directly in question would subject to destination-over so much only of the residue as had been taken by the said longest liver. It appears to me clearly enough that the respondents' double application of the clause under notice is not tenable, and that the clause is properly exhausted in its application as part of the scheme of disposition relating to the case of the testator's children predeceasing him.

One is thus thrown back on the terms of the clause on which the question immediately arises, and as the terms of that clause are unambiguous the reclaimers are, in my opinion, entitled to succeed in their claim.

The Court recalled the interlocutor of the Lord Ordinary and sustained the claim of Mrs Millar and her children.

Counsel for the Claimants, Mrs Millar and her Children—Macmillan, K.C.—R. C. Henderson. Agent—James Gibson, S.S.C.

Counsel for the Claimants, Mrs Lamont's Children—Constable, K.C.—J. A. Christie. Agents—Boyd, Jameson, & Young, W.S.

Saturday, June 19.

FIRST DIVISION.

[Sheriff Court at Airdrie.

SINNERTONS *v.* ROBERT ADDIE & SONS (COLLIERIES), LIMITED.

Master and Servant—Workmen's Compensation — Compensation — Dependency, Wholly or in Part—Common Fund for Family—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule.*

A workman was killed by accident arising out of and in the course of his employment. At the date of his death he lived in family with his two brothers, his three sons, and his daughter. One brother and the daughter did not earn wages. The three sons paid their wages to their father each week and received pocket money. The father's wages, plus the sons' less the pocket money, amounted to £8, 17s. 6d. a week, out of which the father paid £4 to his non-earning brother, who did the housekeeping; the other brother paid him £1, 10s. Out of that fund of £5, 10s., food and other necessities for the family as a unit were paid, but the contribution of £1, 10s. from the brother did no more than support the contributor. Out of the balance of the £8, 17s. 6d. the father paid for clothes and other personal necessaries for his non-earning brother, his sons, and his daughter. It was admitted that the non-earning brother and the youngest son were in part dependent on the father. An arbitrator having found that the daughter was partially, not wholly, dependent on the father, *held* there was evidence upon which he could competently so find.

William Sinnerton senior, retired miner, Jane Sinnerton, and George Sinnerton, *appellants*, being dissatisfied with a decision of the Sheriff-Substitute (MACDIARMID) at Airdrie in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by them against Robert Addie & Sons (Collieries), Limited, *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or proved:—1. That on 39th September 1919 Joseph Sinnerton met his death by accident arising out of and in the course of his employment with the defenders and respondents. 2. That at the date of his death there lived with him in family his two brothers William and George Sinnerton, his sons Joseph, William, and George, and his daughter Jane. 3. That neither his brother William nor his daughter Jane were working and earning wages. 4. That the deceased, his two elder sons, and his brother George all worked as miners, and his youngest son at another trade. 5. That it was agreed between parties that the average weekly earnings of the deceased at said date were £3, 16s. 6d. per week. 6. That his two elder sons Joseph and William earned 62s. per week, and his youngest son George 20s. per week. 7. That the said sons of the deceased each week paid over their earnings to their father, who allowed the two elder 20s. per week respectively, and the youngest 3s. per week as pocket-money. 8. That after the deduction of said pocket-money there accordingly was in the hands of the deceased each week a sum of £8, 17s. 6d. 9. That out of this amount the deceased paid each week into a common fund held by his brother William Sinnerton the sum of 80s. 10. That into the said common fund the deceased's brother George paid 30s., but that the evidence for the pursuers and appellants, uncontradicted by the defenders and respondents, was that said sum was sufficient only for the said George's maintenance. 11. That the said William Sinnerton used said common fund, amounting to £5, 10s., and of which he was the holder, to provide food and other the like necessaries for the said family as a unit. 12. That in addition to the above-mentioned payment of 80s. the deceased paid for clothes and other personal necessaries when needed by his brother William or his sons or daughter, and that admittedly such payments were made by him out of the accumulation of the balance of said sum of £8, 17s. 6d. 13. That it was matter of agreement between parties that the deceased's brother William and his youngest son George were in part dependent upon his earnings at the date of his death. 14. That the said Jane Sinnerton was accordingly maintained out of the said sum of £8, 17s. 6d.

