The Court answered the first question in the case in the affirmative and the second in the negative, and dismissed the appeal.

Counsel for the Appellant—A. R. Brown. Agent—Alex. Ramsay, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Cochran Patrick. Agents—Russell & Dunlop, W.S.

COURT OF SESSION.

Wednesday, March 6.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

NIDDRIE AND BENHAR COAL COMPANY, LIMITED *v.* YOUNG.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—"*Dependant*"—*Pupil Child of Father in Desertion who has Made Occasional Small Payments, and against whom Decree for Aliment with Arrestment on Decree has been Taken Eighteen Months Prior to Death.*

A husband deserted his wife and four children, two of whom were in pupilarity, in March 1907, and for two years thereafter contributed nothing to the support of any of them except occasional small sums given to the pupil children and sums amounting in all to about £2 given to the wife for their support. In September 1909 a sum of 17s. was recovered from the husband by arrestment on a decree for aliment for the pupil children. The husband thereafter disappeared and, despite all reasonable inquiries at the instance of the wife, was not traced till 22nd April 1911, the date on which he died by accident arising out of and in the course of his employment. A sum of £2, 18s. then due to him as wages was paid to the wife. Since the desertion in March 1907 the wife and children had lived together, and the household had been maintained out of the earnings of the two oldest sons and certain small sums earned by the wife which were insufficient for her own maintenance.

Held that the pupil children were neither wholly nor in part "dependent" upon the earnings of their father at the time of his death within the meaning of section 13 of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13, enacts—"In this Act, unless the context otherwise requires, . . . 'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death. . . ."

In an arbitration under the Workmen's Compensation Act 1906, in the Sheriff Court at Edinburgh, between the Niddrie and Benhar Coal Company, Limited, *appellants*, and Mrs Elizabeth Potts or Young, as tutrix and administratrix-in-law for her pupil children Richard and Gretta Young, *respondent*, the Sheriff-Substitute (GUY) awarded compensation to the respondent, and stated a Case for appeal.

The Case stated—"This is an arbitration in which the respondent (hereinafter referred to as the claimant) claimed compensation on behalf of her two pupil children under the Workmen's Compensation Act 1906 in respect of the death of her husband Robert Young, father of said pupil children, which took place in the Edinburgh Royal Infirmary on 22nd April 1911 as the result of personal injury by accident sustained by him that day arising out of and in the course of his employment as a coal miner in the Woolmet Pit belonging to the appellants (hereinafter referred to as the employers).

"The *facts* admitted or proved were as follows:—The claimant was married to the deceased Robert Young on 10th June 1891. There are four children of the marriage, Arthur, Robert, Gretta, and Richard, aged at the death of their father twenty-one, eighteen, eleven, and eight years respectively. In March 1907 the said Robert Young deserted the claimant and his family, removed certain furniture from the family home at Waverley Place, High Bonnybridge, and took a house for himself at Broomhill. At that time he was engaged as a carter at the paper mills there. The claimant continued to reside at Waverley Place aforesaid along with the four children. She and her family were maintained out of the earnings of the two elder children, her own earnings from charring, and other kinds of occasional employment, and occasional sums of two shillings and sixpence or three shillings which Robert Young gave to his two younger children when he met them on the road, and sums amounting in all to about two pounds during the period of two years immediately following on his said desertion, which the claimant got from him when she met him on the road as aliment for the children. The said Robert Young afterwards was employed as a miner by Messrs Stein & Company at Castlecary. After he got employment there nothing was being got from him for the children, and the claimant in June 1909 consulted a solicitor in Falkirk, who, on her instructions, wrote to Robert Young requesting payment of aliment for the two younger children. Notwithstanding his promise to pay aliment, he did not pay, and the claimant raised an action in the Sheriff Court of Stirling, Dumbarton, and Clackmannan, at Falkirk, against him, in which she was found entitled to the custody of Richard and Gretta Young, the pupil children of the marriage, during their respective pupilarities, and in which decerniture was granted against the said Robert Young for payment of the sum of £15,

