significance.

On the whole matter I am of opinion that we should answer the first query in the negative and the second in the affirmative.

LORD KINCAIRNEY—I am of the same opinion as Lord Kyllachy. We must look at the deed as it stands. Vesting is postponed till the youngest child is twenty-five. There is now only one child. In that state of affairs I concur in the opinion that vesting does not take place until this sole survivor is twenty-five. It is not necessary to say what would happen if the second party died without issue.

LORD STORMONTH DARLING—I concur. The argument for the second party goes so far as to say that because there is now only one child surviving we must read out the whole of the elaborate provisions for benefit of grandchildren and for the maintenance and education of children until the youngest attains twenty-five. I cannot assent to that. I think the clause postponing vesting till the youngest child is twenty-five is of binding force, although there is now only one child.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Parties—Younger, K.C.—Hunter. Agents—J. & J. Milligan, W.S.

Counsel for the Second Party—Sandeman—W. J. Robertson. Agents—J. S. & J. L. Mack, W.S.

Thursday, July 6.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

KELLY *v.* ARROL & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (2) (*b*)—"*Dependants*"—"*Wholly or in Part Dependent*"—*Father Earning Equal Wages with Son but Receiving Allowance from Latter—Father Receiving Allowance from Son whose Income Partially Derived from Betting—Parent and Child.*

A father with no dependants earned an average wage of £1, 4s. 11d. a-week, in spite of his suffering from bronchitis and rheumatism, which sometimes prevented him from working. He was in the habit of receiving payments from a son amounting on an average to 10s. a-week. The son's average weekly wage was £1, 4s. 1d., but he practised a systematic course of betting which brought him a substantial profit. The son was accidentally killed.

Held that the father was not "in part dependent" upon the deceased's earnings at the time of his death within the meaning of section 7 (2) (*b*) of the Workmen's Compensation Act 1897.

Legget & Sons v. *Burke*. November 18, 1902, 4 F. 693, 39 S.L.R. 448, *distinguished.*

Section 7 (2) of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) provides—"In this Act '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."

Edward Kelly, labourer, was accidentally killed in the course of his employment, and his father James Kelly, boltmaker, South William Street, Perth, claimed compensation from Sir William Arrol & Company, Limited, Glasgow, his employers, under the Workmen's Compensation Act 1897. The case was brought in the Sheriff Court at Glasgow, and the Sheriff-Substitute (BOYD) awarded the claimant £78. Sir William Arrol & Company, Limited, applied for and obtained a stated case on appeal.

The following facts were set forth in the stated case as established:—"(1) That the respondent is the father of the deceased Edward Kelly, labourer, who was at the time of his death in the employment of the appellants at Provanmill Gas Works, Glasgow. (2) That on 19th April 1904 the deceased was engaged in the erection of the upright columns of a gasometer, when he fell from the top of one of the columns and was so injured that he died. (3) That the average weekly wage of the deceased was £1, 4s. 1d. (4) That besides his ordinary employment the deceased practised a systematic course of betting which brought him a substantial profit. (5) That the respondent, whose wife had died on 25th March 1902, for the past three years has suffered from bronchitis and rheumatism, which prevented him engaging in steady work, but for a period of forty weeks, from 18th July 1903 to 23rd April 1904, immediately prior to his son's death, he earned an average wage of £1, 4s. 11d. in the employment of the Locomotive Department of the Caledonian Railway Company at Perth. That during the said period of forty weeks his work was irregular by reason of his bronchitis and rheumatism, and the wages earned by him fortnightly for the said period were as follows:—

Fortnight ending	1st August 1903,	£2	16	6
,,	15th ,,	2	8	0
,,	29th ,,	2	14	7
,,	12th September	2	17	6
,,	26th ,,	1	12	11
,,	10th October	3	0	0
,,	24th ,,	2	19	8
,,	7th November	2	11	4
,,	21st ,,	2	10	0
,,	5th December	2	18	4
,,	19th ,,	3	0	0
,,	2nd January 1904	2	1	4
,,	16th ,,	1	17	3
,,	30th ,,	3	0	0
,,	13th February	1	7	6
,,	27th ,,	2	18	4
,,	12th March	3	0	0
,,	26th ,,	2	6	3
,,	9th April	2	14	7
,,	23rd ,,	1	3	6

(6) That his capacity for work is still precarious owing to his attacks of bronchitis and rheumatism. (7) That the deceased was in the habit of making payments to him which amounted on an average to 10s. per week."

On these facts the Sheriff found in law that the deceased was fatally injured while in the employment of the appellants by an accident arising out of and in the course of his employment at an engineering work of which the appellants were the undertakers in the sense of the Workmen's Compensation Act 1897, and that the respondent was partially dependent on the earnings of the deceased, and that he was entitled to compensation therefor from the appellants.

He therefore awarded the respondent the sum of £78 with expenses.

The question of law for the opinion of the Court was:—"Was the respondent in part dependent on his son the deceased Edward Kelly at the date of the latter's death within the meaning of the Workmen's Compensation Act 1897?"

