accident happened. We had the matter discussed and allowed the amendment, and found the pursuer entitled to the expenses occasioned by it.

Now, clearly, the expenses incurred by the pursuer by reason of the amendment—as, for example, the expense of going to his witnesses and asking them what they had to say to the new story presented on record—were not only not expenses incurred in the natural progress of the cause, but also were in this case thrown away. Had the defenders' case been properly written in the beginning they would not have been incurred at all. Accordingly it seems to me that in allowing the pursuer the expenses caused him by the defenders' amendment after the date of tender, we are not traversing the general rule regarding the offer and acceptance of a tender. These expenses became necessary owing to the defenders' change of attitude after his tender was in; they were not expenses incurred in the natural progress of the cause; and accordingly I think they should be allowed and an interlocutor pronounced in terms of the notice of motion.

LORD KINNEAR—I concur.

LORD JOHNSTON—I also concur.

LORD SALVESEN—I agree. I think the rule is quite clear that the pursuer must pay all the necessary expenses incurred in the case after the date of tender, but not unnecessary expenses, that is, expenses not incurred in the proper conduct of the case. Here the expense occasioned by the defenders' amendment was not a necessary expense, and it must therefore be borne by the party responsible for it.

The Court pronounced this interlocutor—

"Apply the verdict . . .: Decern against the defenders for payment to the pursuer of £201: Find the pursuer entitled to expenses down to 9th February 1910, the date of the defenders' tender. . . . *Quoad ultra*, find the defenders entitled to expenses except in so far as these have been disposed of in favour of the pursuer by interlocutor of 8th March 1910. . . ."

Counsel for Pursuer—Watt, K.C.—Hon. W. Watson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders—Morison, K.C.—Aitchison. Agents—Balfour & Manson, S.S.C.

Wednesday, May 25.

FIRST DIVISION.

[Sheriff Court at Hamilton.

HENDRY (SIMPSON'S EXECUTRIX) *v.* THE UNITED COLLIERIES, LIMITED.

(*Ante* July 18 1908, S.C. 1215, 45 S.L.R. 944; *aff.* June 24 1909, S.C. (H.L.) 19, 46 S.L.R. 780.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—"*Arising out of and in the course of his Employment*"—*Miner Using Improper and Dangerous Means of Exit.*

A miner who was making his way home from the pit, instead of taking the recognised exit provided by the mine-owners for the use of their men, crossed a gangway on to a dirt-bing or waste-heap, down which he proceeded by a steep and very rough, and in wet weather very slippery, track, not formed in any way but worn down into uneven steps. Near the foot of the slope, and while still on his employers' premises, he slipped and fell and was fatally injured. The use of this route was neither sanctioned nor expressly prohibited by the mine-owners, and involved, as the deceased must have known, considerable danger. On these facts the Sheriff-Substitute, acting as arbiter, found that the accident to the deceased did not arise out of and in the course of his employment.

Held that there was evidence on which the arbiter might properly find as he did.

Opinion per curiam that the deceased was not in the course of his employment at the time of the accident.

This case is reported *ante ut supra.*

Isabella Simpson or Hendry, wife of Robert Hendry, miner, Shettleston, executrix-dative of the deceased Mrs Marion Wilson or Simpson, widow, residing there, claimed compensation under the Workmen's Compensation Act 1906 from the United Collieries, Limited, Uddingston, in respect of the death of her (Mrs Simpson's) son Alexander Simpson.

The Sheriff-Substitute (THOMSON) assoilzied the defenders, and at the request of the claimant stated a case for appeal.

The Case stated:—"(1) That the deceased Alexander Simpson, who was a miner in respondents' employment, sustained on 9th July 1907 an accident on respondents' premises, from the effects of which he died four days later. (2) That he was survived by his mother Mrs Mary Wilson or Simpson (who was partially dependent upon him) for thirteen weeks, viz., till 16th October 1907, when she died without having made any claim against the respondents for compensation in respect of his death, and that the appellant now claims as her executrix what was due to Mrs Simpson under the said Act as compensation in respect of

