decided cases, we are, so to speak, driven from point to point and made to arrive at a result very far distant from the point at which we started, and I confess that I think this case is a very flagrant example of that. It is really almost painful to see to what a pitch of extravagance we are asked to go as the result of what, I must admit, seems to be quite reasonable argument upon the authorities.

Looking at this as a plain man, I think that nothing could be further removed from an accident than what happened in this case. All that the claimant can say is that in the course of his ordinary work he got overheated—he got, as he puts it, sweated—and that when he got home he felt he had contracted a chill, and afterwards found he was suffering from pleurisy.

I must say that until I am compelled to say so by a higher tribunal I shall never admit that such a thing as this is an accident. We were very strongly urged by the learned counsel who pleaded the case to allow a proof. I do not think we should, because a proof would come to nothing. He cannot ask that he should be better treated than by supposing he has proved every word which he has set forth; and if he had it would amount to no more than what I have said. But in case the matter should go further, I think it necessary to say that I think an arbitrator in Scotland is entitled in the conduct of the arbitration to take the procedure to which we are accustomed in Scotland—I mean the procedure which requires consideration of the question of relevancy before proof is allowed. I think it necessary to say so, because that is not the procedure in England. As we all know, the practical use of demurrer has long ago ceased. Everything goes to what is called trial, and relevancy is taken up along with the inquiry into facts. This is not our practice, and there is no reason why we should alter our practice.

Accordingly I think that this arbitrator, if he was clearly of opinion that the case as stated was irrelevant, was not bound to order a proof, and that we should not order him now to allow it. Assuming that the appellant, as I have just said, had proved everything which is stated in the case, it seems to me that there is no averment of accident.

It would be quite useless to go through the various cases. I would only say, with great respect, that I for my part entirely agree with the general review of the cases that was given by the Court of Appeal in England in the case of *Eke* v. *Hart Dyke* ([1910] 2 K.B. 677). And I notice that in that case Lord Justice Kennedy particularly scouts the idea of the case of a man catching cold being said to be an accident. Well, I cannot see the distinction between catching a cold which passes off, and catching a cold which eventually develops into pleurisy. Upon the whole matter I am of opinion that we should answer the question in the affirmative.

LORD KINNEAR—I agree.

LORD MACKENZIE—I am of the same opinion. I think this is a very plain case. I would only add to what your Lordship has said on the relevancy that there was no suggestion in the argument that the learned arbitrator had omitted to state any fact in the case which would assist the appellant in his claim.

LORD JOHNSTON was absent.

The Court answered the question in the affirmative and dismissed the appeal.

Counsel for Appellant—Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Respondents—Wilson, K.C. —Mitchell. Agents—Adamson, Gulland, & Stuart, S.S.C.

Tuesday, December 10.

FIRST DIVISION.

DOBBIES *v.* THE EGYPT AND LEVANT STEAMSHIP COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, Sec.* 1—*Dependency—Probability of Support.*

Although it is proved that at the time of his death a father has deserted his children for three years, and paid nothing towards their support during that period, it does not necessarily follow that the children were not dependent, or at least partially dependent upon his earnings, for it may be capable of proof that there was a probability of his supporting them in the future.

Janet Helen Dobbie and Helen Yates Dobbie, *appellants*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII cap. 58) from the Egypt and Levant Steamship Company, Limited, 22 Leadenhall Street, London, *respondents*; and being dissatisfied with the determination of the Sheriff-Substitute of the Lothians and Peebles (Guy), acting as arbitrator under the Act, appealed by Stated Case.

The Case stated—"This is an arbitration in which the appellants, aged nine and six years respectively, the pupil children of the deceased John Dobbie, who resided at No. 2 Bothwell Street, Leith, claimed compensation from the respondents under the Workmen's Compensation Act 1906 for the death of their said father, who it was admitted was drowned at sea on or about 18th December 1911, while in the course of his employment with the respondents as a fireman on board the s.s. "Wingrove," and whose average earnings on board said steamer amounted to £1, 14s. 5d. a week, in respect that the appellants were dependent on the earnings of their deceased father in the sense of the said Act.

"The respondents led no evidence.