"In those circumstances I *found* that the said Jane Sinnerton was only in part dependent upon the earnings of her father the said deceased Joseph Sinnerton at the date of his death; and I assessed the dependency as follows—In the case of the said Jane Sinnerton at 18s. per week; of the said George Sinnerton, youngest son of the deceased, at 10s. per week; and of the said William Sinnerton, brother of the deceased, at 5s. per week; and awarded the said Jane

Sinnerton £140, 8s.; George Sinnerton, £78; and William Sinnerton, £39: Ordained the defenders and respondents to pay into Court the said sum of £257, 8s. forthwith, and found the pursuers and appellants liable to the defenders and respondents in expenses."

The *question of law* was—"In the circumstances above set forth, was I right in assessing the compensation found due to the pursuer and appellant Jane Sinnerton, on the basis of partial dependency?"

The Sheriff-Substitute's *note* was:—"The moot point in this case is as regards the dependency of Jane Sinnerton. Was she wholly or only partly dependent on the earnings of her father at the date of his death? The employers maintain that she was partly dependent, and have all along been willing to settle on that basis. The pursuers, however, contended and contend that she was wholly dependent. The case appears to me to be not unattended by difficulty, but on consideration I have come to be of opinion that the employers are entitled to succeed.

"The facts are as set forth in the findings and need not be here again related. It was argued for the pursuers that it was not necessary for the arbiter to consider what were the sources of the fund that each week was found in the hands of the deceased. The argument is not quite easy to follow, but I presume its conclusion must be not only that the fund ought to be regarded as having belonged to the deceased, but also that it consisted of his earnings. For here we are dealing with earnings, and the task set the arbiter is to find whether or not the claimant was dependent, wholly or in part as the case may be, on the earnings of the deceased. I do not think that the arbiter may exclude evidence which is led to establish that such a fund did not in fact consist entirely of the earnings of the deceased. Here the evidence clearly establishes the fact that the fund was made up of the earnings not only of the deceased but of his sons. No doubt the fund in some sense belonged to the deceased, but it does not seem to me that the test of ownership is the true test, for, if it were, the somewhat anomalous result would be that all the sons as well as the daughter must have been held to have been dependent on the deceased at the date of his death. It is not possible to argue that the whole fund was earned by the deceased in the sense of the Act, and, as I have said, the question is whether a claimant was dependent on the earnings of the deceased at the date of death.

"But the pursuers might have proved that, granted the fund was made up of the earnings of father and sons, yet that portion of it which went to the support of Jane Sinnerton was taken entirely from the earnings of the father. They have not done so nor indeed attempted to do so. In the absence of detailed accounts it would probably have been impossible to do so. The arbiter, then, is faced with this position—Here is a common fund into which father and sons all pay their earnings and out of which the father pays for the upkeep of his children. Obviously, of course, the youngest son George was not contributing enough to that fund to support even himself, but it seems to me that the daughter Jane was dependent on that fund, and in the absence of detailed evidence to the contrary, on therefore her father and her two elder brothers. No doubt it is fair to assume, and indeed the employers' agent suggested, that the dependency of Jane Sinnerton although in truth partial was very considerable, and I have given effect to the suggestion. With regard to the lad George, his dependency may fairly be taken at 10s. per week. As regards William Sinnerton, it seems to me that his dependency on the deceased's earnings must in all the circumstances have been slight and I have so dealt with it.

"It was not seriously disputed that in the event of Jane Sinnerton being found to have been only in part dependent on the earnings of her father the defenders are entitled to expenses."