12s. per annum for each of said children, payable quarterly and in advance, with the legal interest on each quarterly instalment from the date of its becoming due till payment. The decree was granted on 6th September 1909, the first instalment being made payable on that date. The claimant extracted the decree, and by virtue of the warrant contained therein used arrestment in the hands of the said Robert Young's employers, Messrs Stein & Company, on 23rd September 1909. The arrestment attached seventeen shillings, which was thereafter paid to the claimant. To avoid further diligence being used on said decree the said Robert Young left his said employment, and also left the district where he had been employed. Notwithstanding that the claimant and her two sons, with the assistance of others, made all reasonable inquiries, they did not learn where the said Robert Young had gone to until the eldest son received a post-card from a doctor in the Royal Infirmary, Edinburgh, on the day of the deceased's death, namely, 22nd April 1911. On that day the said Robert Young, who had for some time previous been in the appellants' employment as a miner in their Woolmet Pit, met with an accident in that pit arising out of and in the course of his employment. He was crushed by a portion of the roof falling upon him, and sustained severe personal injury. He was removed to the Royal Infirmary, Edinburgh, where he himself gave direction for a post-card to be sent to his eldest son requesting to see him. The son went to the Infirmary in response to the post-card, but his father had died before his arrival. The average weekly earnings of the deceased were 27s. 9d., and the sum of £216, 9s. is one hundred and fifty-six times his average weekly earnings. A sum of £2, 18s. was due to the said Robert Young at the date of his death in name of wages, and that sum was paid to the claimant by the head of the squad in which he was employed.

"From the date of said decree down till the said Robert Young's death the claimant and her four children resided together. The claimant earned a sum of 3s. a-week during that period, and no more. This sum was insufficient for her own maintenance. The pupil children earned nothing. The household was maintained out of the earnings of the two eldest sons, whose wages at the time of their father's death were about 25s. and 20s. per week respectively. The two pupil children of the deceased were thus during that period maintained by their two brothers, who were under no obligation to maintain them. They were not doing so *ex pietate*, and the sum contributed by them would have been recoverable by them from their father under said decree. I found that the deceased Robert Young was liable under said decree to repay the disbursers of the aliment due under said decree, and that his estates (if any) after his death were also liable to be made available in the same manner. In these circumstances I found that the deceased's said pupil children were wholly dependent upon the earnings of the deceased within the meaning of the Workmen's Compensation Act 1906, and that therefore the employers were liable in compensation to the extent of the said sum of £216, 9s.

"In any event I should hold that the said pupil children were, in respect of the occasional payments made by the deceased prior to the decree, the sum arrested, and the sum of wages made available after their father's death, partially dependent upon the earnings of the deceased within the meaning of said Act."

The *questions of law* for the opinion of the Court were—"1. Whether the said pupil children of the said deceased Robert Young were wholly dependent upon the earnings of the said deceased at the time of his death within the meaning of the Workmen's Compensation Act 1906? 2. In the event of the foregoing question being answered in the negative, whether the said pupil children were partially dependent, as aforesaid, within the meaning of the Act?"

Argued for the appellants—The question whether the children were dependent on the deceased at the time of his death was a question of fact, and did not depend on the existence of a legal obligation nor on any legal presumption based thereon—*New Monckton Collieries, Limited* v. *Keeling*, 1911 A.C. 648; *Briggs* v. *Mitchell*, 1911 S.C. 705, 48 S.L.R. 606; *Lee* v. *Owners of Ship "Bessie,"* [1912] 1 K.B. 83; *Baird & Company, Limited* v. *Birsztan*, February 2, 1906, 8 F. 438, 43 S.L.R. 300, *per* L.P. Dunedin at p. 441, p. 302. There must be actual maintenance either by payment of money or by, *e.g.*, making money available for the maintenance—*Bowhill Coal Company, Limited* v. *Smith*, 1909 S.C. 252, 46 S.L.R. 250. On the facts here there could be no finding of dependence either total or partial. The occasional payments by the deceased were too small in amount—*per* Lord Dundas in *Briggs* v. *Mitchell* (*cit.*), at p. 710, p. 609—and had ceased too long before his death to afford any support to a finding of dependence. Similarly the arrestment was of no avail, and the decree was merely the expression of the legal obligation, while the payment subsequent to the deceased's death could have no bearing on the question—*Pryce* v. *Penryker Navigation Colliery Company, Limited*, 1902, 1 K.B. 221. Further, the Sheriff-Substitute had found in fact that at the time of the death the children were being supported by their brothers. That was conclusive against dependence on the father either total or in part.