"The following facts were proved by the evidence led before me for the appellants. The appellants' mother died on 22nd December 1906, and thereafter their father, the said deceased John Dobbie, who was in the employment of a fish merchant in Glasgow, continued to live for some time in the same house as that in which he had lived with his wife, maintaining in family with him the appellants. His mother also resided with him. Thereafter he removed with his children and mother to the house of Mr and Mrs Yates, Mrs Yates being his sister. In February 1909 the deceased, who had lost his situation, and had been out of employment for several weeks, left his home to look for work, but did not return. He then deserted the appellants, and left without informing any of his relations where he was going, and without making any provision for the appellants. The appellants were then taken to the house in Glasgow of Archibald Robson, whose wife was a sister of the appellants' deceased mother. This was done at Mrs Robson's request, in the expectation by her and her husband that the deceased would soon be heard of, and that he would repay the sums expended on their maintenance. The said Archibald Robson thereafter maintained the appellants in the expectation that their father would recoup him when he returned. The only alternative was to send them to be inmates of the poorhouse, the Parish Council having refused outdoor relief. The said Archibald Robson from time to time made inquiries to discover the whereabouts of the appellants' father, but was unable to do so, and did not hear of him till after his death. The whereabouts of the appellants' father between the time when he deserted the appellants as aforesaid till 1st October 1909 has not been ascertained, but it is now known that on that date he went to live as a lodger in the house of John Smith, 2 Bothwell Street, Leith. He was then in a destitute condition, and for about six months thereafter he was able to obtain some employment, but did not earn sufficient to maintain himself, and he incurred considerable debt to the said John Smith for his board and lodging. He then got employment in a brewery as a fireman at a wage of £1 a week, and thereafter week by week repaid his indebtedness to the said John Smith for his board and lodging. In October 1910 he went to sea as a fireman on board the s.s. 'Drumlanrig,' at a wage of £4, 10s. a month. In the month of July 1911 he met with an accident on board said steamer, when his leg was broken, and he was laid up in hospital at Hamburg till the end of September 1911, when he returned to 2 Bothwell Street, Leith, and thereafter attended for treatment at the Royal Infirmary, Edinburgh. From the time of his return from Hamburg till he sailed on his last voyage as after mentioned he was in receipt of workmen's compensation in respect of said accident to his leg. During that period he for the first time informed his landlady, Mrs Smith, that he had two children, and he thereafter had frequent conversations with her regarding them, when he expressed his desire to have his children brought to 2 Bothwell Street, Leith, to live with him there, and his intention to maintain them. On one occasion during this time he stated his intention to go to Glasgow that day and bring his children to Mrs Smith's house, and would have then done so had he not been dissuaded from doing so by Mrs Smith, who advised him to delay doing so till he was able to do something towards repaying the sum due to Mr Robson for their maintenance. Shortly before he sailed from Leith on 1st December 1911, on board the s.s. "Wingrove," the deceased arranged with Mrs Smith that he would send her an allotment note for £4 a month when the steamer arrived at Port Said, stating that the master of the steamer would not give an allotment note before this time, and that Mrs Smith should then bring to her house his children (whose address he then gave to Mrs Smith), and should pay to Mr Robson £3 a month till the sum due to him was repaid, and apply the balance of £1 a month for the maintenance of the appellants in her house. Though the deceased John Dobbie knew of his obligation to support the appellants, and expressed an intention to support them, he as a matter of fact deserted them, and was on the date of his death, and had been for nearly three years, in desertion of them.

"In these circumstances I *found in fact and in law* that the appellants were not dependent upon the earnings of the deceased John Dobbie, their father, at the time of his death, within the meaning of the Workmen's Compensation Act 1906, and that the appellants were not entitled to compensation under the said Act in respect of his death. I therefore assoilzied the defenders, and found them entitled to expenses."

The *questions of law* for the opinion of the Court were—"On the facts above set forth—(1) were the appellants dependent upon the earnings of their deceased father at the time of his death within the meaning of the Workmen's Compensation Act 1906? (2) Were the appellants wholly dependent upon the earnings of their deceased father at the time of his death, within the meaning of the said Act?"

Argued for the pursuers and appellants—On the facts stated by the arbitrator the pursuers were clearly dependent upon their father. If at the death of the father there was a probability of support by him, that was sufficient to show dependency—*New Monckton Collieries, Limited* v. *Keeling*, [1911] A.C. 648, *per* Lord Loreburn, L.Ch. at 648, Lord Atkinson at 649 and 653; *Coulthard* v. *Consett Iron Company, Limited*, [1905] 2 K.B. 869; *Lee* v. *The Owner of the Ship "Bessie,"* [1912] 1 K.B. 83; *Stanland* v. *North-Eastern Steel Company, Limited*, reported in note to *Williams* v. *Ocean Coal*

Company, Limited, [1907] 2 K.B. at p. 425. The arbitrator to reach the conclusion he had must have misdirected himself in law, considering it irrelevant to consider the future and its probabilities. [The LORD PRESIDENT referred to *The Bowhill Coal Company, Limited* v. *Smith*, 1909 S.C. 252, 46 S.L.R. 250.]

