Wednesday, December 16.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

BOWHILL COAL COMPANY (FIFE), LIMITED *v.* NEISH AND OTHERS.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—"*Dependant*"—*Illegitimate Child—Partial Dependence—Is Dependence a Question of Fact or of Law?*

Whether a person is a dependant within the meaning of the Workmen's Compensation Act 1906 is a question of fact upon which the arbitrator is final, "unless it appear from the whole statement in the case along with the question put to us as a question of law that his decision of the question in fact had been determined by some erroneous view of the law."

The mother of an illegitimate child obtained in an action of filiation and aliment decree for £6, 6s. annually for ten years against the father. He, by changing his name, evaded payment for some time, but finally the mother found him and arrested a sum of £2 in his employers' hands. She did not proceed with a furthcoming, but the father agreed that the money should be uplifted for behoof of the child. Thereafter the father, the money never having been uplifted, died from injuries sustained in the course of his employment. No other money was contributed by the father to the child's support. The mother as *curator ad litem* claimed compensation for the child from his father's employers. The arbitrator found that the child "was entitled to recover compensation as having been partially dependent upon" his father, and put as a question of law, "Was the child "partially dependent upon the earnings" of his father?"

Held that whether a claimant was a "dependant" was a question of fact upon which the arbitrator was final, unless the case disclosed that the decision of the question in fact had been determined by an error in law, and that here no such error appeared, it not being necessary to show that the money had been actually spent upon the child.

Main Colliery Company v. *Davies*, [1900] A.C. 358, *followed.*

By the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13, "'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, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent . . . of an illegitimate child, leaves such a child so dependent upon his earnings, . . . shall include such an illegitimate child . . ."

Samuel Neish senior, Helen Finlay Smith, and Alexander Galloway Smith, all residing at Leven, claimed compensation from the Bowhill Coal Company (Fife), Limited, in an arbitration, in the Sheriff Court at Kirkcaldy, under the Workmen's Compensation Act 1906.

The Bowhill Coal Company (Fife), Limited, being dissatisfied with the decision of the Sheriff-Substitute (HAY SHENNAN) regarding the claim of Alexander Galloway Smith, took an appeal by way of stated case.

The case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which the Sheriff of Fife and Kinross at Kirkcaldy is asked to award compensation to the respondent Samuel Neish senior in respect of his partial dependency on Samuel Neish junior, his son. A minute was lodged for Helen Finlay Smith in which the Sheriff is asked to award the said Helen Finlay Smith the sum of £68, 17s. 4d., in respect that she is the mother of Alexander Galloway Smith, who was an illegitimate child of the said deceased Samuel Neish junior. Subsequently the said Alexander Galloway Smith also claimed £68, 17s. 4d. of compensation, and was sisted as a party to the arbitration on a minute being lodged on his behalf, and the said Helen Finlay Smith was appointed his *curator ad litem.* The said Helen Finlay Smith intimated that she would not insist in her claim on the claim of the said Alexander Galloway Smith being lodged. The case was heard before me on 29th September 1908, when the following facts were admitted or proved—(1) On 26th September 1907 Samuel Neish junior, while in the appellants' employment at their Bowhill pit, sustained injuries during his work which resulted in his death on 5th May 1908. (2) Between the date of the accident and his death the said Samuel Neish junior received payment of compensation amounting to £31, 13s. 4d. The expenses attendant on his funeral were £7, 3s. 6d. (3) The respondent Samuel Neish senior was father of the deceased workman, and received from him assistance towards his rent of about £4 per annum, and help towards household expenses of about 10s. a fortnight, sometimes more, sometimes less. To that extent the said Samuel Neish senior was partially dependent on the deceased. (4) The said Helen Finlay Smith is the mother of an illegitimate male child of which the deceased was the father. She was to no extent dependent upon him at the time of his death. (5) The minuter, Alexander Galloway Smith, is the illegitimate child of Samuel Neish junior, having been born on 13th May 1905. (6) The said Helen Finlay Smith obtained decree of filiation and aliment in respect of said child for (1) £2, 2s. of inlying expenses, (2) £6, 6s. annually for ten years, and £3, 15s. 4d. of expenses of process, against Samuel Neish junior on 23rd November 1905; but on account of Neish having worked under an assumed name she was unable to enforce the decree until 8th September 1907, when she arrested his wages in the hands of the Fife Coal Company, attaching £3, 15s., of which her agents allowed Neish to uplift £1, 15s. The bal-

ance of £2 is still in the hands of the arrestees the Fife Coal Company, Limited, and the deceased agreed that it should be uplifted for behoof of his said illegitimate child. (7) The minuter Alexander Galloway Smith was partially dependent on Samuel Neish junior at the time of his death.

