case." The pursuer thereupon moved for leave to withdraw his minute of abandonment. The Lord Ordinary, however, refused this motion in respect the pursuer had failed to pay the defender's taxed expenses; and he assoilzied the defenders and decerned against the pursuer for payment to them of the same taxed expenses On a reclaiming note that interlocutor was recalled (8 F. 857), and the Court allowed the minute of abandonment to be withdrawn, holding, as the report bears, that the pursuer had an absolute right to withdraw his minute if he liked; and they remitted to the Lord Ordinary to proceed in the cause as to him might seem just. Now if on his return to the Outer House the pursuer had again impeded the due course of the process, and had by so doing demonstrated that he was not acting in *bona fide*, the defenders might very soon have been in a position to demand absolvitor by default. But the case did not take that shape. On the contrary, within three weeks of the case being remitted back the pursuer enrolled it to have another diet of proof fixed. Clearly he was not entitled to have that motion granted *simpliciter* or without conditions. The previous diet of 1st February had proved abortive owing to his minute of abandonment being lodged on the previous day; and thereby the defenders had or might have incurred outlay and expenses which were not available in the future stages of the case, and which clearly ought to be reimbursed before the pursuer was allowed to proceed. But what the Lord Ordinary did was to allow the pursuer's motion to have a diet of proof fixed only on condition of his paying to the defenders (less a contra account which had to be set off) the whole sum of £130, 13s. 9d. already mentioned, being the defender's whole taxed expenses in the litigation down to 1st February; and upon the pursuer failing, as he did, to make this payment within fourteen days, the Lord Ordinary pronounced decree of absolvitor. It appears to me that the terms thus imposed on the pursuer were suggestive rather of penalty than of indemnity, and went beyond anything which our practice admits or the justice of the case required. I think the pursuer's motion to have a diet of proof fixed should have been allowed on condition of his paying to the defenders a sum representing fully the expenses (as taxed) caused to them by the pursuer's conduct, so far as these will not be available at future stages of the case, but under deduction of the sum of £18, 8s. 8d. mentioned in the Lord Ordinary's interlocutor. As we are not in a position to fix the amount, it will be for the Lord Ordinary to ascertain it.

That is the judgment of the Court; and I am authorised to say that this result has been arrived at after conference with the two other members of this Division who were present when the former remit was made in this case.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR were absent

The Court pronounced this interlocutor—

"Recal the interlocutors of 22nd June and 11th July 1906, and remit to the Lord Ordinary to grant the pursuer's motion to have a diet of proof fixed on condition of his paying to the defenders the taxed amount of the Outer House expenses occasioned to them by or in connection with the pursuer's minute of abandonment and his subsequent withdrawal thereof, so far as the said expenses will not be available at future stages of the cause; but under deduction of the sum of £18, 8s. 8d. mentioned in the Lord Ordinary's interlocutor of 22nd June 1906, and decern: Find the pursuer entitled to expenses since 11th July 1906, the date of the Lord Ordinary's interlocutor, and remit," &c.

Counsel for Pursuer and Reclaimer—Craigie, K.C.—Spens. Agent—J. B. W. Lee, S.S.C.

Counsel for Defenders and Respondents—Lippe. Agents — Boyd, Jameson, & Young, W.S.

Saturday, December 15.

FIRST DIVISION.

[Sheriff Court at Airdrie.

HALEY *v.* THE UNITED COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1), *and sec.* 7—"*Arising Out of and in the Course of the Employment*"—*Accident to Workman Taking Short-Cut Home across Sidings and down Railway Line after Going to Uplift Wages and to Inquire when Work would Resume.*

A miner went to a pit where he was employed to inquire when it would resume work after a temporary stoppage, and to uplift wages. In returning he made use of a short-cut home sometimes used though neither authorised nor actually prohibited, which took him by neither of the provided roads but across the sidings belonging to the mine and down the railway line of a railway company. While in the act of crossing the sidings, and consequently still on the mine premises, he sustained fatal injuries through an accident. *Held* that while the miner's visit to the mine might be "in the course of the employment," the accident was not one "arising out of and in the course of the employment" in the sense of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (1), enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his

employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Section 7 (1)—"This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine . . .;" and (2) "In this Act . . . 'mine' means a mine to which the Coal Mines Regulation Act 1887 or the Metalliferous Mines Regulation Act 1872 applies."

