was necessary for the maintenance of a child—*Valentine* v. *M'Dougall*, 1892, 19 R. 519, 29 S.L.R. 384. The rates for inlying expenses and for aliment hitherto imposed had been fixed many years ago and had at that time been adequate, but at present the cost of living had increased 100 per cent. owing to the war, and accordingly the old rates were no longer adequate in amount. The sums to be awarded should therefore be increased to £3, 3s. for inlying expenses and to £15, 12s. per annum for aliment. Counsel also referred to *A* v. *B*, (1875) 19 Journal of Jurisprudence 165.

Argued for the respondent—The cost of living had admittedly greatly increased owing to the war, but it ought to be open to the respondent in the event of an increased award being granted to apply to the Court to have the award modified should the cost of living substantially decrease after the end of the war.

At advising—

LORD JUSTICE-CLERK—After consulting with the Judges of the First Division as to the circumstances we give the pursuer decree at the rate of 4s. 6d. per week or £11, 14s. per annum, leaving the other party to apply at any time to the Court in the event of a change of circumstances. The amount of inlying expenses, £2, 2s., is not to be altered.

LORD DUNDAS, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court granted decree for £2, 2s. in name of inlying expenses, and for £11, 14s. per annum in name of aliment.

Counsel for the Appellant—R. M. Mitchell. Agent—Francis Chalmers, W.S.

Counsel for the Respondent—Macquisten. Agent—W. K. Lyon, W.S.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

FRASER AND OTHERS *v.* FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Dependency—Partial Dependency—Future Earnings—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, sec.* 1 (*a*) (*ii*).

Held that in the assessment of compensation for partial dependency under the Workmen's Compensation Act 1906 evidence as to the possible earnings of the deceased subsequent to the accident was competent and admissible.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, enacts—"(1) 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 a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of £150, whichever of these sums is the larger, but not exceeding in any case £300 . . .,-and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer; (ii) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or in default of agreement may be determined on arbitration under this Act to be reasonable and proportionate to the injury to the said dependants."

John Fraser and others, *appellants*, being dissatisfied with a decision of the Sheriff-Substitute at Glasgow (DAVID J. MACKENZIE) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by the appellants against the Fairfield Shipbuilding and Engineering Company, Limited, appealed by Stated Case.

The Case stated—"The following *facts* were established:—1. That the appellants are the father (who represents his pupil children) and the mother of the deceased Thomas Fraser, and reside at 44 Greenfield Street Govan, Glasgow, and that the respondents are shipbuilders and engineers having their registered office at Fairfield Works, Govan aforesaid. 2. That on 11th May 1917 the said Thomas Fraser, who was then over fourteen years of age, and had been in the employment of the respondents for about three weeks as a template boy, met with an accident arising out of and in the course of his said employment by the end plate of a tank falling on him, by which he was instantly killed. 3. That the said Thomas Fraser's average weekly wage at the time of his death was 16s. 4. That the appellant, the father of the deceased, had been for some years in bad health, suffering from phthisis and pulmonary hæmorrhage, and had been a patient in Ruchhill Hospital on that account; that his pupil children Annie, aged ten, Marjory, aged seven, John, aged five, and Edward, aged one and a-half years, lived at home, and that they along with the appellants were partially dependent on the wages of the said Thomas Fraser. 5. That the weekly income of the household was made up of £1 from the Parish Council, 5s. from an approved society, 7s. being the wages of Mary Fraser, a sister of the deceased, and the wages of the said deceased (16s.), making in all 48s. per week. 6. That the cost of maintaining the deceased when alive may in the circumstances be taken at the sum of 8s. per week. 7. That the appellants were partially dependent on the deceased, and that an amount reasonable and proportionate to the injury to said dependants was the sum of £45. 8. That I sustained an objection by the respondents to evidence tendered by appellants regard-

ing the possible earnings of deceased subsequent to the accident; that the evidence which I refuse to admit was evidence as to what the deceased's earnings would have been if he had survived, and accountant's statements based on such evidence to show the loss to the various members of the family during the period of their dependency.

"I found in law that the respondents were liable in compensation to the appellants for the death of the said Thomas Fraser to the extent of £45. I therefore awarded said sum accordingly."

The *questions of law* included, *inter alia*—"Was the arbitrator right in refusing to accept the evidence tendered by the pursuers to show the injury to the various dependants on the basis of the number of years each of them would have been dependent on the earnings of the deceased?"