"In these circumstances I found (1) that the respondent Samuel Neish senior, and the minuter Alexander Galloway Smith, were entitled to recover compensation from the appellants as having been partially dependent upon the deceased Samuel Neish junior, and (2) that the minuter Helen Finlay Smith was not entitled to recover compensation, and I assessed the compensation payable to Samuel Neish senior at £47, 3s. 6d., and the compensation payable to Alexander Galloway Smith at £60."

A case was stated on appeal.

The *question of law* for the opinion of the Court was—"Was Alexander Galloway Smith partially dependent on the earnings of the deceased Samuel Neish junior at the date of his death within the meaning of the Workmen's Compensation Act 1906?"

Argued for appellants—Alexander Galloway Smith was not partially dependent on the deceased. No money had been applied for his behoof. It was not enough that the money had been set aside. It must at least be in the possession of the dependant. There must be actual support by the father, and there having been none here the Court should answer the question of law in the negative. Reference was made to the following cases:—*Lindsay* v. *Stewart M'Glashen & Son, Limited*, 1908 S.C. 762, 45 S.L.R. 559; *Murray* v. *Gourlay*, 1908 S.C. 769, 45 S.L.R. 577; *Moyes* v. *William Dixon, Limited*, January 13, 1905, 7 F. 386, 42 S.L.R. 319; *Baird & Co., Limited* v. *Birsztan*, February 2, 1906, 8 F. 438, 43 S.L.R. 300; *Turners Limited* v. *Whitefield*, June 17, 1904, 6 F. 822, 41 S.L.R. 631; *Main Colliery Co.* v. *Davies*, [1900] A.C. 358; *Rees* v. *Penrikyber Navigation Colliery Co.*, [1903] 1 K.B. 259.

Counsel for respondents were not called upon.

Lord President—Samuel Neish junior was injured in the works of the appellants on 26th September 1907, and died from the result of these injuries on 5th May 1908. Between the date of his accident and his death he received certain payments of compensation. After his death a claim was lodged at the instance of his father, and also at the instance of his illegitimate child. We have nothing to do with the claim of the father, which is admitted. The illegitimate child was born on 13th May 1905. The mother was Helen Finlay Smith, who appears as *curator ad litem* to the infant child. She, soon after the birth, namely on 3rd November 1905, got a decree of filiation and aliment, the aliment being fixed at £6, 6s. annually for ten years. She was not able at that time to enforce the decree, as Samuel Neish junior was working under an assumed name, but having found out where he was, she on 8th September 1907, a little more than a fortnight before the accident, arrested his wages in the hands of the Fife Coal Company, and attached £3, 15s. Under the advice of her agent Neish was allowed to uplift £1, 15s. of this, and the balance of £2 is still in the hands of the arrestees, the Fife Coal Company, and we are told that the deceased agreed that it should be uplifted for behoof of his illegitimate child. On these facts the learned Sheriff-Substitute has held that the illegitimate child was partially dependent upon the deceased Samuel Neish junior, and that the mother was not entitled to recover compensation, and he assessed the compensation payable to the child at £60. The respondents object to that. They do not quarrel with the sum, if any sum is due, but their argument has been that the Sheriff has come to the wrong conclusion in law, because his findings show that, as matter of fact, the illegitimate child was not a dependant at Samuel Neish's death.

Now the learned Sheriff-Substitute has held that the child was partially dependent, and that is a matter of fact, and so far we could not go against the learned Sheriff-Substitute upon the matter of fact. But I quite agree that his findings must be taken together, and if it was the true inference in law from the other findings that this conclusion in fact was wrong, I think that we should be in a position to disturb it. But I do not think there is any inference of such a class to be gathered. The appellants' argument was that inasmuch as no actual money from the deceased is proved to have been actually spent upon the child, the child cannot be said to have been dependent upon him. I think that is much too strict a view. I am not going into the law of the matter, because I think that has been clearly decided by the cases cited to us, all following upon the case of the *Main Colliery Company* against *Davies* [1900] A.C. 358. The child here, of course, was of such a tender age that it could not do anything itself. The person who was acting for it was naturally its mother, and what more could this mother have done than she did? She proceeds at once to affirm against the father, who seems to have no wish to come forward and agree to his liability, she proceeds to affirm at once his liability at law, and she gets decree against him, which puts him under obligation to contribute £6, 6s. a-year for ten years. Then for a time she cannot do any more, for the father works under an assumed name, probably with the object of evading payment. She finds him out and arrests his wages. Under the advice of her agent, which I have no doubt was perfectly sound advice, she gives up some of the money she has arrested, and all that can be said against her is that she has not actually gone on with her furthcoming, and got the money out of the hands of the arrestees. Probably the reason was that the agent thought that a furthcoming was not necessary, as the assent of the child's father might be got, and as matter of fact we find that the assent was got. Can it make any difference that this £2 has not been actually