Francis Haley, miner, Longmuir Square, Bargeddie, claimed from the United Collieries, Limited, Kirkwood Colliery, Coatbridge, the sum of £132, 12s., with interest from May 18, 1906, under the Workmen's Compensation Act 1897 as compensation for the death of his son. In an arbitration under the Act in the Sheriff Court at Airdrie the Sheriff-Substitute (GLEGG) assoilzied the defenders, finding in law on the facts—"(1) That the pursuer was in part dependent on the earnings of the deceased; (2) that the accident to the deceased did not arise out of and in the course of the employment by the respondents."

The pursuer took an appeal by stated case.

The facts as given in the case, so far as material, were—"(1) The pursuer's son Francis Haley was in the employment of the respondents as a miner for four trade weeks, and during that period his average earnings were 17s. 7½d. per week . . .; (5) on Thursday, 17th May 1906, work at the respondents' pit, at which the deceased was employed, was stopped through a breakdown in the haulage; (6) on Friday, 18th May, between three and four o'clock in the afternoon, the deceased went to the pit to lift some advance wages which he received and to inquire if the pit would be working on the following day; (7) after accomplishing these objects the deceased proceeded to go home, intending to cross from the pit premises on to the line of the Caledonian Railway and to go home by trespassing along that line; miners sometimes took this route; (8) when crossing between some trucks on a lye on respondents' premises some of them were set in motion by another employee of the company and the deceased was fatally crushed between them; (9) the deceased came suddenly from behind a chimney on to the lye, and the waggon shifter's shout of warning—given at once—although it was heard was either disregarded or was too late to prevent the accident; (10) the route by which the deceased was proceeding to leave the respondents' premises was not the proper exit and the deceased was aware of this; there was no express prohibition by the respondents against miners leaving their premises at this spot; (11) there are two exits provided for leaving the pit; (12) if the deceased had been going to either of these, whether from the pay office or pit head, he would not have crossed the lye where the accident happened; (13) after the deceased had lifted his pay his name the remained on the books as a miner in the employment of the respondents."

The question of law for the opinion of the Court was—"Whether in the circumstances before stated the accident to the deceased Francis Haley arose out of and in the course of his employment with respondents."

Argued for the appellant—By the contract of the deceased's employment he was bound to uplift his wages at the pit. Thus in coming to do so and to inquire as to the resumption of operations the deceased workman was "in the course of the employment." Nor had he left the employers' premises when the accident occurred, for a "mine" included the sidings above ground—Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 75. The Sheriff's findings 1 and 13 also decided that the workman was in the course of his employment. Consequently, short of serious and wilful misconduct, a claim in virtue of his death was covered by the Act, and that even though he was going by an unrecognised route—*M'Nicholas* v. *Dawson & Son*, [1899] 1 Q.B. 773, A. L. Smith (L.J.), at 777; *Logan* v. *Fullerton, Hodgart, & Barclay*, June 26, 1901, 3 F. 1006, 38 S.L.R. 738; *Tod* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784. Though actual work had ceased the employment might continue—*Tod, cit. sup.* The liability of the employer lasted while the workman was on his premises—*Mackenzie* v. *The Coltness Iron Company, Limited*, October 21, 1903, 6 F. 8, Lord M'Laren, at 11, 41 S.L.R. 6; *Goodlet* v. *Caledonian Railway Company*, July 10, 1902, 4 F. 986, 39 S.L.R. 759. The period of "employment" might even begin before that of actual work—*Holmes* v. *Great Northern Railway Company*, [1900] 2 Q.B. 409, A. L. Smith (L.J.) at 412; *Sharp* v. *Johnson & Company, Limited*, [1905] 2 K.B. 139, Collins (M.R.) at 145. That being so, only an act done by the workman amounting to serious and wilful misconduct would relieve the employer of liability—*Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q.B. 141—and there was no serious and wilful misconduct suggested here. The case of *Gibson* v. *Wilson*, March 12, 1901, 3 F. 361, 38 S.L.R. 450, relied on by respondents, was decided on the footing that the employer was not in occupation of the premises.

Argued for the respondents—No compensation was due, the accident not having been one arising out of and in the course of the workman's employment. This case was ruled by *Caton* v. *Summerlee and Mossend Iron and Coal Company, Limited*, July 11, 1902, 4 F. 989, 39 S.L.R. 762. Had the workman used the ordinary route in leaving the premises the employers might have been liable, but he had not done so and they were free—*Gibson* v. *Wilson, cit. sup.*; *Mackenzie* v. *Coltness Iron Company, Limited, cit. sup.*, Lord M'Laren at 6 F. p. 10. The Sheriff's findings, 7 to 12, showed the line taken by the deceased was not the proper one. The pit was idle and he had no title to be on the premises as a workman, nor was it said that that was the proper time to uplift wages. The Sheriff was therefore right and the respondents were not liable.