At the hearing in the Inner House counsel were agreed that the question as put was wrongly stated, and concurred in stating it as follows:—"Was the arbitrator entitled to refuse to admit the evidence tendered by the pursuers regarding the possible earnings of the deceased subsequent to the accident?"

Argued for the appellants—The arbitrator was bound to consider any evidence tendered as to the probable future earnings of the deceased—*Manchester* v. *Carlton Iron Company, Limited*, 1904, 6 W.C.C. 135; *Murray* v. *Gourlay*, 1908 S.C. 769, 45 S.L.R. 577; *New Monckton Collieries, Limited* v. *Keeling*, [1911] A.C. 648, 49 S.L.R. 664; *Healy* v. *Reilly*, 1917, 10 B.W.C.C. 744. In the case of *Woodilee Coal and Coke Company, Limited* v. *M'Neill*, 1917 S.C. (H.L.) 48, [1918] A.C. 43, 55 S.L.R. 15, a similar question was decided with regard to the rise or fall of wages subsequent to partial incapacity, and there was no difference in principle between that and the present case. The consideration was a relevant one at common law, and compensation under the Act was just compensation at common law within the statutory maxima — Adshead Elliott on the Workmen's Compensation Act and authorities there cited.

Argued for the respondents — Compensation under the Act was based on past earnings only, and the arbitrator was not entitled to consider future earnings. The Act had no difficulty in introducing contingent future earnings where that was so desired — First Schedule (16). In cases of partial dependency the only qualification was that the sum should be reasonable and proportionate to the injury, *i.e.*, to the loss sustained by the dependants — *Tamworth Colliery Company, Limited* v. *Hall*, [1911] A.C. 665, 49 S.L.R. 626. That case could not have been decided by the House of Lords in the way in which it was if the basis of assessment had been independent of the past earnings. It was the actual contribution at the date of death that fixed the dependants' loss, the injury consisting in deprivation of the present rate of support. On principle it was not to be supposed that the Act meant to introduce elements so speculative as those contended for by the pursuers apart from direct statutory warrant. There was no suggestion in any case to support the pursuers' contention.

At advising—

LORD JUSTICE-CLERK—The only question which we are now asked to consider is whether the learned arbitrator was entitled to refuse to admit the evidence tendered by the pursuer regarding the possible earnings of the deceased subsequent to the accident.

The answer to that question depends on the construction of section 1 (*a*) (ii) of the First Schedule. That part of the schedule deals with the compensation to be awarded when death results from the injury and the workman leaves no dependants wholly dependent on him, but only dependants in part dependent upon his earnings as is the case here. In these circumstances, as I read the statute, the amount of compensation is to be such sum as failing agreement may be determined by arbitration to be reasonable and proportionate to the injury to the said dependants, provided always that the sum awarded must not exceed the amount payable under section 1 (*a*) (i) of the schedule.

In my opinion the injury for which compensation is to be given to partial dependants is the loss of that support upon which they depend or the loss due to the "cessation of the workman's power of earning" (*New Monckton Collieries Limited.* v. *Keeling*, [1911] A.C. 648, 49 S.L.R. 664). It is not clear what the precise ground was on which the arbitrator disallowed the evidence tendered. If it was on the ground that, even assuming it was proved (as I have no doubt it would have been proved) that the deceased would, while the dependency continued and he survived, have come to earn larger wages than he was earning at the time of his death, but that in the judgment of the arbitrator that would not have led him to increase the compensation awarded—a result which as I think he might well have reached, *e.g.*, if there was no sufficient evidence to show that the boy would have increased his contributions to the family maintenance—then in my opinion we could not have interfered with his decision. But as it does not appear what was the precise ground of the refusal to admit the evidence I agree that the case should be remitted back. I think the proper form of interlocutor was that which was adopted in the case of *Dobbie* v. *Egyptand Levant Steamship Company*, 1913 S.C. 364, 50 S.L.R. 222.

LORD DUNDAS—As this case was presented to us, three questions were submitted for judgment. In the course of the discussion, however, senior counsel came to be agreed that the decision of the Court was only desired upon one question, which they concurred in stating as follows:—"Was the arbitrator entitled to refuse to admit the evidence tendered by the pursuers regarding the possible earnings of the deceased subsequent to the accident?"

The appellants are the father, who represents his pupil children, and the mother of the deceased Thomas Fraser. On 11th May 1917 Thomas Fraser, aged fourteen, met with an accident arising out of and in the

course of his employment with the respondents, by which he was instantly killed. The learned Sheriff-Substitute found that the appellants were partially dependent upon the deceased and awarded compensation. The nature of the evidence which he declined to admit is indicated generally in the eighth finding.