Argued for the respondent—Even though the Court might not have reached the same conclusion as the Sheriff-Substitute, that did not justify recalling his award. It must be shown that he had reached his conclusion by a wrong inference in law. There was none such here. The success of a father in evading for the time being his obligation to support a child whom

nobody else was able to maintain was not enough to negative dependence. In the present case the facts that the husband deserted his wife and children and not *vice versa*, that he continued thereafter to recognise his obligation for some time by occasional payments, that he promised to pay, that the promise was enforced by action and arrestment, that every effort was made to find him in order to enforce the decree for aliment, that on being injured he communicated with his wife and family—all pointed to dependence, and taken together established it—*Cunningham* v. *M'Gregor*, 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; *Bowhill Coal Company, Limited* v. *Smith* (*cit.*); *Coulthard* v. *Consett Iron Company, Limited*, 1905, 2 K.B. 869; *Williams* v. *Ocean Coal Company*, 1907, 2 K.B. 422; *Stanland* v. *North-Eastern Steel Company, Limited*, 1907, 2 K.B. 425, N. 3; *Addie & Sons, Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85. These judgments were not overruled—or at least were overruled only in so far as they affirmed a legal presumption arising from the obligation to support—by the judgment in *New Monckton Collieries, Limited* v. *Keeling* (*cit.*), *per* Lord Shaw at p. 659, Lord Robson at pp. 663, 664. That case decided simply that dependence could not be founded on legal presumption, and recognised that the legal obligation was a fact to be taken into consideration, and that a claim for compensation might be founded on loss by the death of the source of support, though not of actual support—*Orrell Colliery Company* v. *Schofield*, [1909] A.C. 433. In cases where dependence had been negatived—*New Monckton Collieries Limited* v. *Keeling* (*cit.*); *Turners, Limited* v. *Whitefield*, June 17, 1904, 6 F. 822, 41 S.L.R. 631; *Lindsay* v. *Stewart M'Glashen & Son, Limited*, 1908 S.C. 762, 45 S.L.R. 559—there was the element of acquiescence by the deserted wife in the husband's neglect of his obligation, and that element was certainly not present here. In any event there was at least partial dependence. Maintenance afforded by the elder brothers of the children was not inconsistent with partial dependence on the father—*Hodgson* v. *West Stanley Colliery*, 1910 A.C. 229.

LORD JUSTICE-CLERK—It is evident, I think, from the numerous cases to which we have been referred, that a great deal of confusion has crept into the decisions owing to the ambiguity of the word "dependant." That word may be used in one or other of two senses. It may signify a dependant *in right*—which is one thing—or a dependant in actual fact at a particular date—which is a totally different thing. The true question appears to me to be, not, Had the applicant a legal right to maintenance by the deceased? but, Was the applicant actually receiving support from one who was under an obligation to give support, and who was also the servant of the master whom it is proposed to make liable in compensation? Dependants are to get compensation for what they were receiving from the workman who has been killed and lose by his death, not for something they would have got if the deceased had done his duty while he was alive. In so stating the question I think I am expressing what is really the effect of the recent decisions in this matter. In *Keeling's* case (1911 A. C. 648), in which the decision of this Court in *Briggs* v. *Mitchell* (1911 S.C. 705) was approved, Lord Atkinson says,—"It may be that her husband"—*i.e.*, the husband of the applicant—"was bound in law to maintain her, but it is by the discharge of this obligation, and not by its mere existence in law, that a husband supports and maintains his wife."

Now if this is the law I think it enables us to decide this case without any difficulty. Was the deceased in this case, in any sense, discharging his obligation to the children who now claim compensation from the employer? Would the compensation, if it were awarded, take the place of something which the children were receiving before the claim for compensation arose? I think it is very evident that it would not. It would be a payment to them in respect of their father's death, a payment not corresponding to anything he was giving them or expending for their support during life. I do not think the point can be expressed better than in the words of Lord Dundas in the case of *Briggs*—in which the other Judges, including myself, concurred—when he observed that it had been decided "that dependency is in each case to be decided upon a broad view of the facts—Was the applicant, in fact, supported by the earnings of the deceased at the date of his death or from other sources?—and that if the facts disclose the latter state of matters, the existence of a legal obligation of support by the deceased is irrelevant and does not establish the applicant's claim, there being no legal presumption (to be displaced in each case) arising from such obligation." His Lordship then added—"The Scots cases are binding upon this Court, and must continue to be our guides until they are pronounced by the House of Lords to be erroneous; and I must therefore, with all respect, decline to follow *Keeling's* case so far as it differs from the Scots decisions." Now the course which the Court took in differing from the English Court has been approved in the House of Lords; for the case of *Keeling* was appealed to the House of Lords, where the decision of the Court of Appeal was held to be erroneous, and the decision in *Briggs'* case was approved. The Court of Appeal in England, with that loyalty which all courts show to a decision of the House of Lords, have in a subsequent case held quite distinctly that the law stands as was settled in the case of *Briggs*.