At advising—

LORD KYLLACHY—In this case I am prepared to assume in the appellant's favour that his son's visit to the mine on the day in question was in the course of his employment—in other words, that the case may be taken as if the deceased had been at work in the pit and had met with his accident on his way home at the close of his work.

I am also prepared to assume in the appellant's favour that the place where the accident happened was within the employers' premises, or even (so far as that is important) in or about the "mine" at which the deceased was for the time employed.

But so assuming, I am unable to hold that, having regard to the place of the accident, to the deceased's reason for being at the place, and to the whole circumstances, the appellant has succeeded in bringing the case within the scope of the statute.

It was ably argued on his behalf as a proposition deducible, if not from the statutes, at least from the decisions, that whenever an accident happens to a workman on his employer's premises—particularly in or about a mine in which he works—he becomes thereby entitled to compensation, unless it appears that the accident was due to his own serious and wilful misconduct.

I cannot, however, assent to that argument. The suggested proposition is much too broad. It is not, in my opinion, supported by the authorities cited, and, indeed, is not consistent with some of them, particularly the cases of *Gibson* (3 F. 661) and *Caton* (4 F. 989). Nor am I able to deduce it from the terms or the scheme of the statute. The question always remains whether—given everything else—the accident arose out of and occurred in the course of the workman's employment; and that is a question which cannot, in my opinion, be solved by reference to any formula or general principle, but must always depend on the circumstances of each case.

In the present case I think the determining circumstances which, in combination if not separately, exclude the claim, are shortly these—(1) The deceased had on the afternoon in question not only finished his work (such as it was) at the mine, and was some distance off on his way home, but he was not proceeding homewards by either of the provided and usual roads. (2) Again, the place where the accident happened was not a place where he had any duty or business to be, or where at the time in question he was, or indeed at any time could be, in the ordinary course of his employment. (3) Further, in point of fact the deceased was at the place in question only because, desiring apparently to reach his home by a short cut, he was making or trying to make his way to the Caledonian Railway, along which he proposed to walk (as a trespasser) until he reached some point on the public road.

It seems to me that in these circumstances the accident which occurred was no more one arising out of and in the course of the deceased's employment than if he had been injured in getting over the railway fence, or had been knocked down after doing so by a passing train.

I am therefore for answering the question put to us in the negative and refusing the appeal.

LORD PEARSON—The question in this case is whether the deceased, who was a miner, met his death by an accident arising out of and in the course of his employment. I think that this case does not really fall within any of the authorities quoted at the debate, but depends on a combination of circumstances which has not yet occurred in any case, and which, so far as I regard them as material, are as follow:—The accident happened on Friday, 18th May. On the preceding day the pit at which the deceased was employed was stopped through a breakdown in the haulage. As I understand it, the pit remained closed on the Friday, and the deceased went there on the afternoon of that day for two purposes, (1) to lift some advance wages which were due to him, and (2) to inquire if the pit would be working on the Saturday. Having accomplished these purposes, he started to go home, with his money in hand. There are two exits provided for leaving the premises, neither of them leading across the lye where the accident happened. He took neither of those provided exits, but made across a lye on the defender's premises which was not a "provided exit." The Sheriff expressly finds that it was "not the proper exit," and that the deceased was aware of this, though there was no express prohibition against miners using it, and miners in fact sometimes used it.

The question then is, whether in these circumstances the accident happened to the deceased in the course of his employment. Now of course it must be recognised that the term "employment" in this connection is not restricted to the period of the actual work. The course of employment for the day may and generally does begin before the actual work, and may last after the actual work is over. It happens that in the case in hand the day of the accident was not a working day at all; for the pit was stopped. But I think it may reasonably be held, and I assume, that the act of the deceased in going to the pay-office to lift his wages, and to inquire whether the pit was to work next day, was done in the course of his employment; and that if an accident had happened to him on that occasion in the course of using either of the provided entrances or exits, the company would have been liable in compensation. In short, his employment that day consisted (in this view) in entering the works by a provided entrance to get his money and his information, and going home by a provided exit when he had got them. On the facts as stated, the crossing of the lye where the accident took place was no more in the course of his employment than if, in making his exit, he had crossed his employers' wall by climbing, or their canal by swimming.