uplifted? I cannot say that there is any more in that than there would have been if you could have said that the £2 was deposited in the Savings Bank or put into a little jar in the corner of the room. You cannot earmark each source of supply. At that rate it would not be enough to prove that the money had been paid to the woman. You would have to go on and prove that it was spent on some particular thing—absolutely consumed by the infant. I think that would be an absurd particularising.

Accordingly I think there is nothing here upon the findings to dislodge the finding which bears to be a finding in fact, namely, that the child was partially dependent upon his deceased father, and I accordingly think that the appeal should be dismissed.

Lord M'Laren—I am of the same opinion. I think that if money has not been actually applied by the injured person to the maintenance of a dependant, it must be shown that the money was, at all events, at the disposal of the dependant, and was supplied for the purposes of maintenance. Now, the Sheriff-Substitute has found that this illegitimate child was dependent upon his father; and I think the mother has done enough to show that she was really relying upon the father's contribution towards the maintenance of the child, because she first obtained a decree of aliment, and then she did her best to trace the father, who had been going under an assumed name, and when she discovered his residence she used an arrestment. I do not see what more could have been done, unless she had taken out letters of horning and endeavoured to put him in prison for this alimentary debt. But that was quite unnecessary, because it was conceded that after the father had been discovered and his wages arrested he assented to those wages, to the extent of £2, being held by his employers to be uplifted by the woman. Now she might not have to spend the money at the moment. If she had credit from tradesmen it would be enough that she was able to lay her hands upon this sum whenever she wanted it to pay her accounts. Therefore, if it were necessary to consider the facts, I do not think that, when they are looked at in a reasonable sense, there is any ground for differing from the conclusion at which the Sheriff has arrived. I do not know that any definite question of law has been formulated for our decision.

Lord Kinnear—I agree. The Sheriff sets forth in the case, and in detail, a number of facts tending to show, in the first place, that the injured man was liable for the support of his infant child, and in the second place that the mother, in whose custody the child was, was doing her best to enforce that liability for the child's maintenance. These facts, which are set forth in detail, raise the question, which we are asked to consider, whether the Sheriff was justified in drawing the further inference in fact that the child was wholly or partially dependent upon the father at the time of his death, and he drew that inference in fact and said that the child was so dependent. That appears to me to be a question of fact upon which the Sheriff's decision is final. I quite agree that if it could have been shown, from a consideration of the whole statement in the case along with the question put to us as a question in law, that his decision of the question in fact had been determined by some erroneous view of the law, we should have been able to review that opinion on the law and to set him right if he was wrong. But I cannot find any suggestion in the case—and I heard none in the argument addressed to us—that the Sheriff was in any error at all upon any point of law. The whole question appears to me to be one of fact, and I think the Sheriff-Substitute's judgment is final.

Lord Pearson—I also concur.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Hunter, K.C.—Strain. Agents—W. & J. Burness, W.S.

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

Wednesday, December 16.

FIRST DIVISION.

(Single Bills.)

COCHRANE *v.* COCHRANE.

Husband and Wife — Appeal to House of Lords — Expenses in the Appeal — Application by Wife for Interim Award — Competency.

Applications for interim awards of expenses in consistorial appeals to the House of Lords must be made to the Court of Session and not to the Appeal Committee.

In an action of divorce by a husband against his wife, the Court assoilzied the defender. The husband having appealed to the House of Lords, the Court *awarded* the wife £100 towards her expenses in the appeal.

On 14th April 1906 J. Y. Cochrane, 3 Errol Terrace, Dundee, raised an action of divorce against his wife on the ground of desertion. The Lord Ordinary (Dundas) having granted decree of divorce, the defender reclaimed, and on 2nd November 1907 the Extra Division recalled the Lord Ordinary's interlocutor and assoilzied the defender. On 2nd November 1908 the pursuer appealed to the House of Lords, and an order was granted for service of the petition upon the respondent. On 24th November 1908 the respondent presented a note to the Lord President in which she stated, *inter alia*—"The defender is desirous of maintaining her defence against the said appeal, but she is possessed of no funds which enable her to do so. Since the first day of August 1901 she has lived separate from