Argued for the defenders and respondents—The question of dependency was one of fact, and the Sheriff had decided it, and the case should not be sent back to him. The statement of facts in the case showed that he had considered the probability of support, and found it of no value. The probability referred to by Lord Atkinson in *New Monckton Collieries, Limited* (*cit. sup.*) was the probability of the claimant being able to enforce the obligation of support—*Lee* v. *Owner of Ship "Bessie,"* [1912] 1 K.B. 83, Farwell (L.J.) at pp. 91-92; *Briggs* v. *Mitchell*, 1911 S.C. 705, Lord Dundas at 708, 48 S.L.R. 606; *Young* v. *Niddrie and Benhar Coal Company, Limited*, 1912 S.C. 644, 49 S.L.R. 518.

At advising—

LORD PRESIDENT—This is an application at the instance of two pupil children for compensation in respect of the death of their father, John Dobbie, who met his death while employed as a fireman on board the "Wingrove," which belongs to the respondents in the case. The facts stated by the learned Sheriff-Substitute may be accurately summarised as follows:—The mother of the children died in 1906. In 1909 the father being out of work, left the home where his children were, and has never returned since, that is to say, he deserted the children in 1909. His circumstances were such that he had only barely enough money to keep himself—indeed he incurred debt to a landlady with whom he stayed from time to time in Leith. When their father thus deserted them the children were taken in, and have been kept ever since, by their mother's sister and her husband, Mr and Mrs Robson, in Glasgow. Eventually, in December 1911, Dobbie got a really good place as fireman for a voyage at an average weekly wage of £1, 14s. 5d. When he found he was in that position he spoke to his landlady at Leith of his desire to get his children back to him and maintain them, and he then arranged with her that he should give her what is called an allotment note, by which his pay to the extent of £4 a month would be paid to her in this country by the owners of the ship, his employers. That £4 was to be expended to the extent of £3 in paying off the debt incurred to Robson for the support of the children, and the other £1 was to go to their maintenance in the house of the landlady, who was to get the children from Robson when the first instalment arrived. But unfortunately Dobbie died before ever he arrived at Port Said, and it seems that, according to the nautical custom, these allotment notes are not given until some wages have been earned, and Port Said was the first place in which he would have been in a position to make an allotment note.

Now on a statement of those facts the learned Sheriff-Substitute gives his judgment thus—"Though the deceased John Dobbie knew of his obligation to support the appellants, and expressed an intention to support them, he as a matter of fact deserted them, and was on the date of his death, and had been for nearly three years, in desertion of them. In these circumstances I found in fact and in law that the appellants were not dependent upon the earnings of the deceased John Dobbie, their father, at the time of his death, within the meaning of the Workmen's Compensation Act 1906, and that the appellants were not entitled to compensation under the said Act."

The children asked for a stated case upon these facts, and the questions as put to us are—"(1) Were the appellants dependent upon the earnings of their deceased father at the time of his death within the meaning of the Workmen's Compensation Act 1906? (2) Were the appellants wholly dependent upon the earnings of their deceased father at the time of his death within the meaning of the said Act?" Those questions are really wrongly stated. It is not for us to say whether the appellants were dependent either wholly or in part. It is now perfectly well settled that dependency is a question of fact and a question of fact alone, and it is for the Sheriff-Substitute to say whether they were dependent or not. Now if the Sheriff-Substitute had simply found as a matter of fact, on these facts as I have stated them, that the children were not dependent upon the father at all, I do not think we could have altered, because, upon the facts as stated, it seems to me there was evidence upon which he could competently come to a conclusion that the children as matter of fact were not to any extent dependent upon the father. But the Sheriff has so worded his judgment that I am quite unable to say myself whether that is the result at which he has arrived. He has, as your Lordships see from what I have read, stated the simple fact of desertion, and then stated that in these circumstances he found in fact and in law that the children were not dependent. And therefore I cannot say whether he really went upon the fact—whether he valued, so to speak, the dependency as worth nothing—or whether he went upon the supposed legal proposition that if the father had as a matter of fact deserted the children for three years that ended the whole matter. If the Sheriff-Substitute did that, then I think he went upon a legal proposition which is clearly wrong.