Argued for the appellants—The arbitrator should have found that the daughter was wholly dependent on her father. The only fact upon which the Sheriff-Substitute's decision could be based was the existence of the common fund. George senior's contribution thereto was immaterial, for it merely supported himself. As regards the rest the decision appealed from necessarily implied that the daughter was partially dependent on some-one other than the father, but there was no finding to that effect. That also necessarily implied that the contributors to the common fund other than the father contributed more than was required for their maintenance. Upon the facts that was extremely unlikely, but if it was the case, then *non constat* that the daughter was supported out of that surplus. Her father's earnings were sufficient apart from the surplus, if there was one, to support her, and the surplus might simply go into the father's pocket. In those circumstances, without actual proof of dependence upon anyone other than the father, it should have been found that the daughter was wholly dependent on the father—*Barrett* v. *North British Railway Company*, 1899, 1 F. 1139, 36 S.L.R. 874; *Cunningham* v. *M'Gregor & Company*, 1901, 3 F. 775, *per* Lord Young at p. 777, 38 S.L.R. 574; *Baird & Company, Limited* v. *Birsztan*, 1906, 8 F. 438, *per* Lord President Dunedin at pp. 441 and 442, 43 S.L.R. 300; *New Monckton Collieries, Limited* v. *Keeling*, [1911] A.C. 648, *per* Loreburn, L.C., at p. 648, and Lord Atkinson at p. 653, 49 S.L.R. 664; *Tamworth Colliery Company, Limited* v. *Hall*, [1911] A.C. 665, 49 S.L.R. 626; *Montgomery* v. *Blows*, [1916] 1 K.B. 899; *Taylor* v. *Powell Duffryn Steam Coal Company, Limited*, [1916] 2 K.B. 765. The *onus* of proof was on the respondents, who had not discharged it—*Grant* v. *Glasgow and South-Western Railway Company*, 1908 S.C. 187, 45 S.L.R. 128.

Argued for the respondents—The question of dependency was one of fact, and the legal obligation to aliment was one of the circumstances to be taken into consideration, but it went no further than that. Upon the facts it was clear that the daughter was

maintained as a member of the family, which as a unit was supported out of the common fund. In those circumstances the arbitrator was quite entitled to treat the case as one of interdependence, and it was for the appellants to lead evidence to exclude that—*Senior* v. *Fountains & Burnley, Limited*, [1907] 2 K.B. 563; *Hodgson* v. *West Stanley Colliery*, [1910] A.C. 229, 47 S.L.R. 881; *Main Colliery Company, Limited* v. *Davies*, [1900] A.C. 358; *Turners Limited* v. *Whitefield*, 1904, 6 F. 822, 41 S.L.R. 631; *Young* v. *Niddrie & Benhar Coal Company, Limited*, 1913 S.C. (H.L.) 66, 50 S.L.R. 744.

LORD PRESIDENT (CLYDE)—There is no question that Jane Sinnerton was dependent upon her father's earnings; the only point is whether she was wholly or only in part dependent upon those earnings at the time of her father's death.

It is found by the learned arbitrator that the father's family (within the meaning of the Act) consisted of seven persons: Jane's father, his two brothers, his three sons, and his daughter Jane; and of these seven all, except one of his brothers and Jane, were wage-earners. It appears from the findings in the case that the domestic economy of the household was at once systematic and complicated. The expenses of the family, exclusive of the earning brother, were defrayed out of a weekly fund of £8, 17s. 6d., composed of the father's wages and of contributions from the wages of his three sons. Out of this weekly fund of £8, 17s. 6d. a special housekeeping fund of £4 was formed and handed to the non-earning brother, who did the housekeeping. This special housekeeping fund, supplemented by a contribution of £1, 10s. per week from the wages of the earning brother, was used by the non-earning brother in paying the housekeeping expenses. The earning brother did not, as has been explained, contribute to the parent fund of £8, 17s. 6d., and the burden of his maintenance on the housekeeping fund in the hands of his non-earning brother is established by the evidence to have been so heavy as to equal the amount by which he supplemented it. Out of the balance of the parent fund—that balance amounting to £4, 17s. 6d.—Jane's father provided himself, his non-earning brother, his three sons, and Jane, with clothing and other personal necessaries. It is specifically found with regard to the special housekeeping fund (including its supplement) that it was administered by the non-earning brother for the whole family as a unit.