A point of novelty and importance is raised upon the construction of section 1 (*a*) (i) and (ii) of the First Schedule of the Act. These sub-sections prescribe the compensation which shall be awarded where death results from the injury. Sub-section (i) is concerned with the case where a workman leaves dependants wholly dependent on his earnings. In such case the compensation is a sum equal to his earnings during the three years next preceding the injury, or £150, whichever of these sums is the larger, but not in any case exceeding £300. Sub-section (ii) deals with the case (which we have here) of a workman who leaves only dependants in part dependent on his earnings. The compensation is such sum, not exceeding in any case the amount payable under sub-section (i), as in default of agreement may be determined by arbitration under the Act "to be reasonable and proportionate to the injury to the said dependants." There is a marked distinction in the language of the two sub-sections. In the case of those wholly dependent the amount of compensation is strictly defined, and the arbitrator can have regard only to the earnings of the deceased during the three years preceding the accident. But under sub-section (ii) it appears to me that the amount of compensation is not so easily arrived at. There seems to be no minimum sum as in sub-section (i), though the maximum is the same in both cases, and the arbiter must award a sum "reasonable and proportionate to the injury" to the dependants. Under these words I do not think the matter is necessarily confined to the deceased's earnings during the three years prior to the accident; it seems to be open to the arbiter to look into the whole circumstances of the case, including probable prospective earnings. I know of no direct authority on the point, but we were referred to a dictum by Ronan, L.J., in the Irish case of *Healy* v. *Reilly* (1917, 51 Ir. L.T. 171, 10 B.W.C.C. 744), to the effect that the language of sub-section (ii) is an "entire departure" from that of sub-section (i), and that its words resemble to an extent which "can hardly have been accidental" those used in Lord Campbell's Act. I notice that Mr Adshead Elliott in his excellent textbook (7th ed., p. 302) seems to take a similar view. I arrive at the conclusion I have indicated with some reluctance, because I do not at present understand why the Legislature should have drawn the distinction which as matter of legal construction I think must have been intended, and because I fear that in practice some danger may result of arbitrators being pressed to enter into extended inquiries as to future and contingent earnings of deceased workmen.

We have unfortunately no precise information as to the reasons which may have led the arbitrator to sustain the objection, and the circumstances under which he did so, nor whether his attention was particularly directed to the peculiar terms of sub-section (*a*) (ii). It merely appears that he refused to admit a line of evidence which I think was *prima facie* competent and admissible. In these circumstances I do not see that we can give a categorical answer in either sense to the question stated. I think our proper course is to refuse to answer the question, recal *in hoc statu* the determination of the arbitrator, and remit to him to consider his judgment, as was done in the case of *Dobbie*, to which your lordship has referred. But I do not at all desire to restrict the arbitrator *ab ante* in the full exercise of his own judicial discretion when he resumes consideration of the case. I do not think that an arbitrator is bound to admit evidence, even though it be competent, merely because it is tendered to him; on the other hand, the rejection of competent evidence is often a delicate, and may even sometimes prove a fatal, course. Subject to these observations, and to what I have said as to the construction of the sub-section, I consider that the arbitrator will have a free hand to decide, when specific evidence is tendered, to what extent (if any) it should be admitted, and what (if any) may be its effect, if admitted, as sounding in money compensation.

LORD SALVESEN—The boy whose death gives rise to the present claim of compensation was 14½ years of age, and for three weeks had been earning 16s. a-week, the whole of which he contributed to the family budget. In assessing the amount of compensation payable to the appellants, who were partially dependent on the deceased's earnings, the arbitrator, as I infer from his note, has taken into account only the amount of wages which the boy was earning at the time of his death, holding, apparently, that he could not consider any possible increase of these wages had the boy survived.