I do not think there is any doubt as to the law upon this matter. I think it is absolutely settled by what the House of Lords said in the case of *New Monckton Collieries, Limited* v. *Keeling*, ([1911] A.C. 648). In that case the House of Lords upheld a view that had been previously taken in another case in this Court (*Briggs* v. *Mitchell*, 1911 S.C. 705), namely, that dependency was a question of actual fact, and that that actual fact was not settled by a consideration of the legal proposition

of obligation of either the husband to the wife or the parent to the child. But, on the other hand, of course the existence of that legal obligation has a very strong bearing upon the fact. A man is, according to his circumstances, more or less likely to fulfil his legal obligations, and if he is likely to fulfil this legal obligation to support, then that points to an actual fact of dependency. But the result of that is not only that the question is not a mere question of legal obligation, but also that you cannot entirely turn your eyes to the past and hold them quite shut to the future, the point of time with regard to which I speak of past and future being, of course, the date of the death of the parent or husband as the case may be. That is quite clearly put by Lord Atkinson, who at page 653 says—"The existence of the obligation, the probability that it will be discharged, either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife at the time of her husband's injury looked to his earnings for her maintenance and support in whole or in part. It is one of the many elements to be taken into account." And when that case came to be applied by the Court of Appeal in *Lee* v. *Owner of Ship "Bessie"* ([1912], 1 K.B. 83) the matter is exceedingly clearly put by Lord Moulton, as he is now, in two sentences. He first of all summarises *Keeling's* case in a single sentence. He says—"In my opinion the effect of this decision is that legal obligations to support must not be taken at their theoretic value but at their practical value." And then he says again—"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." In another passage his Lordship applies *Keeling's* case to the case of children, where he says—"In my opinion . . . the decision of the House of Lords in *New Monckton Collieries, Limited* v. *Keeling*, though it does not refer to the case of infant children, logically carries with it the result that in their case the County Court Judge is bound to consider the practical value of the father's legal obligation to support them, and that if he comes to the conclusion that there is a reasonable probability that this will be enforced in the future he is entitled and bound to hold them to be dependents and to award compensation accordingly."

Now I think that all those passages, with which I respectfully concur, really bring the matter to this—It is a question of fact, and it is a practical question. So far as the past is concerned, in a case like this we must consider what support the children have been in fact getting. They have been getting nothing, therefore the past is gone. So far as the future is concerned, one must make a valuation of what one thinks the dependency is worth in the whole circumstances. Now in this case I do not wish to prejudge the learned arbitrator in this matter. I think he is entirely master of the situation. If he came to the conclusion that in the whole circumstances of this case the probability of getting £1 in the future, after £3 out of the £4 had been otherwise applied, was practically worth nothing, I think he could competently so find. But I do not know whether he has found so or not. What he undoubtedly must find is some answer to the question that is implicitly put by sub-head (ii) of sub-section (*a*) of section (1) of the First Schedule, which says this—"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." I am treating this, of course, as a case of partial dependency, because I think it is perfectly clear on the facts that the arbitrator never would come to the conclusion that there was total dependency. What he would valuate the partial dependency at I cannot say. I think, upon the whole matter, while we cannot answer the question as put, the case must go back to the arbitrator in order that he may indicate the ground of his decision. He may repronounce his decision if he wishes, or he may do otherwise. But I think it would not be just to the pupil children not to send the case back, because I think it is impossible to say whether the arbitrator has gone upon the view of fact and fact alone—and if he has done so I do not think that *Keeling's* case touches the result he has arrived at—or whether he has gone upon the proposition in law that when you find that as a matter of fact a father has deserted his children for three years and paid nothing towards their support during that period, that necessarily ends the matter—a proposition which, so stated, is not in accordance with the authorities.

LORD KINNEAR—I agree.

LORD MACKENZIE—I agree with your Lordship on the simple ground put by Lord Justice Fletcher Moulton in the case of *Lee*, in the passage already read, in which his Lordship says that the legal obligation of support must be taken not at its theoretic but at its practical value. It is because I am not quite sure, from the way in which the case has been stated, that the Sheriff-Substitute dealt with the matter upon that footing that I agree that the case must go back. The arbitrator has an entirely free hand to dispose of the matter as he thinks just.

LORD JOHNSTON was absent.