Argued for the appellants—To succeed the claimant must prove (1) that he was, at least in part, dependent upon what he received from his son; (2) that what he received was "earnings." (1) He was not dependent, his wages being equal to those of his son, and sufficient to supply him with the ordinary necessaries of life for one in his position—*Simmons and Another* v. *White Brothers*, [1899] 1 Q.B. 1005; *Main Colliery Company* v. *Davies*, [1900] A.C. 358; *Robert Addie & Sons' Collieries* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85; *Moyes* v. *William Dixon, Limited*, January 13, 1905, 42 S.L.R. 319. (2) What he received was not "earnings" but betting profits, the son's wages being only sufficient for his own support.

Argued for the respondent—There was here no question of law for the Court, but merely a question of fact—*Legget & Sons* v. *Burke*, March 18, 1902, 4 F. 693, 39 S.L.R. 448. But assuming there was a question of law, there was sufficient evidence to justify the finding of the Sheriff. The father was in delicate health, and required more than the son, and the mere fact that he could have lived without assistance was immaterial. The question was what did he in fact spend—*Howells* v. *Vivian & Sons*, November 8, 1901, 18 T.L.R. 36; *Main Colliery Company* v. *Davies*, *cit. sup.*, at p. 362. There was nothing in the case to show that the payments were not made out of earnings, and it was certain that had it not been for his earnings the son could not out of his betting profits have both supported himself and made payments to his father.

LORD JUSTICE-CLERK—The facts in this case are that the respondent is a workmen who is a widower and has no dependants, that he is occasionally off work from bronchitis and rheumatism, but that he is able to earn an average weekly wage amounting to £1, 4s. 11d., and has done so continuously for years up to the time of the petition being raised. His son, in consequence of whose death the claim is made, was a workman whose average wages amounted to £1, 4s. 1d. He was addicted to betting and was successful, the case stating that he made a substantial profit. He gave his father sums which amounted to 10s. a-week on an average.

These being the facts, the Sheriff, acting as arbitrator, has found that the respondent was partially dependent upon the earnings of the deceased, and has awarded compensation accordingly.

I am unable to agree with the learned Sheriff. There is, as I think, no ground for saying that at the time of the son's death the respondent was in any way dependent upon the earnings of the deceased. Each of the two persons, father and son, were earning wages quite sufficient for their maintenance respectively, and the father having no dependants cannot be said not to have had by his own earnings fully provided for his necessities as a working man. He was in fact earning a little more per week than the son was doing. It is difficult to see how, if it is a question of earnings, the father should have been dependent on the son, seeing that whatever the son might give to the father out of earnings would necessarily bring what he had for his own maintenance far below what, *ex hypothesi*, was necessary for the father's maintenance. If, as it appears from the case, the son made money by betting, and chose to give his father a share of his illgotten gains, I cannot see how that can affect the present question, which is whether the respondent made a loss by the death of his son in consequence of there no longer being a source of assistance to him from his son's earnings in the work at which he was killed, and on which source, from his own inability to earn wages himself, he was wholly or partially dependent. The father and son were making earnings for themselves of similar amount in each case. To say that in these circumstances the one was dependent on the other to the effect of making a substantial inequality in favour of the father seems to me to be an untenable proposition. I say this with full consideration of the case of *Legget*. That case decided nothing as regards the position here, in which the father stands in no special circumstances as regards other members of the family. He is a lone man with no burdens, legal or moral.

I therefore am of opinion that the question should be answered in the negative.

LORD KYLLACHY—In this case we do not, I think, require to lay down or adopt any general rule as to what constitutes dependence or partial dependence in the sense of the statute. The facts are, it appears to me, such that applying any rule or test or standard which has yet been suggested, the claim here is outside the statute.

It is not necessary to go into particulars. But I may say this, that for myself I cannot conceive of a man of fifty-four without wife or family, and earning a wage of 25s. a-week, being in any reasonable sense dependent on a son residing in a different town and earning 24s. a-week. Exceptional cases may of course always be figured. But in any ordinary circumstances I do not, I confess, see how, as between a father and son placed as the father and son were placed here, there could be as regards maintenance, or even comfortable maintenance, either need of help on the one hand or obligation—legal or moral—to give help on the other. It may be true, as found by the Sheriff, that the son did for some purpose, and from some source, send his father from time to time sums amounting, it is said, on the average to 10s. a-week. But a parent who has a wage which is sufficient for his support is not, I think, in any reasonable sense dependent upon his family merely because they, or some of them, may have from time to time been in the way of making him presents, larger or smaller.

Moreover, in this connection it is impossible to overlook what is found by the Sheriff that this unfortunate "deceased practised a systematic course of betting which brought him a substantial profit." It is at least probable that the 10s. a-week referred to was in whole or in part derived from that source—a source which I do not suppose can be taken into account in a question of dependence on earnings.

I have not, I should add, overlooked that the respondent (the father) has for some years been subject to attacks of rheumatism and bronchitis, and that his power of wage-earning may be to some extent thereby impaired. That may be so. But still, with all his disabilities, he has on an average of forty weeks been earning 25s. a-week, and, so far as appears, there is in present circumstances no prospect of any change for the worse.