The question comes to be whether the facts in this case will permit of the decision at which the Sheriff-Substitute has arrived. Here again there has been some confusion, in my opinion, between two things, viz.—What is a question of fact, and what is the effect to be given to a decision on a question of fact? Undoubtedly the facts

which are proved are to be stated by the Sheriff as matters of fact. But when upon these facts the Sheriff comes to decide as to the right of the party to compensation he is then—although dealing with a matter which is fact—really necessarily giving a decision in law. You may find certain facts in a case—in this Court or in the ordinary Sheriff Court—and in respect of these facts, you may arrive at something which is a legal deduction from these facts, which must be held to be a fact and upon which decree will proceed. Now here the case is exactly in that position, and I should like to call attention to a passage from Lord Atkinson's judgment in the case of *Keeling* which shows plainly that a finding upon the facts that a certain thing is so and so is not a finding of fact in itself but a finding in law, and that the Court is entitled, having certain facts before it, to consider whether these facts would or would not justify another finding. Lord Atkinson says — "Isaac Keeling, the respondent's husband, had never during a period of over twenty years immediately preceding his death, contributed one farthing out of his earnings, or at all, to the support and maintenance of his wife, and I cannot conceive how any reasonable man could, upon the evidence, come to the conclusion that he had in fact maintained her wholly or in part, or that there was any reasonable probability that he would ever do so, either voluntarily or under compulsion." Now, of course, Keeling was under a legal obligation to support his wife, and the decision makes it plain that the essential question was whether he had in point of fact been supporting her. Lord Atkinson further said—"Assuming, then, that the finding of the County Court Judge was what the Master of the Rolls states it to have been, I think that there was no evidence before him which could lead reasonable men to the conclusion at which he arrived, that his award was therefore bad, and, with all respect to the Court of Appeal, that their decision was based upon an assumption decided by your Lordships' House on more than one occasion to be erroneous." I think every word in that sentence applies to the present case.

There are two questions here. The one question is as to total dependence, the other is as to partial dependence. Upon the first question I think that what has been said effectually disposes of it. As regards the second question, anything that goes to support the case of partial dependence is so vague and, may I say, trifling, and—in point of fact, if it exists at all—refers to a period so remote from the date of the workman's death as not to be worthy of consideration. For over certainly eighteen months before his death these children were not in fact receiving anything of value from him for their support.

Accordingly I am of opinion that we should give answers to the two questions different from the answers given by the Sheriff-Substitute.

LORD DUNDAS—I agree. I think both of the questions ought to be answered in the negative, and I need add but little. The respondent's argument as regards the first question seemed to me to be a very difficult one to maintain, looking to the facts found in this case by the learned arbiter and the decisions of *Briggs* in this Court and of *Keeling* in the House of Lords. I had occasion to express my own views on this matter in the former case pretty fully, and I do not think it necessary to say more now.

The second question may suggest more doubt, but I think it also must be answered in the negative. The learned arbiter has given us the facts upon which, if total dependence were to be negatived, he would be prepared to hold dependence "in part" proved; and these were the occasional payments made by the deceased prior to the decree, the sum arrested, and the sum of wages made available after the father's death. Well, now, one must remember that the question on this point is whether or not these children were in part dependent upon the earnings of the workman at the time of his death, and I cannot think that the facts referred to can enable us to answer that question in the affirmative. The payments by the deceased prior to the decree consisted of occasional half-crowns to the children, I think, and of certain small sums, no doubt contributions of aliment, amounting in all to £2. But they are not only small in amount, they are too far back in date, to my mind, to have much importance, the last of them being some time (early, I think,) in 1909. The same remarks apply to the sum of 17s. which was arrested and recovered some time in September 1909. And then, as regards the small sum of wages which had been due to the deceased man and was paid to his widow after his death, I do not think it comes in. The English case of *Pryce*, to which we were referred, in instructive upon that point. It was money coming after the death and not money derived from him during his life. On these grounds, I think, the second question must be answered also in the negative.

LORD SALVESEN—I am of the same opinion. Each case of this kind must be decided on its own special facts as these have been ascertained by the proper tribunal. The broad facts in this case are that for eighteen months or so this workman, who had two years previously deserted his wife and family, did not contribute one penny to their support. He had disappeared in order to evade his obligation to support them, and they had been unable to trace him.