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

Counsel for the Pursuers and Appellants —J. R. Christie—Macdonald. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders and Respondents—Horne, K.C.—J. H. Henderson. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, December 10.

SECOND DIVISION.

[Sheriff Court at Hamilton.

DARROLL *v.* GLASGOW IRON AND STEEL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I* (16)—*Review of Weekly Payment—Industrial Disease—Liability to Recurrence of Disease—Onus.*

In an application under the Workmen's Compensation Act 1906 for review of a weekly payment made to a workman in respect of his incapacity for work which resulted from an attack of nystagmus, the arbiter found that although the workman had "now completely recovered" from the attack, he was liable to a recurrence of the disease, but that the evidence was inconclusive as to whether this liability was due to constitutional predisposition or to the original attack.

Held upon these findings that the employers were entitled to have the weekly payments ended, because the workman had not discharged the *onus* of proving that his liability to a recurrence of the disease was due to the original attack.

Richard Darroll, miner, Blantyre, *appellant*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (SHENNAN) at Hamilton, whereby in an application at the instance of the Glasgow Iron and Steel Company, Limited, coalmasters, Motherwell, *respondents*, the compensation paid by them to him was ended.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, under a minute presented by the respondents craving review of the weekly payment of 8s. 10d. made by the respondents to the appellant in respect of nystagmus acquired by him while employed as a miner at Parkneuk Colliery, Motherwell, belonging to the respondents, on 3rd September 1910. The respondents desire to have the weekly payment of compensation ended or diminished in respect it is alleged that the incapacity of the said appellant for work for which the said weekly payment was awarded has entirely ceased or at least has become greatly lessened.

"Proof was taken before me on 29th July 1912, when the following *facts* were admitted or proved—(1) The appellant having been duly certified as suffering from miner's nystagmus from 3rd September 1910, was paid full compensation at the rate of 13s. 10d. per week down to 27th October 1911. (2) On 27th October 1911, in proceedings for review instituted by the respondents, the appellant's compensation was reduced to 8s. 10d. per week on the ground that he was fit for surface work of a limited character. (3) The medical witnesses for both parties concurred in stating that Darroll has now completely recovered from this attack of nystagmus. No one could now detect that he has ever suffered from nystagmus, and he has good sight. (4) The medical witnesses on both sides also agreed in thinking that it would be unwise for Darroll to resume work underground, because of the danger of a second attack of nystagmus, but the evidence was inconclusive as to the cause of this liability to recur. On the one side the opinion was given that the liability to recur was due to the constitutional predisposition of the appellant, which the first attack merely revealed. On the other side the opinion was expressed that the first attack left a condition of susceptibility to subsequent attacks. The evidence was entirely in the region of opinion and was inconclusive.

"I held that the *onus* was on the appellant to prove that his present susceptibility to a recurrence of nystagmus is due to the attack of September 1910, from which he has now recovered. As he had failed to discharge this *onus*, and had completely recovered from the first attack, I ended his compensation."

The *questions of law* were—"(1) Was the *onus* on the appellant to prove that his existing susceptibility to a recurrence of nystagmus is due to his previous attack? (2) On the facts stated was the appellant's compensation rightly ended."

Argued for the appellant—The findings showed that although the appellant had recovered from the attack of nystagmus he was liable to a recurrence of the disease. The liability to a recurrence of the disease, since it hindered him from resuming his former occupation, was incapacity for work within the meaning of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), which entitled him to compensation—*Thomas* v. *Fairbairn, Lawson, & Company, Limited*, 1911, 4 B.W.C.C. 195; *Ball* v. *Hunt*, [1912] A.C. 496, 49 S.L.R. 711; *Duris* v. *Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708; *Garnant Anthracite Collieries, Limited* v. *Rees*, 1912, 5 B.W.C.C. 694; *Jones* v. *New Brynmally Colliery Company, Limited*, 1912, 106 L.T. 524, 5 B.W.C.C. 375; *Carlin* v. *Stephen & Sons, Limited*, 1911 S.C. 901, 48 S.L.R. 862. It was the defenders who were seeking to disturb the *status quo*, viz., the payment of compensation, and therefore the *onus* was on them of showing that the appellant was no longer entitled to compensation. In any event, since the appellant had shown that he was still incapacitated, there was an *onus* on the respondents to show that the cause of the incapacity, viz., the liability to a recurrence of the disease, was not the result of the original attack—*M'Callum* v. *Quinn*, 1909 S.C. 227, 46 S.L.R.