It is clear from those findings that the cost of Jane's food was defrayed out of the special housekeeping fund of £4, and that the cost of her clothing and other necessaries was defrayed out of the balance of the original parent fund of £8, 17s. 6d. It follows that as matter of fact the cost of Jane's food ahd other personal necessaries was paid out of a common fund or funds to which her father was only a contributor. The conclusion in fact to be drawn from that circumstance *prima facie* appears to me to be that while she was dependent for her living and necessaries on her father, she was so only in part.

The fact that Jane had in this matter legal rights against her father and none against his sons, though not necessarily an irrelevant consideration—*Young* v. *Niddrie and Benhar Coal Co.*, 1913 S.C. (H.L.) 66, 50 S.L.R. 744—is insufficient by itself either to make her a dependant, partial or complete, upon her father's earnings or to negative her dependence on her brothers—*New Monckton Collieries* v. *Keeling*, [1911] A.C. 648, 49 S.L.R. 664.

Now I am far from saying that it would be inadmissible where it was possible so to analyse the constituents of a common fund and the objects upon which it was expended as to show that the *prima facie* conclusion to be drawn from the fact that a person is a dependant upon a common fund is incorrect, and that in truth the real dependency, having regard to all the circumstances of the case, is not upon the whole of the contributors to the fund, but only upon one of them, *e.g.*, the father if he is one of the contributors to the fund. I notice that in the case of *Hodgson* v. *West Stanley Colliery* ([1910] A.C. 229, 47 S.L.R. 881), where several contributors to a common fund were overwhelmed in one disaster it was held that those who were dependent as matter of fact for their living on that common fund were in law—that is, within the meaning of the Act—partially dependent upon each of the three persons who had been overwhelmed and who were contributors to the fund. I think that is just an example of the *prima facie* inference (which stands good unless and until it is displaced) to be drawn from the fact that there is a common fund, and that a certain person has his or her living defrayed out of that common fund. In short, I think the pooling of resources in a common fund or funds *prima facie* draws this conclusion after itself. That is the effect of Lord Halsbury's observations in *Main Colliery Co.* v. *Davies* ([1900] A.C. 358). But, as I have said, it may none the less depend on the specialities of fact in a particular case whether such pooling is conclusive; and if the same facts as are found here had been found in *Hodgson's* case, I take it that the same question might have been argued there as here.

The argument in this case is that the father's contribution to the common fund was more than enough by itself to meet his own and his daughter's expenses, and to supplement, as far as that was required, the expenses of his youngest son. But that conclusion can only be reached on the assumption of a standard of some kind by which these various shares of expenses drawn out of the common fund can be measured and compared. It is sought to reach such a standard on the principle of roughly averaging the common expenses among the members of the household or (in the case of the special housekeeping fund) among the members who actually participated in it as a common fund. I add that because I agree with the appellant in thinking that

George, who is proved to have been consuming as much as he contributed, is to be excluded in considering the special housekeeping fund, on the principle that the accounts of this fund really contained a cross entry—a contribution by George of so much on the one side, and a deduction from the fund of so much in respect of the expense of his food on the other.

Standardisation for a cognate purpose was denounced by the House of Lords in the *Main Colliery Company* v. *Davies*, and the observations favourable to it which had been made in the case of *Simmons* v. *White Brothers* ([1899] 1 Q.B. 1005), were overruled in that case. I do not think we are entitled to resort to standards of expenditure arrived at by the device of averaging, for if the standards are to be of any value they must apply accurately to the case of each individual member of the household. Any analysis of the account upon which we could safely proceed would require, I think, to be an analysis resting not upon so rough and ready a process as that, but upon positive facts established by evidence and made the subject of a finding by the arbitrator.