Now in these circumstances I find it impossible to affirm that the children, who are the claimants here, "were wholly or in part dependent upon the earnings of the workman at the time of his death," which is the language of the Act. I think that they were dependeut on their mother, with whom they resided, and who in turn received assistance which she might natu-

rally expect, and indeed to which after the desertion of her husband she was probably legally entitled, from the two sons who were residing with her and who were earning substantial sums weekly.

These being the facts of this particular case, we need not anticipate other or narrower cases such as were figured by Mr Christie in his very able argument. Taking the facts here as they have been found by the Sheriff-Substitute, I think we should answer the questions of law in the negative.

LORD GUTHRIE—I agree. The respondent admits that the mere fact of legal obligation upon the part of the deceased man would not be enough to support the Sheriff-Substitute's judgment. That follows, manifestly, from the occurence of the words in the Act "at the time of his death," that view being confirmed in terms by the case of *Keeling*. But the respondent differentiates this case from *Keeling* in respect of the admitted facts that in this case the desertion was of the wife and not by the wife, that the wife looked throughout to the husband for support, and that she made every effort to make him liable for the support of herself and the children, including obtaining decree for aliment and following it up by arrestment. It is said that that second element is sufficient for the respondent. It appears to me that, on the cases, that will not do, and that the respondent would at the very least require to point us to facts which would bring this question within the case figured by Lord-Justice Fletcher Moulton in the case of *Lee*, when he said "if on the evidence there is any fair probability that the legal rights would at any future time have been actually and effectually asserted by the wife, then there is evidence of dependency." It is not necessary to decide whether that view is sound or not, because it appears to me that there is no such evidence here. The respondent, I think, admitted that no case has occured of children being held dependent on a father who at the time of his death and for a lengthened period before it had been concealing his whereabouts from his family. I would like to add that, while "dependent" seems to me to be "actually dependent," I do not think it necessarily involves actual payment up the time of his death by the father. If a case occurred where the children were being supported on the father's credit by shopkeepers or banks, that, I think, might quite well come within the words of the statute.

I would only add—if it be the fact, as it appears to me to be, that a decision in respondent's favour would be going further than any previous case had gone—I see no reason in principle for extending the rule. The object of the Act evidently was that, when accident takes away the children's support in whole or in part the employer should pay.

It seems to me that the case here does not come within the rule of any of the decided cases or within the principle of the statute.

The Court answered both questions of law in the negative.

Counsel for Appellants—Munro, K.C.—Pringle. Agents—W. & J. Burness, W.S.

Counsel for Respondents — Christie—Young. Agents—R. & R. Denholm & Kerr, Solicitors.

Thursday, March 7.

SECOND DIVISION.

[Lord Cullen, Ordinary.

M'CONOCHIE'S TRUSTEES *v.* M'CONOCHIE AND OTHERS.

Succession—Heritable and Moveable—Conversion—Constructive Conversion—Resulting Intestacy.

By his trust-disposition and settlement a testator conveyed his whole estate to a trustee, under direction—(1) to pay debts "from the readiest of my means and estate, heritable and moveable"; (2) to pay "from my estate, heritable and moveable," alimentary annuities to his brother and his brother's wife; (3) to "set aside from my said heritable and moveable estate and retain" a sum in alimentary liferent for each of his brother's children, with fee to their issue; (4) to pay duty on said provisions "from the residue of my estate, "heritable and moveable"; (5) to pay "out of my estate, heritable and moveable," certain legacies; and (6) to divide the residue among such educational, charitable, and religious purposes within the city of A as his trustee should think fit.

The trustee paid the debts and legacies out of the moveable estate, sold part of the heritage, and expended the price and the surplus moveable estate on improvement of the remaining heritage. The liferents and annuities were satisfied out of the rents of the heritage. The testator died in 1879. His brother, who was his sole heir *ab intestato* in heritage and in moveables, died intestate in 1893. In a special case, brought in 1909, the residuary purpose of the trust was held void from uncertainty.

In a multiplepoinding, the residue, consisting *de facto* of heritage and accumulated rents of heritage, having been claimed—(1) by the heir-at-law, and (2) by the heirs *in mobilibus* of the testator's brother, *held* (*rev.* Lord Cullen, Ordinary) that, the residuary bequest having failed, there was no implied direction to convert the heritable estate to any greater extent than was necessary for the due execution of the trust, that accordingly the residue to which the testator's brother as his sole heir *ab intestato* in heritage and moveables acquired right must be deemed to have been heritable and moveable in the proportions which the heritable and moveable estate bore to