The question we have to consider depends on the interpretation of the First Schedule —sub-section (1) (*a*) (ii)—of the Workmen's Compensation Act of 1906, which provides that where death results from the injury, if the workman leaves any dependant in part dependent upon his earnings, the amount of compensation shall be such sum (not exceeding a certain maximum) as may be determined "to be reasonable and proportionate to the injury to the said dependant." It was contended before us—and I understand that this was the contention sustained by the arbitrator—that as the compensation to be assessed in the case of persons wholly dependent on the earnings of the workman must be based upon past earnings, it was reasonable to suppose that the same rule applied in cases of partial dependence, and that to introduce possible future earnings into the computation was to open up a field of speculation which was foreign to the principles that underlie the statutory scheme of compensation. I recognise the force of the argument, more especially in view of the fact that this point is

directly raised now for the first time, although in the case of a young person contributing part of his earnings to the support of his parents it must not infrequently have occurred that his life was cut off at a time when the parents might reasonably have looked for a considerable increase of such wages and to an increased contribution. The case of an apprentice who was on the point of becoming a journeyman when he was accidentally killed, and who while an apprentice had contributed to his mother's support wages in excess of the amount necessary for his own keep, may be figured, and in the case of some boys between the ages of fourteen and twenty-one it is not improbable that the rate of wages paid to them would increase as they grew older. Now the only guide which the schedule affords to the arbitrator is to award an amount which he may determine to be reasonable and proportionate to the injury to the persons partially dependent on the workman's earnings. The fact of partial dependency being established compensation is due, but except that the second sub-section provides a maximum beyond which the compensation must not go, the words that I have quoted constitute the only direction to the arbitrator as to how he is to proceed.

In my opinion it is impossible to read into these words any implication that the assessment must be made on the basis of past earnings only and that possible future earnings are not to be considered. The problem after all is not so very complex. It is one which juries have constantly to solve as best they can in actions at common law for damages at the instance of a parent in consequence of the death through negligence of one of his children. In such cases, according to our law, solatium affords a competent element in the amount to be awarded, while I apprehend that such a claim would be excluded from the compensation payable under the Workmen's Compensation Act. But it appears to me that the extent of the injury that the partial dependants have suffered may depend not merely on the earnings which the deceased workman was making at the time of his death, but on the earnings which he might reasonably have been expected to make during the following years. It is the loss of such portion of these earnings as the deceased workman might be expected to contribute towards the maintenance of the family which is the measure of the compensation. On the other hand the arbitrator would have to keep in view (1) that as all such payments would be voluntary on the part of the deceased workman, he might demand or require to retain for his own maintenance an increasingly larger share of his earnings, and (2) in the case of a somewhat older youth the possibility of his marrying and being unable to contribute to his parents' support. I do not think therefore that the arbitrator was justified in holding that the evidence tendered was incompetent or could have no effect on his mind in dealing with the assessment of compensation. In some cases that I can conceive it might be an important element and one which might materially affect the arbitrator's award. In my opinion therefore we ought to answer the first question of law to the effect that the arbitrator ought to have admitted the evidence tendered and to have given it such weight as he thought proper in arriving at the amount of compensation which he found due.

LORD GUTHRIE concurred.

The Court refused to answer the questions of law as stated in the Case, recalled *in hoc statu* the determination of the Sheriff-Substitute and arbitrator, and remitted to him to reconsider his judgment and to proceed.

Counsel for the Appellants—Morton, K.C. —Scott. Agents—Ross & Ross, S.S.C.

Counsel for the Respondents—Moncrieff, K.C. — Gentles. Agents — Macpherson & Mackay, W.S.

HOUSE OF LORDS.

Friday, January 17, 1919.

(Before Lord Buckmaster, Lord Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

BAIKIE *v.* GLASGOW CORPORATION.

(In the Court of Session, November 15, 1917, 55 S.L.R. 71.)

Reparation — Negligence — Property—Stair — Lighting of Common Stair — Contributory Negligence—Relevancy.

An inmate of a house to which access was obtained by a common stair brought an action against a lighting authority for damages for personal injuries sustained by her in falling on the stair. She averred that on returning home at a time when the stair ought to have been lighted she found it unlighted, that she proceeded to mount the stair, which had no handrail, in the dark with the greatest caution, and that at a turn in it she strayed on to the narrow part of the steps, came against the stair wall, slipped and fell down the stair, sustaining injuries. She averred further that the accident was due to the negligence of the defenders in failing to light the stair. The First Division dismissed the action as irrelevant on the ground that the pursuer's averments disclosed a case of contributory negligence. *Held* (*rev.* judgment of the First Division) that while those averments might be evidence of contributory negligence which a judge or jury would be entitled to weigh, they did not *per se* establish a case of contributory negligence, and case *remitted* to the Court of Session with a direction to order issues.

Driscoll v. *Commissioners of Burgh of Partick*, 1900, 2 F. 368, 37 S.L.R. 274, *doubted per* Lord Shaw.