We have no such finding here, and in its absence I do not see how it is possible to interfere with the result at which the learned arbitrator arrived. I think, therefore, we ought to answer the question of law put to us in the affirmative.

LORD MACKENZIE—I am of the same opinion. The question put to us is—"In the circumstances above set forth, was I right in assessing the compensation found due to the pursuer and appellant Jane Sinnerton on the basis of partial dependency?" I do not think that question is put in proper form, because being a question of fact that the arbitrator has to determine, the proper question to be put and for us to answer is—"Was I entitled to come to the conclusion that I did?" One demurs to being asked to express any opinion as to whether the conclusion at which the Sheriff-Substitute arrived on the question of fact was right or not. The only question that we have to determine is whether, it being a question of fact, the case discloses any error in point of law which would justify us in interfering with the decision of the arbitrator.

I am unable to find within the four corners of this case that there has been any error in point of law. One starts with this, that Jane, the daughter, was *de facto* supported out of a common fund, and therefore *prima facie* dependent upon the whole of the earnings that were paid into that common fund. The argument which we heard on her behalf was to the effect that we ought to hold that Jane was wholly kept out of that part of the common fund which was contributed out of the earnings of the deceased—that is to say, that she was wholly dependent upon the earnings of the deceased, and we were asked to arrive at that conclusion because, as it was pointed out, there is no finding in the case that there was a surplus from the earnings of the sons Joseph and William paid into the common fund.

Now I do not think that there are any materials upon which we can come to any such conclusion. The only way in which we could be asked to reach a conclusion contrary to that of the arbitrator is by applying a doctrine of averages. It has been pointed out in the House of Lords that the Legislature has declined to lay down any standard, and we have no materials for laying down any standard here. Accordingly I think the appeal must fail. That is not to say that in a future case a person in the position of Jane in the present case may not be entitled to ask the arbitrator to draw up a household budget in order that it may be ascertained whether the claim, which exists at law upon a particular contributor to the common fund is in point of fact being discharged by the person upon whom the legal duty lies or not.

The question is purely a question of fact, and it may be that in a future case the circumstances may be such as to entitle a person who is a dependant to ask the arbitrator to do what the arbitrator here was not asked to do and what he has not done.

LORD SKERRINGTON—It has been laid down by the highest authority that questions of dependency are questions of fact, and that the findings of an arbitrator on that matter cannot be set aside unless upon the ground either that there was no evidence to justify his decision, or that in arriving at his finding he fell into some error of law. In the present case the facts which the arbitrator states to have been proved or admitted *prima facie* justify the inference that Jane Sinnerton was only partially dependent on her father, because there are findings to the effect that she was maintained out of a common fund which was built up out of contributions made by her father and by her two elder brothers, all of whom were earning considerable weekly wages. Accordingly it is impossible to affirm that there was no evidence to support the arbitrator's decision. That, however, is not conclusive of the case, because, as your Lordships have said, it might be possible to show that although *prima facie* Jane Sinnerton was supported by her brothers as well as by her father, still in truth and in fact she was maintained solely out of that portion of the common fund which had been contributed by her father. It would have been an error of law if the learned arbitrator had overlooked this possibility, but when one reads his note one finds that he had the true question fully and clearly before him, because his ground of judgment against the appellants is that they failed to adduce the evidence which was necessary for the purpose of displacing the *prima facie* aspect of the case. He states that they did not even attempt to adduce any such evidence. I approve of the way in which the arbitrator looked at the question, and accordingly I think that his judgment to the effect that Jane Sinnerton was only partially dependent on her father was by a legitimate inference from the facts which were either admitted or proved. I agree, however, with the observations which fell from Lord Mac-

kenzie with reference to the form of the question of law in the Stated Case, and I suggest that in answer to the question we should state that upon the facts which were proved or admitted the arbitrator was entitled to find that Jane Sinnerton was only partially dependent upon her father. I prefer to express no approval of the basis on which the arbitrator has assessed the compensation, because I do not understand it.