LORD KINCAIRNEY—The question of law stated in this case is whether the applicant was within the meaning of the Workmen's Compensation Act in part dependent on his son who has been killed. The admitted facts are that the father and his son have earned for a considerable period nearly the same weekly wage, which was about £1, 4s. per week, and may be held to have been sufficient for the maintenance of each of them. But it is said that the applicant's capacity for work is precarious owing to bronchitis and rheumatism. The applicant has no dependant living with him. It seems probable that his deceased son did live with him, but I do not see that that is stated. The somewhat singular averment is made that the deceased made a substantial profit by a systematic course of betting. It is further stated that the deceased was in the habit of paying his father 10s. per week, but whether that payment was made out of his earnings or out of the profits of his betting does not appear. If, as I assume, he lived with his father, that payment may, I think, be regarded as made for board and lodging.

The applicant referred to various cases decided in England, among which may be noticed in particular *Howell* v. *Vivian*, 1901, 7 English Law Reports 36, and *Legat* v. *Bank*, which is somewhat closely in point. In that case a father was found entitled to a compensation for the death of his son. But in that case there were resident in family with the father the deceased himself, a cripple brother unable to earn anything, and a sister of this father's. That was the family to the

support of which the deceased had contributed. It was held, apparently with some hesitation, that the award should be confirmed. I do not think the cases should be carried further than in that case, and am prepared to hold that there is no relevant averment of dependence in this case.

LORD STORMONTH DARLING was not present.

The Court answered the question in the negative.

Counsel for the Appellants—Younger, K.C.—C. D. Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—G. Watt, K.C.—C. A. Macpherson. Agents—Coutts & Palfrey, S.S.C.

Thursday, July 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.

CLIPPENS OIL COMPANY, LIMITED *v.* THE EDINBURGH AND DISTRICT WATER TRUSTEES.

(See *ante*, February 22, 1901, 38 S.L.R. 354, 3 F. 1113; November 27, 1900, 38 S.L.R. 121, 3 F. 156; June 7, 1899, 36 S.L.R. 710, 1 F. 899; February 3, 1898, 35 S.L.R. 425, 25 R. 504; December 17, 1897, 35 S.L.R. 304, 25 R. 370).

Process—Expenses—Amendment of Record—Court of Session Act 1868 (31 *and* 32 *Vict, cap.* 100), *sec.* 29—*Public Authorities Protection Act* 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*a*).

A mineral company having raised against a body of water trustees an action for damages on account of an interdict wrongously obtained against them, were after a proof awarded damages by the Lord Ordinary. The defenders, having reclaimed, moved for leave to amend their record by adding a plea under the Public Authorities Protection Act 1893, section 1, which if sustained would render the action incompetent. The respondents opposed the motion on the ground that the amendment should only be allowed on payment of all expenses already incurred since the closing of the record. *Held* that the amendment should be allowed and the question of expenses reserved.

Keith v. *Outram & Company*, June 27, 1877, 4 R. 958, 14 S.L.R. 591, *commented on* and *distinguished.*

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 29, enacts—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper. . . ."

The Clippens Oil Company, Limited, brought an action against the Edinburgh and District Water Trustees, to recover damages in respect of a wrongous interdict obtained against the pursuers, in restraint of their mineral operations by the defenders on 16th March 1897.

Proof was led before the Lord Ordinary (PEARSON), who by interlocutor of 18th March 1905 found the defenders liable to the pursuers in £15,000 damages.

On 6th April 1905 the defenders reclaimed, and on 3rd July 1905 lodged a note craving leave to amend their record in terms of a minute of amendment, by adding the following additional plea-in-law—"The present action is excluded by section 1 of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61)."

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1, enacts—"When after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof; (*b*) . . ."

The respondents objected that the amendment should only be allowed on payment of all expenses already incurred.

Argued for the pursuers and respondents—There was no authority for the proposition that there could be added to the record by way of amendment, without payment of expenses, a plea which, had it been taken earlier, would have excluded the whole action. The whole body of authority showed that expenses from the closing of the record were due by the parties putting on such an amendment—*Keith* v. *Outram & Company*, June 27, 1877, 4 R. 958, 14 S.L.R. 591; *Gray* v. *The Scottish Society for the Prevention of Cruelty to Animals*, May 22, 1890, 17 R. 789, 27 S.L.R. 906; *Morgan, Gellibrand, & Company* v. *Dundee Glen Line Steam Shipping Company, Limited*, December 9, 1890, 18 R. 205, 28 S.L.R. 171; *Gallagher* v. *Pattison*, November 10, 1891, 19 R. 79; *Murdison* v. *Scottish Football Union*, January 30, 1896, 23 R. 449, 33 S.L.R. 337.

Argued for the defenders and reclaimers—The question of expenses should be reserved. If the plea which had been added by amendment were sustained, then without doubt expenses would be due. But if it were repelled they might still succeed on other grounds, and the inequitable result would be brought about, if present payment of expenses were made, that they might have to pay the respondents the expenses of that very proof by reason of which the