On this ground I agree that the appeal must be refused.

LORD ARDWALL concurred.

The Court answered the question of law in the negative and dismissed the appeal.

Counsel for the Appellant—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Horne. Agents—W. & J. Burness, W.S.

Saturday, December 15.

FIRST DIVISION.

PENDER'S TRUSTEES, PETITIONERS.

Trust — Nobile Officium — Jurisdiction— English Trust with Scotch Heritage— General Power to Trustees on English Trust to Grant Feus and Mineral Leases of Trust-Estate in Scotland.

Trustees under an English trust holding Scotch heritage having obtained an order of the High Court of Justice in England sanctioning the application by them to the Courts in Scotland for power to grant feus and mineral leases, petitioned the Court, in virtue of its *nobile officium*, for, *inter alia*, general powers to grant feus and mineral leases of the Scottish heritage.

The Court, exercising an auxiliary jurisdiction, and with the view of enabling the order of the English Court to be carried out, *granted* the powers craved in the terms of the order of the English Court.

On 9th January 1903 Sir John Denison Pender, K.C.M.G., and others (Sir John Pender's trustees) presented a petition to the First Division of the Court, in which they, *inter alia*, narrated that the testator, a domiciled Englishman, had died in 1896 leaving moveables and heritage, and included in the heritage the lands of Seafield, Blackburn, and Whitehill, in Linlithgowshire, which he had bought for the purpose of developing the minerals; that the testator had granted a lease of certain minerals to the Pumpherston Oil Company Limited, for thirty-one years and of a portion of the lands for building purposes for ninety-nine years, on which the company's works had been erected, and also a feu of a piece of ground for the erection of workmen's houses; that the lease of the minerals had been terminated and they were anxious and had arranged terms for a renewal thereof; that they had also been asked for a feu for a school by the School Board of the Parish of Livingston; that although they had under the testator's will express power to sell the heritage, their power to grant feus or a valid lease had been questioned; that conceiving it in the interest of the trust they should have such powers, and the trust being an English trust, they had applied to the High Court of Justice for a judgment on that question; and that Mr Justice Swinfen Eady in the said application pronounced the following order:—"And the Judge being of opinion that it is expedient in the interests of the beneficiaries under the said will that the trustees thereof should have power to deal with the lands of the testator in Scotland devised by the said will by granting feus thereof for building purposes or by leasing the same and the minerals thereunder for mining purposes in accordance in either case with the custom of the locality in which the said lands are respectively situate, and as regards any mining lease subject to setting aside as capital money such part of the rent as is required by section 11 of the Settled Land Act 1882, and also being of opinion that by the law of England, so far as it controls the trusts of the lands devised by the said will and codicils, such feus and leases for mining purposes might be made of the said lands and minerals under the Settled Lands Acts, but the said Acts do not extend to property in Scotland, and the plaintiffs by their counsel, and the defendants Sir James Pender and Dame Marion Denison Des Voeux by their solicitor, consenting to the following order: It is ordered, that the plaintiffs, Sir John Denison-Pender, Lord John Hay, and Richard Enfield, as such trustees as aforesaid, be empowered to apply at any time or from time to time to the proper Court or Courts in Scotland for all necessary relief to enable them to give effect to this direction, and particularly to obtain power and authority to enable the granting with regard to the lands in Scotland devised by and subject to the trusts of the said will of feus for building purposes and of leases for mining purposes."

The prayer of the petition, after providing for service, continued—"And thereafter on resuming consideration hereof, and after such inquiry into the circumstances as to your Lordships shall seem meet, to grant warrant to, authorise and empower the petitioners to grant mineral leases of the minerals in the said lands of Seafield, Blackburn, and Whitehill, in the county of Linlithgow, for periods not exceeding thirty-one years, and to grant feus of the said lands or any part thereof; or otherwise and in any event to grant warrant to, authorise and empower the petitioners to grant a new lease of the shale and coal in the lands of Seafield, Blackburn, and Whitehill, formerly let by the said late Sir John Pender to the said Pumpherston Oil Company, Limited, in terms of the said missives, and to grant a feu to the School Board of the Parish of Livingstone of a piece of ground not exceeding one acre in extent for the erection of a school; or to do further or otherwise in the premises as to your Lordships may seem proper. . . ."

The petitioners now presented a note, dated 7th July 1906, in the said petition, in which after narrating the presentation of the petition, the granting by the Court on 21st February 1903 of power for the particular lease and feu therein mentioned, and the granting under a subsequent note, on