her partial dependency upon her deceased son. . . . (4) That the accident to the deceased Alexander Simpson occurred in the following circumstances. The deceased, who was a miner at the face, had finished his work for the day underground, and had been raised to the pithead, from which he had to make his way home. (5) The exit provided by the respondents lay down the steps from the pithead, around the back of the boiler-house, and then along a track between an ash-heap and a siding for waggons going to and from the boiler-house. This track led to Maryville station, where, in order to reach the platform, it was necessary to cross a 'deadend' of a single line of rails belonging to and on the property of the North British Railway. This exit from the works was known as the firehole road. The track was kept clear by the respondents for the use of the men, and was the recognised exit for them to use. (6) The deceased, however, on the day of the accident, instead of taking the firehole road, turned in the opposite direction at the pithead, crossed from the edge of the pithead along a gangway formed for hutches carrying 'dirt' to a dirt-bing, and got on to the dirt-bing, crossed the bing and went down a steep and very rough track, not formed in any way but worn down into uneven steps, his intention being to proceed to the Maryville Station. (7) The slope is steep, and in wet weather very slippery, and the deceased when he had nearly reached the foot of the slope slipped and fell against some waggons which were being shunted along the siding, which is close to the foot of the slope, with the result that his head was severely injured, his injuries proving fatal on 14th July 1907. (8) The distance from the pithead to the *locus* of the accident is 155 yards by the route taken by the deceased. The distance from the pithead to the station by the dirt-bing is 345 yards, and by the firehole road 335 yards. There was considerable danger in going by the dirt-bing and the sidings, as the deceased must have known. The only advantage in going that way was that the railway signals could be seen, and the men could tell from the signals whether they were in time for their train or required to hurry. As a consequence, men who were short of time occasionally took this route. Its use was neither sanctioned nor expressly prohibited by the respondents. In these circumstance I found that the accident to the deceased did not arise out of and in the course of his employment, and I therefore assoilzied the respondents with expenses."

The *questions of law* included the following:—"Whether in the circumstances stated the Sheriff was right in holding that the accident to the deceased Alexander Simpson did not arise out of and in the course of his employment."

Argued for appellant—*Esto* that the question was one of fact the Court was entitled to review the finding where as here it was not consistent with the evidence—*Sneddon* v. *The Greenfield Coal & Brick Co., Ltd.*, February 10, 1910, 47 S.L.R. 337. The deceased was entitled to use the exit he followed, for its use was not forbidden, and where that was so the existence of the path was an invitation to use it—*Gavin* v. *Arrol & Co.*, February 22, 1889, 16 R. 509, *per* Lord President at p. 514, 26 S.L.R. 370. The deceased was on his employers' premises, for under the Coal Mines Regulation Acts ground adjacent to a mine was part of the mine, and they were bound to see him safely off them. The mere fact that the deceased was leaving the mine by a way other than that usually used did not entitle the arbiter to find that he was not in the course of his employment—*M'Kee* v. *Great Northern Rly. Coy.*, May 7, 1908, 1 Butterworth's Compensation Cases 165.

Counsel for respondents were not called on.

LORD PRESIDENT—The question raised in this Stated Case is whether the deceased Alexander Simpson was or was not killed in circumstances arising out of and in the course of his employment. The learned Sheriff-Substitute, acting as arbitrator, has held that the accident to the deceased did not arise out of and in the course of his employment, and the sole question for your Lordships to decide is whether that conclusion is a conclusion which no reasonable man ought to have come to upon the evidence led.

I confess for myself I think it is perfectly impossible to support that proposition. I would go further, and say that upon the facts before me I should have come to the same conclusion as the Sheriff-Substitute, because I think that where there is a perfectly proper and recognised road out of premises it is impossible to say that a man is in the course of his employment if he neglects that road and goes by some other means of exit which in point of fact is really no road at all. The path here can only be called a path upon a very wide view of what that word means, the mere truth being that it is not a made path of any sort at all, but that all you have is that from the top of a waste-bank, where people are not intended to walk at all, there are evidences that more than one person has got down at one particular part of the slope. That does not seem to me a proper means of exit from the works at all. Still less upon the evidence can I look upon it as a recognised means of exit, because there is no evidence, so far as the Sheriff-Substitute shows us, that the use of this route was anything more than that a certain number of men had occasionally used it, and there is no evidence at all that that illegitimate use of it was ever brought to the knowledge of the mine officials or mine-owners so as to allow them expressly to prohibit it if they were so minded.