LORD CULLEN—I agree.

LORD PRESIDENT—With regard to the form in which we should answer the question—instead of giving a bare affirmative, we shall affirm that the arbitrator was entitled to assess the compensation on the basis of partial dependency.

The Court found in answer to the question of law that upon the facts proved or admitted the arbitrator was entitled to assess the compensation found due to the appellant Jane Sinnerton on the basis of partial dependency.

Counsel for the Appellants—MacRobert, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Lord Advocate (Morison, K.C.)—Carmont. Agents—W. & J. Burness, W.S.

Tuesday, June 22.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

FRASER *v.* LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation — Arising out of — Workman Sitting on Cover of Pulley — Workmen's Compensation Act 1906 (6 *Edw. VII. cap.* 58), *sec.* 1 (1).

In a heading in a mine a bogie, carrying a horizontal pulley, round which a haulage rope passed, was so placed that it would take up the slack in the haulage rope. A workman at the end of his shift, and while waiting for the cage to take him to the surface, entered the heading and sat upon the cover of the pulley. The rope was then stationary, but was afterwards put in motion, and the workman's leg was drawn into the pulley by the rope and was injured. The heading was not fenced off, and it was the regular practice, known to the oversman, for workmen waiting to ascend to collect in the heading for the sake of shelter. The workman knew of the rope being at times stationary and at times in motion. *Held* that while the permitted practice allowed the workman to wait in the heading, he had exceeded the privilege in sitting upon the pulley cover, thereby exposing himself to a peril not incidental to mere presence in the heading, and consequently that the accident did not arise out of the employment.

John Fraser, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Kirkcaldy (Stuart) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58) against the Lochgelly Iron and Coal Company, Ltd., *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or found proved, viz.—1. That the appellant was on said 4th December 1918 a hanger-on and pony driver in the employment of the respondents at said Dora Pit. 2. That his average weekly wages were £2, 14s. 2d. 3. That the section of the said pit in which appellant worked was the 14 feet seam in the Duddy level, situated to the west side of the pit bottom in said level; that the men working in said Duddy level are raised and lowered by a cage working in the shaft, and enter and leave said cage on the east side of said pit bottom, and that in order to reach his work the appellant had accordingly to pass from the east to the west side round the side of the shaft, and on leaving his work to return to the east side in order to re-enter the cage. 4. That in said level on the west side of said pit there was no mechanical haulage; that on the east side of said pit there was a mechanical haulage operated by an engine on the surface, which also drove mechanical haulages on the other levels in said pit. Said mechanical haulage consisted of an endless wire rope passing down said pit or shaft, thence east by the main roadway to the entry to the heading after referred to in finding 6, thence up said heading and round the tension pulley situated in said heading, thence back to the main roadway, and thence eastward into said level, returning by said main roadway to said pit or shaft, up which it ran to said surface engine; and that on the east side of the shaft, where the appellant came off and re-entered the cage, the said mechanical haulage ran under a wooden platform to a point further from the pit bottom than the heading above referred to. 5. That appellant's duties consisted in hanging-on at Nos. 1 and 2 headings in said 14 feet seam and driving the hutches out from thence to a siding situated at a point at least 400 yards from and on the west side of said pit bottom. The points to which appellant was required to travel during his shift are shewn on plan No. 6 of process. 6. That on said 4th December 1918 the appellant, along with other workmen, was waiting at the end of his shift for the cage which would take him to the surface. 7. That the shaft by which the appellant would ascend the pit was the down-cast shaft, and in order to escape the cold draught which came down the shaft the appellant, with the others, although there was plenty of room to wait in the pit bottom, was waiting in an adjacent heading, situated 10 to 15 yards from and on the east side of the shaft. The appellant entered said heading a few minutes before three o'clock, at which hour his shift ended. 8. That said heading was not fenced off in any way, nor was there any notice prohibiting workmen from waiting