I need not, however, go into that, because all I have to consider is whether it is impossible to support the verdict of the Sheriff-Substitute, and I think it is quite possible to support it. Accordingly I am of opinion that the first question should be answered in the affirmative, and in that case the second question does not arise.

LORD KINNEAR—I agree entirely with your Lordship.

LORD JOHNSTON—I agree.

LORD SALVESEN—So do I.

The Court answered the question in the affirmative.

Counsel for Appellant—Dean of Faculty (Scott Dickson, K.C.)—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Respondents—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Wednesday, May 25.

SECOND DIVISION.

(SINGLE BILLS.)

HUGHES *v.* MORGAN.

Expenses — Jury Trial — Modification — Verdict for less than £50 — Act of Sederunt, 20th March 1907, sec. 8.

In an action of damages which was founded on (1) slander and (2) wrongous arrest, an issue of wrongous arrest only was allowed. The jury awarded the pursuer £10 in name of damages.

Held that the action could not be regarded as an action for defamation, and that as the Judge who tried the cause refused to grant the necessary certificate the pursuer could not, in virtue of section 8 of the Act of Sederunt, 20th March 1907, recover more than one-half of his expenses.

The Act of Sederunt, 20th March 1907, enacts—Section 8—"Where the pursuer in any action of damages in the Court of Session, not being an action for defamation or for libel, or an action which is competent only in the Court of Session, recovers by the verdict of a jury £5, or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses not exceeding two-third parts thereof."

In August 1909 Bernard Hughes raised an action of damages against John Morgan. The pursuer averred that he had been slandered by the defender's servant William Greig, and that he had been wrongously arrested in consequence of statements made to the police by the said William Greig.

On 8th January 1910 the Lord Ordinary (GUTHRIE) approved of the following issue:—"Whether on or about 21st March 1909 the defender's servant William Greig, while acting within the scope of his employment by the defender at No. 9 West Scotland Street, Glasgow, maliciously and without probable cause caused the pursuer to be arrested, conveyed to Kinning Park Police Office, and there detained in custody, to the loss, injury, and damage of the pursuer. Damages laid at £500."

On 18th March 1910 the case was tried before the Lord Justice-Clerk and a jury. The jury found for the pursuer and assessed the damages at £10.

The pursuer moved the Court to apply the verdict, and maintained that the action being one of defamation the Act of Sederunt, 20th March 1907, section 8, did not preclude him from recovering his full expenses. Alternatively he asked that the Judge before whom the verdict was obtained should grant him a certificate entitling him to recover two-thirds of his expenses. He cited the following cases—*Gorman* v. *Hughes*, 1907 S.C. 405, 44 S.L.R. 309; *M'Gilp* v. *Caledonian Railway Company*, October 26, 1904, 7 F. 4, 42 S.L.R. 33; *M'Daid* v. *Coltness Iron Company, Limited*, November 4, 1904, 7 F. 33, 42 S.L.R. 50; *Ridley* v. *Kimball & Morton, Limited*, May 23, 1905, 7 F. 655, 42 S.L.R. 559; *Bonnar* v. *Roden*, June 1, 1887, 14 R. 761, 24 S.L.R. 539.

There was no appearance for the defender.

LORD JUSTICE-CLERK—I am very clearly of opinion that the case as it came before the jury was not an action for defamation. It was an action for wrongous apprehension and not for defamation. Accordingly I do not think that it falls within the exception provided in section 8 of the Act of Sederunt, 20th March 1907.

If I am asked to say—as the Judge before whom the verdict was obtained—whether I am prepared to give a certificate entitling the pursuer to recover more than one-half of his expenses, I have no difficulty in saying that I consider he is not entitled to any larger proportion than is allowed by the Act of Sederunt, and that I decline to grant any such certificate.

LORD LOW—I am of the same opinion. Where the pursuer in an action is allowed only one issue, namely, an issue of wrongous apprehension, and the case is tried upon that issue only, I think it is plain that we cannot treat the case as an action for defamation. And as the Judge who tried the cause has refused to grant the necessary certificate, the pursuer cannot recover more than one-half of the amount of his expenses.

LORD ARDWALL and LORD DUNDAS concurred.

The Court applied the verdict, and found the pursuer entitled to one-half of his expenses.

Counsel for Pursuer—Crabb Watt, K.C.—Garson. Agents—Marr & Sutherland, S.S.C.